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THE
LAW TIMES REPORTS

OF
Cases Decided

IN
THE HOUSE OF LORDS, THE PRIVY COUNCIL,
THE COURT OF APPEAL,
THE CHANCERY DIVISION, THE QUEEN'S BENCH DIVISION, THE
PROBATE, DIVORCE, AND ADMIRALTY DIVISION,
THE QUEEN'S BENCH DIVISION IN BANKRUPTCY,
THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED,
AND THE RAILWAY AND CANAL COMMISSION COURT.

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OF THE CASES IN THIS VOLUME.

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HIGH COURT OF JUSTICE.

CHANCERY DIVISION—

Before MR. JUSTICE CHITTY, by G. WELBY KING and H. M. CHARTERS MACPHERSON, Esqrs., Barristers-at-Law.

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CHANCERY DIVISION (continued)—

Before MR. JUSTICE WILLIAMS, sitting as an additional Judge of the Chancery Division, by W. IVIMY COOK, Esq., Barrister-at-Law.

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INDEX

TO

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

INDEX TO PLAINTIFFS.

A.

Administrator-General of Jamaica v. Lascelles, De Mercado, and Co. (Priv. Co.), [1894] App. Cas. 135	page 179
<i>Africano, The</i> , [1894] Prob. 141	250
Aitken, Lilburn, and Co. v. Ernsthausen and Co. (Ct. of App.), [1894] 1 Q. B. 773	822
Alabaster and others v. Harness	375
Aldridge, <i>re</i> ; Aldridge v. Aldridge, [1894] 2 Ch. 97	724
Allen v. Allen (Ct. of App.), [1894] Prob. 134	326
Allen v. Allen and Bell (Ct. of App.), [1894] Prob. 248	783
Allinson v. The General Council of Medical Education and Registration (Ct. of App.), [1894] 1 Q. B. 750	471
Anderson v. Dean (Ct. of App.), [1894] 2 Q. B. 222	830
Anglo-Continental Guano Works v. Bell (Surveyor of Taxes)	670
Ann, <i>re</i> ; Wilson v. Ann [1894] 1 Ch. 549	273
Arbitration between Gregson and Armstrong, <i>re an</i>	106
Arbitration between Keighley, Maxted, and Co. and Bryan, Durant, and Co., <i>re an</i> (No. 2), Ct. of App.)	155
Arbitration between the London County Council and the London Street Tramways Company, <i>re an</i>	97
Arbitration between the London County Council and the London Street Tramways Company, <i>re an</i> (Ct. of App.), [1894] 2 Q. B. 189	572
Arden, <i>re</i> (Ct. of App.)	506

Arden v. Boyce (Ct. of App.), [1894] 1 Q. B. 796	page 430
Attorney-General v. Dodd [1894] 2 Q. B. 150	660
Attorney-General v. Mayor of Cardiff, [1894] 2 Ch. 337	591
Attorney-General for Ontario v. The Attorney-General for Canada (Priv. Co.), [1894] App. Cas. 189	538
Australian Newspaper Company v. Bennett (Priv. Co.), [1894] App. Cas. 284	597
Aylmer, <i>re</i> ; <i>ex parte</i> Aylmer	244

B.

Bagot's Settlement, <i>re</i> ; Bagot v. Kittoe, [1894] 1 Ch.	229
Baker v. Carrick (Ct. of App.), [1894] 1 Q. B. 838	366
Bank of China, Japan, and the Straits Limited v. American Trading Company (Priv. Co.), [1894] App. Cas. 266	849
Barnard v. Tomson, [1894] 1 Ch. 374	306
Bartlett v. The West Metropolitan Tramways Company, [1894] 2 Ch. 286	491
Bassett's Plaster Company Limited, <i>re</i> , [1894] 2 Q. B. 96	658
Batson, <i>re</i> ; <i>ex parte</i> Hastie	382
Bawden <i>re</i> ; Bawden v. Cresswell [1894] 1 Ch. 693	526
Beall <i>re</i> ; <i>ex parte</i> Beall (Ct. of App.), [1894] 2 Q. B. 135	643
Beeny, <i>re</i> ; Ffrench v. Sprotson [1894] 1 Ch. 499	160

PLAINTIFFS.

Bexley Heath Railway Company (apps.) v. North (resp.)	page 903
Beys and Craig, re; <i>ex parte</i> The Trustee ...	561
Birmingham, Mayor, Alderman, and Citizens of the City of, v. Foster	371
Birmingham Vinegar Brewery Company's Trade Mark <i>re</i>	646
Bishopsgate Foundation, re, [1894] 1 Ch. 185.	231
Black v. Christchurch Finance Company (Priv. Co.), [1894] App. Cas. 48	77
Blaker v. Tillstone, [1894] 1 Q. B. 345	31
Bland v. Low (Ct. of App.), [1894] 1 Ch. 147.	57
Blank (deceased), In the Goods of	810
Bognor Water Company v. The Bognor Local Board	402
Bolton v. Curre and others	759
Bond, Maria (deceased), In the Goods of	813
Bond (app) v. Plumb (resp.), [1894] 1 Q. B. 169	405
Borough Commercial and Building Society, re Ct. of App.), [1894] 1 Ch. 289.....	51
Bourke and others (pets.) and Nutt (resp.)...	25
Bourke and others (pets.) v. Nutt (resp.) (Ct. of App.), [1894] 1 Q. B. 725.....	639
Bowes v. Press (Ct. of App.), [1894] 1 Q. B. 202.....	116
Bowker v. Austin [1894] 1 Ch. 556.....	91
Boxsius v. Goblet Frères and others (Ct. of App.), [1894] 1 Q. B. 842.....	368
Brett v. Monarch Investment Building Society (Ct. of App.), [1894] 1 Q. B. 367...	146
Bridger, re; Brompton Hospital for Consumption v. Lewis (Ct. of App.), [1894] 1 Ch. 297	204
British and American Trustee and Finance Corporation v. Conper (H. of L.), [1894] App. Cas. 399	882
Brompton Hospital for Consumption v. Lewis (Ct. of App.), [1894] 1 Ch. 297	204
Brooke, re; Brooke v. Brooke, [1894] 1 Ch. 43	71
Brotherton v. The Metropolitan District Railway Joint Committee (Ct. of App.) [1894] 1 Q. B. 666	218
Brown-Séguard (deceased), In the Goods of...	811
Bryant, re; Bryant v. Hickley, [1894] 1 Ch. 324	301
Buckle, re; Williams v. Marson (Ct. of App.), [1894] 1 Ch. 286	115
Bunting v. Hicks (Ct. of App.)	455
Burnett, re; <i>ex parte</i> The Official Receiver ...	385

C.

Carter v. Fey (Ct. of App.), [1894] 2 Ch. 541	786
Celtic King, The, [1894] Prob. 175	562
Central Sugar Factories of Brazil Limited, re; Flack's case [1894] 1 Ch. 369	645
Chaffers v. Goldsmid, [1894] 1 Q. B. 186	24
Chamberlayne v. Collins and another (Ct. of App.)	217
Chappell (deceased), In the Goods of, [1894] Prob. 98.	245
Charlwood, re; ex parte The Trustee	383

China, Japan, and the Straits Limited, Bank of, <i>v.</i> American Trading Company (Priv. Co.), [1894] App. Cas. 266	page 849
Clark, <i>re</i> ; <i>ex parte</i> Beardmore (Ct. of App.), [1894] 2 Q. B. 393	751
Clark, <i>re</i> ; <i>ex parte</i> Dickenson	284
Clements, <i>re</i> ; Clements <i>v.</i> Pearsall [1894] 1 Ch. 665	682
Clements <i>v.</i> The London and North-Western Railway Company	531
Clements <i>v.</i> The London and North-Western Railway Company (Ct. of App.), [1894] 2 Q. B. 482	896
Clergy Orphan Corporation, <i>re</i>	649
Coats (J. and P.) Limited <i>v.</i> J. Chadwick and Brother Limited, [1894] 1 Ch. 347	228
Cocks (app.) <i>v.</i> Mayner (resp.)	403
Cole <i>v.</i> Eley (Ct. of App.), [1894] 2 Q. B. 350	892
Collins, <i>ex parte</i> <i>v.</i> Ford, [1894] 1 Q. B. 425... ..	107
Coleman's (J. and J.) Application to register a Trade Mark, <i>re</i> , [1894] 2 Ch. 115	398
Cornwall, County Council of, <i>v.</i> Town Council of Truro	354
Coulson <i>v.</i> Disborough (Ct. of App.), [1894] 2 Q. B. 316	617
Cox <i>v.</i> Cox (Ct. of App.)	200
Coxen <i>v.</i> Rowland [1894] 1 Ch. 406	89
Cradock <i>v.</i> The Scottish Provident Institution (Ct. of App.)	718
Cronmire, <i>re</i> ; <i>ex parte</i> Cronmire (Ct. of App.), [1894] 2 Q. B. 246	610
Crozat <i>v.</i> Broden and others (Ct. of App.), [1894] 2 Q. B. 30	522

D.

Daines v. Eaton	761
Dane v. The Mortgage Insurance Corpora- tion Limited (Ct. of App.), [1894] 1 Q. B. 54	83
Davis v. Davis [1894] 1 Ch. 393	265
Davis v. The Corporation of Leicester (Ct. of App.), [1894] 2 Ch. 208	599
Davis v. Whitehead, [1894] 2 Ch. 133	314
De Carteret v. Land Securities Company Limited (Ct. of App.)	328
Delhi Steamship Company Limited, re	626
De Mattos v. Benjamin	560
Duke of Marlborough, re; Davis v. White- head, [1894] 2 Ch. 133	314
Dunn v. The Devon and Exeter Constitu- tional Newspaper Company Limited	598

E.

Eaton, <i>re</i> ; Daines <i>v.</i> Eaton	761
Ecclesiastical Commissioners of England <i>v.</i> Parr and others	170
Edwards <i>v.</i> Edwards and Francis, [1894] Prob. 33	39
Edwards <i>v.</i> Marcus; Townend and others Claimants (Ct. of App.), [1894] 1 Q. B. 587	182

PLAINTIFFS.

Elcom, <i>re</i> ; <i>re</i> Hamilton; Layborn <i>v.</i> Groves-Wright (Ct. of App.), [1894] 1 Ch. 303	page 54
Elmsley <i>v.</i> Mitchell, [1894] 2 Ch. 88	395
<i>Englishman and Australia, The</i> , [1894] Prob. 239	846
Evans, <i>ex parte</i> (H. of L.), [1894] App. Cas. 16	45
Evelyn, <i>re</i> ; <i>ex parte</i> The General Public Works and Assets Company, [1894] 2 Q. B. 302	692

F.

Farbenfabriken, Vormals Friedr. Bayer, and Co. <i>re</i> Trade Mark Application of (Ct. of App.), [1894] 1 Ch. 645	186
Farquharson <i>v.</i> Morgan (Ct. of App.), [1894] 1 Q. B. 552	152
Feast <i>v.</i> Robinson and Fisher	168
Ferndale Industrial Co-operative Society Limited, <i>re</i> , [1894] 1 Q. B. 828	448
Ffinch and others <i>v.</i> Combe and others, [1894] Prob. 191	695
Ffrench <i>v.</i> Sprotson, [1894] 1 Ch. 499	160
Fish, <i>re</i> ; Ingham <i>v.</i> Rayner (Ct. of App.), [1894] 2 Ch. 83	825
Fisher, <i>re</i> (Ct. of App.), [1894] 1 Ch. 450	62
Fitton's Estate, <i>re</i> ; Hardy <i>v.</i> Fitton	397
Flower <i>v.</i> The London and North-Western Railway Company (Ct. of App.), [1894] 2 Q. B. 65	829
Freeman <i>v.</i> The General Publishing Company, [1894] 3 Q. B. 380	845
Furness, Withy, and Co. <i>v.</i> White and Co. (Ct. of App.), [1894] 1 Q. B. 483	463

G.

Garnett (deceased), In the Goods of [1894] Prob. 90	37
Gaskell's Settled Estates, <i>re</i> [1894] 1 Ch. 485	554
Gasquoine, <i>re</i> ; Gasquoine <i>v.</i> Gasquoine (Ct. of App.), [1894] 1 Ch. 470	196
General Phosphate Corporation Limited, <i>re</i> .	626
Gertor, <i>The</i>	703
Giles (Ellen) and the Fines and Recoveries Act 1833, <i>re</i>	757
Gilson, <i>re</i> ; Gilson <i>v.</i> Gilson, [1894] 2 Ch. 92	728
Glendarroch, <i>The</i> (Ct. of App.), [1894] Prob. 226	344
Glendon, <i>The</i>	416
Gordon <i>v.</i> Evans (Ct. of App.), [1894] 1 Q. B. 248	70
Gorman, <i>ex parte</i> (H. of L.), [1894] App. Cas. 23	46
Gough, <i>re</i> ; Lloyd <i>v.</i> Gough	725
Gough <i>v.</i> Wood and Co. (Ct. of App.), [1894] 1 Q. B. 713	297
Gozzett (app.) <i>v.</i> The Maldon Urban Sanitary Authority (resps.), [1894] 1 Q. B. 327	414
Great Western Railway Company <i>v.</i> The Cefn Cribbwr Brick Company, [1894] 2 Ch. 157	279

Great Western Railway Company <i>v.</i> Commissioners of Inland Revenue (Ct. of App.), [1894] 1 Q. B. 507	page 86
Green <i>v.</i> The Chelsea Waterworks Company (Ct. of App.)	547
Gregson and Armstrong, <i>re</i> An Arbitration between	106

H.

Haddow <i>v.</i> Morton; Trout claimant (Ct. of App.), [1894] 1 Q. B. 565	470
Hallett, <i>re</i> ; <i>ex parte</i> The Trustee (Ct. of App.), [1894] 2 Q. B. 237	361
Hallett and Co. <i>re</i> ; <i>ex parte</i> Cocks, Biddulph, and Co. (Ct. of App.), [1894] 2 Q. B. 256	891
Hambro, <i>re</i> ; Hambro <i>v.</i> Hambro, [1894] 2 Ch. 564	684
Hamilton, <i>re</i> ; Layborn <i>v.</i> Groves-Wright (Ct. of App.), [1894] 1 Ch. 303	54
Hanbury <i>v.</i> Hanbury (Ct. of App.)	569
Hanfstaengl <i>v.</i> The Empire Palace Limited and others (Ct. of App.), [1894] 2 Ch. 1	459
Hanfstaengl <i>v.</i> The Empire Palace Limited and others (No. 2) (Ct. of App.)	854
Hanfstaengl <i>v.</i> Newnes (Ct. of App.)	854
Hansen <i>v.</i> Harrold Brothers (Ct. of App.), [1894] 1 Q. B. 612	475
Harbin <i>v.</i> Masterman (Ct. of App.), [1894] 2 Ch. 184	357
Hardy <i>v.</i> Fitton	397
Harper (app.) <i>v.</i> Marcks (resp.), [1894] 2 Q. B. 319	804
Harris <i>v.</i> Beauchamp Brothers (Ct. of App.), [1894] 1 Q. B. 801	636
Harrison, <i>re</i> ; Harrison <i>v.</i> Higson [1894] 1 Ch. 561	868
Harvey's Oyster Company Limited, <i>re</i> ; <i>ex parte</i> Ormerod and others, [1894] 2 Ch. 474	795
Head, <i>re</i> G.S.; <i>ex parte</i> Executors of G. Head, [1894] 1 Q. B. 638	35
Head, <i>re</i> ; Head <i>v.</i> Head (No. 2) (Ct. of App.), [1894] 2 Ch. 236	608
Heath and others <i>v.</i> Overseers of Weaverham, [1894] 2 Q. B. 108	729
Hebditch <i>v.</i> MacIlwaine and others (Ct. of App.), [1894] 2 Q. B. 54	826
Hedley <i>v.</i> Pinkney and Sons' Steamship Company Limited (H. of L.), [1894] App. Cas. 222	630
Helby <i>v.</i> Matthews (Ct. of App.), [1894] 2 Q. B. 262	837
Helsby, <i>re</i> ; <i>ex parte</i> The Trustee (Ct. of App.), [1894] 1 Q. B. 742	144
Hercynia Copper Company Limited, <i>re</i> ; <i>ex parte</i> Richardson	236
Hercynia Copper Company Limited, <i>re</i> ; <i>ex parte</i> Richardson (Ct. of App.), [1894] 2 Ch. 403	709
Hewett, <i>re</i> ; Hewett <i>v.</i> Hallett [1894] 1 Ch. 362	393
Hicks, <i>re</i> ; <i>ex parte</i> North-Eastern Railway Company	529
Hiett (app.) <i>v.</i> Ward (resp.)	374

PLAINTIFFS.

Hill v. Brown (Priv. Co.), [1894] App. Cas. 125.....	page 175
Hobson, <i>ex parte</i>	816
Hoggan v. Esquimalt Railway Company (Priv. Co.), [1894] App. Cas. 429	888
Hole v. The Chard Union (Ct. of App.), [1894] 1 Ch. 293	52
Holford, <i>re</i> ; Holford v. Holford.....	482
Holford, <i>re</i> ; Holford v. Holford (Ct. of App.)	777
Holland and another v. Wallen	376
Holloway, <i>re</i> ; <i>ex parte</i> Pallister (Ct. of App.), [1894] 2 Q. B. 163	615
Hood-Barrs v. Cathcart	622
Hood-Barrs v. Cathcart (Ct. of App.), [1894] 2 Ch. 271	780
Hood-Barrs v. Cathcart (No. 1) (Ct. of App.), [1894] 2 Q. B. 559	862
Hood-Barrs v. Cathcart (No. 2) (Ct. of App.), [1894] 2 Q. B. 559	865
Hood and Sons v. Yates; Derrett, Claimant, [1894] 1 Q. B. 240	557
Hooper v. Hill (Ct. of App.), [1894] 1 Q. B. 659	224
Horsham Industrial and Provident Society Limited, <i>re</i>	801
Hoyle and others (apps.) v. The Assessment Committee of the Oldham Union (resps.) (Ct. of App.), [1894] 2 Q. B. 372.....	741
Hughes v. Justin (Ct. of App.), [1894] 1 Q. B. 667.....	365
Hulbert and Crowe v. Cathcart, [1894] 1 Q. B. 244	558
Hull Docks Company (apps.) v. The Guardians of the Sculcoates Union (resps.) (Ct. of App.), [1894] 2 Q. B. 69	742
Hull Land and Property Investment Company Limited, <i>re</i> [1894] 1 Ch. 736	235
Huntman, <i>The</i> , [1894] Prob. 214	386
Hurcum v. Town Clerk of West Ham	29
Hurcum v. Town Clerk of West Ham (Ct. of App.), [1894] 1 Q. B. 579	505

I.

<i>Industrie, The</i> (Ct. of App.), [1894] Prob. 58	791
Ingham v. Rayner (Ct. of App.), [1894] 2 Ch. 83	825
Innes v. Newman, [1894] 2 Q. B. 292	689
Ives and Barker v. Willans (Ct. of App. [1894] 2 Ch. 478	674

J.

J. — v. S. — No. 1.....	757
J. — v. S. — No. 2.....	758
Jacobs v. Crusha and others (Ct. of App.), [1894] 2 Q. B.	524
Jamaica, Administrator-General of, v. Lascelles, De Mercado and Co. (Priv. Co.), [1894] App. Cas. 135	179
Jaques v. Thomas (Ct. of App.), [1894] 1 Q. B. 747.....	567

Johnson, <i>re</i> ; <i>ex parte</i> Blackett	page 381
Jones v. Daniel, [1894] 2 Ch. 332	588
Jones (app.) v. James (resp.)	351
Jones v. Stone (Priv. Co.), [1894] App. Cas. 122.....	174

K.

Kay's Patent, <i>re</i>	756
Keep v. The Vestry of St. Mary, Newington (Ct. of App.), [1894] 2 Q. B. 524.....	509
Keighley, Maxted, and Co. and Bryan, Durant and Co. <i>re</i> An Arbitration between (No. 2) (Ct. of App.)	155
Keith, Prowse, and Co. Limited v. National Telephone Company Limited, [1894] 2 Ch. 147	276
Kemp v. Wanklyn (Ct. of App.) [1894] 1 Q. B. 583	478
Kent v. Ward (Ct. of App.)	612
Kidd, <i>re</i> ; Kidd v. Kidd	848
Kops v. The Queen (Priv. Co.)	890

L.

Lamb, <i>re</i> ; <i>ex parte</i> The Board of Trade	694
Lambert v. Still (Ct. of App.), [1894] 1 Ch. 73	318
Lands Allotment Company Limited, <i>re</i> (Ct. of App.), [1894] 1 Ch. 616	286
Langtry (Henry) <i>re</i> ; <i>ex parte</i> The Board of Trade	736
La Société Anonyme des Verreries de l'Etoile, Marchienne, Belgium, <i>re</i> Trade Mark of (Ct. of App.) [1894] 2 Ch. 26	295
Lawrance, <i>re</i> ; Bowker v. Austin [1894] 1 Ch. 556.....	91
Layborn v. Groves-Wright (Ct. of App.), [1894] 1 Ch. 303.....	54
Leese (deceased), In the Goods of [1894] Prob. 160	810
Leicester, Mayor, Aldermen, and Burgesses of, (apps.) v. The Churchwardens and Overseers of the Poor of the Parish of Beaumont Leys and the Assessment Committee of the Barrow-in-Soar Union (resps.).....	659
Lemmon v. Webb	275
Lemmon v. Webb (Ct. of App.)	712
Lever v. Land Securities Company Limited (Ct. of App.)	323
L'Herminier, <i>re</i> ; Mounsey v. Burton, [1893] 1 Ch. 675	727
Lister, Elizabeth (deceased), In the Goods of	812
Lloyd v. Gough	725
London County Council and the London Street Tramways Company, <i>re</i> An Arbitration between.....	97
London County Council and the London Street Tramways Company, <i>re</i> An Arbitration between (Ct. of App.), [1894] 2 Q. B. 189	572
Lord Advocate, <i>The</i> v. Bogie and others (H. of L.), [1894] App. Cas. 83	533

PLAINTIFFS.

Lord Sudeley and Baines and Co., <i>re</i> , [1894]	
1 Ch. 334	page 549
Louth Municipal Election, <i>re</i> ; Nell and others (pets.) <i>v.</i> Longbottom (resp.), [1894]	
1 Q. B. 767	499
Lovatt <i>v.</i> Williamson, [1894] 1 Ch. 661.....	681
Low, <i>re</i> ; Bland <i>v.</i> Low (Ct. of App.), [1894]	
1 Ch. 147	57
Lumley, <i>re</i> ; Hood-Barra <i>v.</i> Cathcart	622
Lumley, <i>re</i> ; Hood-Barra <i>v.</i> Cathcart (Ct. of App.), [1894] 2 Ch. 271	780

M.

<i>Main, The</i>	247
Malkin, In the Goods of	811
Malleon <i>v.</i> The National Insurance and Guarantee Corporation, [1894] 1 Ch. 200...	157
Mann <i>v.</i> Johnson	29
Marlborough (Duke of) <i>re</i> ; Davis <i>v.</i> Whitehead, [1894], 2 Ch. 133	314
Martin <i>v.</i> Price (Ct. of App.), [1894] 1 Ch. 276	202
Massey (app.) <i>v.</i> Morris (resp.), [1894] 2 Q. B. 412	873
Mayfair Property Company <i>v.</i> Johnston, [1894] 1 Ch. 508	485
Mellin <i>v.</i> White (Ct. of App.)	775
Mercantile Investment and General Trust Company <i>v.</i> River Plate Trust, Loan, and Agency Company, [1894] 1 Ch. 578	131
Meux Brewery Company Limited <i>v.</i> City of London Electric Lighting Company Lim. 762	
Midland Railway Company <i>v.</i> Edmonton Union	355
Migazzo (deceased), In the Goods of	246
Mighell <i>v.</i> The Sultan of Johore (Ct. of App.) [1894] 1 Q. B. 149	64
Miller's Patent, <i>re</i>	270
Minthead, Local Board for the District of <i>v.</i> Luttrell, [1894] 2 Ch. 178	446
Minter <i>v.</i> Carr, [1894] 2 Ch. 321.....	583
Monson <i>v.</i> Louis Tussaud (Ct. of App.), [1894] 1 Q. B. 671	335
Monson <i>v.</i> Madame Tussaud Limited (Ct. of App.), [1894] 1 Q. B. 671	
Moreton <i>v.</i> Hughes, [1894] 2 Ch. 276	901
Mounsey <i>v.</i> Burton, [1894] 1 Ch. 675.....	727
Munroe, <i>The</i>	246

N.

Nassau Steam Press <i>v.</i> Tyler and others	376
National Provincial Bank of England <i>v.</i> Cresswell, [1894] 1 Ch. 693	526
Neal (app.) <i>v.</i> Devenish (resp.), [1894] 1 Q. B. 544	628
Nell and others (pets.) <i>v.</i> Longbottom (resp.), [1894] 1 Q. B. 767	499
Neuwirth <i>v.</i> Over Darwen Industrial Co-operative Society	374
Newby <i>v.</i> Sims, [1894] 1 Q. B. 478.....	105

Newen, <i>re</i> ; Newen <i>v.</i> Barnes, [1894] 2 Ch. 297	page 653
New Terras Tin Mining Company Limited, <i>re</i> , [1894] 2 Ch. 344	625
New Travellers' Chambers Limited <i>v.</i> Messrs. Cheese and Green	271
New Zealand Gold Extraction Company (Newbery-Vantin Process) Limited <i>v.</i> Peacock (Ct. of App.), [1894] 1 Q. B. 622.....	110
Nind <i>v.</i> Nineteenth Century Building Society, [1894] 1 Q. B. 472	316
Nind <i>v.</i> Nineteenth Century Building Society (Ct. of App.), [1894] 2 Q. B. 226.....	831
Norburn <i>v.</i> Norburn, [1894] 1 Q. B. 448	411
North Britain, <i>The</i> (Ct. of App.), [1894] Prob. 77	210
Northern Transvaal Gold Mining Company Limited, <i>re</i>	626
Northey Stone Company Limited <i>v.</i> Gidney (Ct. of App.), [1894] 1 Q. B. 99	82
Northledge <i>v.</i> Northledge.....	815

O.

Oliver <i>v.</i> Horsham Local Board (Ct. of App.), [1894] 1 Q. B. 332	206
--	-----

P.

Page <i>v.</i> Midland Railway Company (Ct. of App.), [1894] 1 Ch. 11	14
Page <i>v.</i> Norfolk	23
Page <i>v.</i> Norfolk (Ct. of App.).....	781
Palmer (app.) <i>v.</i> Wade (resp.); Wade (app.) <i>v.</i> Palmer (resp.), [1894] 1 Q. B. 268.....	407
Papé <i>v.</i> Westacott (Ct. of App.), [1894] 1 Q. B. 272	18
Parapans and others <i>v.</i> Happaz and others (Priv. Co.), [1894] App. Cas. 165	254
Parker's Trusts, <i>re</i> , [1894] 1 Ch. 707	165
Partridge <i>v.</i> Partridge, [1894] 1 Ch. 351	261
Patten <i>v.</i> The West of England Iron, Timber, and Charcoal Company Limited [1894] 2 Q. B. 159	908
Peacock <i>v.</i> Lucas, [1894] 1 Ch. 678	122
Peek <i>v.</i> Ray (Ct. of App.)	769
Pethick <i>v.</i> Mayor, &c., of Plymouth	304
Petrel, <i>The</i>	417
Pharmaceutical Society <i>v.</i> Armson	733
Pharmaceutical Society <i>v.</i> Delve, [1894] 1 Q. B. 71.....	139
Pickard, <i>re</i> ; Elmsley <i>v.</i> Mitchell, [1894] 2 Ch. 88	395
Piddocke <i>v.</i> Burt, [1894] 1 Ch. 343	553
Pinhorne, <i>re</i> ; Moreton <i>v.</i> Hughes, [1894] 2 Ch. 276	901
Pledge <i>v.</i> Carr, [1894] 2 Ch. 328.....	586
Pollard <i>v.</i> Pollard, [1894] Prob. 172	815
Pollock <i>v.</i> Moses	378
Ponsford <i>v.</i> The Newport District School Board (Ct. of App.), [1894] 1 Ch. 454	502

PLAINTIFFS.

Ponting v. Noakes and others, [1894] 2 Q. B. 281	page 842
Powell v. Birmingham Vinegar Brewery Company (H. of L.), [1894] App. Cas. 8 ...	1
Pratt, re; Pratt v. Pratt, [1894] 1 Ch. 491 ...	489
Prescott, Dimsdale, Cave, Tugwell and Co. Limited v. The Governor and Company of the Bank of England (Ct. of App.), [1894] 1 Q. B. 351	7
Primula, The, [1894] Prob. 128	253
Princess, The	388
Printing, Telegraph, and Construction Company of the Agence Havas Limited, re; ex parte Cammell, [1894] 1 Ch. 258	74
Printing, Telegraph, and Construction Company of the Agence Havas Limited, re; ex parte Cammell (Ct. of App.), [1894] 2 Ch. 392	705
Pryor v. Petre (Ct. of App.), [1894] 2 Ch. 11	331
Pulborough School Board Election Petition, re; Bourke and others (pets.) and Nutt (resp.)	25
Pulborough School Board Election, re; Bourke and others (pets.) and Nutt (resp.) (Ct. of App.), [1894] 1 Q. B. 725	639
R.	
Ramsay v. Margrett (Ct. of App.), [1894] 2 Q. B. 18	788
Reg. v. Berger, [1894] 1 Q. B. 823	807
Reg. v. Blaby, [1894] 2 Q. B. 170	879
Reg. v. Bradley	379
Reg. v. Dyson, [1894] 2 Q. B. 176	877
Reg. v. His Honour Commissioner Kerr and Hives	595
Reg. v. His Honour Judge Snagge	874
Reg. v. Horace Smith, Esq., and the Aerated Bread Company	373
Reg. v. The Justices of the County of London and the London County Council (Ct. of App.), [1894] 1 Q. B. 453	148
Reg. v. Lushington, Esq. (Metropolitan Police Magistrate); ex parte Otto [1894] 1 Q. B. 420	412
Reg. v. Mansel-Jones	845
Reg. v. Mead, Esq.; ex parte Anthony, [1894] 2 Q. B. 124	766
Reg. v. Pownall and others (Justices of the County of London)	138
Reg. v. Richardson and others, [1894] 2 Q. B. 323	805
Reg. v. Roper and others (Justices) and J. H. Ellis; ex parte Price	409
Reg. v. Steward	44
Reg. v. Tankard, [1894] 1 Q. B. 548	42
Reg. v. Tyrrell, [1894] 1 Q. B. 710	41
Reigate Union and Churchwardens, &c., of Betchworth (apps.) v. South-Eastern Railway Company (resps.), [1894] 1 Q. B. 411	353
Reigate Union and Churchwardens, &c., of Chipstead (apps.) v. South-Eastern Railway Company (resps.) [1894] 1 Q. B. 411	page 353
Reigate Union and Churchwardens, &c., of Gatton (apps.) v. South-Eastern Railway Company (resps.), [1894] 1 Q. B. 411	353
Reigate Union and Churchwardens, &c., of Merstham (apps.) v. South-Eastern Railway Company (resps.), [1894] 1 Q. B. 411	353
Reigate Union and Churchwardens, &c., of Reigate (Foreign) (apps.) v. South-Eastern Railway Company (resps.), [1894] 1 Q. B. 411	353
Rendell's Patent, re	756
Richardson, Spence, and Co., and others v. Rowntree (H. of L.), [1894] App. Cas. 217	817
Roberts and Son v. Ocean Marine Insurance Company; The North Britain (Ct. of App.), [1893] Prob. 77	210
Rogers re; ex parte Collins v. Ford, [1894] 1 Q. B. 425	107
Rogers v. Rogers (The Queen's Proctor showing cause), [1894] Prob. 161	699
Rolfe, re; Tyson v. Johnson	624
Roscoe v. Boden, [1894] 1 Q. B. 608	450
Rose and others v. Bank of Australia (H. of L.)	422
Rose and another (apps.) v. Watson (resp.), [1894] 2 Q. B. 90	906
Ross v. Woodford, [1894] 1 Ch. 38	22
Rothschild (Messrs. N. M.) and Sons v. The Commissioners of Inland Revenue, [1894] 2 Q. B. 142	667
Rougement, The	420
Rouse v. The Bradford Banking Company Limited (Ct. of App.), [1894] 2 Ch. 32	427
S.	
Sadler v. Worley, [1894] 2 Ch. 170	494
Salaman, re (Ct. of App.), [1894] 2 Ch. 201 ...	772
Sale v. Phillips, [1894] 1 Q. B. 349	559
Sanders, re	755
Seal, re; Seal v. Taylor (Ct. of App.), [1894] 1 Ch. 316	329
Securities Insurance Company Limited, re (Ct. of App.), [1894] 2 Ch. 410	609
Seed v. Bradley (Ct. of App.), [1894] 1 Q. B. 319	214
Shaw v. The Great Western Railway Company, [1894] 1 Q. B. 373	218
Shelfer v. City of London Electric Lighting Company Limited	762
Sheppard's Corn Malting Company Limited, re; ex parte Lowenfeld (Ct. of App.)	3
Shoosmith (deceased), In the Goods of, [1894] Prob. 23	809
Simonsen, re; ex parte Ball, [1894] 1 Q. B. 433	32
Sims v. Landray, [1894] 2 Ch. 318	530
Singer Manufacturing Company v. London and South-Western Railway Company, [1894] 1 Q. B. 833	172
Singleton v. Roberts, Stocks, and Co.	687

PLAINTIFFS.

Small v. National Provincial Bank of England, [1894] 1 Ch. 686	page 492
Smith v. Hancock, [1894] 1 Ch. 209	163
Smith v. Hancock (Ct. of App.), [1894] 2 Ch. 377	578
Smith (app.) v. Mason and Co. (resps.), [1894] 2 Q. B. 363	909
Smith (app.) v. Muller (resp.), [1894] 1 Q. B. 192	170
Smith and Service v. The Rosario Nitrate Company Limited (Ct. of App.), [1894] 1 Q. B. 174	68
Smith, <i>re</i> ; Smith v. Lancaster	871
Solicitor, <i>re</i> A.; <i>ex parte</i> The Incorporated Law Society, [1894] 1 Q. B. 254	27
Somersett (app.) v. Wade (resp.), [1894] 1 Q. B. 574	452
Spiral Woodcutting Company Limited, <i>re</i> , [1894] 1 Ch. 736	235
Stelfox (deceased), In the Goods of	814
St. Giles, Camberwell, Vestry of v. London Cemetery Company, [1894] 1 Q. B. 699 ..	734
Stock and Share Auction and Banking Company Limited, <i>re</i> , [1894] 1 Ch. 736	235
Stoddart v. Savile, [1894] 1 Ch. 480	552
Stroud v. The Wandsworth District Board of Works (Ct. of App.), [1894] 2 Q. B. 1	190
Sudeley (Lord) and Baines and Co. <i>re</i> , [1894] 1 Ch. 334	549
Swansea Grammar School, Governors of v. Charity Commissioners (Priv. Co.) [1894] App. Cas. 252	738
Swyny v. Harland (Ct. of App.), [1894] 1 Q. B. 707	227
Synge v. Synge and others (Ct. of App.), [1894] 1 Q. B. 466	221

T.

Talbot's Trade Mark, <i>re</i>	119
Taylor v. Roe, [1894] 1 Ch. 413	232
Taylor, Sons, and Tarbuck (Solicitors, &c.) <i>re</i> , [1894] 1 Ch. 503	161
Taylor, <i>re</i> ; Taylor v. Wade, [1894] 1 Ch. 671	556
Thomas (Howell) <i>re</i> ; Jaquess v. Thomas (Ct. of App.), [1894] 1 Q. B. 747	567
Thompson, <i>re</i> R. G.; <i>ex parte</i> Baylis, [1894] 1 Q. B. 462	238
Thompson v. Mayor and Corporation of Brighton (Ct. of App.), [1894] 1 Q. B. 332	206
Thorne v. Heard (Ct. of App.), [1894] 1 Ch. 599	541
Thorneloe v. Hill, [1894] 1 Ch. 569	124
Thursby and another (apps.) v. The Churchwardens and Overseers of the Parish of Briercliffe with Extwistle in the County of Lancaster (resps.) (Ct. of App.), [1894] 2 Q. B. 11	618
Travis v. Uttley, [1894] 1 Q. B. 233	242
Tubbs and the Mayor of London, <i>re</i> A Contract between (Ct. of App.)	719
Tucker, <i>re</i> ; Tucker v. Tucker, [1894] 1 Ch. 724	127

Turnbull v. The West Riding Athletic Club, Leeds, Limited	page 92
Tyrrell v. Painton (Ct. of App.), [1894] Prob. 151	453
Tyson v. Johnson	624

U.

Ultzyen v. Nichols, [1894] 2 Q. B. 92	140
Underwood v. Lewis (Ct. of App.), [1894] 2 Q. B. 306	833
Underwood v. Underwood (Ct. of App.), [1894] Prob. 204	390
Union Steamship Company v. Claridge (Priv. Co.), [1894] App. Cas. 185	177
Utopia, The (Priv. Co.)	47

V.

Venn and Furze's Contract, <i>re</i> , [1894] 2 Ch. 101	312
Verner v. The General and Commercial Investment Trust Limited (Ct. of App.), [1894] 2 Ch. 239	516
Vestry of St. Giles, Camberwell v. London Cemetery Company, [1894] 1 Q. B. 699	734
Vitoria, <i>re</i> ; <i>ex parte</i> Vitoria (Ct. of App.) [1894] 1 Q. B. 259; [1894] 2 Q. B. 387	141

W.

Wade (app.) v. Palmer (resp.), [1894] 1 Q. B. 268	407
Walker (app.) v. Laxton (resp.)	690
Walker's Settled Estate, <i>re</i> , [1894] 1 Ch. 189	259
Wallace v. Automatic Machine Company Limited	497
Wallace v. Automatic Machine Company Limited (Ct. of App.), [1894] 2 Ch. 547	852
Wallasey Brick and Land Company Limited, <i>re</i>	879
Wallen (app.) v. Lister (resp.), [1894] 1 Q. B. 312	348
Walsh v. The Queen (Priv. Co.), [1894] App. Cas. 144	257
Want v. Moss and Wife (Priv. Co.)	178
Weardale Iron and Coal Company v. Hodson; A. Hodson, Claimant (Ct. of App.), [1894] 1 Q. B. 598	632
Webb, <i>re</i> ; Lambert v. Still (Ct. of App.), [1894] 1 Ch. 73	318
Wegg-Prosser v. Evans, [1894] 2 Q. B. 101 ..	664
Welch, <i>re</i> ; <i>ex parte</i> Trustees of Star of the West Lodge of Oddfellows	691
Wendon v. The London County Council, [1894] 1 Q. B. 227	94
Wendon (app.) v. The London County Council (resps.) (Ct. of App.), [1894] 1 Q. B. 812	440

PLAINTIFFS.

West Ham Union, Guardians of <i>v.</i> Church- wardens of St. Matthew, Bethnal Green (H. of L.), [1894] App. Cas. 230page	818	Williams <i>v.</i> Marson (Ct. of App.), [1894], 1 Ch. 286page	115
West India Improvement Company <i>v.</i> Attorney-General of Jamaica (Priv. Co.), [1894] App. Cas. 243	80	Wilson <i>v.</i> Ann, [1894], 1 Ch. 549	273
West London and General Permanent Benefit Building Society, <i>re</i> , [1894] 2 Ch. 352	796	Wilson <i>v.</i> McIntosh (Priv. Co.), [1894] App. Cas. 129	536
Whiston's Estate, <i>re</i> ; Lovatt <i>v.</i> Williamson, [1894] 1 Ch. 661	681	Winkle (Edward) jun., <i>re</i> (Ct. of App.), [1894] 2 Ch. 519	710
Whitehead, <i>re</i> ; Peacock <i>v.</i> Lucas, [1894] 1 Ch. 678	122	Wood, <i>re</i> ; <i>ex parte</i> Woolfe, [1894] 1 Q. B. 605	282
Whitlock, <i>re</i> ; <i>ex parte</i> The Official Receiver	34	Worcester City and County Banking Com- pany <i>v.</i> Firbank, Panling, and Company ...	102
Wiggin <i>v.</i> Cox, Sons, Buckley and Co., [1894] 1 Q. B. 792	656	Worcester City and County Banking Com- pany <i>v.</i> Firbank, Pauling, and Company (Ct. of App.), [1894], 1 Q. B. 784	443
		Workington, <i>ex parte</i> , The Overseers of (Ct. of App.), [1894] 1 Q. B. 416	143

INDEX TO DEFENDANTS.

A.

Aldridge, Aldridge v.	page 724
Allen, Allen v.	326
Allen and Bell, Allen v.	783
American Trading Company, Bank of China, Japan, and the Straits Limited v.	849
Ann, Wilson v.	278
Armson, Pharmaceutical Society v.	733
Attorney-General for Canada, The Attorney- General for Ontario v.	538
Attorney-General of Jamaica, West India Improvement Company v.	80
Austin, Bowker v.; re Lawrence	91
Australasia, Bank of, Rose and others v.	422
Automatic Machine Company Limited, Wal- lace v.	497, 852

B.

Bank of England, Governor and Company of, Prescott, Dimsdale, Cave, Tugwell, and Co. Limited v.	7
Barnes, Newen v.	653
Beauchamp Brothers, Harris v.	636
Beaumont Leys, Churchwardens and Over- seers of the Poor of the Parish of, and the Assessment Committee of the Barrow-in- Soar Union (resps.) The Mayor, Aldermen, and Burgesses of Leicester (apps.) v.	659
Bell (Surveyor of Taxes), The Anglo-Conti- nental Guano Works v.	670
Benjamin, De Mattos v.	560
Bennett, Australian Newspaper Company v.	597
Berger, Reg. v.	807
Birmingham Vinegar Brewery Company, Powell v.	1
Blaby, Reg. v.	879
Boden, Roscoe v.	450
Bogie and others, The Lord Advocate v.	533
Bognor Local Board, The Bognor Water Company v.	402
Boyce, Arden v.	480

Bradford Banking Company Limited, Rouse v.	page 427
Bradley, Reg. v.	379
Bradley, Seed v.	214
Briercliffe with Extwistle in the County of Lancaster, Churchwardens and Overseers of the Parish of (resps.), Thursby and another (apps.) v.	618
Brighton, Mayor and Corporation of, Thompson v.	206
Brogden and others, Crozat v.	522
Brooke, Brooke v.	71
Brown, Hill v.	175
Burt, Piddoche v.	553
Burton, Mounsey v.; re L'Herminier	727

C.

Cardiff, Mayor of, Attorney-General v.	591
Carr, Minter v.	583
Carr, Pledge v.	586
Carrick, Baker v.	366
Cathcart, Hood-Barrs v.; re Lumley.	622, 780
Cathcart (No. 1), Hood-Barrs v.	862
Cathcart (No. 2), Hood-Barrs v.	865
Cathcart, Hulbert and Crowe v.	558
Cefn Cribbwr Brick Company, Great Western Railway Company v.	279
Chadwick (J.) and Brother Limited, J. and P. Coats Limited v.	228
Chard Union, Hole v.	52
Charity Commissioners, Governors of Swan- sea Grammar School v.	738
Cheese (Messrs.) and Green, The New Travellers' Chambers Limited v.	271
Chelsea Waterworks Company, Green v. ...	547
Christchurch Finance Company, Black v. ...	77
City of London Electric Lighting Company Limited, Meux Brewery Company Lim. v.	762
City of London Electric Lighting Company Limited, Shelfer v.	762
Claridge, Union Steamship Company v.	177

DEFENDANTS.

Collins and another, Chamberlayne v.page	217	General Council of Medical Education and Registration, Allinson v.page	471
Combe and others, Finch and others v.	695	General Publishing Company, Freeman v. ...	845
Couper, British and American Trustee and Finance Corporation v.	882	Gidney, The Northey Stone Company Limited v.	82
Cox, Cox, v.	200	Gilson, Gilson v.....	728
Cox, Sons, Buckley, and Co., Wiggan v. ...	656	Goblet Frères and others, Boxsius v.	368
Cresswell, Bawden v.....	526	Goldsmid, Chaffers v.	24
Cresswell, National Provincial Bank of England v.	526	Gough, Lloyd v.	725
Crusha and others, Jacobs v.	524	Great Western Railway Company, Shaw v....	218
Curre and others, Bolton v.....	759	Groves-Wright, Layborn v.; <i>re</i> Hamilton; <i>re</i> Elcom	54
D.			
Daniel, Jones v.	588	H.	
Davis, Davis v.	265	Hallett, Hewett v.	393
Dean, Anderson v.	830	Hambro, Hambro v.	684
Delve, Pharmaceutical Society v.	139	Hanbury, Hanbury v.	569
Devenish (resp.), Neal (app.) v.	628	Hancock, Smith v.	163, 578
Devon and Exeter Constitutional Newspaper Company Limited, Dunn v.....	593	Happay and others, Parapano and others v....	254
Disborough, Coulson v.	617	Harland, Swyny v.	227
Dodd, The Attorney-General v.	660	Harness, Alabaster and others v.	375
Dyson, Reg v.	877	Harrold Brothers, Hansen v.	475
E.			
Eaton, Daines v.....	761	Head (No. 2), Head v.	608
Edmonton Union, Midland Railway Company v.	355	Heard, Thorne v.	541
Edwards and Francis, Edwards v.	39	Hickley, Bryant v.....	301
Eley, Cole v.	892	Hicks, Bunting v.	455
Empire Palace Limited and others Hanfstaengl v.	459	Higson, Harrison v.	868
Empire Palace Limited and others (No. 2), Hanfsteengl v.	854	Hill, Hooper v.	224
Ernsthausen and Co., Aitken, Lilburn and Co. v.....	822	Hill, Thorneloe v.	124
Esquimalt Railway Company, Hoggan v.....	888	Hodson, The Weardale Iron and Coal Company v.....	632
Evans, Gordon v.	70	Holford, Holford v.	482, 777
Evans, Wegg-Prosser v.	664	Horsham Local Board, Oliver v.	206
F.			
Fey, Carter v.	786	Hughes, Moreton v.; <i>re</i> Pinhorne	901
Firbank, Pauling and Co., Worcester City and County Banking Company v.	102, 443	I.	
Fitton, Hardy v.	397	Inland Revenue, Commissioners of, The Great Western Railway Company v.....	86
Ford, <i>ex parte</i> Collins v.; <i>re</i> Rogers	107	Inland Revenue, Commissioners of, Messrs. N. M. Rothschild and Sons, v.	667
Foster, Mayor, Aldermen, and Citizens of the City of Birmingham v.	371	J.	
G.			
Gasquoine, Gasquoine v.	196	James (resp.), Jones (app.) v.	351
General and Commercial Investment Trust Limited, Verner v.	516	Johnson, Mann v.	29
K.			
		Johnson, Tyson v.; <i>re</i> Rolfe	624
		Johnston, Mayfair Property Company v.	485
		Justin, Hughes v.	365
		K.	
		Kerr (His Honour Commissioner) and Hives, Reg. v.	595

DEFENDANTS.

Kidd, Kidd v.	page 648
Kittoe, Bagot v.	229

L.

Lancaster, Smith v.	871
Landray, Sims v.	530
Land Securities Company Limited, De Carteret v.	323
Land Securities Company Limited, Lever v.	323
Lascalles, De Mercado, and Co., Administrator-General of Jamaica v.	179
Laxton (resp.), Walker (app.) v.	690
Leicester, Corporation of, Davis v.	599
Lewis, Brompton Hospital for Consumption v.; re Bridger.	204
Lewis, Underwood v.	833
Lister (resp.), Wallen (app.) v.	348
London Cemetery Company, Vestry of St. Giles, Camberwell v.	734
London County Council, Wendon v.	94, 440
London (Justices of the County of) and the London County Council, Reg v.	148
London and North-Western Railway Company, Clements v.	531, 896
London and North-Western Railway Company, Flower v.	829
London and South-Western Railway Company, Singer Manufacturing Company v.	172
Longbottom (resp.), Nell and others (pets.) v.	499
Low, Bland v.	57
Lucas, Peacock, v.; re Whitehead	122
Lushington, Esq. (Metropolitan Police Magistrate), Reg. v.	412
Luttrell, Local Board for the District of Minehead v.	446

M.

MacIlwaine and others, Hebditch v.	826
McIntosh, Wilson v.	536
Maldon Urban Sanitary Authority (resps.), Gozzett (app.) v.	414
Mansel-Jones, Reg. v.	845
Marcks (resp.), Harper (app.) v.	804
Marcus, Edwards v.	182
Margrett, Ramsay v.	788
Marson, Williams v.; re Buckle.	115
Mason and Co. (resps.), Smith (app.) v.	909
Masterman, Harbin v.	357
Matthews, Helby v.	837
Mayner (resp.), Cocks (app.)	403
Mead, Esq., Reg. v.	766
Medical Education and Registration, General Council of, Allinson v.	471
Metropolitan District Railway Joint Committee, Brotherton v.	218
Midland Railway Company, Page v.	14
Mitchell, Elmsley v.; re Pickard	395

Monarch Investment Building Society, Brett v.	page 146
Morgan, Farquharson v.	152
Morriss (resp.) Massey (app.) v.	873
Mortgage Insurance Corporation Limited, Dane v.	83
Morton, Haddow v.	470
Moses, Pollock v.	378
Moss and Wife, Want v.	178
Muller (resp.), Smith (app.) v.	170

N.

National Insurance and Guarantee Corporation, Malleon v.	157
National Provincial Bank of England, Small v.	492
National Telephone Company Limited, Keith Prowse and Co. Limited v.	276
Newman, Innes v.	689
Newnes, Hanfstaengl v.	854
Newport District School Board, Ponsford v.	502
Nichols Ultsyen v.	140
Nineteenth Century Building Society, Nind v.	316, 831
Noakes and others, Ponting v.	842
Norburn, Norburn v.	411
Norfolk, Page v.	23, 781
North (resp.), Bexley Heath Railway Company (apps.) v.	903
Northledge, Northledge v.	815
Nutt (resp.) Bourke and others (pets.) v.	25, 639

O.

Ocean Marine Insurance Company, Roberts and Son v.	210
Oldham Union, Assessment Committee of (resps.), Hoyle and others (apps.) v.	741
Over Darwen Industrial Co-operative Society, Neuwirth v.	374

P.

Painton, Tyrrell v.	453
Palmer (resp.), Wade (app.) v.	407
Parr and others, Ecclesiastical Commissioners of England v.	170
Partridge, Partridge v.	261
Peacock, The New Zealand Gold Extraction Company (Newbery-Vautin Process) Limited v.	110
Pearsall, Clements v.	682
Petre, Pryor v.	331
Phillips, Sale v.	559
Pinkney and Sons Steamship Company Limited, Hedley v.	630

DEPENDANTS.

Plumb (resp.), Bond (app.)page	405	South-Eastern Railway Company (resps.), Reigate Union and Churchwardens &c., of Merstham (apps.) v.....page	353
Plymouth, Mayor, &c., of, Pethick v.	304	South-Eastern Railway Company (resps.), Reigate Union and Churchwardens &c., of Reigate (Foreign) (apps.) v.	353
Pollard, Pollard v.	815	Sprotson, Ffrench v., re Beeny	160
Pownall and others (Justices of the County of London), Reg v.....	138	Steward, Reg.....	44
Pratt, Pratt v.....	489	Still, Lambert v.; re Webb	318
Press, Bowes v.	116	St. Mary, Newington, Vestry of, Keep. v. ...	509
Price, Martin v.	202	St. Matthew, Bethnal Green, Churchwardens of, Guardians of West Ham Union v.	818
Q.		Stone, Jones v.	174
Queen, The, Kops v.	890	Sultan of Johore, Mighell v.	64
Queen, The, Walsh v.	257	Synge and others, Synge v.....	221
R.		T.	
Ray, Peek v.	769	Tankard, Reg. v.....	42
Rayner, Ingham v.; re Fish	825	Taylor, Seal v.....	329
Richardson and others, Reg. v.	805	Thomas, Jaquess v.	567
River Plate Trust, Loan, and Agency Com- pany, Mercantile Investment and General Trust Company	131	Tillstone, Blaker v.....	31
Roberts, Stocks, and Co., Singleton v.	687	Tolson, Barnard v.	306
Robinson and Fisher, Feast v.....	168	Truro, Town Council of, County Council of Cornwall v.	354
Roe, Taylor v.	232	Tucker, Tucker v.	127
Rogers (the Queen's Proctor showing cause), Rogers v.	699	Tussaud, Louis, Monson v.	335
Roper and others (Justices) and J. H. Ellis, Reg. v.	409	Tussaud (Madame) Limited, Monson v.	335
Rosario Nitrate Company Limited, Smith and Service v.	68	Tyler and others, Nassau Steam Press v.....	376
Rowland, Cozen v.	89	Tyrell, Reg v.	41
Rowntree, Richardson, Spence, and Company, and others	817	U.	
S.		Underwood, Underwood v.	390
S— (No. 1), J— v.	757	Uttley, Travis v.....	242
S— (No. 2), J— v.	758	W.	
Savile, Stoddart v.	552	Wade (resp.), Palmer (app.) v.....	407
Scottish Provident Institution, Cradock v. ...	718	Wade (resp.), Somerset (app.).....	452
Sculcoates Union, Guardians of (resps.), The Hull Docks Company (apps.) v.	742	Wade, Taylor v.	556
Sims, Newby v.	105	Wallen, Holland and another v.	376
Smith (Horace) Esq., and the Aerated Bread Company, Reg. v.	373	Wandsworth District Board of Works, Stroud v.	190
Snagge His Honour Judge, Reg. v.	874	Wanklyn, Kemp v.....	478
South-Eastern Railway Company (resps.), Reigate Union and Churchwardens, &c., of Betchworth (apps.) v.	353	Ward (resp.), Hiatt (app.) v.	374
South-Eastern Railway Company (resps.), Reigate Union and Churchwardens &c., of Buckland (apps.) v.	353	Ward, Kent v.....	612
South-Eastern Railway Company (resps.), Reigate Union and Churchwardens &c., of Chipstead (apps.) v.	353	Watson (resp.), Rose and another (apps.) v....	906
South-Eastern Railway Company (resps.), Reigate Union and Churchwardens &c., of Gatton (apps.) v.	353	Weaverham, Overseers of, Heath and others v. 729	
		Webb, Lemmon v.	275, 712
		Westacott, Papé v.....	18
		West of England Iron, Timber, and Charcoal Company Limited, Patten v.	908
		West Ham, Town Clerk of, Hurcum v. ...	29, 505
		West Metropolitan Tramways Company, Bartlett v.....	491
		West Riding Athletic Club, Leeds, Limited, Turnbull v.	92

DEPENDANTS.

White and Co., Furness, Withy and Co. v. page	463	Woodford, Ross v.page	22
White, Mellin v.	775	Worley, Sadler v.	494
Whitehead, Davis v.; re Duke of Marlborough	314		
Willans, Ives and Barker v.....	674		
Williamson, Lovatt v.	681		
Wood and Co., Gough v.	297		
		Y.	
		Yates, Hood and Son v.	557

IN THE FOLLOWING APPEALS THE DECISIONS OF THE COURTS
BELOW WERE REVERSED.

Allen v. Allen and Bell.....	page 783	Low, <i>re</i> ; Bland v. Low.....	page 57
Arbitration between the London County Council and the London Street Tramways Company, <i>re</i> An.....	572	Lumley, <i>re</i> ; Hood Barrs v. Cathcart (order varied).....	780
Attorney-General for Ontario v. Attorney- General for Canada.....	538	Martin v. Price.....	202
Australian Newspaper Company v. Bennett.....	597	Mellin v. White.....	775
Baker v. Carrick.....	366	Monson v. Madame Tussaud Limited; Monson v. Louis Tussaud.....	335
Black v. Christchurch Finance Company.....	77	Nind v. The Nineteenth Century Building Society.....	831
Boxsius v. Goblet Frères and others.....	368	Oliver v. Horsham Local Board.....	206
Brett v. Monarch Investment Building Society.....	146	Page v. Midland Railway Company.....	14
British and American Trustee and Finance Corporation v. Couper.....	882	Parapano and others v. Happaz and others... ..	254
Buckle, <i>re</i> ; Williams v. Marson.....	115	Prescott, Dimsdale, Cave, Tugwell and Co. Limited v. The Governor and Company of the Bank of England.....	7
Bunting v. Hicks.....	455	Pulborough School Board Election, <i>re</i> ; Bourke and others (pets.) v. Nutt (<i>resp.</i>) ...	639
Clark, <i>re</i> ; <i>ex parte</i> Beardmore.....	751	Roberts and Son v. Ocean Marine Insurance Company. <i>The North Britain</i>	210
Crozat v. Brogden and others.....	522	Rose and others v. Bank of Australasia.....	422
Farquharson v. Morgan.....	152	Rouse v. The Bradford Banking Company Limited.....	427
Glendarroch, <i>The</i>	344	Salaman, <i>re</i>	772
Hallett and Co., <i>re</i> ; <i>ex parte</i> Cocks, Biddulph, and Co.....	891	Sheppard's Corn Malting Company Limited, <i>re</i> ; <i>ex parte</i> Lowenfeld.....	3
Hallett, <i>re</i> ; <i>ex parte</i> The Trustee.....	361	Synge v. Synge and others.....	221
Hanbury v. Hanbury (order varied).....	569	Thompson v. Mayor and Corporation of Brighton.....	206
Hanfstaengl v. The Empire Palace Limited and others (No. 2); Hanfstaengl v. Newnes.....	854	Tyrrell v. Painton.....	453
Harris v. Beauchamp Brothers.....	636	Underwood v. Underwood.....	390
Helby v. Matthews.....	837	<i>Utopia, The</i>	47
Hood-Barrs v. Cathcart (No. 2).....	865	Vitoria, <i>re</i> ; <i>ex parte</i> Vitoria.....	141
Hughes v. Justin.....	365	Wallace v. Automatic Machine Company Limited.....	852
Hull Docks Company (apps.) v. The Guardians of the Sculcoates Union (<i>resps.</i>) (order varied).....	742	Weardale Iron and Coal Company v. Hodson; A. Hodson, claimant.....	632
<i>Industrie, The</i>	791	West Ham Union, Guardians of, v. Church- wardens of St. Matthew, Bethnal Green... ..	818
Jones v. Stone.....	174	Wilson v. McIntosh.....	536
Kemp v. Wanklyn.....	478	Worcester City and County Banking Company v. Firbank, Pauling, and Co.	443
Kent v. Ward.....	612		
Lemmon v. Webb.....	712		
Lever v. Land Securities Company Limited; De Carteret v. Land Securities Company Limited (order varied).....	323		

TABLE OF CASES CITED

IN THIS VOLUME.

A.

Abergavenny Improvement Commissioners v. Straker (60 L. T. Rep. N. S. 756; 42 Ch. Div. 83).....page 372
 Abouloff v. Oppenheimer (47 L. T. Rep. N. S. 325; 10 Q. B. Div. 295)..... 524
 Accidental Marine Assurance Company v. Davis (15 L. T. Rep. N. S. 182) 159
 Acton Local Board v. Batten (52 L. T. Rep. N. S. 17; 38 Ch. Div. 283) 242, 447
 Adams, re (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329) 482, 778
 Adams v. Angell (36 L. T. Rep. N. S. 334; 5 Ch. Div. 634)..... 585
 Adams v. Catley (66 L. T. Rep. N. S. 687; 40 W. R. 570)..... 675
 Adamson v. Armitage (19 Ves. 416) 727
 Agriculturalist Cattle Insurance Company, re; ex parte Official Manager (31 L. T. Rep. N. S. 710; L. Rep. 10 Ch. 1) 801
 Agriculturists' Cattle Insurance Company, re; Bush's case (24 L. T. Rep. N. S. 1; 6 Ch. App. 246) 609
 Ainslie & Co.'s Trade Mark, re (4 Pat. Rep. 212) ... 120
 Ainalie v. Nicholson (61 L. T. Rep. N. S. 809; 24 Q. B. Div. 144) 505
 Aitken v. Batchelor (68 L. T. Rep. N. S. 530; 62 L. J. 193, Q. B.)..... 240
 Akerman, re (65 L. T. Rep. N. S. 194; (1891) 3 Ch. 212) 556
 Alderson v. Maddison (43 L. T. Rep. N. S. 349; 5 Ex. Div. 293) 221
 Alexander, re; ex parte Alexander (66 L. T. Rep. N. S. 133; (1892) 1 Q. B. 216)..... 233
 Alexandre v. Alexandre (23 L. T. Rep. N. S. 268; L. Rep. 2 P. & D. 164) 701
 Allbutt v. The General Council of Medical Education and Registration (61 L. T. Rep. N. S. 585; 23 Q. B. Div. 400) 472
 Allen, re; Davies v. Chatwood (40 L. T. Rep. N. S. 187; 11 Ch. Div. 244, 249) 773
 Allen v. Taylor (22 L. T. Rep. N. S. 651; 16 Ch. Div. 355; 24 L. T. Rep. N. S. 249; 19 W. R. 35) 163, 457, 579
 Allhusen v. Whittell (16 L. T. Rep. N. S. 695; L. Rep. 4 Eq. 295) 123
 Alliance Society, re (52 L. T. Rep. N. S. 695; 28 Ch. Div. 559) 308
 Aine Holmes, The (68 L. T. Rep. N. S. 862; (1893) P. 173)..... 69
 American and Syria, The (31 L. T. Rep. N. S. 42; 2 Asp. Mar. Law Cas. 350; 6 P. C. 127) 848
 Anderson v. Hamlin (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) 379

Andrews, re (53 L. T. Rep. N. S. 422; 30 Ch. Div. 159) page 864, 867
 Andrews v. Barnes (58 L. T. Rep. N. S. 748; 39 Ch. Div. 133) 149
 Andrews v. Swansea Cambrian Building Society (44 L. T. Rep. N. S. 106) 450
 Angell v. Vestry of Paddington (3 L. Rep. Q. B. 714; 37 L. J. 171, M. C.) 735
 Anglesey Colliery Company, re (15 L. T. Rep. N. S. 127; L. Rep. 1 Ch. App. 555) 4
 Anglo-Austrian Printing and Publishing Union, Limited, re; ex parte Isaacs (66 L. T. Rep. N. S. 250, 593; (1892) 2 Ch. 158) 237, 706, 710
 Anglo-Californian Gold Mining Company, re (1 Dr. & Sm. 628, 630; 5 L. T. Rep. N. S. 739)..... 609
 Anglo-Greek Steam Company (14 L. T. Rep. N. S. 120; L. Rep. 2 Eq. 1) 803
 Anglo-Italian Bank v. Davies (39 L. T. Rep. N. S. 244; 9 Ch. Div. 275) 638
 Anlaby v. Praetorius (58 L. T. Rep. N. S. 671; 20 Q. B. Div. 764)..... 366, 616
 Ann, re; Wilson v. Ann (70 L. T. Rep. N. S. 273; (1894) 1 Ch. 549) 623
 Anon (2 K & J. 441, at p. 454) 758
 Aplin v. Porritt (69 L. T. Rep. N. S. 433; (1893) 2 Q. B. 57) 805
 Apollinaris Company's Trade Marks, re (63 L. T. Rep. N. S. 162; 65 L. T. Rep. N. S. 6; (1891) 2 Ch. 186)..... 2, 121
 Apollinaris Company v. Wilson (54 L. T. Rep. N. S. 478; 31 Ch. Div. 632) 271
 Arbitration between Walker and Son and Brown, re an (9 Q. B. Div. 434; 51 L. J. 424, Q. B.; 30 W. R. 703) 908
 Arbitration between the Yeaddon Local Board and the Yeaddon Waterworks Company, re an (59 L. T. Rep. N. S. 844; reported on appeal, 60 L. T. Rep. N. S. 550; 41 Ch. Div. 52) 403
 Arden's Settlement, re (W. N. 1890 p. 204) 552
 Arizona Copper Company v. Smiles (3 Tax. Cases, 149 (Nov. 1891) 673
 Armour v. Walker (50 L. T. Rep. N. S. 293; 25 Ch. Div. 673) 23
 Arnold, re; Arnold v. Arnold (42 L. T. Rep. N. S. 705; 14 Ch. Div. 270) 721
 Arnold v. The Corporation of Gravesend (27 L. T. Rep. O. S. 97; 25 L. J. N. S. 530) 601
 Arnold v. Mayor of Poole (4 M. & G. 860, 897) 613
 Arrospé v. Barr (8 Court of Sess. Cas. 4th series, 602) 476
 Ashby v. White and others (2 Lord Raym. Rep. 938) 25
 Ashenden v. London, Brighton, and South Coast Railway Company (42 L. T. Rep. N. S. 586; 5 Ex. Div. 190) 219

TABLE OF CASES CITED.

<i>Asiatic Banking Corporation, re; Royal Bank of India's case</i> (19 L. T. Rep. N. S. 805; L. Rep. 4 Ch. 252).....	288	<i>Bailey v. Bailey</i> (50 L. T. Rep. N. S. 722; 13 Q. B. Div. 855).....	391
<i>Aslatt v. The Corporation of Southampton</i> (43 L. T. Rep. N. S. 464, at p. 466; 16 Ch. Div. 143, at p. 148).....	638	<i>Bailey v. Edwards</i> (4 B. & S. 761, 773).....	429
<i>Astley v. Earl of Essex</i> (30 L. T. Rep. N. S. 485; L. Rep. 18 Eq. 290).....	263	<i>Baillie v. Goodwin</i> (55 L. T. Rep. N. S. 56; 33 Ch. Div. 604).....	689
<i>Atkin v. Wardle</i> (61 L. T. Rep. N. S. 23).....	376	<i>Baillie v. Treharne</i> (44 L. T. Rep. N. S. 247; 17 Ch. Div. 388).....	394
<i>Atkins re</i> (3 R. P. C. 164).....	398	<i>Baker v. Carrick</i> (70 L. T. Rep. N. S. 366).....	369
<i>Atkinson v. Smith</i> (14 M. & W. 695).....	849	<i>Baker v. Gray</i> (33 L. T. Rep. N. S. 721; 1 Ch. Div. 491).....	585
<i>Attorney-General v. Birkbeck and Co.</i> (51 L. T. Rep. N. S. 199; 12 Q. B. Div. 605).....	10	<i>Baker v. White</i> (38 L. T. Rep. N. S. 347; L. Rep. 20 Eq. 166).....	72
<i>Attorney-General v. Brumming</i> (3 L. T. Rep. N. S. 36; 8 H. of L. Cas. 243).....	663	<i>Balfie v. Balfie</i> (15 Sim. 88).....	164
<i>Attorney-General v. Corporation of Blackburn</i> (57 L. T. Rep. N. S. 385).....	592	<i>Ball's Trustees, re</i> (40 L. T. Rep. N. S. 880; 11 Ch. Div. 270).....	552
<i>Attorney-General v. Corporation of Manchester</i> (68 L. T. Rep. N. S. 608; (1893) 2 Ch. 87).....	305	<i>Bank of Ireland v. Beresford</i> (6 Dow 233, 238).....	436
<i>Attorney-General v. Lomas</i> (29 L. T. Rep. N. S. 749; L. Rep. 9 Ex. 29).....	663	<i>Bank of Toronto v. Lambe</i> (57 L. T. Rep. N. S. 377; 12 App. Cas. 575).....	539
<i>Attorney-General v. The Marquis of Allesbury</i> (58 L. T. Rep. N. S. 192; 12 App. Cas. 672).....	662	<i>Banks v. Scott</i> (5 Madd. 493, 501).....	693
<i>Attorney-General v. Mayor, &c., of Newark-upon-Trent</i> (1 Hare 395, at p. 401).....	650	<i>Barber v. Manico</i> (10 Rep. Pat. Cas. 93).....	296
<i>Attorney-General v. Mayor of Newcastle-upon-Tyne</i> (23 Q. B. Div. 492; 67 L. T. Rep. N. S. 728; (1892) A. C. 568).....	592	<i>Barclay, ex parte</i> (5 De G. M. & G. 403).....	300
<i>Attorney-General v. Nethercote</i> (11 Sim. 529).....	293	<i>Barclay, ex parte; re Joyce</i> (30 L. T. Rep. N. S. 479; L. Rep. 9 Ch. 576).....	493
<i>Attorney-General v. Potter</i> (5 Beav. 164).....	313	<i>Baring v. Nash</i> (1 V. & B. 551).....	488
<i>Attorney-General v. Smith</i> (66 L. T. Rep. N. S. 857; (1892) 2 Q. B. 288).....	350	<i>Barker v. Janson</i> (17 L. T. Rep. N. S. 473; 3 Mar. Law Cas. 28; L. Rep. 3 C. P. 803).....	250
<i>Attorney-General v. Tomline</i> (36 L. T. Rep. N. S. 684; 5 Ch. Div. 750).....	487	<i>Barlow v. Kensington Vestry</i> (52 L. T. Rep. N. S. 155; 27 Ch. Div. 362).....	442
<i>Auckland v. The Westminster District Board of Works</i> (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597).....	441	<i>Barlow v. Vestry of St. Mary Abbots, Kensington, and Elsdon</i> (48 L. T. Rep. N. S. 348).....	96
<i>August, The</i> (66 L. T. Rep. N. S. 32; (1891) p. 328; 7 Asp. Mar. Law Cas. 110).....	792	<i>Barnes v. Barnes</i> (17 L. T. Rep. N. S. 268; L. Rep. 1 P. & D. 505).....	201
<i>Auld v. Glasgow Working Men's Building Society</i> (56 L. T. Rep. N. S. 776; 12 App. Cas. 197).....	309	<i>Barnes (app.) v. Rider (resp.)</i> (68 L. T. Rep. N. S. 447; 62 L. J. 25, M. C.; 56 J. P. 709).....	628
<i>Austin v. Culpepper</i> (2 Shower, 320).....	335	<i>Barnes v. Ward</i> (9 C. B. N. S. 392).....	843
<i>Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company</i> (16 Q. B. 600; 10 C. B. 454).....	220	<i>Baroness Wenman v. Mackenzie</i> (5 Ell. & Bl. 447).....	136
<i>Australasian Mortgage and Agency Company, Limited v. The Commissioners of Inland Revenue</i> (16 Bettie (Scotch Session Cases), p. 64).....	669	<i>Barrow Hematite Steel Company, re</i> (59 L. T. Rep. N. S. 590; 39 Ch. Div. 582).....	871
<i>Australian Direct Steam Navigation Company, re; Miller's case</i> (3 Ch. Div. 661, 665; 5 Ch. Div. 70).....	75, 257, 706	<i>Barry v. Butlin</i> (2 Moo. P. C. 480, 482).....	454
<i>Autothreptic Steam Boiler, re</i> (59 L. T. Rep. N. S. 632; 57 L. J. 448, Q. B.; Div. 182).....	908	<i>Bartlett v. Gibbs</i> (5 M. & G. 81).....	30
<i>Avon and Thomas Joliffe, The</i> (1891) p. 7).....	849	<i>Bartlett v. Pickersgill</i> (1 Cox, 15).....	315
<i>Ayles's Trusts, re</i> (1 Ch. Div. 282).....	869	<i>Bartonshill Coal Company v. McGuire</i> (3 Mac. H. L. C. 300).....	419
<i>Aynsley v. Glover</i> (31 L. T. Rep. N. S. 219; L. Rep. 18 Eq. 544).....	202	<i>Bartonshill Coal Company v. Reid</i> (3 Mac. H. L. C. 266).....	419
B.		<i>Barwick v. The English Joint Stock Bank</i> (16 L. T. Rep. N. S. 461; L. Rep. 2 Ex. 259, 265).....	545
<i>B. (or Bathe) re</i> (66 L. T. Rep. N. S. 38 (1892); 1 Ch. 459; 61 L. J. 446, Ch.).....	758	<i>Baschiera's Trade Mark, re</i> (5 Times L. Rep. 580; 33 Sol. J. 469).....	121
<i>Back v. Holmes</i> (56 L. T. Rep. N. S. 713; 51 J. P. 693).....	510	<i>Basham, re</i> (48 L. T. Rep. N. S. 476; 23 Ch. Div. 195).....	129
<i>Baddeley v. The Consolidated Bank</i> (59 L. T. Rep. N. S. 419, 423; 38 Ch. Div. 238).....	895	<i>Batchelor v. Fortescue</i> (49 L. T. Rep. N. S. 644; 11 Q. B. Div. 474).....	374
<i>Badeley v. Consolidated Bank</i> (59 L. T. Rep. N. S. 419; 38 Ch. Div. 238).....	267	<i>Batt v. The Earl of Derby</i>	203
<i>Badham v. Badham and Gorst</i> (62 L. T. Rep. N. S. 663).....	40	<i>Baxendale v. The Great Eastern Railway Company</i> (L. Rep. 4 Q. B. 244).....	219
<i>Baggett v. Meux</i> (1 Coll. 138; affirmed, 1 Ph. 627).....	866	<i>Baxter v. Taylor</i> (4 B. & Ad. 72).....	488
<i>Bagot's Settlement, re; Bagot v. Kitcoe</i> (70 L. T. Rep. N. S. 229; (1894) 1 Ch. 177).....	654	<i>Baylis v. Baylis</i> (17 L. T. Rep. N. S. 613; L. Rep. 1 P. & D. 395).....	201
<i>Bailey v. Badham</i> (53 L. T. Rep. N. S. 13; 30 Ch. Div. 84).....	685	<i>Beal, ex parte</i> (L. Rep. 3 Q. B. 387 sub. nom.; Graves v. Beal 18 L. T. Rep. N. S. 285).....	461, 854
		<i>Bebb v. Bunny</i> (1 K. & J. 216).....	671
		<i>Beck, re</i> (49 L. T. Rep. N. S. 95; 24 Ch. Div. 608).....	872
		<i>Beck v. Pierce</i> (61 L. T. Rep. N. S. 448; 23 Q. B. Div. 316).....	834
		<i>Beckett v. Corporation of Leeds</i> (26 L. T. Rep. N. S. 375; L. Rep. 7 Ch. App. 421).....	332
		<i>Beckham v. Drake</i> (2 H. L. Cas. 579).....	562
		<i>Beetive v. Hodgson</i> (10 H. L. C. 656).....	482
		<i>Beddow v. Beddow</i> (9 Ch. Div. 89).....	336
		<i>Beever v. Luck</i> (L. Rep. 4 Eq. 537).....	585
		<i>Bell and Co. v. Antwerp, London and Brazil Line</i> (64 L. T. Rep. N. S. 276; (1891) 1 Q. B. 103).....	83
		<i>Bell v. Midland Railway Company</i> (10 C. B. N. S. 287).....	489
		<i>Bennett v. Colley</i> (2 My. & K. 225, 232).....	320
		<i>Benyon v. Benyon</i> (1 P. Div. 447).....	571

TABLE OF CASES CITED.

Berdan v. Greenwood (46 L. T. Rep. N. S. 524, n.; 20 Ch. Div. 764, n.).....	page 23
Bernina, <i>The</i> (56 L. T. Rep. N. S. 450; 6 Asp. Mar. Law Cas. 112; 12 P. Div. 38).....	848
Bernstein v. Bernstein (69 L. T. Rep. N. S. 513; (1893) P. 292).....	40
Berridge v. Ward (10 C. B. N. S. 400).....	332
Besant v. Wood (40 L. T. Rep. N. S. 445; 12 Ch. Div. 605).....	601
Bettine v. Gye (34 L. T. Rep. N. S. 246; 1 Q. B. Div. 183).....	849
Bette v. Armstead (58 L. T. Rep. N. S. 811; 20 Q. B. Div. 771).....	31
Bevan v. Mahon Hagan (L. Rep. (Ir.) 27 Ch. Div. 399).....	263
Bewley v. Atkinson (41 L. T. Rep. N. S. 603; 13 Ch. Div. 283).....	240
Bianchi v. Nash (1 M. & W. 545).....	830
Biddulph v. St. George's Vestry (8 L. T. Rep. N. S. 558; 3 De G. J. & Sm. 493).....	304
Bilborough v. Holmes (35 L. T. Rep. N. S. 759; 5 Ch. Div. 255).....	429, 608
Binstead, <i>re</i> ; <i>ex parte</i> Dale (68 L. T. Rep. N. S. 31; (1893) 1 Q. B. 199).....	233
Birch v. Cropper (61 L. T. Rep. N. S. 621; 14 App. Cas. 525).....	4
Birch v. Sherratt (17 L. T. Rep. N. S. 153; L. Rep. 2 Ch. 644).....	685
Bird v. Holbrook (4 Bing. 628).....	843
Bird v. Lake (1 H. & M. 111, 338, 340).....	579
Bird v. Wenn (54 L. T. Rep. N. S. 933; 33 Ch. Div. 215).....	585
Bird's Estate, <i>re</i> (W. N. 1889, p. 182).....	233
Bird's Trusts, <i>re</i> (3 Ch. Div. 214).....	681
Birkley v. Presgrave (1 East, 220).....	422
Birmingham and District Land Company and All-day, <i>re</i> (67 L. T. Rep. N. S. 850; (1893) 1 Ch. 342).....	601
Bishop of London, <i>ex parte</i> (2 L. T. Rep. N. S. 365; 3 L. T. Rep. N. S. 224; 2 De G. F. & J. 14).....	232
Bittlestone v. Cooke (6 E. & B. 296; 25 L. J. 281, Q.B.).....	180
Bizzey v. Flight (3 Ch. Div. 269).....	55
Blackburn, <i>re</i> ; Smiles v. Blackburn (43 Ch. Div. 75).....	55
Blackham v. Pugh (2 C. B. 611).....	367
Blackmore v. Vestry of Mile-end Town (46 L. T. Rep. N. S. 869; 9 Q. B. Div. 451).....	207
Blainberg, <i>ex parte</i> ; <i>re</i> Toomer (49 L. T. Rep. N. S. 16; 23 Ch. Div. 254).....	284
Blair v. Bromley (2 Ph. 354).....	542
Blaker v. Herts and Essex Waterworks Company (60 L. T. Rep. N. S. 776; 41 Ch. Div. 399).....	495
Blosse v. Wheatley (53 L. T. Rep. N. S. 49; 14 Q. B. Div. 504).....	30, 505
Blount v. Harris (39 L. T. Rep. N. S. 465; 4 Q. B. Div. 603).....	168
Boddy v. Dawes (1 Keen, 362).....	683
Bodenham v. Ricketts (6 N. & M. 176).....	153
Bold Buccleuch, <i>The</i> (7 Moo. P. C. 267).....	251
Bolton v. Natal Land, & Co., Company (65 L. T. Rep. N. S. 786; (1892) 2 Ch. 124).....	521
Bond (app.) v. Evans (resp.) (59 L. T. Rep. N. S. 411; 57 L. J. 105, M. C.; 21 Q. B. Div. 249).....	452, 874
Bone v. Ekless (5 H. & N. 925).....	568
Bonella v. Twickenham Local Board of Health (58 L. T. Rep. N. S. 299; 20 Q. B. Div. 63).....	447
Bonard v. Perryman (65 L. T. Rep. N. S. 506; (1891) 2 Ch. 269).....	336
Bonnewell v. Jenkins (38 L. T. Rep. N. S. 581; 8 Ch. Div. 20).....	590, 782
Boreham v. Boreham (L. Rep. 1 P. & D. 77).....	40
Borough Commercial and Building Society, <i>re</i> (69 L. T. Rep. N. S. 96; (1893) 2 Ch. 242).....	798
Borough of Bathurst v. Macpherson (41 L. T. Rep. N. S. 778 4 App. Cas. 256).....	207
Boswell v. Coaks (57 L. T. Rep. N. S. 742).....	page 233
Bothamley v. Sherson (33 L. T. Rep. N. S. 150; L. Rep. 20 Eq. 304).....	205, 490
Bottomley v. Nuttall (28 L. J. 110, C. P.).....	387
Bowden, <i>re</i> ; Andrew v. Cooper (45 Ch. Div. 444).....	288
Bowen v. Scowcroft (2 Y. & Coll. Exch. 640).....	176
Bower v. Peate (35 L. T. Rep. N. S. 321; 1 Q. B. Div. 321).....	77
Bowes v. Shand (36 L. T. Rep. N. S. 857; 2 App. Cas. 455).....	849
Bown, <i>re</i> (50 L. T. Rep. N. S. 796; 27 Ch. Div. 411).....	866
Bows v. Fenwick (30 L. T. Rep. N. S. 524; 9 C. P. 339; 43 L. J. 107, M. C. 160, C. P.).....	406
Boyse, <i>re</i> (15 Ch. Div. 591).....	60
Boyse, <i>re</i> ; Crofton v. Crofton (46 L. T. Rep. N. S. 522; 20 Ch. Div. 760).....	22
Brackley v. Vestry of St. Mary, Battersea (23 Q. B. Div. 486).....	509
Bradbury v. Hotten (27 L. T. Rep. N. S. 450, 455; L. Rep. 8 Ex. 16).....	461, 856
Bradbury v. Wild (68 L. T. Rep. N. S. 50; (1893) 1 Ch. 377).....	311
Bradlaugh, <i>ex parte</i> (38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509).....	380
Brandon v. Aston (2 Y. & C. Ch. 24, 30).....	482, 778
Brandlyn v. Ord (1 Atk. 571).....	564
Bread Supply Association Limited, <i>re</i> (68 L. T. Rep. N. S. 434).....	237
Bremer v. Freeman (10 Moo. P. C. 306, 307).....	858
Brickenden v. Williams (L. Rep. 7 Eq. 310).....	90
Bridges v. Berry (3 Taunt. 128).....	666
Bridges v. Garrett (22 L. T. Rep. N. S. 448; L. Rep. 5 C. P. 451).....	19
Brighton Marine Palace and Pier Limited v. Woodhouse (68 L. T. Rep. N. S. 669; (1893) 2 Ch. 486).....	675
Britannia Permanent Benefit Building Society, <i>re</i> (65 L. T. Rep. N. S. 196).....	798
British and American Telegraph Company v. Albion Bank (26 L. T. Rep. N. S. 257; L. Rep. 7 Ex. 119).....	288
British Mutual Banking Company Limited v. The Charnwood Forest Railway Company (57 L. T. Rep. N. S. 833; 18 Q. D. Div. 714).....	542
British South Africa Company v. Companhia de Mocambique (69 L. T. Rep. N. S. 604; (1893) A. C. 602).....	135
Broad v. Perkins (60 L. T. Rep. N. S. 8; 21 Q. B. Div. 533).....	153, 225
Broadbent v. Ramsbotham (11 Ex. 602).....	456
Broadhurst, <i>ex parte</i> ; <i>re</i> Broadhouse (17 L. T. Rep. N. S. 126; L. Rep. 2 Ch. 655).....	875
Brodie v. Howard (17 C. B. O. S. 109).....	387
Brodrick v. Soalé (28 L. T. Rep. N. S. 861; L. Rep. 6 C. P. 98).....	168
Brook v. Badley (L. Rep. 3 Ch. 672).....	396
Brooke, <i>re</i> (35 L. T. Rep. N. S. 301; 3 Ch. Div. 630).....	72
Brooke v. Lord Mostyn (10 L. T. Rep. N. S. 892; 2 De G. J. & Sm. 373, at p. 415).....	650
Brophy v. Bellamy (29 L. T. Rep. N. S. 380; L. Rep. 8 Ch. App. 798).....	302
Brown, <i>re</i> ; Brown v. Brown (87 W. R. 472).....	825
Brown v. Brown and Paget (30 L. T. Rep. N. S. 767; L. Rep. 3 Prob. Div. 198).....	785
Brown v. Fisher (63 L. T. Rep. N. S. 465).....	454
Brown v. Mallett (5 C. B. 599).....	48
Brown v. Muller (27 L. T. Rep. N. S. 272; L. Rep. 7 Ex. 319).....	849
Brown v. Raindle (3 Ves. 256).....	394
Browne and Wingrove, <i>re</i> (65 L. T. Rep. N. S. 485; (1891) 2 Q. B. 574).....	853
Brownlie v. Russell (48 L. T. Rep. N. S. 881; 8 App. Cas. 235).....	310, 798, 852
Bruce, <i>ex parte</i> (6 P. Div. 16).....	816
Brunsdon v. Allard (2 E. & E. 19).....	893
Brunton v. Electrical Engineering Corporation (65 L. T. Rep. N. S. 745; (1892) 1 Ch. 434).....	91
Brussel's Palace of Varieties Limited v. Prockter (10 Times L. Rep. 72).....	796

TABLE OF CASES CITED.

Bruton v. Downs (1 F. & F. 668).....	page 369
Bryan v. Twigg (3 L. J. 114, Ch.).....	834
Buckinghamshire Railway Company, <i>re</i> (14 Jur. 1065).....	507
Buckland v. Johnson (23 L. J. C. P. 204).....	666
Buckle v. Lordonny (56 L. T. Rep. N. S. 273).....	798
Buckley v. Gross (7 L. T. Rep. N. S. 743; 3 B. & S. 566; 32 L. J. 129, Q. B.).....	414
Budge v. Parsons (3 B. & S. 379).....	805
Buggin v. Burnett (4 Burr. 2037).....	153
Buller and Basset Tin and Copper Company Limited, <i>re</i> (35 Sols. Jour. 260).....	626
Burchell v. Pugin; Molloy, garnishee (32 L. T. Rep. N. S. 495; 44 L. J. 278, C. P.; L. Rep. 10 C. P. 397).....	898
Burden v. Burden (1 Ves. & B. 176).....	725
Burdett, <i>re</i> ; <i>ex parte</i> Byrne (58 L. T. Rep. N. S. 708; 20 Q. B. Div. 310).....	493
Burford v. Lenthall (2 Atk. 551).....	149
Burgess v. Boetsefure and Brown (8 Scott's New Rep. 194; 7 M. & G. 481; 13 L. J. 122, M. C.).....	880
Burgoynne's Trade Mark, <i>re</i> (61 L. T. Rep. N. S. 39; 6 Pat. Rep. 227).....	121, 187
Burke v. South-Eastern Railway Company (41 L. T. Rep. N. S. 554; 5 C. P. Div. 1).....	817
Burnaby v. The Equitable Reversionary Interest Society (52 L. T. Rep. N. S. 350; 28 Ch. Div. 416).....	394
Burns v. Walford (W. N. 1884, p. 31).....	481
Burrell v. Simpson (4 Ct. Sess. Cas. (4th series) 177).....	418
Burridge v. Bellew (32 L. T. Rep. N. S. 807).....	774
Burt and another v. Gray and another (65 L. T. Rep. N. S. 229; (1891) 2 Q. B. 98).....	317, 832
Burton, <i>re</i> (67 L. T. Rep. N. S. 221; (1892) 2 Ch. 38).....	482, 779
Burton v. White (1 Ex. 526 and 2 Ex. 797).....	176
Burton-upon-Trent, Mayor, &c., of, v. Churchwardens, &c., of Egginton (61 L. T. Rep. N. S. 368; 24 Q. B. Div. 197).....	660
Burt's Estate, <i>re</i> (1 Dr. 319).....	166
Bushire, <i>The</i> (52 L. T. Rep. N. S. 740; 5 Asp. Mar. Law Cas. 416).....	848
Butler v. Butler (62 L. T. Rep. N. S. 344; 15 P. Div. 66; 69 L. T. Rep. N. S. 54; (1893) P. 185).....	700
Butler's Trusts, <i>re</i> (29 L. T. Rep. N. S. 386; 88 Ch. Div. 286; 3 Ir. Rep. Eq. 138).....	53, 394
Butt v. The Great Western Railway Company (11 C. B. 140).....	220
Butterfield v. Heath (15 Beav. 408).....	752
Byron's Estate, <i>re</i> (8 L. T. Rep. N. S. 562; 1 De G. J. & S. 358).....	232
Bywell Castle, <i>The</i> (41 L. T. Rep. N. S. 747; 4 P. D. 219).....	48
C.	
Caistor Union v. Cleaver (56 J. P. 503).....	806
Caldwell v. Fellowes (22 L. T. Rep. N. S. 225; L. Rep. 9 E. 410).....	394
Caledonian Railway Company v. Sprot (2 Macq. 449; 2 Jur. N. S. 623).....	280
Cambeport and Co. v. Chapman (57 L. T. Rep. N. S. 625; 19 Q. B. Div. 229).....	657, 664
Campbell v. The Queen (11 Q. B. Rep. 799; 15 L. J. 76 M. C.).....	356
Candler v. Tillett (22 Beav. 257).....	197, 199
Cape Breton Company, <i>re</i> (45 L. T. Rep. N. S. 395; 19 Ch. Div. 77).....	609
Capital and Counties Bank v. The Governor and Company of the Bank of England (61 L. T. Rep. N. S. 516).....	8
Capital and Counties Bank v. Henty (7 App. Cas. 741, 786).....	340
Cardigan v. Curzon-Howe (60 L. T. Rep. N. S. 723; 41 Ch. Div. 375).....	872
Carlington v. The Wycombe Railway Company (18 L. T. Rep. N. S. 96; 3 Ch. App. 377).....	page 650
Carpenter v. Deen (61 L. T. Rep. N. S. 860; 23 Q. B. Div. 566).....	183
Carr v. The Lancashire and Yorkshire Railway Company (7 Ex. 707).....	220
Carriok v. North British Building Society (22 Scottish Law Rep. 833).....	310
Carson v. Pickersgill (52 L. T. Rep. N. S. 950; 14 Q. B. Div. 859).....	525, 526
Carstairs v. Carstairs (10 L. T. Rep. N. S. 696; 3 Sw. & T. 538).....	327
Carter v. Wake (4 Ch. Div. 605).....	495
Cartwright v. Pultney (2 Atk. 380).....	487
Case v. Storey (29 L. T. Rep. N. S. 618; 38 L. J. 113, M. C. and 168, Ex.; L. Rep. 4 Ex. 319).....	405
Casey v. Hellyer (54 L. T. Rep. N. S. 103; 17 Q. B. Div. 97).....	174
Castellain v. Thompson (13 C. B. N. S. 105).....	173
Castlegate, <i>The</i> ((1893) App. Cas. 52; 7 Asp. Mar. Law Cas. 284; 68 L. T. Rep. N. S. 99).....	48
Cate v. Devon and Exeter Constitutional Newspaper Company (60 L. T. Rep. N. S. 672; 40 Ch. Div. 500).....	858
Cattle v. The Stockton Waterworks Company (33 L. T. Rep. N. S. 475; L. Rep. 10 Q. B. 453).....	548
Cavendish Bentick v. Fenn (57 L. T. Rep. N. S. 773; 12 App. Cas. 652, 662).....	287
Cella, <i>The</i> (59 L. T. Rep. N. S. 125; 6 Asp. Mar. Law Cas. 293; 13 P. Div. 82).....	251
Cercle Restaurant Castiglione Company v. Lavery (18 Ch. Div. 555).....	272
Chadwick v. Herapath (3 C. B. 885).....	594
Chadwick v. Trower (6 Bing. N. C. 1).....	714
Charles v. Brunswick Permanent Building Society (44 L. T. Rep. N. S. 449; 6 Q. B. Div. 696).....	798
Chapman v. Biggs (48 L. T. Rep. N. S. 704; 11 Q. B. Div. 27).....	864, 868
Chappell v. Bray (3 L. T. Rep. N. S. 278; 30 L. J. 24 Ex.).....	387
Chappell v. North (65 L. T. Rep. N. S. 23; (1891) 2 Q. B. 252, 256).....	175
Chapple, <i>re</i> ; Newton v. Chapman (51 L. T. Rep. N. S. 748; 27 Ch. Div. 584).....	320
Charitable Corporation v. Sutton (2 Atk. 400).....	288
Charkish, <i>The</i> (29 L. T. Rep. N. S. 513; L. Rep. 4 A. & E. 59).....	65
Charles v. Jones (56 L. T. Rep. N. S. 848; 35 Ch. Div. 544).....	544
Charles v. Taylor (38 L. T. Rep. N. S. 773; 3 C. P. Div. 492).....	418
Charlesworth v. Mills (66 L. T. Rep. N. S. 690; (1892) A. C. 231).....	789
Charlton v. Earl of Durham (20 L. T. Rep. N. S. 467; L. Rep. 4 Ch. App. 433).....	313
Charlwood, <i>re</i> ; <i>ex parte</i> The Trustees (70 L. T. Rep. N. S. 883; (1894) 1 Q. B. 643).....	562
Charter v. Charter (L. Rep. 7 E. & I. App. 364, 377).....	245, 825
Chartered Mercantile Bank of India v. Netherlands Steam Navigation Company (48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65).....	792, 848
Chatterton v. Cave (38 L. T. Rep. N. S. 397; 3 App. Cas. 483).....	858
Cheese v. Lovejoy (37 L. T. Rep. N. S. 295; 2 P. Div. 251).....	696
Cherry v. Boulton (4 My. & Cr. 442).....	556
Childers v. Childers (30 L. T. Rep. O. S. 3; 1 De G. & J. 482).....	315
Childs v. Cox (58 L. T. Rep. N. S. 338; 20 Q. B. Div. 290).....	479
Chippendale's Case (21 L. J. 22 Q. B.).....	220
Christopher v. Croll (53 L. T. Rep. N. S. 655; 16 Q. B. Div. 66).....	142
Christ's Hospital, <i>re</i> (62 L. T. Rep. N. S. 10; 15 App. Cas. 172).....	739

TABLE OF CASES CITED.

Charlton v. Douglas (John. 174)	page 125
Citizen's Insurance Company v. Parsons (45 L. T. Rep. N. S. 721; 7 App. Cas. 96)	539
City of Lincoln, <i>The</i> (62 L. T. Rep. N. S. 49; 6 Asp. M. L. C. 475; 15 P. Div. 15)	704
City of London Brewery Company v. Tenant (29 L. T. Rep. N. S. 755; L. Rep. 9 Ch. App. 212)...	203
City of Mecca, <i>The</i> (41 L. T. Rep. N. S. 444; L. Rep. 5 P. D. 28)	524
Clara, <i>The</i> (Swabey, 1)	251
Clark, <i>re</i> (60 L. T. Rep. N. S. 335; 6 Morr. 42) ...	752
Clark, <i>re</i> ; <i>ex parte</i> Kennedy (70 L. T. Rep. N. S. 284)	751
Clarke v. Colls (9 H. L. C. 601)	552
Clarke v. Franklin (4 K. & J. 257)	662
Clarke v. St. Pancras Vestry (34 J. P. 181)	441
Clarkson v. Ontario Bank (15 Ontario Appeals 116)	538
Claxton v. Swift (2 Show. 441, 494)	666
Claydon v. Finch (28 L. T. Rep. N. S. 101; 15 Eq. 266)	864, 866
Clayton's case (1 Mer. 572)	36, 363
Cleadon, <i>The</i> (14 Moo. P. C. 93)	848
Cleaver v. Sarraude (1 Camp. 268)	827
Cleverly v. Gladdish (5 L. T. Rep. N. S. 689; 2 S. and T. 335)	814
Clifford v. Koe (43 L. T. Rep. N. S. 322; 5 App. Cas. 447)	176
Climie v. Wood (20 L. T. Rep. N. S. 1012; L. Rep. 4 Ex. 828)	299
Clinch v. The Financial Corporation Limited (19 L. T. Rep. N. S. 334; L. Rep. 4, Ch. App. 117)	112
Clink v. Radford and Co. (64 L. T. Rep. N. S. 491; (1891) 1 Q. B. 625)	476
Clough v. Bond (3 M. & Cr. 490)	197
Coch v. Alcock (21 Q. B. Div. 178)	22
Coey v. Smith (22 Court of Sess. Cas. N. S. 955) ...	211
Coggs v. Bernard (1 Smith L. C., 9th Edit., p. 246)	220
Cohen v. Mitchell (63 L. T. Rep. N. S. 206; 25 Q. B. Div. 262)	108, 284, 752
Colam v. Pagett (12 Q. B. Div. 66)	804
Cole v. Scott (1 Mac. & G. 518)	205
Cole v. Wade (16 Ves. 27)	166
Colegrave v. Dias Santos (2 B. & C. 76)	300
Coleman v. Mellersh (2 Mac. & G. 309)	320
Colemore, <i>re</i> (13 L. T. Rep. N. S. 621; L. Rep. 1 Ch. 128)	180
Collard v. Marshall (66 L. T. Rep. N. S. 248; (1892) 1 Ch. 571)	344
Collinge, <i>ex parte</i> (4 De G. J. & Sm. 538)	36
Collins, <i>ex parte</i> (2 Ir. Ch. Rep. 618)	15
Collins v. Collins (9 App. Cas. 205)	701
Collins v. Lamport (11 Jur. N. S. 1; 34 L. J. 196, Ch.)	563
Collins, <i>ex parte</i> ; <i>re</i> Lees (32 L. T. Rep. N. S. 108; L. Rep., 10 Ch. App. 367)	183
Collis v. Lewis; Claridge, claimant (57 L. T. Rep. N. S. 716; 20 Q. B. Div. 202)	557
Colombia Chemical Factory, Manure, and Phosphate Works, <i>re</i> ; Brett and Hewitt's case (49 L. T. Rep. N. S. 479; 25 Ch. Div. 283)	75
Colquhoun, <i>re</i> (5 De G. M. & G. 35)	773
Columbia Chemical Factory, Manure, and Phosphate Works, <i>re</i> ; Brett's case, Hewitt's case (47 L. T. Rep. N. S. 571; 49 Ib. 479; 25 Ch. Div. 283)...	706
Colyer v. Finch (28 L. T. Rep. O. S. 27; 5 H. L. C. 905, 923)	314
Commissioner of Stamps v. Hope (65 L. T. Rep. N. S. 268; (1891) A. C. 476)	258
Committee of the Western Synagogue, &c., <i>ex parte</i> (26 Sol. J. 435)	649
Company of African Merchants v. Liverpool Marine Insurance Company (Mitchell's Maritime Register, vol. 15, p. 914, and vol. 16, p. 145)	249
Company of Proprietors of the Neath Canal Navigation (apps.) v. Overseers, &c., of the Parish of Neath (resps.) (24 L. T. Rep. N. S. 871; L. Rep. 6, Q. B. 707)	619
Consolidated Credit and Mortgage Corporation v. Gosney (54 L. T. Rep. N. S. 21; 16 Q. B. Div. 24)	page 215
Constable v. Constable (40 L. T. Rep. N. S. 516, 518; 11 Ch. Div. 681, 686)	206
Contract and Agency Corporation Limited, <i>re</i> (57 L. J. 5, Ch.)	523
Cook v. Collingridge (Jac. p. 623)	725
Cook v. Gill (28 L. T. Rep. N. S. 32; L. Rep. 8 C. P. 107)	83
Cooke, <i>ex parte</i> ; <i>re</i> Strachan (35 L. T. Rep. N. S. 649; 4 Ch. Div. 123)	362
Coombe v. Woolf (8 Bing. 156, 161)	436
Cooper v. Crabtree (45 L. T. Rep. N. S. 587; 19 Ch. Div. 193; 47 L. T. Rep. N. S. 5; 20 Ch. Div. 589)	467, 763
Cooper v. Simmons (5 L. T. Rep. N. S. 712; 7 H. & N. 707)	532, 896
Corn and another (apps.) v. Matthews and another (resps.) (68 L. T. Rep. N. S. 480; (1893) 1 Q. B. 310)	532, 830, 896
Cornick v. Pearce (7 Hare. 477)	549
Cornill v. Hudson (8 E. & B. 429)	26
Corporation of Colchester v. Lowten (1 V. & B. 226)	605
Corporation of the Sons of the Clergy and Skinner, <i>re</i> (67 L. T. Rep. N. S. 751; (1893) 1 Ch. 178)...	649
Corser v. Cartwright (L. Rep. 7 H. L. 731, 735) ...	313
Cotton, <i>ex parte</i> (2 Mon. Dea. & De G. 725)	299
Cotton's Trustees and the School Board for London, <i>re</i> (46 L. T. Rep. N. S. 813; 19 Ch. Div. 624)	549
Couch v. Steel (3 E. & B. 402)	207
Coulson v. Coulson (3 Times L. Rep. 846)	336
Counsell v. The London and Westminster Loan and Discount Company (19 Q. B. Div. 512)	183
Countess of Bective v. Hodgson (10 H. of L. Cas. 656)	777
Courtenay v. Williams (3 Hare. 539)	556
Cowley v. Newmarket Local Board (67 L. T. Rep. N. S. 486; (1892) A. C. 345)	207
Cox v. Bennett (64 L. T. Rep. N. S. 380; (1891) 1 Ch. 617)	623, 864, 867
Cox v. Burbidge (13 C. B. N. S. 430)	844
Cox v. Hickman (8 H. L. Cas. 268)	267
Cox v. Willoughby (42 L. T. Rep. N. S. 125; 13 Ch. Div. 863)	277
Craig v. Rose (16 Scot. L. R. 750)	346
Cranley v. Dixon (29 L. T. Rep. O. S. 119; 23 Beav. 512)	123
Crawcour v. Salter (45 L. T. Rep. N. S. 62; 18 Ch. Div. 30)	19
Crawley v. Crawley (7 Sim. 427)	123
Creaton v. Creaton (3 Sm. & Giff. 386)	72
Creighton v. Rankin (7 Cl. & F. 325)	436
Cresswell v. Byron (14 Ves. 271)	834
Cresswell v. Davidson (56 L. T. Rep. N. S. 311; W. N. (1887), 87)	317, 832
Cripps v. Jee (4 Bro. C. C. 471)	315
Crisp v. Crisp (27 L. T. Rep. N. S. 428; L. Rep. 2 P. & D. 426)	816
Croft v. Lumley (6 H. L. Cas. 672)	277
Crook v. Corporation of Seaford (25 L. T. Rep. N. S. 1; L. Rep. 6 Ch. App. 551)	604
Crook v. Morley (65 L. T. Rep. N. S. 389; (1891) A. C. 316)	33
Cropp v. Tilney (3 Salk. 225)	336
Cross v. Pagliano (23 L. T. Rep. N. S. 420; 3 Mar. Law Cas. 492; L. Rep. 6 Ex. 9)	253
Crossley v. Maycock (L. Rep. 18 Eq. 180)	24, 590
Crowhurst v. Amersham Burial Board (39 L. T. Rep. N. S. 355; 4 Ex. Div. 5)	713, 843
Crowther v. Elgood (56 L. T. Rep. N. S. 415; 34 Ch. Div. 691)	554
Cubitt v. Porter (8 B. & C. 257, 264)	487
Cullwick v. Swindell (L. Rep. 3 Eq. 249)	299
Cumber v. Wane (1 Str. 426; 1 Sm. L. Cas. 8th edit., p. 367)	390

TABLE OF CASES CITED.

Cumberland Union Banking Company v. Maryport Hematite, &c., Company (66 L. T. Rep. N. S. 108; (1892) 1 Ch. 415).....	299
Cundy (app.) v. Leococq (resp.) (51 L. T. Rep. N. S. 265; 53 L. J. 125; M. C.; 13 Q. B. Div. 207) ...	452
Cunliffe v. Branoker (35 L. T. Rep. N. S. 578; 3 Ch. Div. 393)	72
Cunnington v. Cunningham (1 Sw. & Tr. 475).....	200
Cupit v. Jackson (13 Price, 721).....	685
Curry, re (5 Notes of Cases, Eccl. & Mar. 54)	166
Curtis v. Kesteven County Council (63 L. T. Rep. N. S. 543; 45 Ch. Div. 504).....	332
Cushing v. Dupuy (42 L. T. Rep. N. S. 445; 7 App. Cas. 409).....	539
Cutter v. Powell (2 Sm. L. C. 1)	834
Czech v. General Steam Navigation Company (17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. 5; L. Rep. 3 C. P. 14).....	346
D.	
D'Aguilar v. D'Aguilar (1 Hagg. 788).....	327
Dahl v. Nelson (44 L. T. Rep. N. S. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38)	253
Dalison's Settled Estates, re (1892) 3 Ch. 522).....	260
Dallow v. Garrold; ex parte Adams (52 L. T. Rep. N. S. 240; 14 Q. B. Div. 543)	893
Dalrymple v. Hall (16 Ch. Div. 715)	552
Dalton v. Angus (44 L. T. Rep. N. S. 844; 6 App. Cas. 740).....	77, 280
Dane v. The Mortgage Insurance Corporation Limited (70 L. T. Rep. N. S. 83; (1894) 1 Q. B. 54)	428
Darby v. Darby (3 Drew. 495).....	269
Daubuz v. Lavington (51 L. T. Rep. N. S. 206; 13 Q. B. Div. 347)	481
Davenport v. The Queen (37 L. T. Rep. N. S. 727; 3 App. Cas. 115).....	277
David, re; Buckley v. The Royal National Lifeboat Institution (60 L. T. Rep. N. S. 786; 41 Ch. Div. 168)	396
David v. Ellice (5 B. & C. 196).....	428
Davidson v. Donaldson (47 L. T. Rep. N. S. 564; 4 Asp. Mar. Law Cas. 601; 9 Q. B. Div. 623)	387
Davies v. Goodhew (6 Sim. 585)	662
Davies v. Stainback (6 De G. M. & G. 679)	429
Davies' Trusts, re (25 L. T. Rep. N. S. 785; L. Rep. 13 Eq. 163)	90
Davis v. Burton (48 L. T. Rep. N. S. 433; 11 Q. B. Div. 537)	632
Davis v. Games (12 Ch. Div. 813)	266
Davis v. Garrett (6 Bing. 716).....	19
Davis v. Gyde (2 Ad. & Ell. 623).....	19
Davis v. Jones (2 B. & Ald. 165).....	300
Davis v. Otty (12 L. T. Rep. N. S. 789; 35 Beav. 208)	315
Davis v. Roe (10 J. P. 385)	413
Dawkins v. Prince Edward of Saxe-Weimar (1 Q. B. Div. 499)	25
Dean v. Mellard (15 C. B. N. S. 19).....	799
Deane v. Clayton (7 Taunt. at p. 533).....	843
De Bost v. Bousford (2 Camp. 511).....	336
De Burgh Lawson, re (41 Ch. Div. 568).....	274
De Chatalein v. De Pontigny (1 Sw. & Tr. 34).....	166
Deeming, ex parte (1892) A. C. 422)	890
De Francesco v. Barnum (62 L. T. Rep. N. S. 40; 63 L. T. Rep. N. S. 438, 514; 45 Ch. Div. 430).....	532, 896
De Lancey's Succession, re (L. Rep. 5 Ex. 102, reported as The Commissioners of Inland Revenue v. De Lancey, 22 L. T. Rep. N. S. 239)	663
De Lusi's Trusts, re (3 L. Rep. Ir. 232, 237)	90
De Mattos v. Gibson (28 L. J. 165, 498, Ch.)	563
Dent v. Auction Mart Company (14 L. T. Rep. N. S. 827; L. Rep. 2 Eq. 238)	203
Dent v. Dent (13 L. T. Rep. N. S. 252; 4 Sw. & Tr. 105)	page 701
Dent v. Turpin (4 L. T. Rep. N. S. 637; 2 J. & H. 139).....	125
Denton v. Marshall (1 H. & C. 654)	153
Denver Hotel Company, re (68 L. T. Rep. N. S. 8; (1893) 1 Ch. 495)	882
Dering v. Dering (19 L. T. Rep. N. S. 48; L. Rep. 1 P. & D. 531)	201
De Rothschild Frères v. Morrison, Kekewich, and Co. (63 L. T. Rep. N. S. 46; 24 Q. B. Div. 750).....	172
Desdemona, The (Swabey, 158).....	251
De Silvale v. Kendall (4 M. & S. 37)	253
De Stern v. De Stern (31 L. J. 34, Prob., note).....	571
De Teissier's Settled Estates, re; De Teissier v. De Teissier (68 L. T. Rep. N. S. 275; (1893) 1 Ch. 153)	260, 555
De Vaux v. Salvador (4 Ad. & Ell. 420)	211
De Visme v. De Visme (1 Mac. & G. 336)	721
Dicker v. Popham, Radford, and Co. (63 L. T. Rep. N. S. 379)	203
Dicks v. Brooks (43 L. T. Rep. N. S. 71, 73, 74; 15 Ch. Div. 22, 35)	460, 855
Dickson, re; Hill v. Grant (52 L. T. Rep. N. S. 707; 29 Ch. Div. 331)	483, 682, 778
Dickson v. Wilton (1 F. & F. 419)	369
Ditton, ex parte; re Woods (40 L. T. Rep. N. S. 297; 11 Ch. Div. 56).....	737
Dixon, re (57 L. T. Rep. N. S. 94; 35 Ch. Div. 4).....	624
Dixon v. Cardus, re (59 L. T. Rep. N. S. 776).....	385
Dixon v. The Metropolitan Board of Works (45 L. T. Rep. N. S. 312; 7 Q. B. Div. 418).....	548
Dixon v. Sadler (5 M. & W. 405)	631
Dobbie v. Williams (21 Scot. L. R. 667)	346
Dobbs v. Grand Junction Waterworks Company (49 L. T. Rep. N. S. 541; 53 L. J. 50, Q. B.; L. Rep. 9 App. Cas. 49)	907
Dobson v. Grave (6 Q. B. 637).....	107
Dodd's case (2 De G. & J. 510)	846
Doe v. Biggs (2 Taunt. 109)	73
Doe d. Burton v. White (1 Ex. 526; affirmed on appeal, 2 Ex. 797)	176
Doe d. Cardigan v. Roe (1 D. & R. 540).....	481
Doe d. Carter v. Roe (10 M. & W. 670)	481
Doe d. Clarke v. Clarke (1 Cr. & M. 39).....	176
Doe v. Clayton (8 East, 141)	176
Doe d. Cundy v. Sharpley (15 M. & W. 558)	481
Doe d. Foster v. Earl of Derby (1 A. & E. 790).....	135
Doe d. Harrison v. Hampson (4 C. B. 745)	233
Doe v. Hiscocks (5 M. & W. 363)	825
Doe d. Knight v. Smythe (4 M. & S. 347)	174
Doe d. Lean v. Lean (1 Q. B. 238)	176
Doe d. Lloyd v. Powell (5 B. & C. 308)	752
Doe d. Pottow v. Fricker (6 Ex. 510)	176
Doe v. Walker (12 M. & W. 591)	206
Doering v. Doering (42 Ch. Div. 203; 58 L. J. 553 Ch.; 37 W. R. 796)	760
Doncaster Permanent Building Society, re (15 L. T. Rep. N. S. 270; L. Rep. 3 Eq. 158; L. Rep. 4 Eq. 579)	798
Donnithorne, ex parte; re Green (40 L. T. Rep. N. S. 660)	142
Donovan v. Laing and Co. (68 L. T. Rep. N. S. 512; (1893) 1 Q. B. 629).....	177
Doogan v. Colquhoun (20 L. Rep. Ir. 361)	479
Dorin v. Dorin (33 L. T. Rep. N. S. 281; L. Rep. 7 E. & I. App. 568).....	825, 869
Douglas, The (47 L. T. Rep. N. S. 502; 7 P. D. 151; 5 Asp. Mar. Law Cas. 15).....	48
Douglas v. Andrews (12 Beav. 310).....	302
Dowling, re; ex parte Banks (36 L. T. Rep. N. S. 117; 4 Ch. Div. 689).....	108
Dowse v. Gorton (64 L. T. Rep. N. S. 809; (1891) App. Cas. 190)	648
Drake v. Mitchell (3 East, 251)	664
Drake v. Trefusis (33 L. T. Rep. N. S. 85; L. Rep. 10 Ch. App. 364)	507

TABLE OF CASES CITED.

Draycott v. Harrison (17 Q. B. Div. 147) page 864, 868	
Dreyfus v. Peruvian Guano Company (62 L. T. Rep. N. S. 518; 43 Ch. Div. 316)	203
Drinkwater v. Falconer (2 Ves. sen. 623)	55
Drummond's Patent, <i>re</i> (6 R. P. C. 576; 43 Ch. Div. 80; 59 L. J. 102, Ch.)	270, 756
Drury v. Drury (2 Eden. 39)	899
Duchess of Kingston's case (2 Sm. L. C., 9th edit. 812)	136
Dudden v. Guardians of Chilton Union (1 H. & N. 627)	456
Duffield v. Scott (3 T. B. 374)	136
Duke of Beaufort v. Phillips (9 L. T. Rep. O. S. 352; 1 De G. & Sm. 321)	234
Duke of Bedford v. Overseers of St. Paul's, Covent Garden (45 L. T. Rep. N. S. 616; 51 L. J. N. S. 41, M. C.)	372
Duke of Brunswick v. The King of Hanover (2 H. of L. Cas. 1)	65
Duke of Buccleuch v. The Metropolitan Board of Works (27 L. T. Rep. N. S. 1; L. Rep. 5 H. of L. E. & I. App. 418)	905
Duke of Devonshire v. Pattinson (58 L. T. Rep. N. S. 392; 20 Q. B. Div. 263)	332
Dunn v. The Birmingham Canal Company (27 L. T. Rep. N. S. 683; L. Rep. 8 Q. B. 42)	548
Duplany v. Duplany (66 L. T. Rep. N. S. 267; (1892) p. 53)	201
Durant v. Durant (1 Hagg. Eccl. 783)	701
Dwyer v. Rich (Ir. Rep. 6 Com. Law 144)	332

E.

Eardley v. Granville (34 L. T. Rep. N. S. 609; 3 Ch. Div. 826)	281
Eardly v. Knight (60 L. T. Rep. N. S. 780; 41 Ch. Div. 537)	233
Earl of Buckinghamshire v. Drury (2 Eden. 69)	839
Earl of Lonsdale v. Nelson (2 Barn. & Cr. 302, 311)	275, 713
Earl's Trust, <i>re</i> (4 K. & J. 673)	55
Earl Botallack Consolidated Mining Company, <i>re</i> (11 L. T. Rep. N. S. 408; 34 Beav. 82)	626
East Gloucestershire Railway Company v. Bartholomew (17 L. T. Rep. N. S. 256; L. Rep. 3 Ex. 15)	707
Easton v. Richmond Highway Board (25 L. T. Rep. N. S. 586; L. Rep. 7 Q. B. 69)	380
Ebbw Vale Steel, Iron, and Coal Company, <i>re</i> (36 L. T. Rep. N. S. 308; 4 Ch. Div. 827 at p. 831)	518, 895
Eckersley v. The Mersey Docks and Harbour Board (Ct. of App. 16th March, 1894, unreported)	676
Eden v. Weardale Iron and Coal Company (56 L. T. Rep. N. S. 281, 464; 35 Ch. Div. 287)	136
Edgar v. The Central Bank (15 Ontario Appeals Cases, 183)	530
Edinburgh and Leith Railway Company v. Dawson (7 Dowl. 573)	524
Edison and Swan United Electric Light Company v. Holland (61 L. T. Rep. N. S. 32; 41 Ch. Div. 28)	136
Edmonds v. Lawley (6 M. & W. 285)	26
Edwards v. Carter (69 L. T. Rep. N. S. 153; (1893) A. C. 360)	900
Elborne v. Goode (14 Sim. 165, 176)	358
Elliot v. Clayton (16 Q. B. 581)	108
Elliot v. Merryman (2 Atk. 43; Barnar. Ch. Cas. 78)	314
Elliot v. North-Eastern Railway Company (10 H. of L. Cas. 333)	280
Elliott v. Dearsley (44 L. T. Rep. N. S. 198; 16 Ch. Div. 322)	527
Elliott v. Turner (13 Sim. 477, 485)	721
Ellis, <i>ex parte</i> (34 L. T. Rep. N. S. 705; 2 Ch. Div. 797)	180

Ellis v. The Loftus Iron Company (L. Rep. 10 C. P. 10)	page 844
Ellis v. The Plumstead Board of Works (57 J. P. 359)	442
Elwes v. Payne (41 L. T. Rep. N. S. 118; 12 Ch. Div. 468)	372
Emden v. Carte (44 L. T. Rep. N. S. 344, 636, 840; 17 Ch. Div. 169, 768; 50 L. J. 492, Ch.)	108, 893
Emmerson v. Heelis (2 Taunt. 38)	530
Emmins v. Bradford (42 L. T. Rep. N. S. 45; 13 Ch. Div. 493)	552
Emperor of Austria v. Day and Kossuth (4 L. T. Rep. N. S. 494; 3 De G. F. & J. 217)	336
Empire Assurance Corporation, <i>re</i> ; <i>ex parte</i> Bagshaw (16 L. T. Rep. N. S. 346; L. Rep. 4 Eq. 341, 347)	112
Energy, <i>The</i> (3 A. & E. 48)	848
English, <i>re</i> (11 Jur. N. S. 434)	652
Eno v. Dunn (63 L. T. Rep. N. S. 6; L. Rep. 15 App. Cas. 252)	120
Erlanger v. The New Sombrero Phosphate Company (39 L. T. Rep. N. S. 269; 3 App. Cas. 1218, 1279)	320
Ernest v. Croyadill (2 L. T. Rep. N. S. 616; 2 De G. F. & J. 175, 198)	129
Essex v. The Acton District Local Board (61 L. T. Rep. N. S. 1 (H. of L.); 14 App. Cas. 153)	905
Etna Insurance Company, <i>re</i> ; <i>ex parte</i> The National Provincial Bank of England (Ir. Rep. 7 Eq. 362)	609
European Life Assurance Society, <i>re</i> (L. Rep. 9 Eq. 122)	804
Evans v. Oakley (1 Car. & Kir. 125)	380
Evans v. Wills (34 L. T. Rep. N. S. 679; 1 C. P. Div. 229)	149
Everth v. Smith (2 Maule & Selwyn, 278)	249
Exchange Banking Company, <i>re</i> ; Flitcroft's case (46 L. T. Rep. N. S. 474; 21 Ch. Div. 519; 48 L. T. Rep. N. S. 86)	287, 518
Exchange, <i>The</i> (7 Cranch. 116)	67
Eyre v. Franklin (42 J. P. 68)	336
Eyre v. Marsden (2 Keen, 564, 578)	359

F.

Fairman v. Ives (5 B. & A. 642)	827
Faithfull v. Ewen (37 L. T. Rep. N. S. 805; 7 Ch. Div. 495)	893
Fanchon, <i>The</i> (5 P. Div. 173)	563
Farrer v. Lacy, Hartland, and Co. (53 L. T. Rep. N. S. 515; 31 Ch. Div. 42)	18
Farrer v. St. Catherine's College (28 L. T. Rep. N. S. 800; L. Rep. 16 Eq. 19)	55
Farwell v. Boston Railway Corporation (4 Metcalf, 49)	419
Faure Electric Accumulator Company, <i>re</i> (59 L. T. Rep. N. S. 918; 40 Ch. Div. 141)	288
Faversham Charity, <i>re</i> (10 W. R. 291)	649
Fawsitt, <i>re</i> ; Galland v. Burton (53 L. T. Rep. N. S. 271; L. Rep. 30 Ch. Div. 231)	616
Fay v. Prentice (1 C. B. 828)	717
Fearon v. Flinn (5 C. P. 34)	908
Featherstonhaugh v. Turner (25 Beav. 382)	725
Fellows v. Wood (59 L. T. Rep. N. S. 513)	830
Ferguson v. Kootenay Smelting and Trading Syndicate (36 S. J. 461)	523
Fergusson v. Davison (46 L. T. Rep. N. S. 191; 8 Q. B. Div. 470)	218
Fergusson v. Fyffe (8 Cl. & F. 121)	429
Fernandes, <i>re</i> (64 L. T. 310; W. N. 1878, p. 57)	240
Ferrand v. The Hallas Land and Building Company (69 L. T. Rep. N. S. 8; (1893) 2 Q. B. Div. 135)	242, 447
Festing v. Allen (2 L. T. Rep. N. S. 150; 12 Mees. & Wel. 279)	72
Field v. Thorne (20 L. T. Rep. N. S. 563)	380
Filburn v. People's Palace and Aquarium Company Limited (25 Q. B. Div. 258)	805

TABLE OF CASES CITED.

Financial Corporation v. Lawrence (L. Rep. 4 C. P. 781)	page 233
Finnis to Forbes (No. 2) (48 L. T. Rep. N. S. 814; 24 Ch. Div. 291)	649
Firth v. Bowling Iron Company (38 L. T. Rep. N. S. 569; 3 C. P. Div. 254)	843
Fish, re; Bennett v. Bennett (69 L. T. Rep. N. S. 233; (1893) 2 Ch. 413, 425)	319
Fishburn v. Hollingshead (64 L. T. Rep. N. S. 647; (1841) 2 Ch. 871)	858
Fisher, re (70 L. T. Rep. N. S. 62; (1894) 1 Ch. 450)	508
Fisher v. Dixon (12 Cl. & Fin. 312)	299
Fitzgerald v. Fitzgerald (31 L. T. Rep. N. S. 270; L. Rep. 3 Prob. & Div. 136)	703
Fleet, <i>ex parte</i> ; re Jardine (19 L. J. 10, Bank.)	692
Fletcher v. Ashburner (1 White & Tudor L. C. 968, 6th edit.)	662
Fletcher v. Braddick (2 B. & P. 182)	48
Fletcher v. Rylands (L. Rep. 1 Ex. 265; L. Rep. 3 H. of L. 330)	843
Flint v. Howard (68 L. T. Rep. N. S. 390; (1893) 2 Ch. 54)	585
Flower v. London and North-Western Railway Company (70 L. T. Rep. N. S. 829; (1894) 2 Q. B. 65)	901
Foskes v. Beer (51 L. T. Rep. N. S. 833; 9 App. Cas. 605)	390
Forbes v. Aspinall (13 East, 328)	249
Ford, <i>ex parte</i> ; re Caughey (34 L. T. Rep. N. S. 634; 1 Ch. Div. 521)	285, 752
Ford v. Foster (27 L. T. Rep. N. S. 219; 17 Ch. 611)	125
Ford v. Hoar (53 L. T. Rep. N. S. 44; 14 Q. B. Div. 507, 508)	30, 505
Ford v. Tiley (6 B. & C. 325)	221
Forest of Dean Coal Mining Company, re (40 L. T. Rep. N. S. 287; 10 Ch. Div. 451, 453)	293
Forshaw, re (16 Sim. 121)	726
Forshaw v. De Witte (24 L. T. Rep. N. S. 397; L. Rep. 6 Ex. 200; 40 L. J. 153, Ex.)	908
Forsyth v. Forsyth (65 L. T. Rep. N. S. 556; (1891) P. 363)	816
Fortescue v. Vestry of St. Matthew, Bethnal Green (65 L. T. Rep. N. S. 256; (1891) 2 Q. B. 170)	509
Forth v. Chapman (1 P. Wms. 633)	72
Foskett v. Kaufman (54 L. T. Rep. N. S. 64; 16 Q. B. Div. 279)	30, 505
Foss v. Harbottle (2 Hare, 461)	325
Foster v. The Bank of England (3 Dowl. & L. 790)	526
Foster v. Dodd (14 L. T. Rep. N. S. 827; 17 L. T. Rep. N. S. 614; L. Rep. 1 Q. B. 475, 487; L. Rep. 3 Q. B. 67, 75)	503
Fothergill, re; <i>ex parte</i> Corry (45 L. J. 153, Bank.)	84
Fothergill v. Rowland (29 L. T. Rep. N. S. 415; L. Rep. 17 Eq. 132)	277
Fowler v. Down (1 B. & P. 44)	284
Fowler v. Reynal (2 De G. & Sm. 749)	129
Franconia, The (39 L. T. Rep. N. S. 57; 3 P. Div. 164; 4 Asp. Mar. Law Cas. 1)	418
Frape, re; <i>ex parte</i> Perrett (68 L. T. Rep. N. S. 47, 558; (1893) 2 Ch. 284)	240
Fraser v. Murdoch (6 App. Cas. 855)	643
Frazer v. Cuthbertson (6 Q. B. Div. 93; 50 L. J. 277, Q. B.)	387
Free v. Burgoyne (6 B. & C. 538)	150
Freeman v. Cox (8 Ch. Div. 143)	161
Freeman v. Read (4 B. & S. 174)	731, 808
French v. Gerber (36 L. T. Rep. N. S. 350; 2 C. P. Div. 247)	476
Friend v. Shaw (58 L. T. Rep. N. S. 89; 20 Q. B. Div. 374)	481
Frith v. Cartland (15 L. T. Rep. N. S. 175; 2 Hem. & M. 417)	362
Fromont v. Coupland (2 Bing. 170)	269
Frost v. Knight (26 L. T. Rep. N. S. 77, 79; L. Rep. 7 Ex. 111)	221, 849
Fry v. Moore (61 L. T. Rep. N. S. 545; 23 Q. B. Div. 395)	103, 444
Fulham Board of Works v. Smith (48 J. P. 375) page 510	
Fullalove v. Carter (6 L. T. Rep. N. S. 653; 12 C. B. N. S. 246)	613
Fuller v. Hooper (2 Ves. sen. 242)	55
Fulton v. Andrew (32 L. T. Rep. N. S. 209; L. Rep. 7 E. & I. App. 443, 460)	454
Furber v. Cobb (56 L. T. Rep. N. S. 689; 18 Q. B. Div. 494)	215, 632
Furneaux v. Rucker (W. N. 1879, p. 135)	483, 778
Furness Railway Company v. The Commissioners of Inland Revenue (10 L. T. Rep. N. S. 161; 33 L. J. 173, Ex.)	88
G.	
Gastano and Maria, The (46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535)	792
Gainsford v. Dunn (30 L. T. Rep. N. S. 283; 17 Eq. 405)	527
Galatti v. Wakefield (40 L. T. Rep. N. S. 30; 48 L. J. 70, Ex.; 4 Ex. Div. 249)	908
Gambart v. Ball (8 L. T. Rep. N. S. 426, 427; 14 C. B. N. S. 306, 316, 317)	461, 858
Gardner v. London, Chatham, and Dover Railway Company (15 L. T. Rep. N. S. 494, 552, 644; L. Rep. 2 Ch. 201)	492, 496
Garner v. Briggs (31 L. T. Rep. O. S. 68)	233
Garnett v. Bradley (39 L. T. Rep. N. S. 261; 3 App. Cas. 944)	63, 149
Gaunt v. Taylor (3 My. & K. 302)	233
Goddie v. Proprietors of the Bann Reservoir (3 App. Cas. 430, 455)	207
General Credit and Discount Company v. Glegg (48 L. T. Rep. N. S. 182; 22 Ch. Div. 549)	496
Genery v. Fitzgerald (Jac. 468)	482, 777
Gent, re (60 L. T. Rep. N. S. 355; 40 Ch. Div. 190)	554
George Hill and Co. v. Hill (55 L. T. Rep. N. S. 769; 35 W. R. 137)	579
Gething v. Keighley (9 Ch. Div. 547)	322
Gibbins v. North-Eastern Metropolitan Asylum District (11 Beav. 1)	590
Gibbs v. Guild (46 L. T. Rep. N. S. 135; 9 Q. B. Div. 59)	542
Gibbs v. Pike (8 M. & W. 223)	233
Gibson, re (L. Rep. 2 Eq. 669)	490
Gibson v. Ingo (6 Hare, 112)	563
Gibson v. Mayor of Preston (22 L. T. Rep. N. S. 293; L. Rep. 5 Q. B. 218)	207
Gilchrist, <i>ex parte</i> ; re Armstrong (55 L. T. Rep. N. S. 538; 17 Q. B. Div. 521)	274
Gillatime v. Adderley (15 Ves. 384)	490
Glanvill, re (54 L. T. Rep. N. S. 411; 31 Ch. Div. 532)	624, 863, 867
Gleadow v. Leatham (22 Ch. Div. 269, 271)	115
Gledstones v. Allen (12 C. B. 202)	476
Glendenning, <i>ex parte</i> (Buck's Bank. Cas. 517)	434
Glennie v. Glennie (3 S. & T. 109)	785
Godard v. Gray (24 L. T. Rep. N. S. at p. 91; L. Rep. 6 Q. B. at p. 148)	522
Gollmere v. Battison (1 Vernon. 48)	221
Goldamid, re (18 Q. B. Div. 295)	384
Goldamid v. Great Eastern Railway Company (49 L. T. Rep. N. S. 717; 25 Ch. Div. 511; 52 L. T. Rep. N. S. 270; 9 App. Cas. 927)	372
Goldstrom v. Tallerman (55 L. T. Rep. N. S. 866; 18 Q. B. Div. 1)	633
Gomersall, re; <i>ex parte</i> Gordon (33 L. T. Rep. N. S. 483; 1 Ch. Div. 137, 142)	244
Goodall's Trade Marks, re (42 Ch. Div. 566)	120
Goodson v. Richardson (30 L. T. Rep. N. S. 142; L. Rep. 9 Ch. App. 221, 225, 226)	203, 487
Gordon v. Duff (3 De G. F. & J. 662; 28 Beav. 519)	490
Gosling v. Gosling (Johns. 265)	358
Goslings and Sharpe v. Blake (61 L. T. Rep. N. S. 311; 23 Q. B. Div. 324)	672

TABLE OF CASES CITED.

Gough v. Birch (Lewin on Trusts (9th ed.) 531) page 313	Guthrie v. Walrond (47 L. T. Rep. N. S. 614; 22 Ch. Div. 578)page 683
Governors of Christ's Hospital, <i>ex parte</i> (2 H. & M. 166) 282	Gyll, <i>re</i> ; <i>ex parte</i> The Board of Trade (50 L. T. Rep. N. S. 778) 386
Governors of St. Bartholomew's Hospital, <i>ex parte</i> (32 L. T. Rep. N. S. 652; L. Rep. 20 Eq. 369) 232	
Governors of St. Thomas's Hospital v. Charing Cross Railway Company (1 Jo. & H. 400) 650	H.
Governors for Relief of Poor Widows, &c., of Clergymen v. Sutton (27 Beav. 651) 649	Hackett v. Baiss (L. Rep. 20 Eq. 494) 203
Graham, <i>ex parte</i> (5 De G. M. & G. 356) 434	Hadden, Best, and Co. v. Oppenheim (60 L. T. Rep. N. S. 962) 215
Graham v. Maxwell (1 Mac. & G. 71) 59	Haigh v. Kaye (26 L. T. Rep. N. S. 675; L. Rep. 7 Ch. App. 469) 316
Graham v. Mayor, &c., of Newcastle-upon-Tyne (69 L. T. Rep. N. S. 6; (1893) 1 Q. B. 643) 207	Haigh (app.) v. The Town Council of Sheffield (resps.) (31 L. T. Rep. N. S. 536; 10 Q. B. 102; 44 L. J. 17 M. C. and 333 Q. B.) 406
Grant v. Anderson (65 L. T. Rep. N. S. 619; (1892) 1 Q. B. 108; 66 L. T. Rep. N. S. 79) 103, 444, 689	Hair, <i>re</i> (10 Beav. 117) 774
Grant v. Coverdale, Todd, and Co. (51 L. T. Rep. N. S. 472; 9 App. Cas. 470) 69	Hall and Barker, <i>re</i> (9 Ch. Div. 538) 834
Grant v. Grant (31 L. T. Rep. N. S. 645; 22 L. T. Rep. N. S. 233, 829; L. Rep. 2 P & D. 8; L. Rep. 5 C. P. 380, 727) 825	Hall v. Comfort (55 L. T. Rep. N. S. 555; 18 Q. B. Div. 11) 481
Graves v. Ashford (16 L. T. Rep. N. S. 98; L. Rep. 2 C. P. 410) 461	Hall v. Hurt (2 J. & H. 76) 685
Graves' case (20 L. T. Rep. N. S. 877; L. Rep. 4 Q. B. 715) 858	Hallas v. Robinson (15 Q. B. Div. 288) 285
Graves v. Hicks (11 Sim. 551) 685	Hallett's Estate, <i>re</i> ; Knatchbull v. Hallett (42 L. T. Rep. N. S. 421; 13 Ch. Div. 696) 362, 364
Graves v. Legg (9 Ex. 709) 849	Hamlyn v. Betteley (43 L. T. Rep. N. S. 790; 6 Q. B. Div. 63; 50 L. J. 1, C. P.) 557
Great Australian Gold Mining Company v. Martin (35 L. T. Rep. N. S. 874; 5 Ch. Div. 1) 103	Hammersley v. De Bie (12 Cl. & Fin. 45, 78) 223
Great Eastern Railway v. Hackney District Board of Works (49 L. T. Rep. N. S. 509; 8 App. Cas. 687) 736	Hammersmith Brewery Company v. Brand (21 L. T. Rep. N. S. 238; L. Rep. 4 H. of L. 171) 548
Great Tower Street Tea Company v. Smith (6 Pat. Rep. 165, 173; 5 Times L. Rep. 232) 120	Hammond v. Bradstreet (15 Ex. 390) 808
Great Western Railway Company v. Bennett (16 L. T. Rep. N. S. 186; L. Rep. 2 H. L. 27) 280	Hammond v. Hooking (50 L. T. Rep. N. S. 267; 12 Q. B. Div. 291) 633
Great Western Railway Company v. Bunch and Wife (58 L. T. Rep. N. S. 128; 57 L. J. 361, Q. B.; 13 App. Cas. 31) 141	Hampden v. Wallis (51 L. T. Rep. N. S. 357; 27 Ch. Div. 251) 161
Great Western Railway Company v. Denchworth (25 J. P. 342) 731	Hampden v. Walsh (33 L. T. Rep. N. S. 852; 1 Q. B. Div. 189) 568
Great Western Railway Company v. Rimell (18 C. B. 575) 220	Hanbury v. Kirkland (3 Sim. 265) 198
Great Western Railway Company v. Waterford and Limerick Railway Company (44 L. T. Rep. N. S. 723; 17 Ch. Div. 493) 149	Hancoo v. Allen (2 Dick. 498) 198
Green v. Duckett (48 L. T. Rep. N. S. 677; 11 Q. B. Div. 275) 451	Hanfstaengl Art Publishing Company v. Holloway (68 L. T. Rep. N. S. 676; (1893) 2 Q. B. 1, 5) 459, 858
Green v. Dunn (20 Beav. 6) 527	Hanfstaengl v. The Empire Palace Limited (70 L. T. Rep. N. S. 459; (1894) 2 Ch. 1) 855
Green v. Gascoigne (4 De G. J. & Sm. 565) 358	Hannah Lynes, <i>re</i> (68 L. T. Rep. N. S. 739; (1893) 2 Q. B. Div. 118) 868
Green v. Tribe (38 L. T. Rep. N. S. 914; 9 Ch. Div. 231) 55	Hanson's Trade Mark (57 L. T. Rep. N. S. 859; 5 Rep. Pat. Cas. 130; 37 Ch. Div. 112) 647
Greenham v. Child (61 L. T. Rep. N. S. 563; 24 Q. B. Div. 29) 168	Harding v. Roberts (10 Ex. 819) 176
Greenough v. McClelland (2 Ell. & Ell. 424) 429	Hardwick v. Hardwick (L. Rep. 16 Eq. 168, 175) ... 329
Greenwood v. Hornsey (55 L. T. Rep. N. S. 135; 33 Ch. Div. 471) 203	Harris, <i>ex parte</i> (1 De G. 162) 692
Greer v. Young (49 L. T. Rep. N. S. 224; 52 L. J. 915, Ch.; 24 Ch. Div. 545) 893	Harris v. Arnott and others (24 L. Rep. (Ir.) 404) 594
Gregson, <i>re</i> (26 Beav. 87) 91	Harris v. Farwell (15 Beav. 31) 430, 608
Greaham Life Assurance Society v. Styles (67 L. T. Rep. N. S. 479; (1892) A. C. 309) 673	Harris v. Osbourn (2 C. & M. 629) 834
Greville v. Browne (7 H. L. Cas. 689, 697) 73, 527	Harris v. Packwood (3 Taunt. 263) 220
Grey's Brewery Company, <i>re</i> (50 L. T. Rep. N. S. 14; 25 Ch. Div. 400) 643	Harris v. Quine (20 L. T. Rep. N. S. 947; L. Rep. 4 Q. B. 653) 61, 834
Griffies v. Griffies (11 W. E. 943) 487	Harrison v. Bush (5 E. & B. 344) 827
Grill v. General Iron Screw Collier Company Limited (18 L. T. Rep. N. S. 485; 3 Mar. Law Cas. 77; L. Rep. 3 C. P. 476) 346	Harrison v. Harrison (60 L. T. Rep. N. S. 39; 13 P. Div. 180) 391, 867
Groesmith's Trade Mark, <i>re</i> (60 L. T. Rep. N. S. 612) 120, 187	Harrison v. Mexican Railway Company (32 L. T. Rep. N. S. 82; L. Rep. 19 Eq. 358) 887
Guinness v. Land Corporation of Ireland (47 L. T. Rep. N. S. 517; 22 Ch. Div. 349) 518, 887	Hart v. Alexander (2 M. & W. 484) 430
Guirieke v. Nord Deutscher Lloyd (Kierulff's decisions in the Lübeck Court of Appeal (1884) vol. 14, p. 34) 793	Harter v. Colman (46 L. T. Rep. N. S. 154, 157; 19 Ch. Div. 630, 635) 584, 588
Gurney v. Gurney (3 Dr. 208) 55	Hartnall v. Ryde Commissioners (4 B. & S. 361) ... 207
	Harvey v. The Principal and Ancients of Barnard's Inn (45 L. T. Rep. N. S. 280; 50 L. J. 750, Ch.) 24
	Harvey v. Walters (28 L. T. Rep. N. S. 343; 8 C. Pl. 162) 280
	Haseldine, <i>re</i> ; Grange v. Sturdy (54 L. T. Rep. N. S. 322; 31 Ch. Div. 511, at p. 517) 869
	Haslewood v. The Consolidated Credit Company Limited (63 L. T. Rep. N. S. 71; 25 Q. B. Div. 555) 633
	Hasluck v. Pedley (L. Rep. 19 Eq. 271, 274) 206
	Hassel v. Hassel (2 Dickens, 527) 527

TABLE OF CASES CITED.

Hawes v. Pavely (34 L. T. Rep. N. S. 836; 1 C. P. Div. 418).....	83
Hawkes v. Cottrell (3 H. & N. 243).....	834
Hawkesworth v. Chaffey (54 L. T. Rep. N. S. 72; 55 L. J. 335, Ch.).....	24, 782
Hawkins v. Combe (1 Bro. C. C. 335).....	778
Hawkins, <i>re</i> ; <i>ex parte</i> Hawkins (64 L. T. Rep. N. S. 769; (1894) 1 Q. B. 25).....	391
Haymes v. Cooper (33 Beav. 431).....	893
Haywood v. Brunswick Permanent Benefit Building Society (45 L. T. Rep. N. S. 699; 8 Q. B. Div. 403).....	136
Head, <i>re</i> ; Head v. Head (69 L. T. Rep. N. S. 753; (1893) 3 Ch. 426).....	430, 608
Hearle v. Greenbank (1 Ves. sen. 298, 304).....	263
Hearn v. Cole (1 Dow. 459).....	436
Heart of Oak, <i>The</i> (29 L. J. 78, Ad.).....	421
Heath v. Percival (1 Peere Wms. 682).....	608
Hebblethwaite v. Hebblethwaite (L. Rep. 2 Prob. & Div. 29).....	785
Heinemann and Co. v. Hale and Co. (64 L. T. Rep. N. S. 548; (1891) 2 Q. B. 83).....	104, 444
Heinrich Bjorn, <i>The</i> (49 L. T. Rep. N. S. 405; 5 Asp. Mar. Law Cas. 391; 11 App. Cas. 279).....	251
Hellawell v. Eastwood (6 Ex. 295).....	217, 498
Helmors v. Smith (56 L. T. Rep. N. S. 72; 85 Ch. Div. 449).....	693
Hemming, <i>ex parte</i> (27 L. T. Rep. O. S. 144).....	240, 320
Henderson v. Stevenson (32 L. T. Rep. N. S. 709; L. Rep. 2 H. of L. Sc. 470).....	817
Hendon Local Board v. Pounoe (61 L. T. Rep. N. S. 465; 42 Ch. Div. 602).....	415
Henwood v. Harrison (26 L. T. Rep. N. S. 988; L. Rep. 7 C. P. 606).....	369
Hepburn, <i>re</i> ; <i>ex parte</i> Smith (14 Q. B. Div. 394).....	36
Herbert v. Sayer (5 Q. B. 965).....	284, 752
Hermann v. Royal Exchange Company (1 C. & E. 413).....	389
Hermann Loog v. Bean (51 L. T. Rep. N. S. 442; 26 Ch. Div. 306).....	341
Heseltine v. Simmons (67 L. T. Rep. N. S. 611; (1892) 2 Q. B. 547).....	183
Hester, <i>re</i> ; <i>ex parte</i> Hester (60 L. T. Rep. N. S. 943; 22 Q. B. Div. 632).....	386
Hetherington v. Groome (51 L. T. Rep. N. S. 412; 13 Q. B. Div. 789).....	633
Hetling and Merton's Contract, <i>re</i> (68 L. T. Rep. N. S. 749; (1893) 3 Ch. 269).....	721
Higgins v. Frankis (15 L. J. 320, Ch.).....	585
Highworth v. Westbury (61 L. T. Rep. N. S. 733; 14 App. Cas. 465).....	818
Hiles v. Moore (15 Beav. 175).....	563
Hill v. Crook (24 L. T. Rep. N. S. 448; L. Rep. 6 E. & I. App. 265).....	826, 869
Hill v. Hill (55 L. T. Rep. N. S. 769; 35 W. R. 137).....	163
Hill v. New River Company (9 B. & S. 303).....	704
Hilliard, <i>re</i> (2 D. & L. 919).....	228
Hinton v. Dibbin (2 Q. B. 646).....	220
Hirsch v. Coates (18 C. B. 757, at p. 764).....	895
Hiscox v. Greenwood (4 Esp. 174).....	173
Hitchcock v. Stretton (66 L. T. Rep. N. S. 707; (1892) 2 Ch. 343).....	240
Hitchins v. Brown (2 C. B. 25).....	30
Hoare v. Osborne (10 L. T. Rep. N. S. 258).....	90
Hochster v. De la Tour (2 E. & B. 678).....	221
Hodge v. The Queen (50 L. T. Rep. N. S. 301; 9 App. Cas. 117).....	539
Hodges v. Callaghan (2 C. B. N. S. 306).....	365
Hodgkinson v. Fernie (2 C. B. N. S. 415).....	48
Hodgson v. Bective (10 H. L. Cas. 656).....	359
Hodgson v. Patterson (5 Scott N. R. 76).....	234
Hodson v. Tea Company (14 Ch. Div. 859).....	498, 852
Holder v. Coates (1 Mos. & Malk. 112, 114, n), 713, 717	
Holder v. Soulbly (2 L. T. Rep. N. S. 219; 29 L. J. 246, C. P.; 8 C. B. (N. S.) 254).....	140
Hole v. Sittingbourne Railway Company (3 L. T. Rep. N. S. 750; 6 H. & N. 488).....	78
Holgate v. Jennings (24 Beav. 623).....	page 123
Holland v. Hodgson (26 L. T. Rep. N. S. 709; L. Rep. 7 C. P. 328).....	299
Holland v. Worley (50 L. T. Rep. N. S. 526; 26 Ch. Div. 578).....	208
Holliday v. Overton (15 Beav. 480).....	681
Hollier v. Eyre (9 Cl. & F. 1, 45).....	434
Hollis v. Burton (67 L. T. Rep. N. S. 146; (1892) 3 Ch. 226).....	161
Hollis v. Claridge (4 Taunt. 807).....	173
Holman v. Johnson (Cowp. 341, 343).....	568
Holmes v. Bellingham (7 C. B. N. S. 329).....	332
Holmes, <i>re</i> ; Holmes v. Holmes (63 L. T. Rep. N. S. 477; 60 L. J. 267, Ch.).....	396
Holmes v. Millage (68 L. T. Rep. N. S. 205; (1893) 1 Q. B. 551).....	686
Holroyd v. Marshall (7 L. T. Rep. N. S. 173; 10 H. of L. Cas. 191).....	181, 394
Holtby v. Hodgson (62 L. T. Rep. N. S. 145; 24 Q. B. Div. 103).....	864, 868
Hope v. The Croydon and Norwood Tramways Company (1887, H. 357).....	492
Hopper, <i>re</i> (L. Rep. 2 Q. B. 367).....	107
Horner, <i>re</i> ; Eagleton v. Horner (58 L. T. Rep. N. S. 103; 37 Ch. Div. 695).....	869
Horton v. Hall (L. Rep. 17 Eq. 437; 23 W. R. 391).....	685
Hosking v. Nicholls (1 Y. & C. Ch. 478).....	490
Hoskins v. Campbell; Gibbon v. Campbell (W. N. (1869), p. 59).....	654
Hough v. Edwards (1 H. & N. 171).....	892
Houldsworth v. City of Glasgow Bank (42 L. T. Rep. N. S. 194, 196; 5 App. Cas. 317, 326).....	545
Houston v. Hughes (6 B. & Cr. 408).....	72
Hovenden v. Lord Annesley (2 Sch. & Lef. 634).....	543
Howard's Settled Estate, <i>re</i> (67 L. T. Rep. N. S. 156; (1892) 2 Ch. 233).....	260
Howarth v. Howarth (9 P. Div. 218).....	702
Howe v. Earl of Dartmouth (7 Ves. 187).....	123, 198, 762
Hoyle, <i>re</i> ; Hoyle v. Hoyle (67 L. T. Rep. N. S. 674; (1893) 1 Ch. Div. 84).....	530
Hubbard, <i>ex parte</i> (59 L. T. Rep. N. S. 172, n; 17 Q. B. Div. 699).....	790
Hudson, <i>re</i> (55 L. T. Rep. N. S. 228; 3 E. P. C. 155; 32 Ch. Div. 311).....	898
Hudson v. Ede (18 L. T. Rep. N. S. 764; L. Rep. 3 Q. B. 412).....	69
Hudson v. South (6 L. Rep. Ir. 69).....	479
Hudson's Trade Mark (55 L. T. Rep. N. S. 228; 3 Rep. Pat. Cas. 155; 32 Ch. Div. 311).....	647
Huffer v. Allen (15 L. T. Rep. N. S. 225; L. Rep. 2 Ex. 15).....	365
Hughes v. Percival (49 L. T. Rep. N. S. 189; 8 App. Cas. 443).....	77
Hugill v. Masker (60 L. T. Rep. N. S. 774; 23 Q. B. Div. 364).....	839
Hulse v. Hulse and Tavernor (24 L. T. Rep. N. S. 847; L. Rep. 2 P. & D. 259).....	702
Hulton v. Hulton (62 L. T. Rep. N. S. 200).....	269
Humphreys v. Jones (53 L. T. Rep. N. S. 482; 31 Ch. Div. 30).....	872
Hunt v. White (37 L. J. 326, Ch.).....	15
Hurlbert and Crowe v. Cathcart (70 L. T. Rep. N. S. 558; (1894) 1 Q. B. 244).....	780
Hussey v. Horne Payne (41 L. T. Rep. N. S. 1; 8 Ch. Div. 670; 4 App. Cas. 311).....	590, 782
Hutchinson v. The York, Newcastle, and Berwick Railway Company (5 Ex. 343).....	418
Hutton, <i>re</i> ; <i>ex parte</i> Benwell (51 L. T. Rep. N. S. 677; 14 Q. B. Div. 301).....	108
Hutton v. Crutwell (1 E. & B. 15; 22 L. J. 78, Q. B.).....	180
Hutton v. Scarborough Cliff Hotel Company (12 L. T. Rep. N. S. 228, 289; 2 Dr. & Sm. 514; 4 De G. J. & Sm. 672).....	887
Hyde v. Hyde (59 L. T. Rep. N. S. 529; 13 Prob. Div. 166).....	559, 623, 864, 867

TABLE OF CASES CITED.

I.

<i>Ibbetson v. Beekwith</i> (Cases temp. Talbot, 157).....	page 176
<i>Iokeringill's Estate, re; Hinsley v. Iokeringill</i> (17 Ch. Div. 151).....	90
<i>Iderton, re</i> (33 Beav. 201).....	774
<i>Incumbent of Whitfield, re</i> (1 J. & H. 610).....	508
<i>Indigo Company v. Ogilvy</i> (64 L. T. Rep. N. S. 846; (1891) 2 Ch. 31).....	103, 444
<i>In the Goods of Allen</i> (68 L. T. Rep. N. S. 462; (1893) P. 184).....	810
<i>In the Goods of Anstruther</i> (Unreported).....	814
<i>In the Goods of Ashton</i> (67 L. T. Rep. N. S. 325; (1892) Prob. 83).....	825
<i>In the Goods of Beavon</i> (2 Curt. 369).....	696
<i>In the Goods of Brake</i> (45 L. T. Rep. N. S. 191; 6 P. Div. 217).....	245
<i>In the Goods of Burrell</i> (1 Sw. & Tr. 64).....	810
<i>In the Goods of De Rosaz</i> (36 L. T. Rep. N. S. 263; 2 P. Div. 66).....	245
<i>In the Goods of Earle</i> (10 P. Div. 196).....	811
<i>In the Goods of Ecoles</i> (61 L. T. Rep. N. S. 652; 15 P. Div. 1).....	810
<i>In the Goods of Gunn</i> (9 P. Div. 242).....	662
<i>In the Goods of Harris</i> (2 L. T. Rep. N. S. 118; 1 Sw. & Tr. 536).....	696
<i>In the Goods of Horsford</i> (31 L. T. Rep. N. S. 553; L. Rep. 3 P. & D. 211).....	696
<i>In the Goods of Ibbetson</i> (2 Curt. 337).....	696
<i>In the Goods of James</i> (1 Sw. & Tr. 238).....	696
<i>In the Goods of Maccabe</i> (29 L. T. Rep. N. S. 250; L. Rep. 3 P. & D. 94).....	696, 698
<i>In the Goods of Rippin</i> (3 Curt. 121).....	696
<i>In the Goods of Shoosmith</i> (70 L. T. Rep. N. S. 809; (1894) P. 23).....	811
<i>In the Goods of Shuttleworth</i> (1 Curt. 911).....	245
<i>In the Goods of Sir Charles Ibbetson</i> (reported in 2 Curt. 337).....	697
<i>Ionides v. Pender</i> (30 L. T. Rep. N. S. 547; L. Rep. 9 Q. B. 531; 2 Asp. Mar. Law Cas. 266).....	248
<i>Ireland v. Livingston</i> (27 L. T. Rep. N. S. 79, 80; L. Rep. 5 E. & I. App. 395, 416).....	468
<i>Irish Post Company v. Phillips</i> (1 B. & S. 598, 629).....	707
<i>Irving v. Manning</i> (1 H. L. Cas. 287).....	250

J.

<i>Jackson v. Barry Railway Company</i> (68 L. T. Rep. N. S. 472; (1893) 1 Ch. 238).....	676
<i>Jackson v. Hamilton</i> (3 Jo. & La T. 702; 9 Ir. Eq. Rep. 430, 650).....	528
<i>Jackson v. Peaked</i> (1 M. & S. 234).....	488
<i>Jackson v. Spittall</i> (22 L. T. Rep. N. S. 755; L. Rep. 5 C. P. 542).....	83
<i>Jackson's Will, re</i> (41 L. T. Rep. N. S. 494; 13 Ch. Div. 189).....	394
<i>Jacobs, re; ex parte Jacobs</i> (31 L. T. Rep. N. S. 745; L. Rep. 10 Ch. 211).....	85
<i>James v. Castle</i> (33 L. T. Rep. N. S. 665).....	662
<i>James, ex parte; re Condon</i> (L. Rep. 9 Ch. 609).....	284
<i>James v. James</i> (16 Eq. 153).....	496
<i>Jameson v. Brick and Stone Company</i> (39 L. T. Rep. N. S. 594; 4 Q. B. Div. 208).....	752
<i>Jansen, ex parte; re Corf</i> (3 Madd. 229).....	429
<i>Jardine v. Jardine</i> (6 P. Div. 213).....	570
<i>Jarman v. Woolston</i> (3 T. B. 618).....	789
<i>J. B. Palmer's Trade Mark, re</i> (50 L. T. Rep. N. S. 30; 24 Ch. Div. 504).....	120
<i>Jefferies v. Duncombe</i> (11 East. 226).....	336
<i>Jeffery, re</i> (L. T. Rep. N. S. 622; (1891) 1 Ch. 671).....	482, 778
<i>Jennings v. Johnson</i> (L. Rep. 8 C. P. 425).....	240

<i>Jennings v. Jordan</i> (45 L. T. Rep. N. S. 593, at p. 594, and App. Cas. 698, at p. 700).....	page 585, 588
<i>Jephson v. Barker</i> (3 Times L. Rep. 40).....	880
<i>Jervis v. Berridge</i> (28 L. T. Rep. N. S., at p. 483; 8 Ch. App., at p. 360).....	590
<i>Jesser v. Gifford</i> (4 Burr. 2141).....	489
<i>Jesus College, Cambridge, ex parte</i> (50 L. T. Rep. N. S. 583).....	507
<i>J. and J. Colman's Trade Mark, re</i> (11 Rep. Pat. Cas. 129).....	647
<i>Johann Friederich, The</i> (1 W. Rob. 35).....	421
<i>Johnson, ex parte</i> (50 L. T. Rep. N. S. 214; 26 Ch. Div. 338).....	180
<i>Johnson v. Diprose</i> (68 L. T. Rep. N. S. 485; (1893) 1 Q. B. 512).....	283
<i>Johnson v. Lindsay</i> (65 L. T. Rep. N. S. 97; (1891) A. C. 371).....	177, 631
<i>Johnson, re; Shearman v. Robinson</i> (43 L. T. Rep. N. S. 372; 15 Ch. Div. 548).....	648
<i>Joint Stock Discount Company v. Brown</i> (20 L. T. Rep. N. S. 844; L. Rep. 8 Eq. 381).....	288
<i>Jones, re</i> (21 L. T. Rep. N. S. 482; L. Rep. 9 Eq. 63).....	613
<i>Jones v. Chapman</i> (2 Ex. 803).....	790
<i>Jones v. Chappell</i> (20 Eq. 539).....	763
<i>Jones v. Coxeter</i> (2 Atk. 400).....	149
<i>Jones v. Hough</i> (42 L. T. Rep. N. S. 108; 4 Asp. Mar. Law Cas. 248; 5 Ex. Div. 115).....	389
<i>Jones v. James</i> (19 L. J. 257, Q. B.).....	153
<i>Jones v. Mackie</i> (17 L. T. Rep. N. S. 151; L. Rep. 3 Ex. 1).....	594
<i>Jones v. Maggs</i> (9 Hare, 605).....	358
<i>Jones v. Ogle</i> (27 L. T. Rep. N. S. 367; L. Rep. 8 Ch. App. 192).....	205
<i>Jones v. Owen</i> (5 Dow. & Lowndes, 669).....	155
<i>Jones v. Williams</i> (8 M. & W. 349; 11 M. & W. 176; 12 L. J. N. S. 249, Ex.).....	233, 275, 718, 843
<i>Jordin v. Crump</i> (8 M. & W. 782).....	843
<i>Joseph v. Lyons</i> (51 L. T. Rep. N. S. 740; 15 Q. B. Div. 280).....	285
<i>Josselyn v. Josselyn</i> (9 Sim. 63).....	358
<i>Judkins, re</i> (50 L. T. Rep. N. S. 200; 25 Ch. Div. 743).....	780

K.

<i>Kearley v. Thomson</i> (63 L. T. Rep. N. S. 150; 24 Q. B. Div. 742).....	568
<i>Keay v. Fenwick</i> (1 C. P. Div. 745).....	422
<i>Kemp v. Clark</i> (12 Q. B. 647).....	464
<i>Kemp v. Halliday</i> (13 L. T. Rep. N. S. 256; 34 L. J. 233, Q. B.).....	422
<i>Kendall v. Hamilton</i> (39 L. T. Rep. N. S. 250; 41 L. T. Rep. N. S. 418; 4 App. Cas. 504) 129, 657, 665	665
<i>Kent v. Worthing Local Board</i> (48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118).....	206
<i>Kerby v. Carr</i> (3 Y. & C. Exch. 184, 186).....	758
<i>Kidgill v. Moore</i> (9 C. B. N. S. 864).....	489
<i>Kidman v. Kidman</i> (40 L. J. 359, Ch.).....	482
<i>King, ex parte</i> (34 L. T. Rep. N. S. 466; 2 Ch. Div. 256).....	180
<i>King and Company Limited, re</i> (66 L. T. Rep. N. S. 489; (1892) 2 Ch. 462).....	756
<i>King v. Hoare</i> (13 M. & W. 494).....	665
<i>King v. Marshall</i> (33 Beav. 565).....	113
<i>Kirton v. Elliott</i> (2 Bulstr. 69).....	896
<i>Kish v. Cory</i> (32 L. T. Rep. N. S. 670; Law Rep. 10 Q. B. 553).....	476
<i>Knapman, re; Knapman v. Wreford</i> (45 L. T. Rep. N. S. 102; 18 Ch. Div. 300; 50 L. J. 629, Ch.).....	760
<i>Knight v. Crookford</i> (1 Esp. 189).....	530
<i>Knight and Tabernaole Permanent Building Society, re</i> (67 L. T. Rep. N. S. 403; (1892) 2 Q. B. 613).....	308
<i>Knowles v. Holden</i> (24 L. J. 223, Ex.).....	154

TABLE OF CASES CITED.

Knowles v. Lancashire and Yorkshire Railway Company (61 L. T. Rep. N. S. 91; 14 App. Cas. 248).....	280	Leigh v. Jack (42 L. T. Rep. N. S. 463; 5 Ex. Div. 264).....	332
Knox v. Gye (L. Rep. 5 H. L. 656).....	554	Leigh's Estate, <i>re</i> (25 L. T. Rep. N. S. 644; L. Rep. 6 Ch. App. 887).....	508
Krehl v. Burrell (40 L. T. Rep. N. S. 637; 11 Ch. Div. 146).....	203, 487	Lemage v. Goodban (13 L. T. Rep. N. S. 508; L. Rep. 1 P. & M. 57).....	55
L		Lemann v. Whitley (4 Russ. 423, 426).....	315
Labouchere v. Dawson (25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322).....	579	Lempriere v. Lempriere and Roebel (L. Rep. 1 P. & D. 569).....	40
Lacey v. Hill (28 L. T. Rep. N. S. 86; 8 Ch. 441)....	36	Leonard and Ellis's Trade Mark, <i>re</i> (51 L. T. Rep. N. S. 35; 26 Ch. Div. 288).....	187
La Compagnie Générale d'Eaux Minérales et des Bains de Mers Trade Mark, <i>re</i> (1891) 3 Ch. 451; 60 L. J. 728, Ch.; 8 R. P. C. 446).....	756	Leslie and others (apps.) v. Fitzpatrick (resp.) (37 L. T. Rep. N. S. 461; 3 Q. B. Div. 229; 47 L. J. 22, M. C.).....	532, 830, 898
Lady Langdale v. Briggs (8 De G. M. & G. 391, 435).....	205	Lethbridge v. Phillips (2 Stark, 544).....	374
Lady Stanley of Alderley v. Earl of Shrewsbury (32 L. T. Rep. N. S. 248; L. Rep. 19 Eq. 616)....	203	Levett v. Withington (1 Lutw. 317).....	17
Lafone v. Smith (4 H. & N. 158).....	594	Lewis v. Arnold (32 L. T. Rep. N. S. 553; L. Rep. 10 Q. B. 245).....	560
Laing v. Hollway (3 Q. B. Div. 437).....	416	Lewis v. Brass (37 L. T. Rep. N. S. 738; 3 Q. B. Div. 667).....	24, 782
Lake v. King (1 Levinz. 240).....	369	Lewis v. Evans (31 L. T. Rep. N. S. 487; L. Rep. 10 C. P. 297).....	479
Lamb, <i>ex parte</i> ; <i>re</i> Southam (45 L. T. Rep. N. S. 639; 19 Ch. Div. 169).....	142	Lewis v. Graham (20 Q. B. Div. 780).....	163, 579
Lambert's Trade Mark, <i>re</i> (61 L. T. Rep. N. S. 138; W. N. 1889, p. 65; 6 Pat. Rep. 344).....	120	Lewis v. The Great Western Railway Company (37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195, 206)....	721
Land Credit Company of Ireland. <i>re</i> ; Weikersheim's case (28 L. T. Rep. N. S. 253, 653; L. Rep. 8 Ch. App. 831).....	707	Lewis, <i>re</i> ; <i>ex parte</i> Munro (35 L. T. Rep. N. S. 857; 1 Q. B. Div. 724).....	240, 562
Lander v. Lander (64 L. T. Rep. N. S. 120; (1891) P. 161).....	40	Lewis v. Weston-super-Mare Local Board of Health (49 L. T. Rep. N. S. 769; 40 Ch. Div. 55; 58 L. J. 39, Ch.).....	192, 198
Langford v. Gascoyne (11 Ves. 338).....	198	Leyman v. Latimer (37 L. T. Rep. N. S. 360, 819; 3 Ex. Div. 15, 352).....	341
Langham Skating Rink Company, <i>re</i> (36 L. T. Rep. N. S. 605; 5 Ch. Div. 669).....	802	Licensed Victuallers' Mutual Trading Association, <i>re</i> ; <i>ex parte</i> Audain (42 Ch. Div. 1).....	796
Lantsbery v. Collier (2 K. & J. 709).....	549	Lichtenberg v. Kormer (Kierulff's decisions in the Lübeck Court of Appeal (1878), vol. 25, p. 6).....	793
Larchin v. North-Western Deposit Bank (33 L. T. Rep. N. S. 124; L. Rep. 10 Ex. 64).....	169	Lidgett v. Secretan (24 L. T. Rep. N. S. 942; 3 Mar. Law Cas. 365; L. Rep. 6 C. P. 615).....	249
Laroche v. Washbrough (2 T. R. 737).....	365	Lidiard and Jackson and Broadley's Contract, <i>re</i> (61 L. T. Rep. N. S. 322; 42 Ch. Div. 254).....	171
La Société Anonyme des Verreries Trade Mark (10 Rep. Pat. Cas. 290).....	271	Lilley v. Doubleday (44 L. T. Rep. N. S. 814; 7 Q. B. Div. 510).....	19
Lassence v. Tierney (15 L. T. Rep. O. S. 557; 1 Mac & G. 551).....	124	Limpu v. London General Omnibus Company (7 L. T. Rep. N. S. 641; 32 L. J. 34, Ex.).....	78
Lathropp's Charity, <i>re</i> (13 L. T. Rep. N. S. 784; L. Rep. 1 Eq. 467, 469).....	508	Lincoln v. Wright (33 L. T. Rep. O. S. 35; 4 De G. & J. 16).....	315
Lawless v. Anglo-Egyptian Cotton Company (L. Rep. 4 Q. B. 262).....	369	Lindon v. Sharp (6 M. & G. 895).....	180
Lawrance, <i>re</i> ; Bowker v. Austin (70 L. T. Rep. N. S. 91; (1894) 1 Ch. 556).....	726	Lindsay Petroleum Company v. Hurd (L. Rep. 5 P. C. 221).....	320
Lawrance v. Lord Norreys (62 L. T. Rep. N. S. 706; 15 App. Cas. 210).....	543	Linton, <i>re</i> ; <i>ex parte</i> Linton (52 L. T. Rep. N. S. 782; 15 Q. B. Div. 239).....	391
Lawrence v. Horton (62 L. T. Rep. N. S. 749).....	203	Liquidators of Imperial Mercantile Credit Association v. Coleman (29 L. T. Rep. N. S. 1; L. Rep. 6 Eng. & Ir. App. Cas. 189).....	93
Leader v. Duffy (59 L. T. Rep. N. S. 9; 13 App. Cas. 301).....	632	Litchfield v. Jones (58 L. T. Rep. N. S. 20; 36 Ch. Div. 530).....	553
Leaf v. Coles; <i>re</i> Coles (1 De G. M. & G. at p. 171).....	757	Liverpool Household Stores Association v. Smith (58 L. T. Rep. N. S. 204; 37 Ch. Div. 170).....	336
Leak v. Driffeld (61 L. T. Rep. N. S. 771; 24 Q. B. Div. 98).....	867	Llewellyn v. Rutherford (32 L. T. Rep. N. S. 610; 10 C. P. 456).....	125
Learoyd v. The Halifax Joint Stock Banking Company (68 L. T. Rep. N. S. 158; (1893) 1 Ch. 686).....	643	Lloyd v. Guibert (13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115).....	792
Lechmere v. Earl of Carlisle (3 P. Wms. 219).....	662	Lloyd v. Jones (6 C. B. 81).....	149
Lee v. Butler (69 L. T. Rep. N. S. 370; (1893) 2 Q. B. 318).....	838	Lofthouse, <i>re</i> (53 L. T. Rep. N. S. 174; 29 Ch. D. 921).....	302
Lee v. Gibbings (67 L. T. Rep. N. S. 268).....	339	London, Brighton, and South Coast Railway Company v. Truman (54 L. T. Rep. N. S. 250; 11 App. Cas. 45).....	548
Lee v. Neuchâtel Asphalte Company (61 L. T. Rep. N. S. 11; 41 Ch. Div. 1).....	517	London Chartered Bank of Australia, <i>re</i> (69 L. T. Rep. N. S. 593; (1893) 3 Ch. 540).....	85
Lee v. Risdon (7 Taun. 188).....	300	London County Council v. Assessment Committee of Woolwich (1893) 1 Q. B. 227).....	151
Leeds Estate Building and Investment Company v. Shepherd (57 L. T. Rep. N. S. 684; 36 Ch. Div. 787).....	287	London County Council v. Churchwardens, &c., of the Parish of Erith (69 L. T. Rep. N. S. 725; (1893) A. C. 560, 562).....	660, 749
Leeson v. The General Council of Medical Education and Registration (61 L. T. Rep. N. S. 849; 43 Ch. Div. 366).....	472	London County Council v. Churchwardens and Overseers of West Ham (67 L. T. Rep. N. S. 363; (1892) 2 Q. B. 173).....	62, 148, 748, 846
Lehaine v. Philpott (33 L. T. Rep. N. S. 93; L. Rep. 10 Ex. 242).....	451		
Lehmann, <i>re</i> ; <i>ex parte</i> Hasluck (62 L. T. Rep. N. S. 941).....	233		

TABLE OF CASES CITED.

London County Council v. Cross (66 L. T. Rep. N. S. 731; 61 L. J. 160, M. C.)	page 95, 441
London Financial Association v. Kelk (50 L. T. Rep. N. S. 492; 26 Ch. Div. 107)	288
London Marine Insurance Association, <i>re</i> (20 L. T. Rep. N. S. 943; L. Rep. 8 Eq. 176)	798
London and North-Western Railway Company v. Evans (67 L. T. Rep. N. S. 820; (1893) 1 Ch. 16)	280
London Provident Building Society v. Morgan (69 L. T. Rep. N. S. 595; (1893) 2 Q. B. 266)	798
London and South-Western Railway Company v. Gomm (46 L. T. Rep. N. S. 449; 20 Ch. Div. 562)	136, 604
London Stereoscopic and Photographic Company v. Kelly (5 Times L. Rep. 169)	858
London and Suburban Bank, <i>re</i> (66 L. T. Rep. N. S. 716; (1892) 1 Ch. 604)	449
London Syndicate v. Lord (38 L. T. Rep. N. S. 329; 8 Ch. Div. 84)	161
London Wharfing and Warehousing Company, <i>re</i> (53 L. T. Rep. N. S. 112)	233
Long v. Ovenden (44 L. T. Rep. N. S. 462; 16 Ch. Div. 691)	683
Long v. Short (1 P. Wms. 403)	528
Longbottom v. Berry (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 123)	299
Lord v. Colvin (3 Drewry, 222)	785
Lord Auckland v. The Westminster District Board of Works (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597)	95
Lord Cranstown v. Johnston (3 Ves. 170)	135
Lord Gerard's Settled Estate, <i>re</i> (69 L. T. Rep. N. S. 393; (1893) 3 Ch. 252)	260, 555
Lord Irnham v. Child (1 Bro. C. C. 92)	315
Lord Shipbrook v. Lord Hinchinbrook (11 Ves. 252; 16 Ib. 477)	198
Lords Bailiff, The; Jurats of Romney Marsh v. The Corporation of the Trinity House (L. Rep. 7 Ex. 247)	704
Loveden v. Loveden (2 Hag. Consist. Rep. 512)	783
Lovell v. Howell (1 C. P. Div. 161)	419
Lovell v. Newton (39 L. T. Rep. N. S. 609; 4 C. P. Div. 7)	163
Lovelock v. Franklyn (8 Q. B. 371)	221
Lowther v. Carlton (2 Atk. 241)	564
Lubbock v. British Bank of South America (67 L. T. Rep. N. S. 74; (1892) 2 Ch. 198)	518
Lucas v. Brandreth (2 L. T. Rep. N. S. 785; 28 Beav. 274)	682
Lucas v. Cooke (42 L. T. Rep. N. S. 180, 183; 13 Ch. Div. 872, 879)	461, 855
Lucas v. Harris (55 L. T. Rep. N. S. 658; 18 Q. B. Div. 127)	638
Lucas v. Williams (66 L. T. Rep. N. S. 706; (1892) 2 Q. B. 113)	858
Luckin v. Hamlyn (21 L. T. Rep. N. S. 366)	169
Lumley, <i>re</i> (W. N. 1894, p. 77, corrected at p. 80; since affirmed W. N., 1894, p. 114)	868
Lumley v. Simmons (56 L. T. Rep. N. S. 134; 34 Ch. Div. 698, 702)	283
Lumley v. Wagner (1 De G. M. & G. 604; 21 L. J. 898, Ch.)	563
L'Union St. Jacques de Montreal v. Bélisle (31 L. T. Rep. N. S. 111; L. Rep. 6 P. C. 31)	539
Luscombe v. Yates (5 B. & Ald. 553)	263
Lushington v. Onslow (6 Notes of Cas. 183)	696, 698
Luxon, <i>ex parte</i> ; <i>re</i> Pidsley (47 L. T. Rep. N. S. 211; 20 Ch. Div. 71)	145
Lynch v. Bellew (3 Phillimore's Rep. 424)	166
Lynch v. Nurdin (1 Q. B. 29)	245
Macdonald v. Carrington (39 L. T. Rep. N. S. 426; 4 C. P. Div. 28)	728
Macdonald v. Irvine (58 L. T. Rep. N. S. 155; 8 Ch. Div. 101)	page 762
Macdougall v. Knight (55 L. T. Rep. N. S. 274; 17 Q. B. Div. 636)	339
Macfarlane v. Lister (58 L. T. Rep. N. S. 201; 37 Ch. Div. 88)	91
Mackenzie v. Childers (62 L. T. Rep. N. S. 98; 43 Ch. Div. 265)	602
Mackenzie's Settlement, <i>re</i> (L. Rep. 2 Ch. 345)	394
Mac Taggart v. Watson (3 Cl. & F. 525)	436
Maddison v. Alderson (49 L. T. Rep. N. S. 303; 8 App. Cas. 467)	603
Maddon v. White (2 T. E. 159)	896
Magnus v. Queensland National Bank (58 L. T. Rep. N. S. 248; 37 Ch. Div. 466)	544
Maingay v. Lewis (Ir. Rep. 3 C. L. 495; Ib. 5 C. L. 229)	428
Malcomson v. Malcomson (17 L. Rep. Ir. 69)	302
Mallinson v. Carr (63 L. T. Rep. N. S. 459; (1891) 1 Q. B. 48)	31
Manchester and Liverpool District Banking Company v. Parkinson (22 Q. B. Div. 173)	636
Manning v. Adams (32 W. R. 430)	177
Mannox v. Greener (27 L. T. Rep. N. S. 408; L. Rep. 14 Eq. 456)	727
Mansergh v. Rimell (W. R. 1884, p. 34)	481
Maple and Co. v. Junior Army and Navy Stores (47 L. T. Rep. N. S. 589; 21 Ch. Div. 369)	461
March, <i>re</i> ; Mander v. Harris (51 L. T. Rep. N. S. 380; 27 Ch. Div. 166)	205
Markham, <i>re</i> ; Markham v. Markham (16 Ch. Div. 1)	609
Markland, The (3 Adm. & Eccl. 343)	251
Marquis of Abercorn's case (4 De G. F. & J. 78)	708
Marquis of Salisbury v. Great Northern Railway Company (32 L. T. Rep. O. S. 175; 5 C. B. N. S. 174)	332
Marquis of Townshend v. Stangroom (6 Ves. 328, 332)	316
Marris v. Ingram (41 L. T. Rep. N. S. 613; 13 Ch. Div. 338)	554
Marsden v. Meadows (45 L. T. Rep. N. S. 301; 7 Q. B. Div. 80)	788
Marsden v. Wardle (3 E. & B. 695, 701)	155
Marshall v. Barkworth (4 B. & Ad. 508)	285
Marshall v. Gingell (47 L. T. Rep. N. S. 159; 21 Ch. Div. 790)	72
Martin, <i>re</i> (21 Q. B. Div. 29, 34; 58 L. T. Rep. N. S. 889)	695
Martin v. Gale (36 L. T. Rep. N. S. 357; 4 Ch. Div. 428; 46 L. J. 84, Ch.)	532, 896
Martin v. Wright (6 Sim. 297)	460
Martinson v. Clowes (33 W. R. 555)	525
Mary, The (41 L. T. Rep. N. S. 351; 4 Asp. Mar. Law Cas. 183; 5 P. Div. 14)	848
Mary Jane Hart and the Fines and Recoveries Act 1833, <i>re</i> (W. N. 1882, p. 36)	757
Mason and Taylor, <i>re</i> (10 Ch. Div. 729)	91
Masters v. Pollie (2 Roll. Abr. 131)	713
Mather v. Fraser (2 K. & J. 536)	299
Matson v. Swift (8 Beav. 368)	663
Matthison v. Clarke (3 Drew. 3)	544
Mande, <i>ex parte</i> (23 L. T. Rep. N. S. 749; L. Rep. 5 Ch. App. 51)	4
Maughan, <i>re</i> (59 L. T. Rep. N. S. 253; 21 Q. B. Div. 21)	611
Maurice and Co. v. Perger and Co. (Kierulf's decisions in the Lübeck Court of Appeal (1870), Vol. 6, p. 350)	793
Max Morris, The (30 Davies's Repts. 1)	848
May v. Thomson (47 L. T. Rep. N. S. 295; 20 Ch. Div. 705)	24
Mayfair Property Company v. Johnston (70 L. T. Rep. N. S. 485; (1894) 1 Ch. 508)	768
Mayor, Aldermen, and Burgesses of Dorchester v. Ensor (21 L. T. Rep. N. S. 145; L. Rep. 4 Ex. 335)	372
Mayor, Aldermen, and Citizens of Manchester v. Lyons (47 L. T. Rep. N. S. 677; 22 Ch. Div. 287)	372

M.

TABLE OF CASES CITED.

Mayor, &c., of Colchester v. Lowten (1 Ves. & B. 226).....	page 650
Mayor and Commonalty of the City of London v. Low (42 L. T. Rep. N. S. 16; 49 L. J. 144, Q. B.)	372
Mayor of London v. Cox (L. Rep. 2 H. of L. 239) 153, 225	
Mayor, &c., of Southport v. Ormskirk Union Assessment Committee (69 L. T. Rep. N. S. 852, 853; (1894) 1 Q. B. 196, 199).....	548
McClellan v. Clark (50 L. T. Rep. N. S. 616)	490
M'Cormack v. Melton (1 A. & E. 331).....	365
M'Dougall v. Claridge (1 Camp. 267).....	827
Meador v. West Cowes Local Board (67 L. T. Rep. N. S. 454; (1892) 3 Ch. 18).....	243
Meaking (app.) v. Morris (resp.) (12 Q. B. Div. 352) 532, 896	
Medley v. Medley (47 L. T. Rep. N. S. 556; 7 P. Div. 122).....	570
Medlock, re; Ruffe v. Medlock (54 L. T. Rep. N. S. 828).....	683
Meggy v. Imperial Discount Company (38 L. T. Rep. N. S. 309; 3 Q. B. Div. 711).....	752
Megrath v. Gray (30 L. T. Rep. N. S. 16; L. Rep. 9 C. P. 216).....	84
Mellersh v. Keen (27 Beav. 242)	725
Melville v. Stringer (50 L. T. Rep. N. S. 774; 13 Q. B. Div. 392).....	632
Mendes v. Guedalla (2 J. & H. 259).....	198
Mercantile Investment and General Trust Company v. International Company of Mexico (68 L. T. Rep. N. S. 603; (1893) 1 Ch. 484).....	134
Mercantile Investment and General Trust Company v. River Plate Trust Loan and Agency Company (66 L. T. Rep. N. S. 711; (1892) 2 Ch. 303; 61 L. J. 473, Ch.).....	760
Mercoers' Company, ex parte (10 Ch. Div. 481)	62
Mersey Docks and Harbour Board v. Overseers of Birkenhead.....	749
Mersey Docks and Harbour Board v. Overseers of Liverpool.....	747
Merton College, re (9 L. T. Rep. N. S. 633, and 10 L. T. Rep. N. S. 8; 1 De G. J. and Sm. 361)	232
Metcalfe v. The London, Brighton, and South Coast Railway Company (4 C. B. N. S. 307).....	220
Metropolitan Association v. Petch (5 C. B. N. S. 504).....	489
Metropolitan Asylum District v. Hill (44 L. T. Rep. N. S. 653; 6 App. Cas. 193).....	548
Metropolitan Board of Works v. McCarthy (31 L. T. Rep. N. S. 182; 43 L. J. 385, C. P.; 7 H. of L. E. & I. App. 243).....	905
Metropolitan Carriage and Repository Company, re; Brown's case (29 L. T. Rep. N. S. 562; 9 Ch. App. 102, 106, 109).....	75, 237, 706
Meux v. Jacobs (32 L. T. Rep. N. S. 171; L. Rep. 7 E. & Ir. App. 481).....	299
Mews v. Mews (15 Beav. 529).....	163
Meyer v. Simonsen (5 De G. & Sm. 723).....	762
Meyerstein v. Barber (16 L. T. Rep. N. S. 569; L. Rep. 2 C. P. 38).....	465
Meyerstein's Trade Mark, re (62 L. T. Rep. N. S. 526; 43 Ch. Div. 604).....	120, 187
Meyler v. Meyler (11 L. Rep. 522).....	681
M'Gaffigan v. Riddall (26 L. R. Ir. 257).....	408
Micklethwaite v. Newlay Bridge Company (55 L. T. Rep. N. S. 336; 33 Ch. Div. 133).....	332
Middleton v. Barker (29 L. T. Rep. N. S. 643; W. N. 1873, p. 231).....	681
Middleton v. Chichester (L. Rep. 6 Ch. Ap. 152)	554
Midland Railway Company v. Checkley (16 L. T. Rep. N. S. 260; 4 Eq. 19).....	280
Midland Railway Company v. Churchwardens of Great Wigton (32 L. T. Rep. N. S. 753; nom. R. v. Midland Railway Company, L. Rep. 10 Q. B. 389).....	620
Midland Railway Company v. Pye (10 C. B. N. S. 179, at p. 191).....	641
Milan, The (1 Lush. 388).....	page 848
Miller, re; ex parte The Official Receiver (67 L. T. Rep. N. S. 601; (1893), 1 Q. B. 327).....	692
Mills' Estate, re (55 L. T. Rep. N. S. 465; 34 Ch. Div. 24).....	62, 150, 846
Mills v. Jennings (42 L. T. Rep. N. S. 169; 13 Ch. Div. 639).....	585
Mills v. Norris (5 Ves. 335).....	483, 778
Minshall v. Lloyd (2 M. & W. 450).....	300
Minter v. Carr (70 L. T. Rep. N. S. 583).....	588
Mirehouse v. Scaife (2 My. & Cr. 695, 707).....	527
Missouri Steamship Company (58 L. T. Rep. N. S. 377; 42 Ch. Div. 321; 6 Asp. Mar. Law Cas. 423) 793	
Mitchell v. Henry (43 L. T. Rep. N. S. 186; 15 Ch. Div. 181).....	398
Mitcheson v. Oliver (5 E. & B. 419; 25 L. J. 39, Q. B.).....	387
Moger (app.) v. Escott (resp.) (26 L. T. Rep. N. S. 99; L. Rep. 7 C. P. 158; 41 L. J. 86, C. P.).....	408
Moir, re; Warner v. Moir (50 L. T. Rep. N. S. 10; 25 Ch. Div. 605).....	263
Molyneux and White, re (13 L. Rep. Ir. 382; 15 L. Rep. Ir. 383).....	313
Moore, ex parte; re Faithfull (52 L. T. Rep. N. S. 376; 14 Q. B. Div. 627).....	233
Moore v. Frowd (3 My. & Cr. 45, 48).....	320
Moore v. Hall (38 L. T. Rep. N. S. 419; 3 Q. B. Div. 178).....	203
Moore v. Knight (63 L. T. Rep. N. S. 831; (1891) 1 Ch. 547).....	288, 542
Moore v. The Lambeth Waterworks Company (55 L. T. Rep. N. S. 809; 17 Q. B. Div. 462).....	207
Moore v. Moore (the Queen's Proctor showing cause (67 L. T. Rep. N. S. 530; (1892) P. 382) 700	
Moore v. Palmer (2 Times L. Rep. 781).....	177
Mordaunt v. Clark (L. Rep. 1 Prob. & Div. 592)	813
Mordy v. Jones (4 B. & C. 394).....	422
Morgan v. Crawshaw (24 L. T. Rep. N. S. 889; L. Rep. 5 E. & I. 304).....	619, 621
Morgan v. Knight (9 L. T. Rep. N. S. 803; 15 C. B. N. S. 669).....	284, 752
Morgan v. Minett (36 L. T. Rep. N. S. 948; 6 Ch. Div. 638).....	319
Morgan v. Morgan (14 Beav. 72).....	762
Morgan, re; Morgan v. Morgan (69 L. T. Rep. N. S. 407; (1893) 3 Ch. 222).....	527
Morgan v. Rees (44 L. T. Rep. N. S. 133; 6 Q. B. Div. 508).....	596
Morgan v. Vale of Heath Railway Company (13 L. T. Rep. N. S. 564; L. Rep. 1 Q. B. 149).....	419
Morley v. Bird (3 Ves. 628).....	490
Morris v. Barrett (3 Y. & J. 384).....	269
Morris v. Morris (31 L. J. 33, Prob.).....	571
Morritt v. The North-Eastern Railway Company (34 L. T. Rep. N. S. 940; 1 Q. B. Div. 302).....	220
Morritt, re; ex parte The Official Receiver (56 L. T. Rep. N. S. 42; 18 Q. B. Div. 222).....	633
Mors-le-Blanch v. Wilson (28 L. T. Rep. N. S. 415; L. Rep. 8 C. P. 227).....	465
Mosley v. Chadwick (7 B. & C. 47, note (a).....	372
Mott v. Shoolbred (20 Eq. 22).....	763
Moufet v. Washburn (54 L. T. Rep. N. S. 16)	153
Mower v. Orr (7 Hare, 473).....	549
M'Queen v. Farquhar (11 Ves. 467).....	564
Mulliner v. The Midland Railway Company (40 L. T. Rep. N. S. 121; 11 Ch. Div. 611).....	604
Mullins v. Collins (29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 292).....	874
Mullwo, March, and Co. v. The Court of Wards (L. Rep. 4 P. C. 419, 433).....	268
Mumford v. Oxford Railway Company (1 H. & N. 34).....	763
Munden v. The Duke of Brunswick (10 Q. B. 656)...	65
Municipality of Picton v. Geldert (69 L. T. Rep. N. S. 510; (1893) A. C. 524).....	207
Murchie v. Black (19 C. B. N. S. 190).....	280
Murphy v. Caralli (3 H. & C. 462).....	177

TABLE OF CASES CITED.

Murphy v. Smith (19 C. B. N. S. 361).....	page 630
Murray v. Bogue (1 Drewry, 353, 358, 367-8)	855, 858
Murray v. Currie (23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24)	177
Murray v. Scott (51 L. T. Rep. N. S. 462; 9 App. Cas. 519, at pp. 546-8 and 554)	798
Mutual Aid Permanent Building Society, re (53 L. T. Rep. N. S. 802; 30 Ch. Div. 434)	798
Mutual Society re (24 Ch. Div. 425, n)	308
Mutual Tontine Westminster Chambers Association Limited v. The Assessment Commissioners of St. George's Union (25 L. T. Rep. N. S. 696; 7 Q. B. 90)	372
Myers v. Elliott (54 L. T. Rep. N. S. 552; 16 Q. B. Div. 526)	283
Myers v. Rawson (1 L. T. Rep. N. S. 405; 5 H. & N. 99)	799
Mytton v. Mytton (31 L. T. Rep. N. S. 328; L. Rep. 19 Eq. 30)	490
N.	
Nadin v. Basset (49 L. T. Rep. N. S. 454; 25 Ch. Div. 21)	23
Nanson v. Gordon (34 L. T. Rep. N. S. 401; 1 App. Cas. 195)	36
Nathan v. Metropolitan Board of Works (1894) 1 Q. B. 230, note)	95, 441
National Insurance and Investment Association, re; Marquis of Abercorn's case (7 L. T. Rep. N. S. 225; 4 De G. F. & J. 78)	237
National Permanent Mutual Benefit Building Society, re (62 L. T. Rep. N. S. 596; 43 Ch. Div. 431)	288
National Provincial Plate Glass Insurance Company v. Prudential Assurance Company (37 L. T. Rep. N. S. 91; 6 Ch. Div. 757)	203
National Telephone Company v. Baker (68 L. T. Rep. N. S. 283; (1893) 2 Ch. 186)	202, 548, 763
Needham v. Kirkman (3 B. & Ald. 531)	221
Neilson v. Moessend Iron Company (11 App. Cas. 298)	277
Nelson, ex parte; re Hoare (42 L. T. Rep. N. S. 389; 14 Ch. Div. 41)	559
Newbattle, The (52 L. T. Rep. N. S. 15; 10 P. Div. 33; 5 Asp. Mar. Law Cas. 356)	421
Newhaven and Seaford Water Company v. The Local Board of the District of Newhaven (72 L. T. 226)	403
Newington Local Board v. Eldridge (12 Ch. Div. 349)	726
New Land Development Association, re (66 L. T. Rep. N. S. 404, 694; (1892) 2 Ch. 138)	285, 752
Newling v. Dobell (19 L. T. Rep. N. S. 408; 38 L. J. 111, Ch.)	163, 578
New Mashonaland Exploration Company, re (67 L. T. Rep. N. S. 90; (1892) 3 Ch. 577)	287
Newnham v. Stevenson (10 C. B. 713; 13 C. B. 285)	285
Newton v. Lord Conyngham (11 L. T. Rep. O. S. 294)	234
Newton's Settled Estates, re (W. N. 1890, p. 24) ..	555
New Zealand Loan and Mercantile Agency Company Limited, re (10 Times L. Rep. 379)	627
Nicholls v. Wilson (11 M. & W. 106)	834
Nichols, ex parte; re Jones (48 L. T. Rep. N. S. 492; 22 Ch. Div. 782)	108
Nicholson v. Willan (5 East, 507)	220
Niseman v. Moss (29 L. J. N. S. 206, Q. B.)	416
Niobe, The (59 L. T. Rep. N. S. 257; 6 Asp. Mar. Law Cas. 300; 13 P. D. 55; (1891) App. Cas. 401) ..	848
Noel v. Noel (10 P. Div. 179)	816
Norris v. Baker (1 Roll. Rep. 393, 394; sub-nom. Morris v. Baker, 3 Bulstr. 196)	275, 713
Norris v. Chambres (3 L. T. Rep. N. S. 720; 4 L. T. Rep. N. S. 345; 29 Beav. 246, 253; 3 De G. F. & J. 583-4)	135
North Central Waggon Company v. The Manchester, Sheffield, and Lincolnshire Railway Company (56 L. T. Rep. N. S. 755; 35 Ch. Div. 191)	page 788
North London Railway Company v. The Great Northern Railway Company (48 L. T. Rep. N. S. 695; 11 Q. B. Div. 30)	636
North Molton Mining Company, re (W. N. 1886, p. 78)	626
North Staffordshire Railway Company, re; ex parte Vaudrey's Trusts (4 L. T. Rep. N. S. 735; 3 Giff. 224)	756
Norton v. Florence Land and Public Works Company (38 L. T. Rep. N. S. 377; 7 Ch. Div. 332) ..	136
Norwich Equitable Fire Insurance Company, re (51 L. T. Rep. N. S. 404; 27 Ch. Div. 515)	643
Notara v. Henderson (26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225)	422
Nottingham Brick and Tile Company v. Butler (54 L. T. Rep. N. S. 444; 15 Q. B. Div. 261; 16 Q. B. Div. 778)	602
Nugent v. Smith (34 L. T. Rep. N. S. 827; 1 C. P. Div. 423; 3 Asp. Mar. Law Cas. N. S. 198)	793
Nuttall v. Mayor, &c., of Manchester (8 Times L. Rep. 513)	676
O.	
Oakeley v. Pasheller (4 Cl. & F. 207; 10 Bli. N. S. 548)	428
Oakford v. European and American Steam Shipping Company Limited (1 H. & M. 182, 190)	428
Oddie v. Brown (De G. & J. 179)	359
Official Receiver, ex parte; re Morritt (56 L. T. Rep. N. S. 42; 18 Q. B. Div. 222)	632
Ogilvie v. Foljambe (3 Mer. 53, 65)	15
Orford, ex parte (1 De G. M. & G. 483)	692
Oriental Financial Corporation v. Overend, Gurney, and Co. (25 L. T. Rep. N. S. 813; L. Rep. 7 Ch. App. 142, 150, 151; 31 L. T. Rep. N. S. 322; L. Rep. 7 E. & I. App. 348, at p. 360)	431
Oriental Inland Steam Company Limited, re; ex parte The Scinde Railway Company (31 L. T. Rep. N. S. 5; L. Rep. 9 Ch. App. 557)	645
Ormrod's Settled Estate, re (66 L. T. Rep. N. S. 845; (1892) 2 Ch. 318)	260
Orr-Ewing and Co. v. Johnston and Co. (42 L. T. Rep. N. S. 67; 13 Ch. Div. 434)	296
Overend, Gurney, and Co. v. Oriental Financial Corporation (25 L. T. Rep. N. S. 813; L. Rep. 7 Ch. App. 142; on app., 31 L. T. Rep. N. S. 322; L. Rep. 7 E. & I. App. 348)	428
Overseers of Everton, ex parte (24 L. T. Rep. N. S. 361; L. Rep. 6 C. P. 245)	149
Owen v. Homan (4 H. of L. 997, 1037)	434
Oxford Benefit Building and Investment Society, re (55 L. T. Rep. N. S. 598; 35 Ch. Div. 502) ..	287
Oxford, Worcester, and Wolverhampton Railway Company, re; ex parte Melward (27 Beav. 571) ..	507
P.	
Padstow Total Loss and Collision Assurance Association, re (45 L. T. Rep. N. S. 774; 20 Ch. Div. 137) ..	43
Padwick v. Scott (2 Ch. Div. 736)	728
Page v. International Agency and Industrial Trust Limited (68 L. T. Rep. N. S. 435)	495
Page, re; Jones v. Morgan ((1893) 1 Ch. 304)	288
Page v. Young (L. Rep. 19 Eq. 501)	490
Paine and Co.'s Trade Marks, re; Paine and Co. v. Daniel and Sons' Breweries Limited (68 L. T. Rep. N. S. 801; (1893) 2 Ch. 567)	120

TABLE OF CASES CITED.

<i>Palermo, The</i> (52 L. T. Rep. N. S. 390; 5 Asp. Mar. Law Cas. 369; 10 P. Div. 21)	418
<i>Palliser v. Gurney</i> (19 Q. B. Div. 519)	867
<i>Pallister v. The Corporation of Gravesend</i> (27 L. T. Rep. O. S. 282; 25 L. J. 776, Ch.)	608
<i>Palmer v. Fletcher</i> (1 Lev. 122)	581
<i>Palmer v. Palmer</i> (2 L. T. Rep. N. S. 363; 2 Sw. & Tr. 61)	703
<i>Panama, New Zealand, and Australian Royal Mail Company, re</i> (22 L. T. Rep. N. S. 424; L. Rep. 5 Ch. App. 318)	499, 852
<i>P. and O. Steamboat Company v. Shand</i> (12 L. T. Rep. N. S. 808; 2 Mar. Law Cas. 244; 3 Moore P. C. C. N. S. 272)	347
<i>Parker v. Fairfax</i> (17 Ves. 548)	487
<i>Parker v. Gerard</i> (Amb. 236)	487
<i>Parker v. Lewis</i> (29 L. T. Rep. N. S. 199; 8 Ch. App. 1035, 1056, 1059, <i>et seq.</i>)	134, 288
<i>Parker v. South-Eastern Railway Company</i> (36 L. Rep. N. S. 540; 2 C. P. Div. 416)	817
<i>Parker, re; Wignall v. Park</i> (64 L. T. Rep. N. S. 257; (1891) 1 Ch. 682)	396
<i>Parkin, re; Hill v. Schwarz</i> (67 L. T. Rep. N. S. 77; (1892) 3 Ch. 510)	222, 274
<i>Parlement Belge, The</i> (5 P. D. 197; 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. N. S. 273)	50, 65
<i>Parminster v. Coupland</i> (6 M. & W. 105)	342
<i>Parmiter v. Parmiter</i> (2 De G. F. & J. 526)	609
<i>Parrott v. Worsfold</i> (1 Jac. & W. 594)	490
<i>Parry, re; Powell v. Parry</i> (60 L. T. Rep. N. S. 489)	359
<i>Parry v. Roberts</i> (25 L. T. Rep. N. S. 371)	263
<i>Parsons v. Timewell</i> (44 J. P. 296)	350
<i>Partridge v. The General Council of Medical Education and Registration</i> (62 L. T. Rep. N. S. 787; 25 Q. B. Div. 90)	472
<i>Payne v. Haine</i> (16 M. & W. 541)	556
<i>Peacock v. Peacock</i> (12 L. T. Rep. N. S. 299; 13 W. R. 516)	527
<i>Peake's Settled Estates, re</i> (69 L. T. Rep. N. S. 281; (1893) 3 Ch. 430)	654
<i>Pearman v. Pearman and Burgess</i> (1 Sw. & Tr. 601)	40
<i>Pearson v. Cox</i> (36 L. T. Rep. N. S. 495; 2 C. P. Div. 369)	78
<i>Pearson v. Lemaitre</i> (5 M. & G. 700, at p. 709, 710)	827
<i>Pearson v. Pearson</i> (51 L. T. Rep. N. S. 311; 27 Ch. Div. 145)	579
<i>Pearson v. Scott</i> (38 L. T. Rep. N. S. 747; 9 Ch. Div. 198)	19
<i>Pearson v. Spencer</i> (4 L. T. Rep. N. S. 769; 1 B. & S. 571)	330
<i>Peat v. Crane</i> (2 Dick. 499, note)	198
<i>Peek v. The North Staffordshire Railway Company</i> (8 L. T. Rep. N. S. 768; 10 H. of L. Cas. 473; 32 L. J. 241, Q. B.)	219, 220
<i>Pelly v. Wathen</i> (7 Hare, 351, 362)	726
<i>Pelton Brothers v. Harrison</i> (65 L. T. Rep. N. S. 514; (1891) 2 Q. B. 422)	624, 868
<i>Pemberton v. Mc'Gill</i> (1 Dr. & Sm. 266)	866
<i>Penn v. Baltimore</i> (1 Ves. sen. 444)	135
<i>Penrose v. Martyr</i> (E. B. & E. 499)	376
<i>Penruddock's case</i> (5 Rep. 101; Coke's Rep. vol. 3, part 5, p. 205)	275, 713
<i>Pepe v. City and Suburban Permanent Building Society</i> (68 L. T. Rep. N. S. 846; (1893) 2 Ch. 311)	307
<i>Percy Mining Company, re</i> (2 Ch. Div. 531)	523
<i>Peters v. Fleming</i> (6 M. & W. 42)	898
<i>Peters v. Lewes and East Grinstead Railway Company</i> (45 L. T. Rep. N. S. 234; 18 Ch. Div. 429)	549
<i>Peto v. Overseers of West Ham</i> (2 E. & E. 144)	620
<i>Petre v. Petre</i> (1 Drew. 371, 397)	543
<i>Petty v. Cooke</i> (25 L. T. Rep. N. S. 90; L. Rep. 6 Q. B. 790)	435
<i>Pharmaceutical Society v. Delve</i> (70 L. T. Rep. N. S. 139; (1894) 1 Q. B. 71)	733
<i>Pharmaceutical Society v. Piper</i> (68 L. T. Rep. N. S. 490; (1893) 1 Q. B. 686)	page 140, 733, 756
<i>Phillips v. Clark</i> (2 C. B. N. S. 156)	348
<i>Phillips v. Gutteridge</i> (7 L. T. Rep. N. S. 402; 3 De G. J. & Sm. 332)	685
<i>Phillips v. Martin</i> (11 N. S. W. Law Rep. 153)	538
<i>Phillips v. Phillips</i> (Freem. Ch. Ca. 11)	198
<i>Phipps v. Ingram</i> (3 Dowl. 669)	107
<i>Phosphate Sewage Company v. Molleson</i> (1 App. Cas. 780; 4 App. Cas. 801)	59
<i>Pickering v. The Ilfracombe Railway Company</i> (17 L. T. Rep. N. S. 650; L. Rep. 3 C. P., at pp. 250, 251)	895
<i>Pickering v. Budd</i> (4 Camp. 219; 1 Stark. N. P. 56)	713
<i>Pickup v. Atkinson</i> (4 Hare, 624)	762
<i>Pigott v. Waller</i> (7 Ves. 98)	55
<i>Pike v. Fitzgibbon</i> (42 L. T. Rep. N. S. 525; 44 L. T. Rep. N. S. 562; 14 Ch. Div. 837; 17 Ch. Div. 454)	274, 863, 866
<i>Pilcher v. Arden; ex parte Brook</i> (38 L. T. Rep. N. S. 111; 47 L. J. 479, Ch.; 7 Ch. Div. 818)	893
<i>Pilling, re</i> (26 Ch. Div. 432)	166
<i>Pimlico Tramway Company v. Greenwich</i> (29 L. T. Rep. N. S. 605; L. Rep. 9, Q. B. 9)	99
<i>Pinède's Settlement, re</i> (41 L. T. Rep. N. S. 579; 12 Ch. Div. 667)	90
<i>Pink, re</i> (49 L. T. Rep. N. S. 418; 23 Ch. Div. 577)	711
<i>Pinnel's case</i> (5 Rep. 117a)	390
<i>Pinto v. Badham</i> (8 R. P. C. 181, 191)	125, 898, 647
<i>Pirie v. Goodall</i> (65 L. T. Rep. N. S. 640; 9 R. P. C. 17; (1892) 1 Ch. 35)	398
<i>Pitcher v. Roberts</i> (12 L. J. 178, Q. B.)	234
<i>Planet Benefit Building and Investment Society, re</i> (27 L. T. Rep. N. S. 638; L. Rep. 14 Eq. 441)	802
<i>Plant v. Potts</i> (63 L. T. Rep. N. S. 730; (1891) 1 Q. B. 256)	30, 505
<i>Plenderleith, re</i> (69 L. T. Rep. N. S. 325; (1893) 3 Ch. 332)	711
<i>Plumpton v. Spiller</i> (4 Ch. Div. 286)	229
<i>Plumstead Board of Works v. The British Land Company</i> (31 L. T. Rep. N. S. 752; 32 L. T. Rep. N. S. 94; L. Rep. 10 Q. B. 16, 203; 44 L. J. 38 Q. B.)	332, 735
<i>Pollard v. Photographic Company</i> (60 L. T. Rep. N. S. 418; 40 Ch. Div. 345)	336
<i>Pollitt, re; ex parte Minor</i> (67 L. T. Rep. N. S. 715; (1893) 1 Q. B. 175, 455; 68 L. T. Rep. N. S. 366)	33, 34, 384, 562
<i>Pooley v. Harradine</i> (7 E. & B. 431)	429
<i>Pope v. Whalley</i> (11 L. T. Rep. N. S. 769; 6 B. & S. 303)	372
<i>Popplewell v. Hodgkinson</i> (20 L. T. Rep. N. S. 578; L. Rep. 4 Ex. 248)	763
<i>Porrett v. White</i> (53 L. T. Rep. N. S. 514; 31 Ch. Div. 52)	161
<i>Portal and Lamb, re</i> (53 L. T. Rep. N. S. 650; 30 Ch. Div. 50)	205
<i>Porter v. Lopes</i> (37 L. T. Rep. N. S. 824; 7 Ch. Div. 358)	786
<i>Portobello Town Council v. Sulley</i> (2 Tax Cases 674)	672
<i>Portsea Island Building Society, re</i> (69 L. T. Rep. N. S. 138; (1893) 3 Ch. 205)	449
<i>Portsmouth, Kingston, Fratton, and Southsea Tramway Company, re</i> (66 L. T. Rep. N. S. 671; (1892) 2 Ch. 362)	492
<i>Portuguese Consolidated Copper Mines Limited, re; Lord Inchiquin's case</i> (64 L. T. Rep. N. S. 841; (1891) 3 Ch. 28)	75, 237, 706
<i>Postlethwaite v. Freeland</i> (42 L. T. Rep. N. S. 845; 5 App. Cas. 599)	69, 467
<i>Potter v. The Commissioners of Inland Revenue</i> (10 Ex. 147)	125
<i>Pountain, re</i> (59 L. T. Rep. N. S. 76; 37 Ch. Div. 609)	711
<i>Pountney v. Clayton</i> (49 L. T. Rep. N. S. 283; 11 Q. B. Div. 820)	280

TABLE OF CASES CITED.

Powell, <i>ex parte</i> (34 L. T. Rep. N. S. 224; 1 Ch. Div. 501)page 19	Real Estates Company, <i>re</i> (68 L. T. Rep. N. S. 24; (1893) 1 Ch. 604)page 449
Powell v. Evans (5 Ves. 839) 198	Redgrave v. Hurd (45 L. T. Rep. N. S. 485; 20 Ch. Div. 2, 13) 721
Powell's Trade Mark, <i>re</i> (69 L. T. Rep. N. S. 60; (1893) 2 Ch. 388) 120	Rees v. George (15 Ch. Div. 490) 625
Pratt, <i>re</i> ; <i>ex parte</i> Pratt (50 L. T. Rep. N. S. 294; 12 Q. B. Div. 334) 26, 639	Reg. v. Abney Park Cemetery Company (29 L. T. Rep. N. S. 174; 8 L. Rep. Q. B. 515; 42 L. J. 124, M. C.) 735
Pratt v. Mathew (22 Beav. 328; 8 De G. M. & G. 522) 552	Reg. v. Ackroyd (1 C. & R. 158) 881
Pray v. Edie (1 T. R. 267) 524	Reg. v. Allan (4 B. & S. 915) 473
Prescott v. Prescott (20 L. T. Rep. N. S. 331) 391	Reg. v. Barker (62 L. T. Rep. N. S. 578; 25 Q. B. Div. 213) 731
Prettyman's case (2 Vern. 279) 135	Reg. v. Bertrand (16 L. T. Rep. N. S. 752; L. Rep. 1 P. C. 520) 808
Price v. Crouch (60 L. J. 767, Q. B.) 893	Reg. v. Bishop (42 L. T. Rep. N. S. 240; 5 Q. B. Div. 259; 49 L. J. 45, M. C.) 452
Price v. Jenkins (37 L. T. Rep. N. S. 51; 5 Ch. Div. 619) 224	Reg. v. Bolingbroke (69 L. T. Rep. N. S. 717; (1893) 2 Q. B. 347) 143
Price v. Moulton (10 C. B. 561) 665	Reg. v. Bolton (1 Q. B. 66) 380
Priestley v. Fowler (3 M. & W. 1) 419	Reg. v. Boulton (5 C. & P. 537) 43
Pringle v. Secretary of State for India (60 L. T. Rep. N. S. 796; 40 Ch. Div. 288) 149	Reg. v. Burditt (6 Cox C. C. 458) 785
Printing, Telegraph, and Construction Company of the Agence Havas Limited, <i>re</i> ; <i>ex parte</i> Cammell (1894) (1 Ch. 528; 70 L. T. Rep. N. S. 74) 237	Reg. v. Cooke (51 L. T. Rep. N. S. 21; 13 Q. B. Div. 377) 436
Professional Commercial and Industrial Benefit Building Society, <i>re</i> (25 L. T. Rep. N. S. 397; L. Rep. 6 Ch. 856) 799	Reg. v. County of Wellington (17 Ontario Appeals, 615) 538
Professional Life Assurance Company, <i>re</i> (17 L. T. Rep. N. S. 631; L. Rep. 3 Ch. 167) 801	Reg. v. Duncan (44 L. T. Rep. N. S. 521; 7 Q. B. Div. 198) 808
Pullman v. Hill (64 L. T. Rep. N. S. 691; (1891) 1 Q. B. 524) 369	Reg. v. Elvet (2 E. & E. 266) 819
Pyer v. Carter (1 H. & N. 916) 455	Reg. v. Farrant (57 L. T. Rep. N. S. 880; 20 Q. B. Div. 58) 472
Pyle Works, <i>re</i> (63 L. T. Rep. N. S. 628; (1891) 1 Ch. 173) 495	Reg. v. Freeman (33 L. T. Rep. O. S. 220) 731
Pyle Works Limited, <i>re</i> (62 L. T. Rep. N. S. 887; 44 Ch. Div. 534) 113	Reg. v. Gaisford (66 L. T. Rep. N. S. 24; (1892) 1 Q. B. 381) 472
Pyman and Co. v. Burt (76 L. T. 425; W. N. 1884, p. 100) 233	Reg. v. Goodall (L. Rep. 9 Q. B. 557; 48 L. J. 119, M. C.) 356
	Reg. v. Handsley (8 Q. B. Div. 383) 472
	Reg. v. Heath (13 L. T. Rep. N. S. 669; L. Rep. 1 Q. B. 218) 731
	Reg. v. Hellier (21 L. J. 3, M. C.; 17 Q. B. 229) 356
	Reg. v. Henley (61 L. J. 135, M. C.) 472
	Reg. v. Higgins (2 East, 5) 42
	Reg. v. Hull Dock Company (18 Q. B. 325, at p. 338, 339) 747
	Reg. v. Hunt (8 C. & P. 642) 43
	Reg. v. Hutchins (44 L. T. Rep. N. S. 364; 6 Q. B. Div. 300) 731
	Reg. v. Ingall (35 L. T. Rep. N. S. 552; 2 Q. B. Div. 199) 354
	Reg. v. The Inhabitants of Christchurch (12 Q. B. at p. 156) 26
	Reg. v. The Inhabitants of St. Mary, Whitechapel (17 Q. B. 120) 639
	Reg. v. Inhabitants of Wick St. Lawrence (5 B. & A. 526) 731
	Reg. on the prosecution of James Barter and Henry John v. Great Northern Railway Company (35 L. T. Rep. N. S. 551; 49 L. J. 4, Q. B.; 2 Q. B. Div. 151) 905
	Reg. v. Johnson (2 E. & E. 613) 808
	Reg. v. The Judge of the County Court at Croydon (51 L. T. Rep. N. S. 102; 53 L. J. 545, Q. B.; 13 Q. B. Div. 963) 658
	Reg. v. Justices of Anglesey (1892) 1 Q. B. 850 138
	Reg. v. Justices of Glamorganshire (66 L. T. Rep. N. S. 444; (1892) 1 Q. B. 621) 46
	Reg. v. Justices of London (70 L. T. Rep. N. S. 148; (1894) 1 Q. B. 453) 846
	Reg. v. Justices of Swindon (42 J. P. 407) 807
	Reg. v. Justices of the West Riding; Drake's case (21 L. T. Rep. N. S. 490; L. Rep. 5 Q. B. 33) 138
	Reg. v. Kennedy (68 L. T. Rep. N. S. 454; (1893) 1 Q. B. 533) 904
	Reg. v. Kingsley (16 L. T. Rep. O. S. 408; 15 J. P. 65) 374
	Reg. v. Kingswinford (7 B. & C. 236, 242) 747
	Reg. v. Leeds Union (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) 819

Q.

Quarman v. Burnett (6 M. & W. 499) 177
Quartley v. Timmins (L. Rep. 9 C. P. 416) 149
Quartz Hill Mining Company v. Beall (46 L. T. Rep. N. S. 746; 20 Ch. Div. 501) 336
Queen, The, No. 2 (3 Mar. Law Cas. 189) 251
Queen's Benefit Building Society, <i>re</i> (24 L. T. Rep. N. S. 346; L. Rep. 6 Ch. 815) 802
Quirt v. The Queen (19 Supreme Court Reports 510) 538

R.

Baby v. Ridehalgh (25 L. T. Rep. O. S. 19; 7 De G. M. & G. 104; 3 W. R. 344) 760
Raikes v. Boulton (29 Beav. 41) 528
Raison, <i>re</i> ; <i>ex parte</i> Raison (63 L. T. Rep. N. S. 709; 60 L. J. 206, Q. B.) 26, 639
Ramsay v. Quinn (8 Ir. Rep. C. L. 322) 630
Randall v. Lithgow (50 L. T. Rep. N. S. 587; 12 Q. B. Div. 525) 637
Randall v. Tuchin (6 Taunt. 410) 176
Rapier v. The London Tramways Company (68 L. T. Rep. N. S. 645) 763
Ratcliffe v. Evans (66 L. T. Rep. N. S. 794; (1892) 2 Q. B. 524) 776
Rattray v. George (16 Ves. 232) 525
Raven, <i>re</i> ; <i>ex parte</i> Pitt (45 L. T. Rep. N. S. 742; 30 W. R. 134) 240
Ray v. Baker (41 L. T. Rep. N. S. 265; 4 Ex. Div. 279) 174
Read v. Anderson (51 L. T. Rep. N. S. 55; 13 Q. B. Div. 779) 561
Read v. Brown (59 L. T. Rep. N. S. 605; 60 L. T. Rep. N. S. 250; 58 L. J. 14, Q. B.; 22 Q. B. Div. 128) 82

TABLE OF CASES CITED.

Reg. v. Llanelly (17 Q. B. 40)	page 818	Roberts v. Humby (3 M. & W. 120)	page 155
Reg. v. Lord (12 Q. B. 757)	532	Roberts, <i>re</i> ; Tarleton v. Bruton (53 L. T. Rep. N. S. 432; 30 Ch. Div. 234).....	902
Reg. v. Manchester	819	Robertson v. Robertson (45 L. T. Rep. N. S. 237; 6 P. Div. 119).....	327
Reg. v. Marsham (65 L. T. Rep. N. S. 778; (1892) 1 Q. B. 371).....	191	Robinson, <i>re</i> (51 L. T. Rep. N. S. 737; 27 Ch. Div. 160).....	391
Reg. v. McKellar (67 L. T. Rep. N. S. 527; (1893) 1 Q. B. 121).....	30, 505	Robinson v. Addison (2 Beav. 515).....	490
Reg. v. Meyer (34 L. T. Rep. N. S. 247; 1 Q. B. Div. 173).....	472	Robinson v. Emanuel (30 L. T. Rep. N. S. 500; L. Rep. 9 C. P. 414)	149
Reg. v. Midland Railway Company (10 Q. B. 389).....	619	Robinson v. Galland (W. N. (1889) 108; 5 Times L. Rep. 504).....	758
Reg. v. Midland Railway Company (57 L. T. Rep. N. S. 619; 19 Q. B. Div. 540).....	149	Robinson v. Local Board of Barton Eccles (47 L. T. Rep. N. S. at p. 287; 50 L. T. Rep. N. S. 57; 53 L. J. 226 Ch.).....	415
Reg. v. Miles (24 Q. B. Div. 423)	880	Robinson v. Read (9 B. & C. 449)	387
Reg. v. Much Hoole (17 Q. B. 548).....	819	Robinson v. Wood (5 Beav. 388).....	638
Reg. v. Parbly (W. N. 1889, p. 190).....	149	Rochdale Canal Company v. King (2 Sm. N. S. 78).....	203
Reg. v. Peters (54 L. T. Rep. N. S. 545; 16 Q. B. Div. 636; 16 Cox C. C. 36; 55 L. J. 173, M. C.).....	878	Rochford v. Hackman (9 Hare, 475).....	482, 779
Reg. v. Pott-Shrigley (12 Q. B. 143).....	818	Rockett v. Chippingdale (64 L. T. Rep. N. S. 641; (1891) 2 Q. B. 293).....	63
Reg. v. Rand (L. Rep. 1 Q. B. 230).....	472	Rodick v. Gandell (1 De G. M. & G. 763).....	273
Reg. v. Robson (53 L. T. Rep. N. S. 823; 16 Q. B. Div. 137; 55 L. J. 55, M. C.).....	44	Rodocanachi v. Milburn (56 L. T. Rep. N. S. 594; 18 Q. B. Div. 67).....	476
Reg. v. Sleep (4 L. T. Rep. N. S. 525; 30 L. J. 170 M. C.).....	31	Roeke v. Roeke (9 Beav. 66)	358
Reg. v. Southwark and Vauxhall Water Company (28 L. T. Rep. O. S. 123; 6 E. & B. 1008).....	619	Rogers, <i>re</i> (8 Morr. 236).....	752
Reg. v. Spooner (18 L. T. Rep. N. S. 325).....	875	Rogers, <i>ex parte</i> ; Bookham v. Potter (18 L. T. Rep. N. S. 479; L. Rep. 3 C. P. 490).....	875
Reg. v. Stainer	43	Rogers (app.) v. Lewis (resp.) (7 C. B. N. S. 29) ...	408
Reg. v. St. Ebb's (12 Q. B. 137).....	818	Rolfe v. Perry (8 L. T. Rep. N. S. 441; 3 De G. J. & S. 481).....	55
Reg. v. St. Olave's Union (29 L. T. Rep. N. S. 426; L. Rep. 9 Q. B. 38).....	819	Rollett v. Corringham (32 L. T. Rep. N. S. 769; L. Rep. 10 Q. B. 469)	731
Reg. v. Stonnell (1 Cox C. C. 142).....	881	Romer and Haslam, <i>re</i> (69 L. T. Rep. N. S. 547; (1893) 2 Q. B. 286).....	835
Reg. v. St. Paul, Covent Garden (74 L. J. 109, M. C.).....	78	Ronalds v. Ronalds (L. Rep. 3 P. & D. 259).....	327
Reg. v. Sylvester (5 L. T. Rep. N. S. 794; 31 L. J. 93, M. C.)	410	Ronorth v. Wilkes (1 Camp. 94, 99).....	858
Reg. v. Taffs (4 Cox C. C. 169)	45	Roper, <i>re</i> (59 L. T. Rep. N. S. 203; 39 Ch. Div. 482).....	274
Reg. v. Tolson (60 L. T. Rep. N. S. 899; 23 Q. B. Div. 168).....	31	Roper v. Johnson (28 L. T. Rep. N. S. 296; L. Rep. 8 C. P. 167).....	849
Reg. v. Turmine (39 L. T. Rep. N. S. 255; 4 Q. B. Div. 79).....	639	Rose v. Gardden Lodge Coal Company (38 L. T. Rep. N. S. 101; 3 Q. B. Div. 235).....	845
Reg. v. Vine (31 L. T. Rep. N. S. 842; L. Rep. 10 Q. B. 195).....	26, 640	Rosenthal v. Reynolds (67 L. T. Rep. N. S. 162; 61 L. J. 508, Ch.; (1892) 2 Ch. 301; 9 R. P. C. 189).....	398, 647
Reg. v. Waite (2 Cox C. C. 245).....	45	Ross, <i>ex parte</i> (6 Ves. 802)	692
Reg. v. Wakefield (54 J. P. 148).....	629	Ross v. Army and Navy Hotel (55 L. T. Rep. N. S. 473; 34 Ch. Div. 43).....	495
Reg. v. Whitechurch (24 Q. B. Div. 420).....	42	Ross v. Buxton (60 L. T. Rep. N. S. 630; 58 L. J. 442, Ch.; 42 Ch. Div. 190).....	893
Reg. v. Whitehouse (1 Dears. 1).....	808	Rossiter v. Miller (39 L. T. Rep. N. S. 173; 3 App. Cas. 1124).....	590
Renals v. Cowlishaw (38 L. T. Rep. N. S. 503; 41 L. T. Rep. N. S. 116; 9 Ch. Div. 125; 11 Ch. Div. 866).....	602	Rouch v. Hall (44 L. T. Rep. N. S. 183; 6 Q. B. Div. 17).....	374
Restitution Steamship Company v. Pirie (64 L. T. Rep. N. S. 491, n.).....	476	Rourke v. White Moss Colliery Company (36 L. T. Rep. N. S. 49; 2 C. P. Div. 205).....	177
Rex v. Clifford (1 C. & P. 521)	413	Rowland and Crankshaw, <i>re</i> (L. Rep. 1 Ch. App. 421).....	726
Rex v. Fowler (4 B. & Ald. 273).....	808	Rowson v. Earle (M. & M. 538).....	835
Rex v. The Inhabitants of Hindringham (6 T. E. 557).....	898	Royal Society of London and Thompson (44 L. T. Rep. N. S. 274; 17 Ch. Div. 407).....	649
Rex v. Justices of Essex (5 M. & S. 513)	143	Russell v. Cambefort (61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526).....	103, 689
Rex v. Kealing (1 Dowl. 440).....	149	Russell v. Hankey (6 T. R. 12)	18
Rex v. Kenworthy (1 B. & C. 711)	881	Russell v. Men of Devon (2 Term Rep. 667).....	208
Rex v. Sankey (6 N. & M. 839; 5 A. & E. 423) ...	726	Russell v. Niemann (10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163; 34 L. J. 10, C. P.).....	793
Reynolds, <i>ex parte</i> ; <i>re</i> Barnett (15 Q. B. Div. 169).....	658	Russell v. The Queen (46 L. T. Rep. N. S. 889; 7 App. Cas. 829).....	539
Rhodes v. Whitehead (2 Dr. & Sm. 532)	72	Russell v. Russell (66 L. T. Rep. N. S. 436; (1892) P. 152).....	327
Richards v. Butcher (1891) 2 Ch. 522).....	120	Russell, Son, and Scott, <i>re</i> (52 L. T. Rep. N. S. 794; 30 Ch. Div. 114).....	240
Richards, <i>ex parte</i> ; <i>re</i> Jones (38 L. T. Rep. N. S. 684; 3 Q. B. Div. 368; 47 L. J. 498, Q. B.).....	191	Rust v. Victoria Graving Dock Company (56 L. T. Rep. N. S. 216; 36 Ch. Div. 113).....	763
Richards v. The London, Brighton, and South Coast Railway (7 C. B. 839; 18 L. J. 251, C. P.)	141	Ryan and Cavanagh, <i>re</i> (17 L. Rep. Ir. 42)	313
Richardson v. Methley School Board (69 L. T. Rep. N. S. 308; (1893) 3 Ch. 510).....	94		
Riddell, <i>re</i> ; <i>ex parte</i> Earl of Strathmore (58 L. T. Rep. N. S. 838; 20 Q. B. Div. 318, 512).....	283		
Riding v. Smith (34 L. T. Rep. N. S. 500; 1 Ex. Div. 91).....	336		
Rigby v. Bennett (48 L. T. Rep. N. S. 47; 21 Ch. Div. 559).....	765		
Ripley v. Waterworth (7 Ves. 425).....	269		
Rivière's Trade Mark, <i>re</i> (50 L. T. Rep. N. S. 763; 26 Ch. Div. 48)	2		

TABLE OF CASES CITED.

Ryan v. Mutual Tontine Westminster Chambers Association (67 L. T. Rep. N. S. 820; (1893) 1 Ch. 116)	page 277
Rylands v. Fletcher (19 L. T. Rep. N. S. 220; L. Rep. 3 E. & I. App. 330)	547
S.	
Sackets Harbor Bank v. Lewis County Bank (11 Barb. 213, cited in Brice on Ultra Vires, 3rd edit., p. 177)	288
Sadler v. The South Staffordshire and Birmingham District Steam Tramways Company (23 Q. B. Div. 17)	548
Salaman, re; ex parte Salaman (52 L. T. Rep. N. S. 378; 14 Q. B. Div. 936)	26
Salomons v. Knight (64 L. T. Rep. N. S. 589; (1891) 2 Ch. 294)	336
Salt v. Cooper (43 L. T. Rep. N. S. 682; 16 Ch. Div. 544)	638
Sanders v. Davis (15 Q. B. Div. 218)	299
Sanders v. Vanzeller (4 Q. B. 260)	464
Sandgate District Local Board of Health v. Keene (66 L. T. Rep. N. S. 741; (1892) 1 Q. B. 831) ..	193
Sanitary Commissioners of Gibraltar v. Orfila (63 L. T. Rep. N. S. 58; 15 App. Cas. 400)	207
Sankey Brook Coal Company Limited, re (22 L. T. Rep. N. S. 784; L. Rep. 9 Eq. 721; 10 Eq. 381) ..	113
Saracen, The (Wm. Rob. 457; 6 Moo. P. C. 56) ..	251
Sarah, The (1 Lush. 549)	848
Sargent v. Read (1 Ch. Div. 600)	786
Saunders Davies, re; Saunders Davies v. Saunders Davies (56 L. T. Rep. N. S. 153; 34 Ch. Div. 482)	528
Saunders v. Vautier (Cr. & Ph. 240)	358
Savage v. Whitbred (3 Ch. Rep. 14)	15
Saward v. Anstey (2 Bing. 519; 10 J. B. Moore, 55) ..	428
Sax, re; Bamed v. Sax (68 L. T. Rep. N. S. 849) ..	10
Saxby v. Easterbrook (3 C. P. Div. 339)	342
Sayer v. Bennett (1 Cox, 107, 110)	758
Sayers v. Collyer (51 L. T. Rep. N. S. 723; 28 Ch. Div. 103)	203
Scarll v. Dixon (4 F. & F. 250)	827
Schauer v. J. C. and J. Field (68 L. T. Rep. N. S. 81; (1893) 1 Ch. 35; 9 Times L. Rep. 29)	855
Schofield, ex parte; re Firth (40 L. T. Rep. N. S. 832; 12 Ch. Div. 337)	891
Scholfield v. Spooner (51 L. T. Rep. N. S. 138; 26 Ch. Div. 94)	394
Schroeder v. Central Bank of London (34 L. T. Rep. N. S. 735; 24 W. B. 710)	272
Schuster v. Fletcher (38 L. T. Rep. N. S. 605; 3 Q. B. Div. 418)	422
Scott v. Brown & Co. (67 L. T. Rep. N. S. 782; (1892) 2 Q. B. 724)	568
Scott v. Earl of Scarborough (1 Beav. 154)	483
Scott v. Morley (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120)	274, 863, 865
Scott v. Pape (54 L. T. Rep. N. S. 399; 31 Ch. Div. 554)	202
Scott v. Scarborough (1 Beav. 154)	778
Scott v. Stanford (16 L. T. Rep. N. S. at pp. 52, 53; L. Rep. 3 Eq. at pp. 722, 723)	855
Scottish Widows Fund v. Craig (20 Ch. Div. 208) ..	685
Scott's Executors v. Methven's Executors (17 Court Sess. Cas. 4th series, 389)	533
Searle v. Cooke (61 L. T. Rep. N. S. 189; 62 L. T. Rep. N. S. 211; 43 Ch. Div. 519)	685
Seed v. Bradley (70 L. T. Rep. N. S. 214; (1894) 1 Q. B. 319)	633
Selby v. Pomfret (4 L. T. Rep. N. S. 314; 3 De G. F. & J. 595)	585
Sergeant, re (21 Ch. Div. 575)	552
Seringapatam, The (3 W. Rob. 41, n.)	421
Seymour v. Vernon (33 L. J. 692, Ch.)	263
Shakespeare, re (53 L. T. Rep. N. S. 145; 30 Ch. Div. 169)	page 567
Shand v. Sanderson (28 L. J. 278, Ex.)	476
Sharpe, re; re Bennett; Masonic and General Life Assurance Company v. Sharpe (65 L. T. Rep. N. S. 76; (1892) 1 Ch. 154)	288
Sharpe v. McHenry (57 L. T. Rep. N. S. 606; 38 Ch. Div. 427)	168
Shaw v. Earl of Jersey (4 C. P. Div. 120)	336
Shaw v. The York and North Midland Railway Company (13 Q. B. 347)	220
Sheen, ex parte; re Wright (37 L. T. Rep. N. S. 451; 6 Ch. Div. 235)	36
Sheffield, ex parte; re Austin (40 L. T. Rep. N. S. 15; 10 Ch. Div. 434)	693
Sheffield and Hallamshire Ancient Order of Foresters' Co-operative and Industrial Society Limited, re; Fountain's case (12 L. T. Rep. N. S. 335; 34 L. J. 593, Ch.)	800
Sheffield and South Yorkshire Permanent Building Society, re (60 L. T. Rep. N. S. 186; 22 Q. B. Div. 470)	798
Sheffield Waterworks Company v. Bennett (27 L. T. Rep. N. S. 199, 205; 41 L. J. 233, Ex.; L. Rep. 7 Ex. 409)	907
Shepherd, re; Atkins v. Shepherd (62 L. T. Rep. N. S. 337; 43 Ch. Div. 131)	638, 411
Shepherd v. Ingram (Amb. 448)	483, 778
Sherr v. Bishop (4 B. C. C. 54)	55
Sherratt v. Mountford (29 L. T. Rep. N. S. 284; L. Rep. 8 Ch. App. 928)	825
Sherry, re; London and County Banking Co. v. Terry (50 L. T. Rep. N. S. 227; 25 Ch. Div. 692) ..	428
Sherwin v. Shakspear (5 De G. M. & G. 517) ..	720, 721
Shine, re; ex parte Shine (66 L. T. Rep. N. S. 146; (1892) 1 Q. B. 522)	108
Shippey and another v. Gray (42 L. T. Rep. N. S. 673; 49 L. J. 524, Q. B.)	893
Short v. Stone (8 Q. B. 358)	221
Sidebotham, ex parte (42 L. T. Rep. N. S. 783; 14 Ch. Div. 458, 463)	737
Sidney v. Sidney (29 L. T. Rep. N. S. 569; L. Rep. 17 Eq. 65)	55
Sillence, ex parte; re Sillence (37 L. T. Rep. N. S. 676; 7 Ch. Div. 238)	142
Sillitoe, ex parte (1 Gl. & J. 374)	36
Silver Valley Mines, re (45 L. T. Rep. N. S. 104; 18 Ch. Div. 472)	626
Simmonds, ex parte; re Carnac (54 L. T. Rep. N. S. 439; 16 Q. B. Div. 308)	284, 752
Simmons v. Woodward (66 L. T. Rep. N. S. 534; (1892) A. C. 100)	283, 633
Simpson v. Savage (1 C. B. N. S. 347)	489, 763
Sinclair, re; ex parte Payne (53 L. T. Rep. N. S. 767; 15 Q. B. Div. 616)	33, 44, 384, 562
Sinquasi, The (43 L. T. Rep. N. S. 768; 4 Asp. Mar. Law Cas. 383; 5 P. Div. 241)	848
Sisters, The (34 L. T. Rep. N. S. 338; 2 Asp. Mar. Law Cas. 589; 1 P. Div. 117)	849
Sitwell v. Bernard (6 Ves. 520)	124
Skeats' Settlement, re; Skeats v. Evans (61 L. T. Rep. N. S. 500; 42 Ch. Div. 522)	654
Skinner's Company v. Knight (65 L. T. Rep. N. S. 240; (1891) 2 Q. B. 542)	317, 832
Slade v. Bigg (3 Hare, 35)	496
Slater v. Jones (29 L. T. Rep. N. S. 56; L. Rep. 8 Ex. 186)	84
Slazenger and Sons v. Feltham and Co. (6 Pat. Rep. 531; 5 Times L. Rep. 169, 365)	120
Sleech's case; Devaynes v. Noble (1 Mer. 539) ..	430
Smidt v. Tiden (30 L. T. Rep. N. S. 891; L. Rep. 9 Q. B. 446)	465
Smith, ex parte (3 Q. B. Div. 374)	47
Smith v. Baker (65 L. T. Rep. N. S. 467; H. of L. (1891) App. Cas. 325)	141
Smith, re; Bilke v. Roper (63 L. T. Rep. N. S. 448; 45 Ch. Div. 632)	55

TABLE OF CASES CITED.

Smith v. Butler (1 Jones & La T. 692)	page 527
Smith v. Chatto (31 L. T. Rep. N. S. 775; 23 W. R. 290)	855
Smith v. Legg (68 L. T. Rep. N. S. 347; (1893) 1 Q. B. 398)	349
Smith, <i>re</i> ; <i>ex parte</i> London and North-Western Railway Company and Midland Railway Company (60 L. T. Rep. N. S. 77; 40 Ch. Div. 386)	650
Smith v. Lucas (45 L. T. Rep. N. S. 460; 18 Ch. Div. 531)	896
Smith v. M'Guire (3 H. & N. 554, 565)	823
Smith v. Pyman (64 L. T. Rep. N. S. 436; 7 Asp. Mar. Law Cas. 7; (1891) 1 Q. B. 742)	253
Smith v. Ridgway (L. Rep. 1 Ex. 331)	330
Smith v. Smith (32 L. T. Rep. N. S. 787; L. Rep. 20 Eq. 500)	203
Smith v. Widlake (3 C. P. Div. 10, 16)	135
Smokeless Powder Company's Trade Mark (66 L. T. Rep. N. S. 407; 9 Rep. Pat. Cas. 109; (1892) 1 Ch. 590)	398, 647
Sneath v. Valley Gold Limited (68 L. T. Rep. N. S. 602; (1893) 1 Ch. 477)	135
Sneesby v. The Lancashire and Yorkshire Railway Company (L. Rep. 9 Q. B. 263)	704
Snell, <i>re</i> (37 L. T. Rep. N. S. 350; 8 Ch. Div. 105) ..	91
Snook v. The Grand Junction Waterworks Company Limited (2 Times L. Rep. 308)	548
Snow v. Bolton (44 L. T. Rep. N. S. 571; 17 Ch. Div. 433)	780
Somerset (app.) v. Hart (resp.) (12 Q. B. Div. 360) ..	452
Southampton Gaslight and Coke Company v. Guardians of the Southampton Union (36 L. T. Rep. N. S. 548; 2 Q. B. Div. 371; 46 L. J. 238, M. C.)	356
South Durham Brewery Company, <i>re</i> (53 L. T. Rep. N. S. 928; 31 Ch. Div. 261)	887
South-Eastern of Portugal Railway Company Limited, <i>re</i> (21 L. T. Rep. N. S. 220)	645
South-Eastern Railway Company v. Railway Commissioners (44 L. T. Rep. N. S. 203; 6 Q. B. Div. 586)	173
Southport and West Lancashire Railway Company v. Thompson (58 L. T. Rep. N. S. 143; 37 Ch. Div. 64)	299
Sovereign Life Assurance Company v. Wilmot (9 Times L. Rep. 525)	287
Spackman, <i>re</i> ; <i>ex parte</i> Foley (62 L. T. Rep. N. S. 849; 24 Q. B. Div. 728)	34
Spackman, <i>re</i> ; <i>ex parte</i> May (62 L. T. Rep. N. S. 266; 24 Q. B. Div. 728)	33, 384, 562
Spackman v. Plumstead District Board (53 L. T. Rep. N. S. 157; L. Rep. 10 App. Cas. 229) ..	96, 441
Sparrow v. Paris (5 L. T. Rep. N. S. 799; 7 H. & N. 594)	389
Speakman, <i>re</i> ; Unsworth v. Speakman (4 Ch. Div. 620)	902
Speers v. Daggers (Cab. & E. 503)	830
Speer's Trusts, <i>re</i> (3 Ch. Div. 262)	508
Speight v. Gaunt (50 L. T. Rep. N. S. 330; 9 App. Cas. 1)	197, 442
Spence v. Spence (6 L. T. Rep. N. S. 538; 12 C. B. N. S. 199)	72
Spencer v. Williams (24 L. T. Rep. N. S. 513; L. Rep. 2 P. & D. 230, 237)	134
Spicer v. Martin (60 L. T. Rep. N. S. 546; 14 App. Cas. 12)	602
Spill v. Maule (20 L. T. Rep. N. S. 675; L. Rep. 2 Ex. 232)	367
Splidt v. Bowles (10 East, 279)	564
Spurstone's Charity, <i>re</i> (30 L. T. Rep. N. S. 355; 18 Eq. 279)	649
Squire v. Pardoe (W. N. 1890, p. 153)	585
Staley v. Castleton Overseers (10 L. T. Rep. N. S. 606; 5 B. & S. 505)	742
Stanford, <i>ex parte</i> ; <i>re</i> Barber (54 L. T. Rep. N. S. 894; 17 Q. B. Div. at p. 270)	632
Stanley v. Farndale (56 J. P. 709)	689
Stanley v. Stanley (7 L. T. Rep. N. S. 136; 2 J. & H. 491)	page 330
Stanley v. Stanley (37 L. T. Rep. N. S. 777; 7 Ch. Div. 589)	864, 868
State Fire Insurance Company, <i>re</i> (34 L. J. 436, Ch.)	801
St. Aubyn v. Smart (19 L. T. Rep. N. S. 192; L. Rep. 3 Ch. App. 646)	545
Stedman v. Collett (17 Beav. 608)	320
Stedman v. Smith (8 E. & B. 1)	487
Steel v. The State Line Steamship Company (37 L. T. Rep. N. S. 333; 3 App. Cas. 72)	631
Steele v. Dickson (Scotch Sess. Cas., 4th series, vol. 3, p. 1093)	387
Stephens v. Venables (30 Beav. 625)	760
Stevens v. Sampson (49 L. J. 120, Q. B.)	339
Steward v. Blakeway (L. Rep. 4 Ch. App. 603)	267
Stewart v. Jones (3 De G. & J. 532)	902
St. Gobain and Co. v. Hoyermann's Agency (69 L. T. Rep. N. S. 329; (1893) 2 Q. B. 96)	444
St. John-street Wesleyan Methodist Chapel, Chester, <i>re</i> (69 L. T. Rep. N. S. 105; (1893) 2 Ch. 618)	649
St. Leonard's, Shoreditch, <i>re</i> (51 L. T. Rep. N. S. 305; 10 App. Cas. 304)	739
Stock and Share Auction and Banking Company Limited, <i>re</i> (70 L. T. Rep. N. S. 235; (1894) 1 Ch. 736)	626
Stockton and Darlington Railway Company v. Brown (3 L. T. Rep. N. S. 131; 6 Jur. N. S. 1167, Ch.; 9 H. of L. Cas. 246, at p. 256; 3 L. T. Rep. N. S. p. 134)	192
Stockton and Middlesbrough Water Board v. Kirk-leatham Local Board (69 L. T. Rep. N. S. 661; (1893) A. C. 444)	101, 572
Stogden, <i>re</i> (56 L. T. Rep. N. S. 355; 56 L. J. 420, Ch.)	240
Stogden v. Lee (64 L. T. Rep. N. S. 494; (1891) 1 Q. B. 661)	624, 867
Stoker v. Stoker (60 L. T. Rep. N. S. 400; 14 P. Div. 60)	40
Stokes v. Trumper (2 K. & J. 232)	834
Stonor v. Fewle (58 L. T. Rep. N. S. 1; 13 App. Cas. 20)	559
Story v. Story and O'Connor (57 L. T. Rep. N. S. 536; 12 P. Div. 196)	40
St. Paul v. St. Paul (21 L. T. Rep. N. S. 108; L. Rep. 1 P. & D. 739)	201
Strauss v. The County Hotel Company (49 L. T. Rep. N. S. 601; 12 Q. B. Div. 27)	375
Street, <i>re</i> (22 L. T. Rep. N. S. 429; L. Rep. 10 Eq. 165)	240
Strousberg v. The Republic of Costa Rica (44 L. T. Rep. N. S. 199)	66
Stuart v. Bell (64 L. T. Rep. N. S. 633; (1891) 2 Q. B. 341)	827
Suburban Hotel Company, <i>re</i> (17 L. T. Rep. N. S. 22; L. Rep. 2 Ch. 737)	802
Suffield and Watts, <i>re</i> ; <i>ex parte</i> Brown (58 L. T. Rep. N. S. 911; 20 Q. B. Div. 693)	893
Summers v. The Holborn District Board of Works (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612) ..	509
Sunderland 32nd and 36th Universal Building Societies, <i>re</i> (62 L. T. Rep. N. S. 293; 24 Q. B. Div. 394)	308
Sutton v. Sutton (48 L. T. Rep. N. S. 95; 22 Ch. Div. 511)	318
Swain, <i>re</i> ; Swain v. Bringeman (65 L. T. Rep. N. S. 266; (1891) 3 Ch. 233)	288, 543
Swan v. Sanders (44 L. T. Rep. N. S. 424; 50 L. J. 67, M. C.)	804
Swansborough v. Coventry (9 Bing. 305)	457
Swanston v. The Twickenham Local Board of Health (40 L. T. Rep. N. S. 208 and 734; 48 L. J. 623, Ch.)	191
Sweet v. Southeste (2 Bro. C. Cas. 66)	564
Sweeting v. Pearce (7 C. B. N. S. 449)	19

TABLE OF CASES CITED.

Swire v. Redman (35 L. T. Rep. N. S. 470; 1 Q. B. Div. 536).....	page 428
Sykes, <i>ex parte</i> (33 L. T. Rep. N. S. 566; 1 Q. B. Div. 52).....	47
Sykes v. Giles (5 M. & W. 645).....	19
Symson v. Prothero (26 L. J. 671, Ch.).....	893
T.	
Talbot v. Jevors (L. Rep. 20 Eq. 255).....	358
Tambracherry Estates Company, <i>re</i> (52 L. T. Rep. N. S. 712, 714; 29 Ch. Div. 689).....	518
Tanqueray-Willame and Landau, <i>re</i> (46 L. T. Rep. N. S. 542, 545; 20 Ch. Div. 465, 476).....	72, 313
Tanvaco v. Lucas (28 L. J. 150, 301, Q. B.).....	156
Tassell v. Smith (2 De G. & J. 713).....	585
Tatham v. Vernon (4 L. T. Rep. N. S. 531; 29 Beav. 604).....	682
Tatnall v. Hankey (2 Moo. P. C. 342).....	812
Taylor, <i>re</i> (55 L. T. Rep. N. S. 649; 34 Ch. Div. 255; 58 L. J. 420, Ch.).....	825
Taylor v. Bowers (34 L. T. Rep. N. S. 938; 1 Q. B. Div. 291).....	568
Taylor v. Chester (21 L. T. Rep. N. S. 359; L. Rep. 4 Q. B. 309).....	568
Taylor v. Corporation of Oldham (35 L. T. Rep. N. S. 696; 4 Ch. Div. 395; 46 L. J. 105, Ch.).....	415
Taylor v. Dewar (33 L. J. 141, Q. B.; 5 B. & S. 58).....	211
Taylor v. Landey (9 East. 49).....	568
Taylor v. Liverpool and Great Western Steam Company (30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q. B. 546).....	347
Taylor's Settlement, <i>re</i> (9 Hare, 596).....	662
Taylor v. Taylor (30 L. T. Rep. N. S. 49; L. Rep. 17 Eq. 324; 33 L. T. Rep. N. S. 89; L. Rep. 20 Eq. 297).....	230, 685
Taylor, <i>re</i> ; Whitty v. Highton (58 L. T. Rep. N. S. 842).....	55
Tebbs v. Carpenter (1 Madd. 290).....	198
Tempest v. Lord Camoys (48 L. T. Rep. N. S. 13; 21 Ch. Div. 571, 576, n).....	302
Tempest v. Tempest (2 K. & J. 635).....	55
Tenant v. Goldwin (2 Ld. Raym. 1089, 1093; 1 Salk. 360).....	581, 843
Tennant v. Elliot (1 B. & P. 3).....	43
Tennant v. Trenchard (20 L. T. Rep. N. S. 856; 4 Ch. App. 537, 542).....	495
Tharp, <i>re</i> ; Tharp v. Macdonald (38 L. T. Rep. N. S. 867; 3 Prob. Div. 76).....	166
Thomas v. Kelly (60 L. T. Rep. N. S. 114; 13 App. Cas. 506; affirming the decision of the Court of Appeal, reported sub nom. Kelly v. Kellond, 58 L. T. Rep. N. S. 263; 20 Q. B. Div. 569).....	214
Thomas v. Seales (65 L. T. Rep. N. S. 39; (1891) 2 Q. B. 408).....	183
Thomas v. Sylvester (29 L. T. Rep. N. S. 290; L. Rep. 6 Q. B. 368).....	685
Thomas, <i>re</i> ; Wood v. Thomas (65 L. T. Rep. N. S. 142; (1891) 3 Ch. 482).....	123
Thomas v. Williams (43 L. T. Rep. N. S. 91; 14 Ch. Div. 864).....	339, 693, 776
Thompson, <i>re</i> ; Bedford v. Teal (63 L. T. Rep. N. S. 471; 45 Ch. Div. 161).....	396
Thompson v. Montgomery; <i>re</i> Joule's Trade Marks (41 Ch. Div. 35).....	120
Thompson v. Percival (5 B. & Ad. 925).....	429
Thompson v. Waithman (3 Dr. 628).....	129
Thorncroft v. Crockett (2 H. of L. Cas. 239).....	585
Thornton v. Hawley (10 Ves. 129).....	662
Thurston, <i>re</i> ; Thurston v. Evans (54 L. T. Rep. N. S. 833; 32 Ch. Div. 508).....	90
Ticonderoga, <i>The</i> (Swa. 215).....	48
Tidd v. Lister (5 Madd. 429).....	230
Tinsley v. Lacy (1 Hem. & Mil. 747).....	855
Todd v. Wilson (9 Beav. 486).....	page 320
Tolson v. Dykes (1 Ph. 439).....	233
Tomlinson v. Ashworth (50 J. P. 164).....	117
Tompson v. Dashwood (48 L. T. Rep. N. S. 943; 11 Q. B. Div. 43).....	827
Toogood v. Spyryng (1 C. M. & R. 181).....	369, 827
Topping, <i>ex parte</i> ; <i>re</i> Levy (12 L. T. Rep. N. S. 3).....	36
Torrance v. Bank of British North America (29 L. T. Rep. N. S. 109; L. Rep. 5 P. C. 246).....	436
Tosh v. North British Building Society (11 App. Cas. 489).....	798
Townley v. Watson (3 Curt. 761).....	696
Townsend v. Barber (1 Dick. 356).....	197, 199
Townsend v. Wathen (9 East, 277).....	843
Trade Auxiliary Company v. Middlesbrough and District Tradesmen's Protection Association (60 L. T. Rep. N. S. at p. 682; 40 Ch. Div. p. 429).....	855
Trade Mark of the Société Anonyme des Verreries de l'Etoile, <i>re</i> (69 L. T. Rep. N. S. 708; (1894) 1 Ch. 61).....	120
Travers v. Blundell (36 L. T. Rep. N. S. 341; 6 Ch. Div. 436).....	330
Trevor v. Whitworth (57 L. T. Rep. N. S. 457 at p. 459; L. Rep. 12 App. Cas. 409 at p. 415).....	518, 883
Trust and Investment Corporation of South Africa, <i>re</i> (67 L. T. Rep. N. S. 777; (1892) 3 Ch. 332).....	627
Tucker, <i>ex parte</i> (4 M. & G. 1079).....	149
Tucker v. Collinson (54 L. T. Rep. N. S. 263; 16 Q. B. Div. 562).....	526
Tucker v. Newman (11 A. & E. 40).....	487
Tucker, <i>re</i> ; Tucker v. Tucker (69 L. T. Rep. N. S. 85; (1893) 2 Ch. 323).....	685
Tucker v. Vowles (67 L. T. Rep. N. S. 763; (1893) 1 Ch. 195).....	601
Tulk v. Moxhay (2 Ph. 774; 18 L. J. 83, Ch.).....	136, 564
Turliani, <i>The</i> (32 L. T. Rep. N. S. 841; 2 Asp. Mar. Law Cas. 603).....	251
Turner v. Cameron (22 L. T. Rep. N. S. 525; L. Rep. 5 Q. B. 306).....	217, 493
Turner v. Culpán (58 L. T. Rep. N. S. 340).....	633
Turner v. Evans (17 Jur. 1073; 2 De G. M. & G. 740).....	579
Turner v. Hand (27 Beav. 561).....	320
Turner v. Morgan (8 Ves. 143).....	487
Turner v. Mullineux (1 J. & H. 334).....	115
Turner v. Ringwood Highway Board (21 L. T. Rep. N. S. 745; L. Rep. 9 Eq. 418).....	332
Turner v. Robinson (10 Ir. Ch. Rep. 121, 125, 126, 144, 510).....	459, 854
Turnock v. Sartoris (62 L. T. Rep. N. S. 209; 43 Ch. Div. 150).....	676
Turquand v. Kirby (16 L. T. Rep. N. S. 260; L. Rep. 4 Eq. 123).....	113
Turquand v. Marshall (20 L. T. Rep. N. S. 766; L. Rep. 4 Ch. 376).....	288
Tuson v. Evans (12 A. & E. 733).....	369
Tuton v. Sansoni, or Sanoner (31 L. T. Rep. O. S. 118; 3 Hurlst. & Norm. 280).....	169
Tweedale v. Tweedale (23 Beav. 341).....	585, 588
Tweedie and Miles, <i>re</i> (27 Ch. Div. 315).....	549
Tyars v. Alsop (61 L. T. Rep. N. S. 8).....	319
U.	
Ultzen v. Nicols (1894) 1 Q. B. 92).....	374
Umbilo, <i>The</i> (64 L. T. Rep. N. S. 328; 7 Asp. Mar. Law Cas. 26; (1891) P. 118).....	418
Underbank Mills, &c., Company, <i>re</i> (53 L. T. Rep. N. S. 957; 31 Ch. Div. 226).....	707
Underwood v. Stevens (1 Mer. 712).....	198
Upton v. Brown (41 L. T. Rep. N. S. 340; 12 Ch. Div. 872).....	552
Uthwatt v. Bryant (6 Taunt. 317).....	176

TABLE OF CASES CITED.

V.	
Vale of Neat Colliery Company v. Furness (34 L. T. Rep. N. S. 231; 45 L. J. 276, Ch.).....	24
Van Duzer's Trade Mark, <i>re</i> (55 L. T. Rep. N. S. 134; 56 L. T. Rep. N. S. 286; 34 Ch. Div. 623).....	121, 187
Vane v. Barnard (Gilb. 6).....	15
Van Hagan, <i>re</i> ; Sperling v. Rochfort (44 L. T. Rep. N. S. 161; 16 Ch. Div. 18).....	90
Vansandau v. Browne (9 Bing. 402).....	834
Vardon's Trusts, <i>re</i> (55 L. J. 259, Ch.).....	616
Vaspor v. Edwards (12 Mod. 658).....	451
Vaughan, <i>ex parte</i> ; <i>re</i> Middeough (14 Q. B. Div. 25).....	284, 752
Vaughan v. The Taff Vale Railway Company (2 L. T. Rep. N. S. 395; 5 H. & N. 679).....	548
Vaughan v. Vanderstegen; Annesley's case (2 Drew 409).....	726
Varasseur v. Krupp (39 L. T. Rep. N. S. 437; 9 Ch. Div. 351).....	271
Vera Cruz, <i>The</i> (51 L. T. Rep. N. S. 24, 104; 5 Asp. Mar. Law Cas. 254, 270; 9 P. Div. 88; 10 App. Cas. 59).....	848
Vernon v. Vestry of St. James, Westminster (44 L. T. Rep. N. S. 229; 16 Ch. Div. 449).....	304
Vestry of St. Giles, Camberwell v. Board of Works for Greenwich District (19 Q. B. Div. 502).....	191
Vhirboom v. Chapman (13 M. & W. 230).....	793
Victoria Permanent Benefit Building, Investment and Freehold Land Society, <i>re</i> ; Hill's case; Jones's case (22 L. T. Rep. N. S. 777; L. Rep. 9 Eq. 605).....	798
Vindobala, <i>The</i> (60 L. T. Rep. N. S. 657; 13 P. D. 42; 6 Asp. Mar. Law Cas. 376).....	563
Viney, <i>ex parte</i> ; <i>re</i> Gilbert (36 L. T. Rep. N. S. 43; 4 Ch. Div. 794).....	142, 145
Vint v. Padgett (81 L. T. Rep. O. S. 21; 1 Giff. 446; on appeal, 32 L. T. Rep. O. S. 66; 2 De G. & J. 611).....	585, 588
Vitoria, <i>re</i> ; <i>ex parte</i> Vitoria (70 L. T. Rep. N. S. 141).....	144
Volante, <i>The</i> (1 W. Rob. 383).....	252
Vowles, <i>re</i> (54 L. T. Rep. N. S. 846; 32 Ch. Div. 243).....	129
W.	
Wadling v. Oliphant (33 L. T. Rep. N. S. 837).....	108
Wadsworth v. Marshall (2 C. & J. 665).....	834
Wadsworth v. The Queen of Spain (20 L. J., at p. 492, Q. B.; 17 Q. B. 171).....	65, 66
Wake v. Hall (48 L. T. Rep. N. S. 834; 8 App. Cas. 195).....	299
Walcot v. Botfield (Kay, 534).....	263
Walker v. Jackson (10 M. & W. 161).....	219
Walker v. London Tramways Company (12 Ch. Div. 705).....	158
Walker, <i>re</i> ; Meredith v. Walker (68 L. T. Rep. N. S. 517, 519).....	726
Walker v. Symonds (3 Swanst. 1, 58, 73).....	320
Wallace v. Allen (32 L. T. Rep. N. S. 830; L. Rep. 10 C. P. 607).....	149
Waller v. South-Eastern Railway Company (2 H. & C. 102).....	419
Wallingford v. Mutual Society (43 L. T. Rep. N. S. 258; 5 App. Cas. 685).....	174
Walmesley v. Milne (7 C. B. N. S. 115).....	300
Walton v. Edge (52 L. T. Rep. N. S. 666, at p. 670; 10 App. Cas. 33, at p. 44).....	147, 308
Walton v. Stamford (2 Vern. 279).....	135
Wandsworth Board of Works v. United Kingdom Telephone Company (51 L. T. Rep. N. S. 148; 13 Q. B. Div. 904).....	714
Ward v. Shakeshaft (2 L. T. Rep. N. S. 203; 1 Dr. & Sm. 269).....	page 234
Ward v. Sharp (50 L. T. Rep. N. S. 557).....	319
Waring v. McCaldin (7 Ir. Rep. C. L. 282, at p. 288).....	827
Warne and Co. v. Seeborn (58 L. T. Rep. N. S. 928; 39 Ch. Div. 73).....	855
Warner v. Baines (Amb. 589).....	487
Warwick Canal Company v. Birmingham Canal Company (40 L. T. Rep. N. S. 846; 5 Ex. Div. 1).....	149
Waterer v. Waterer (L. Rep. 15 Eq. 402).....	266
Waterman v. Ayres (59 L. T. Rep. N. S. 17; 39 Ch. Div. 29).....	120
Waterman's Trade Mark, <i>re</i> (59 L. T. Rep. N. S. 17; 39 Ch. Div. 29).....	187
Waterpark v. Fennell (7 H. L. Cas. 684).....	334
Waters v. Taylor (2 V. & B. 303).....	758
Watkins v. Evans (56 L. T. Rep. N. S. 177; 18 Q. B. Div. 386).....	633
Watkins v. Rymill (48 L. T. Rep. N. S. 426; 10 Q. B. Div. 178).....	817
Watson v. Cave (44 L. T. Rep. N. S. 40; 17 Ch. Div. 19).....	609
Watson v. Gray (42 L. T. Rep. N. S. 294, 295; 14 Ch. Div. 192, 195).....	487
Watson, <i>ex parte</i> ; <i>re</i> Roberts (12 Ch. Div. 380).....	284, 752
Watson and Sons Limited, <i>re</i> (65 L. T. Rep. N. S. 170; (1891) 2 Ch. 55).....	626
Watson v. Woodman (20 Eq. 721).....	129
Watts v. Halswell.....	899
Watts v. Jeffereyes (3 Mac. & G. 422).....	638
Watts v. Kelson (24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166).....	455
Wayne v. Hanham (9 Hare, 62).....	496
Weatherall v. Thornburgh (39 L. T. Rep. N. S. 9; 8 Ch. Div. 261).....	358
Webber v. Stanley (10 L. T. Rep. N. S. 417; 16 C. B. N. S. 698, 752).....	330
Webster, <i>re</i> (64 L. T. Rep. N. S. 250; (1891) 2 Ch. 102).....	162
Welles v. Middleton (1 Cox. 112).....	319
Wells v. Wells (31 L. T. Rep. N. S. 16; L. Rep. 18 Eq. 504).....	825
Wenmoth, <i>re</i> (57 L. T. Rep. N. S. 709; 37 Ch. Div. 266).....	485
West v. Francois (5 B. & Ald. 737, 743).....	461, 858
West v. Skip (1 Ves. sen. 239).....	36
West v. West (17 L. Rep. Ir. 49).....	233
West of England Bank, <i>re</i> ; <i>ex parte</i> Dale (40 L. T. Rep. N. S. 712; 11 Ch. Div. 772).....	362
West, King, and Adams <i>re</i> ; <i>ex parte</i> Clough (67 L. T. Rep. N. S. 57; (1893) 2 Q. B. 102).....	240
West Riding of Yorkshire Permanent Benefit Building Society, <i>re</i> (62 L. T. Rep. N. S. 486; 43 Ch. Div. 407).....	798
West Riding of Yorkshire Permanent Benefit Building Society, <i>re</i> ; <i>ex parte</i> Pullman (63 L. T. Rep. N. S. 483; 45 Ch. Div. 463).....	798
Westcott, <i>ex parte</i> (30 L. T. Rep. N. S. 739; 9 Ch. 626).....	36
Western Counties Manure Company v. The Lawes Chemical Manure Co. (L. Rep. 9 Ex. 218, 222).....	776
Western National Bank of the City of New York v. Perez, Triana, and Co. (64 L. T. Rep. N. S. 543; (1891) 1 Q. B. 304).....	103, 657
Westhead v. Riley (49 L. T. Rep. N. S. 776; 25 Ch. Div. 413).....	638
Westmeath v. Westmeath (2 Hagg. Sup. 133).....	327
Wheat Buller Consols Limited, <i>re</i> ; <i>ex parte</i> Jobling (48 L. T. Rep. N. S. 823, 826; 38 Ch. Div. 42).....	75, 706
Wheatcroft v. Local Board of Matlock (57 L. T. Rep. N. S. 356).....	660
Wheeldon v. Burrows (41 L. T. Rep. N. S. 327; 12 Ch. Div. 31).....	455
Whistler, <i>re</i> (57 L. T. Rep. N. S. 77; 35 Ch. Div. 561).....	313
Whitaker v. Kershaw (63 L. T. Rep. N. S. 203; 45 Ch. Div. 320).....	867

TABLE OF CASES CITED.

Whitbread v. St. John (10 Ves. 152)	page 485
Whitechurch, <i>ex parte</i> (45 L. T. Rep. N. S. 379; 6 Q. B. Div. 545; 50 L. J. 99, M. C.)	191
White v. Crisp (10 Ex. 312)	48
White v. Hillacre (3 Y. & C. Ex. 597)	585, 588
White v. Hindley Local Board (32 L. T. Rep. N. S. 460; L. Rep. 10 Q. B. 219)	208
White v. James (26 Beav. 191)	685
White v. Redfern (41 L. T. Rep. N. S. 524; 5 Q. B. Div. 15)	31
Whitehead v. Lord (7 Ex. 691)	834
Whitehead, <i>ex parte</i> ; <i>re</i> Whitehead (52 L. T. Rep. N. S. 597; 14 Q. B. Div. 419)	579
Whitehouse v. Fellowes (10 C. B. N. S. 765, 779) ..	53
"White Rose" Trade Mark, <i>re</i> (53 L. T. Rep. N. S. 33; 30 Ch. Div. 505)	402
Whitwell v. Perrin (4 C. B. N. S. 412)	387
Whitwood Chemical Company v. Hardman (1891) 2 Ch. 416)	564
Wilcock v. Terrell (89 L. T. Rep. N. S. 84; 3 Ex. Div. 323)	558, 780
Wilding v. Bean (64 L. T. Rep. N. S. 41; (1891) 1 Q. B. 100)	444
Wilkinson v. Belsher (2 Brown's Chan. Cas. 272) ..	525
Willet v. Sandford (1 Ves. Sen. 178)	55
William F. Safford, <i>The</i> (1 Lush. 69)	251
William of Kyngeston Charity, <i>re</i> (30 W. R. 78) ..	649
Williams v. Adams (5 L. T. Rep. N. S. 790)	381
Williams v. Evans (13 L. T. Rep. N. S. 753; L. Rep. 1 Q. B. 352)	19
Williams v. Glenton (13 L. T. Rep. N. S. 727; L. Rep. 1 Ch. App. 200)	721
Williams v. Jones (13 M. & W. at p. 633)	522
Williams, <i>ex parte</i> ; <i>re</i> Jones (46 L. T. Rep. N. S. 242)	142
Williams v. The North China Insurance Company (35 L. T. Rep. N. S. 884; 3 Asp. Mar. Law Cas. 342; 1 C. P. Div. 757)	250
Williams (app.) v. Powning (resp.) (48 L. T. Rep. N. S. 672)	415
Williamson v. Barbour (37 L. T. Rep. N. S. 698; 9 Ch. Div. 529)	322
Willis v. Earl Howe (69 L. T. Rep. N. S. 358; (1893) 2 Ch. 545)	543
Willoughby v. Willoughby (1 T. B. 763)	563
Willoughby-Osborne v. Holyoake (48 L. T. Rep. N. S. 152; 22 Ch. Div. 238)	90
Wilson v. Atkinson (11 L. T. Rep. N. S. 220; 4 De G. J. & S.)	552
Wilson v. Lloyd (28 L. T. Rep. N. S. 331; L. Rep. 16 Eq. 60)	429
Wilson v. Merry (19 L. T. Rep. N. S. 30; L. Rep. 1 H. L. Sc. 326)	630
Wilson v. Newberry (25 L. T. Rep. N. S. 695; L. Rep. 7 Q. B. 31)	843
Wilson v. O'Leary (26 L. T. Rep. N. S. 463; L. Rep. 7 Ch. App. 448)	55
Wilson v. Turner (48 L. T. Rep. N. S. 370; 22 Ch. Div. 521)	302
Wilson v. The West Hartlepool Railway Company (2 De G. J. & S. 475, 496)	604
Wilson v. Wilson (2 Hag. Con. 203, 204)	327
Wiltshire v. Sidford (1 M. & Ry. 404; 8 B. & C. 259, n.)	487
Wincham Shipbuilding and Boiler Company, <i>re</i> ; Hallmark's case (38 L. T. Rep. N. S. 413, 660; 9 Ch. Div. 329)	75
Wingfield, <i>ex parte</i> ; <i>re</i> Florence (40 L. T. Rep. N. S. 15; 10 Ch. Div. 591)	839
Winn v. Bull (7 Ch. Div. 29)	page 24, 782
Winn v. Mossman (20 L. T. Rep. N. S. 672; L. Rep. 4 Ex. 292)	355
Winter v. Winter (5 Hare, 306)	55
Wood v. Lambert and Butler (54 L. T. Rep. N. S. 314; 32 Ch. Div. 247)	125
Wood v. Scoles (14 L. T. Rep. N. S. 470; L. Rep. 1 Ch. App. 369)	724
Wood v. Waud (3 Ex. 748, 777)	457
Woodfin and Wray, <i>re</i> (51 L. J. 427, Ch.)	228
Woodgate v. Godfrey (42 L. T. Rep. N. S. 34; 5 Ex. Div. 24)	791
Woodward v. Billericay Highway Board (11 Ch. Div. 214)	560
Woolley v. Colman (46 L. T. Rep. N. S.; 21 Ch. Div. 169)	497
Wolverhampton New Waterworks Company v. Hawksford (7 C. B. N. S. 795)	707
Working Men's Mutual Society, <i>re</i> (21 Ch. Div. 831) ..	383
Wormer v. Biggs (2 Car. & Kir. 31)	451
Worthington v. Jeffries (32 L. T. Rep. N. S. 606; L. Rep. 10 C. P. 379)	149, 153
Wrey, <i>re</i> ; Stuart v. Wrey (53 L. T. Rep. N. S. 334; 30 Ch. Div. 507)	358
Wright v. Ingle (54 L. T. Rep. N. S. 511; 16 Q. B. Div. 379)	734
Wright v. Mills (4 H. & N. 488)	711
Wright v. New Zealand Shipping Company (40 L. T. Rep. N. S. 413; 4 Ex. Div. 165)	467
Wrighton v. Macaulay (4 Hare. 487)	662
Wyatt v. Gems (69 L. T. Rep. N. S. 456; (1893) 2 Q. B. 225)	510
Wyld v. Pickford (8 M. & W. 461)	347
Wythes, <i>re</i> ; West v. Wythes (68 L. T. Rep. N. S. 520; (1893) 2 Ch. 369)	230, 654

X.

<i>Xantho, The</i> (55 L. T. Rep. N. S. 203; 6 Asp. Mar. Law Cas. 8; 12 App. Cas. 503)	345
--	-----

Y.

Yates, <i>re</i> ; Batchelder v. Yates (59 L. T. Rep. N. S. 47; 38 Ch. Div. 112)	493
Yates v. Jack (14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. App. 295)	202
Yates v. Palmer (6 Dowl. & Lowndes 288)	154
Yerbury's Estate, <i>re</i> ; Ker v. Dent (62 L. T. Rep. N. S. 55)	396
Yescombe v. Landor (28 Beav. 80)	499
Young, <i>ex parte</i> (45 L. T. Rep. N. S. 90; 17 Ch. Div. 668, 670, 3)	134
Young v. The Corporation of Leamington (49 L. T. Rep. N. S. 1; 8 App. Cas. 517)	601
Young v. Moeller (5 E. & B. 755, 760)	469
Young and Harston's Contract, <i>re</i> (53 L. T. Rep. N. S. 837; 29 Ch. Div. 691; 31 Ch. Div. 168) ...	721

Z.

<i>Zeta, The</i> (33 L. T. Rep. N. S. 477; 3 Asp. Mar. Law Cas. 73; (1893) App. Cas. at p. 487)	848
---	-----

INDEX

TO

THE SUBJECTS OF THE CASES

REPORTED IN THIS VOLUME.

ADMINISTRATION.

Administration bond—Sureties dispensed with.—
In an estate where there were no debts, and where it appeared that no money could come into the hands of the administratrix except her own share in the estate, owing to the appointment of a receiver, who had given security: The Court made an order dispensing with sureties to the administration bond. (In the Goods of Stelfox, deceased.)page 814

Administration with will annexed—Sureties.—
The testator, a domiciled German, left to his widow everything that he could dispose of in her favour by the laws of Germany. The testator left considerable property in this country, and the very small amount of his debts had been paid. Upon application by a son, the duly constituted attorney of the widow, who filed a written consent: The Court refused to dispense with sureties to the administration bond, or to reduce the amount of the bond to a nominal amount. (In the Goods of Blank, deceased.) 810

—Testatrix deserted by her husband—Grant to son without citing husband.—The Court passed over the husband of a testatrix without citation, and granted administration with the will annexed to her son, where it appeared that the husband of the testatrix had left her many years before her death, and she had not since heard of or from him, and she and her family believed him to have died. (In the Goods of Shoosmith, deceased.) 809

—Aged and infirm person—Lunacy Act 1890—Grant to committee for use and benefit of infirm person.—Where the next of kin of a deceased person was an aged and infirm woman, for whose protection a committee had been appointed under the Lunacy Act 1890, the Court, upon the application of the said committee, granted administration to the estate of the deceased, under sect. 73 of the Probate Act, for the use and benefit of the infirm person. (In the Goods of Leese, deceased.) 810

Intestacy—Italian subject—Property and debts in England—Infant child—Other relatives abroad—Probate Act 1857—Grant *ad colligendum* to Italian Vice-Consul.—A domiciled Italian died intestate, leaving in London a child whom he had formally declared, in accordance with the law of Italy, to be his lawful child. The deceased, who left two brothers and a sister resident abroad, was possessed of certain property in this country, some of it being of a perishable character. Upon the application of the Italian Vice-Consul, the Court made a grant to him *ad colligendum bona*. (In the Goods of Migazzo, deceased.) 246

Legacies vested but not payable until future date—Discretionary annuity—Funds set apart to answer legacies and annuity—Residuary bequest—Tenant for life and remainderman of residue—Income of funds until payment—Capital or income.—The income of a fund set apart to answer a legacy vested but not payable until a future date falls into the residue as capital, and must, as between the tenant for life and the remainderman of the residue, be invested, and the income only arising from such investment paid to the tenant for life. The unapplied income of a fund set apart to answer an annuity payable at the discretion of trustees belongs to the tenant for life of the residue as income. (*Re Whitehead; Peacock v. Lucas.*)page 122

Motion by creditor passing over next of kin—Grant *ad colligendum*.—The fact that the next of kin of a deceased intestate was a lady over eighty years of age, who had held no communication with the deceased, and that the estate was said to be insolvent: Held, insufficient grounds for passing over the next of kin and granting administration to a creditor under sect. 73. (In the Goods of Malkin.) 811

Scotch judgment—Registration in England—Certificate of debts—*Res judicata*—Statute of Limitations (21 Jac. 1, c. 16)—Judgments Extension Act 1868.—An action having been commenced in Scotland against an administratrix to recover a debt which was barred by the Statute of Limitations in England, an action for the administration of the intestate's estate was commenced in England, and an order for administration made. Judgment for the plaintiff by default was afterwards given in the Scotch action. The Scotch creditor then sought to prove his debt in the administration action, but the chief clerk disallowed the claim, as being barred by the Statute of Limitations. The administratrix afterwards obtained an order from the Scotch court recalling the judgment by default, and giving her leave to defend. The action was then heard, and judgment given against her, which was then registered in England under the Judgments Extension Act 1868. Held, that the Scotch creditor was entitled to prove in the administration action as a creditor for the amount of the judgment and costs; and that it was not necessary that the chief clerk's certificate should be varied, as the Scotch judgment when registered under the Act created a new cause of action which had not been adjudicated upon. (*Re Low; Bland v. Low.*) 57

Specific bequest of profits of business—Legatee debtor to estate—Retainer by executors.—Where

SUBJECTS OF CASES.

the legatee of the profits of a business directed to be carried on by the executors is a debtor to the testator's estate, the executors have a right to retain moneys in their hands representing profits as against the debt due from the legatee. (*Re Taylor; Taylor v. Wade.*)page 556

ADMIRALTY.

Collision—Actions *in rem* and *in personam*—Cross-cause—Bail—Admiralty Court Act 1861, s. 10.—Where a collision action *in personam* and one *in rem* were consolidated and the conduct given to the plaintiff in the action *in personam* who had brought his action *in personam* because the other ship had been sunk, the Court held that it had no power under sect. 34 of the Admiralty Court Act 1861 to stay the defendant's proceedings until he had given security to answer the plaintiff's claim. (*The Rougemont.*) 420

Common employment—Limitation of liability—Gross tonnage—Crew space.—Where a collision occurred in Sea Reach of the river Thames between two steamers owned by the same owners, it was held that the masters and crews of such steamers were not in common employment, and hence the master and crew of one ship were allowed to prove for their lost effects against the fund which represented the limit of liability of the owners for the negligence of the other ship. If the requirements of sect. 9 of the Merchant Shipping Act 1867 are complied with, shipowners in limiting their liability are entitled to deduct crew space from the gross tonnage, notwithstanding the repeal of sect. 21, sub-sect. 4 of the Merchant Shipping Act 1854, by sect. 1 of the Merchant Shipping (Tonnage) Act 1889. (*The Petrol.*) 417

Steamship towing—Liability of tow—Admiralty jurisdiction—Maritime tort—Joint tort-feasors.—Where a steam-tug towing comes into collision with another vessel the tow will be held jointly liable with the tug, unless it can be shown that the sole control is in the tug. Such a collision is a maritime tort within the jurisdiction of the Court of Admiralty, and the right to recover damages is governed by the rule prevailing in that court, and not by any common law doctrine of contributory negligence. (*The Englishman and Australia.*) 846

Sunken wreck—Lights—Harbour authority—Maritime lien—Wrecks Removal Act 1877.—Where the harbour authority of the port of G. undertook and paid for the lighting of a sunken wreck, of which her owners continued in possession and eventually raised, and in consequence of the lighting being inefficient another vessel collided with the wreck, her owners were held not liable for the collision, the control and management of the lighting of the wreck having been undertaken by the harbour authority, and the owners having been guilty of no negligence: Held further, that in the circumstances no maritime lien attached to the wreck so as to render it liable to make good the damage done to the other ship. (*The Utopia.*) ... 47

Damage—Negligence—Natural and probable consequence—Remoteness of damage.—A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manoeuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway and the full force of a strong gale, the towing hawser parted, and she was driven ashore, doing damage to the plaintiff's property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the court that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided

with the pier, and considering the wind and weather she would meet whilst being towed, it was held, that the damage following upon such breaking of the tow rope was a natural consequence of the defendants' original negligence, and that the owners of the ship were liable for such damage. (*The Gertor.*)page 703

ADULTERATION.

(See SALE OF FOOD AND DRUGS ACTS.)

ARBITRATION.

Costs of action, reference and award—Costs of reference not given by special referee.—A cause of action having been referred to a special referee for trial under Order XXXVI., the referee made his award in favour of the defendants, and awarded them the costs of the action and of the award. Nothing was said as to the costs of the reference. Held, that, as the costs of the action and of the award had been given by the referee, it must be considered that the costs of the reference were included in the costs of the action. (*Patten v. The West of England Iron, Timber, and Charcoal Company Limited.*) 908

Legal misconduct of arbitrators—Information taken from one side in the absence of the other—Award set aside.—By agreement between the landlord of a farm and his outgoing tenant certain matters in dispute between them were referred to arbitration, the Arbitration Act 1889 and first schedule thereto being incorporated in the agreement. All the evidence on both sides having been heard, the arbitrators on a subsequent day before making their award, held a meeting on the farm at which the outgoing tenant was present, but without the knowledge and in the absence of the landlord. Held, that the award must be set aside, it being improper to take information from one side in the absence of the other. (*Re An Arbitration between Gregson and Armstrong.*) 106

Staying proceedings in action—Statement of claim, requiring delivery of—"Step in the proceedings"—Unfitness of arbitrators.—A "step in the proceedings," in sect. 4 of the Arbitration Act 1889, means some application to the court by summons or motion, and does not include an application by letter or notice from one party to another, or by correspondence between their respective solicitors. Where, therefore, a defendant to an action relating to a matter agreed by the parties to be referred to arbitration has, under Order XX., r. 1 (b), of the Rules of Court 1883, given notice that he requires the delivery of a statement of claim, he is not thereby precluded from applying under the section to stay the proceedings in the action, such a notice not being a "step in the proceedings" within that section. The fact that the arbitrators named in a contract for the execution of engineering works are the engineers of the persons for whose undertaking the works contracted for are being done, or the fact that they have previously expressed an opinion as to some of the matters in dispute, does not, in the absence of evidence of fraud or collusion, render them unfit to act as arbitrators. (*Ives and Barker v. Willans.*) 674

ATTACHMENT.

Partnership—Order for payment against partner—Fiduciary capacity—Debtors Act 1869.—A partner receiving money on account of the firm does not receive it in a fiduciary capacity so as to be liable, under sect. 4, sub-sect. 3 of the Debtors Act, to imprisonment for disobeying an order for payment thereof. (*Piddocke v. Burt.*) 553

BAILMENT.

Restaurant keeper—Negligence.—Upon entering defendant's restaurant, plaintiff's coat was taken from him by a waiter in the employ of defendant, who hung it up immediately behind plaintiff. On plaintiff leaving the restaurant the

SUBJECTS OF CASES.

coat was missing. The jury having found that there was want of reasonable care on defendant's part: Held, that the defendant was liable. (*Ultzen v. Nichols*)page 140

BANKERS.

Issue of notes—Country banks—Composition for issuing Bank of England notes—Amalgamation with other banks—Subsequent right to composition—Bank Charter Act 1844.—An action was brought to recover from the Bank of England 1625*l.*, the agreed amount of three several compositions allowed to be payable under the Bank Charter Act of 1844. That Act gave for the future to the Bank of England a monopoly of the issue of bank-notes, reserving, however, the rights of other bankers who on the 6th May 1844 were legally entitled to issue notes. Prior to 1891 the Bank of England had paid a composition of 100*l.* a year to bankers at Winchester, 630*l.* a year to bankers at Bath, and 895*l.* a year to bankers at Bristol. The Winchester and Bath banks were included in Schedule C. to the Act of 1844, and the compositions were paid under sect. 23. The composition paid to the Bristol bank was paid in pursuance of an agreement entered into under sect. 24. In Dec. 1890 an agreement was entered into between P. and Co., bankers in London, D. and Co., also bankers in London, the Bristol Bank, the Bath Bank, and a trustee for a proposed company (which afterwards became incorporated as a limited company under the Companies Act) that these four businesses should be bought up by the proposed company in consideration of certain shares in that company. The Winchester Bank was subsequently bought up by the company on like terms, and stood in the same position as the Bath and Bristol Banks. Neither of the two London banks bought up was entitled to a composition from the Bank of England. Held, that, the company being an entirely new company, and having no rights or obligations except such as it acquired or incurred after registration, could not itself acquire a new right to be paid a composition under the Act of 1844; and that the old banks had by ceasing to carry on business lost their right to its continuance, and, having done so, they had no right to any composition which they could enjoy themselves or transfer to others. (*Prescott, Dimesdale, Cave, Tugwell, and Co. Limited v. The Governor and Company of the Bank of England*)... .. 7

BANKRUPTCY.

Act of bankruptcy—Bill of sale—Fraudulent assignment—Bankruptcy Law of Jamaica (No. 33 of 1879), s. 151—Jurisdiction of court.—A bill of sale, including the whole of a trader's property, given as security for an advance, with a promise of further assistance, made in good faith, to enable him to carry on his business, and in the reasonable belief that he will thereby be enabled to do so, is not a fraudulent assignment and an act of bankruptcy, though the trader was in fact, at the time of giving it, insolvent. (*Administrator-General of Jamaica v. Lascelles, De Meroado, and Co.*) 179

Appeal—"Person aggrieved."—By the Bankruptcy Act 1883, sect. 104, "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." A person wishing to appeal as a "person aggrieved" need not first prove his debt; all that he must do is to satisfy the court that the proposed order is one that will take away some advantage from him or impose some onus on him. (*Re Henry Langtry; Ex parte The Board of Trade*) 736

Bill of sale—Seizure by grantee—One instalment due—Bankruptcy of grantor.—A bill of sale to secure a loan payable by instalments contained no proviso making the principal due on failure to pay any instalment. The first instalment being in arrear, the grantee after demand seized the goods; the grantor became bankrupt, and the trustee

tendered the instalment due, which the grantee refused, and sold the goods. The County Court judge decided that, in the absence of a proviso making the principal payable on failure to pay an instalment, the grantee was not entitled as against the trustee to the proceeds of sale. The grantee appealed. Held, that such a proviso was unnecessary, as in default to pay any instalment the property secured by the bill of sale passed to the grantee, who was thereupon entitled to seize and sell the same, and out of the proceeds to repay himself his loan. (*Re Wood; Ex parte Woolfe*)page 282

Debt proved in former bankruptcy—Revival of, by promissory notes—Proof for, in subsequent bankruptcy.—A debtor to secure a present advance agreed to revive a debt due to the lender which had been proved for in a former bankruptcy, and for this purpose gave promissory notes for the old debt; on the debtor again becoming bankrupt, the lender sought to prove on the notes. Held, that the promise to revive and pay the old debt was not under the present Bankruptcy Act illegal; and that, as there was nothing in the circumstances of the case to justify the court in supposing that the borrower, when he gave the notes, had no intention of carrying out his promise and paying the old debt, the proof ought to be admitted. (*Re Aylmer; Ex parte Aylmer*) 244

Disqualification of bankrupt—School board election—Adjudication of bankruptcy before the passing of disqualifying Act.—Sect. 32 of the Bankruptcy Act 1883 does not apply to an adjudication of bankruptcy previous to the passing of the Act. (*Re The Pulborough School Board Election; Bourke and others, petitioners, v. Nutt, resp.*) 25, 639

Friendly society—Money in the possession of secretary *virtute officii*—Preferential claims.—By the Friendly Societies Act 1875, sect. 15, sub-sect. 7: Upon the bankruptcy of any officer of a society having in his possession by virtue of his office any money belonging to the society, the trustee in bankruptcy shall, upon demand in writing of the trustees of the society, pay such moneys to the trustees of the society in preference to any other debts or claims against the estate of such officer. The secretary of a friendly society, whose duty was to collect subscriptions and receive money for the society, but to hand over at once all moneys so received to the treasurer, wrongfully retained in his hands large sums of money belonging to the society, and did not hand them over to the treasurer. On bankruptcy ensuing, the society claimed to have, under sect. 15, a right to the assets of the bankrupt in preference to other creditors. Held, that the society had such a preferential right in respect of moneys properly received by the secretary, and in his possession by virtue of his office; and that such right was not lost by reason of the secretary having been allowed to retain moneys wrongfully, and not hand them over to the treasurer. (*Re Welch; Ex parte Trustees of Star of the West Lodge of Oddfellows*) 691

Lease—Covenant not to assign—Assignment by trustee in bankruptcy—Liability of trustee for rent due.—A lessee covenanted with his lessor that neither he himself, his executors, administrators, or assigns, nor any person who might thereafter claim any estate in the premises, would assign without licence. On the bankruptcy of the lessee his trustee assigned the lease. The lessor claimed as against the trustee the rent due. Held, that, as the trustee's liability was based on privity of estate, he ceased on the assignment over to be liable for rent accrued due after the date of the assignment. (*Re Johnson; Ex parte Blackett*) ... 381

Notice of suspension of payment—Circular—Costs of solicitors and accountants.—On the 15th Aug. debtors, after consulting their solicitors, issued a circular to their creditors, "We regret to inform you that the recent fall in the ivory market and other matters have placed us in financial difficulty

- which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by [our] . . . accountants, and as soon as this is complete, we propose inviting you to a meeting of our creditors." On the 30th Aug. the meeting of creditors was held, and on the 12th Sept. a receiving order was made against the debtor. Between the 17th Aug. and 14th Sept. the accountants received or collected a sum of money for the debtors, and out of it paid the solicitors their costs, and retained a portion for themselves for preparing the statement of affairs. Held, that the circular was an act of bankruptcy, and that the sums paid to the solicitors and retained by the accountants must be returned to the trustee. Though a trustee may, under certain circumstances, adopt and pay for work done by solicitors and accountants at the debtor's request before receiving order, still he ought to act very strictly in the matter and only pay for such services as he is satisfied, after going through the items of charge, have resulted in a benefit to the creditors to the extent of the charge. (*Re Simonsen; Ex parte Ball.*)page 32
- Power to annul adjudication.—The debts of a bankrupt, amounting to 1600*l.*, were purchased from the creditors by a lady for 144*l.*, and the creditors withdrew their proofs. The debts were then assigned to the bankrupt for 1600*l.*, which sum was provided by a third person. The deputy registrar of the County Court annulled the adjudication, on the ground that the debts had been paid in full. On appeal: Held, that the adjudication ought not to be annulled, as the debts had not been paid in full within the meaning of sect. 35 of the Bankruptcy Act 1883. (*Re Burnett; Ex parte The Official Receiver.*) 385
- Practice.—Appeal.—Notice to registrar of County Court—"Forthwith"—Irregularity.—Enlargement of time by court.—Special circumstances.—By the Bankruptcy Rules 1886 it is provided by rule 132 that, "upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the court appealed from. Held, that in a bankruptcy appeal from a County Court, the appellant's strict compliance with this rule is necessary, and that the court cannot in any particular case enlarge the time for compliance unless special circumstances can be shown to exist in the case. (*Re Vitoria; Ex parte Vitoria.*) 141
- Appeal to the Court of Appeal.—Time.—Order "signed, entered, or otherwise perfected"—Extension of time.—Mistake.—Special circumstances.—By rule 130 of the Bankruptcy Rules 1886, no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of twenty-one days from the time at which such order is "signed, entered, or otherwise perfected." An order of the court was signed by the registrar, and sealed on the 1st Dec., and was filed on the 2nd Dec. Notice of appeal against the order was signed on the 23rd Dec. Held, that the order appealed against was perfected when it was signed and sealed, and that the appeal was therefore out of time. Held also, that a mistake by the appellant's solicitors was not such a special circumstance as would enable the court to enlarge the time for appealing. (*Re Helsby; Ex parte The Trustees.*) 144
- Private examination of witnesses by official receiver.—Evidence.—Filing.—Proceedings of the court.—A debtor has no right to be present at an examination of witnesses taken before the court under sect. 27 of the Bankruptcy Act 1883. Such an examination is a proceeding of the court, and the evidence then taken should be filed. (*Re Beall; Ex parte Beall.*) 643
- Proof.—Joint and separate estates.—The executors of a deceased partner whose separate estate was solvent and of which there was a surplus over for the joint creditors, though not sufficient with the joint estate to pay the joint creditors in full, sought to prove against the separate estate of the copartner which was insolvent for money had and received. Held, that, although the dividend received by the solvent estate would go to the joint creditors, this was no violation of the rule which prohibits joint creditors from proving against separate estate until the separate creditors have been paid in full, as it was only equitable that such dividend should be appropriated amongst the joint creditors of the insolvent partner and his copartner. (*Re G. S. Head; Ex parte Executors of G. Head.*)page 35
- Proof.—Secured creditor.—Promissory note.—Guarantee by third party.—H. and Co., upon lending a sum of 16,000*l.*, received from the borrower a promissory note for that amount, and also a guarantee from an insurance company to pay H. and Co. "or the holders for value for the time being" of the promissory note if it was not paid by the borrowers when it fell due. Afterwards H. and Co. borrowed 16,000*l.* from their bankers, and indorsed the note to them, and also handed over to them the guarantee. The note was dishonoured. The insurance company went into liquidation. H. and Co. became bankrupt, and their bankers presented a proof for 12,000*l.*, the balance due to them. The trustee in bankruptcy rejected the proof on the ground that the bankers were "secured creditors" within sect. 168 of the Bankruptcy Act 1883, which defines "secured creditor" as "a person holding a mortgage, charge, or lien on the property of the debtor as a security for a debt due to him from the debtor;" and that consequently the bankers were bound to deduct from their proof the value of the security held by them. Held, that the note having been indorsed over in the ordinary way to the bankers, and the beneficial ownership of the guarantee having been transferred to them, they were not "secured creditors" within sect. 168 of the Bankruptcy Act 1883. (*Re Hallett and Co.; Ex parte Cocks, Biddulph, and Co.*) 891
- Public examination of debtor.—Order by registrar to furnish accounts of a business.—Denial by debtor that business is his.—Jurisdiction to make the order.—Effect of order.—A receiving order was made against the debtor in 1885. A public sitting for his examination was held in 1886, and, having been adjourned, was resumed in March 1894. The debtor was questioned as to a business which it was alleged he carried on as "W. Freeman." The debtor denied that the business was his, but the registrar, upon the facts elicited, made an order that the debtor should furnish accounts of that business, stating in the order that he was of opinion that the business belonged to the debtor. Held, that the registrar had jurisdiction to make the order, and that the debtor, if an application was made to the court to take action against him for failure to comply therewith, might contest the question as to the ownership of the business. *Re Cronmire; Ex parte Cronmire.*) 610
- Sale by mortgagees of debtor's property.—When court will restrain sale.—An undischarged bankrupt having mortgaged his reversionary interest in certain property to a company to secure a loan, subsequently became bankrupt a second time, and the company offered for sale the reversionary interest, subject to the rights of the trustee and the creditors under the first bankruptcy. The County Court judge, on the motion of the official receiver as trustee in the first bankruptcy, restrained the completion of the sale. Held (on appeal), allowing the appeal, that though the Bankruptcy Court could probably prevent a sale which would interfere with the due administration of the estate, or with their officer in the performance of his duty, especially if the sale purported to be of the same property which the trustee had to administer, the present case was not one in which such an order ought to be made. (*Re Evelyn; Ex parte The General Public Works and Assets Company.*) 692
- Selection of same trustee by creditors of two estates.—Objection by Board of Trade.—Notification to court.—General rule.—The creditors of two

SUBJECTS OF CASES.

estates, each of which claimed an interest in a certain asset known as the Maplin Sands, selected the same man to be trustee of each estate. The selected trustee was himself a creditor of both estates, but to a larger extent of one than of the other. The Board of Trade objected to the trustee on the ground that he could not act with impartiality, and at the request of the creditors notified their objection to the court. Held, that though as a general rule the court would support the Board of Trade when it overrode on reasonable grounds the wishes of the creditors in regard to the selection of a trustee, still, having regard to the very strong expression of opinion by the creditors who considered that the peculiar nature of the assets and the necessity for unity of action required the appointment of this particular man as trustee of both estates, the court would sanction this appointment, notwithstanding the general rule. (*Re Lamb; Ex parte The Board of Trade.*)page 604

Solicitor's costs—Defence of debtor for murder—Agreement in writing between debtor and his solicitor—Payment of lump sum—The Attorneys and Solicitors' Remuneration Act 1870, s. 4.—A debtor by an agreement in writing with his solicitor paid a lump sum to his solicitor in return for certain definite services rendered and to be rendered by his solicitor in the defence of the debtor on a charge of murder. The debtor subsequently committed an act of bankruptcy, and was adjudicated bankrupt. The County Court judge refused to order the solicitor to pay over any part of the sum so received to the trustee in bankruptcy. On appeal: Held, that, inasmuch as the money had been paid over for certain definite services under a *bond fide* agreement in writing before an act of bankruptcy had been committed, the solicitor could not be ordered to refund the same. (*Re Charlwood; Ex parte The Trustee.*) 383

—Employment of solicitors by debtors before petition.—A firm of distillers employed solicitors to investigate the affairs of the firm, and placed in the solicitors' hands 50*l.* to cover costs. The solicitors engaged the services of accountants to go through the books, and paid them their charges. The services of the accountants were retained before the solicitors had notice of the presentation of a petition against the debtor, but the charges were paid after such notice; the solicitor afterwards incurred costs in resisting the petition against the debtors, and also in rendering other services to the debtors after receiving order. Held, that the solicitors could retain out of the 50*l.* the accountants' charges, because they had pledged their own credit to the accountants before notice of the petition, though the charges were actually paid after such notice: Held also, that the solicitors could not retain out of the 50*l.* their own costs of resisting the petition, or for services rendered after receiving order, even though incurred by the debtors' authority, because they must have known that the money in their hands was part of the debtors' estate which the trustee was entitled to have handed over to him unburdened by any authority given by the debtors as to how it was to be disposed of, such authority not having been executed before notice of the petition. (*Re Whitlock; Ex parte The Official Receiver.*) 34

—Verbal agreement with debtors to conduct their defence—Petition—Order on solicitors to refund.—Debtors entered into a verbal agreement with solicitors to defend them on a criminal charge, and also to look after their business affairs, and paid to the solicitors a sum of 250*l.* The solicitors had at the time no knowledge of any act of bankruptcy having been committed by the debtors. Subsequently the debtors presented their petition, and on bankruptcy ensuing the trustee claimed from the solicitors the return of the money. Held, that the solicitors' authority was determined by the presentation of the bankruptcy petition, and that, subject to any claim for costs

incurred prior to that date, the solicitors must repay the money to the estate. (*Re Beyts and Craig; Ex parte The Trustee.*)page 561

Surgeon-dentist's practice—Personal earnings—Partnership.—A dental surgeon, carrying on business with a partner, mortgaged his share of the profits to the respondents, and they subsequently had a receiver appointed under the mortgage deed. The debtor became bankrupt, but the partnership was still carried on, and the receiver continued to receive the debtor's share of the profits. The trustee in bankruptcy now claimed the debtor's share of the profits since the bankruptcy. Held, that the trustee was entitled to the debtor's share of the profits since the bankruptcy, even though the business was one which very largely depended upon the exercise of personal skill by the debtor. (*Re Rogers; Ex parte Collins v. Ford.*) 107

Undischarged bankrupt—After-acquired property—Trading without knowledge or consent of trustee—Second bankruptcy—Rights of trustee in first bankruptcy.—The debtor was adjudicated a bankrupt in 1884, and did not obtain his discharge. Without the knowledge or consent of the trustee or creditors he carried on business and thereby acquired property and incurred liabilities. He executed an assignment of all his property to a trustee for the benefit of his creditors, and was adjudicated a bankrupt upon that act of bankruptcy. Held, that the trustee in the first bankruptcy was entitled to all the property acquired by the bankrupt since the first bankruptcy without any obligation to satisfy any of the liabilities incurred by the bankrupt since the first bankruptcy. (*Re Clark; Ex parte Beardmore.*) ... 751

—Obtaining credit without disclosing bankruptcy—Practice—Evidence—Intent to defraud.—An intent to defraud is not an ingredient of the offence created by sect. 31 of the Bankruptcy Act 1883, which renders it unlawful for an undischarged bankrupt to obtain credit to the extent of twenty pounds or upwards from any person without informing such person of the fact of his being an undischarged bankrupt. (*Reg. v. Dyson.*) 877

—Property acquired in trade by—Second bankruptcy—Rights of creditors in first and second bankruptcies.—Property acquired in trade by an undischarged bankrupt will not vest in the trustee in bankruptcy under sect. 44 of the Bankruptcy Act 1883, unless and until the trustee has intervened and asserted his title thereto. A bankrupt who had while undischarged acquired certain property by trading subsequently became bankrupt a second time; the trustee under the first bankruptcy failed to intervene and assert his title to that property until after the second bankruptcy. Held, that the intervention by the trustee after the second bankruptcy came too late, as by that time the property had passed to the trustee in the second bankruptcy, and that therefore the property must be administered by him in the second bankruptcy, but without prejudice to the claim, if any, of the creditors in the first bankruptcy to rank for proof. (*Re Clark; Ex parte Dickinson.*) 284

BILL OF EXCHANGE.

Company—Name of company in bill of exchange—Addition—Liability of directors.—The defendants, who were two directors and the secretary of a company, the registered name of which was the Bastille Syndicate Limited, accepted a bill of exchange on behalf of the company, giving the name of the company as "The Old Paris and Bastille Syndicate Limited." Held, that the name of the company was not "mentioned" in the acceptance in accordance with the requirements of sect. 41 of the Companies Act 1862, and that the company not having paid the bill, the defendants were under sect. 42 personally liable thereon. (*Nassau Steam Press v. Tyler and others.*) 376

SUBJECTS OF CASES.

BILL OF SALE.

Covenant to replace articles damaged or worn out—Term "for the maintenance of the security."—A bill of sale given over the furniture of a dwelling-house mentioned in the schedule thereto contained a covenant by the grantor that, so long as any money remained due on the security of the bill, he would not remove any of the chattels in the said schedule mentioned without the previous consent of the grantee except for necessary repairs, and would "replace any articles damaged or worn out with any others of equal value to be included in the security." Held, that this covenant was one which might properly be inserted in the bill as a term for the maintenance of the security, and the bill was therefore in accordance with the form given in the schedule to the Bills of Sale Act 1882. (*Seed v. Bradley.*) ... page 214

"Defeasance or condition" not contained in bill of sale—Collateral security.—On the 5th Jan 1892 A. and his wife, being in possession of certain goods, assigned the same to B. by way of security for the payment of a sum of 300*l.* with simple interest at the rate and in the manner therein stated. On the same day, and as part of the same transaction, A.'s wife assigned to B. by way of mortgage, to secure the payment of the same sum of 300*l.* with compound interest, certain reversionary interests to which she was entitled in certain estates. Held, that the mortgage operated as a defeasance, within the meaning of sect. 10 (3) of the Bills of Sale Act 1878, of the bill of sale, and not being incorporated therein rendered the bill of sale void. (*Edwards v. Marcus; Townend and others, Claimants.*) ... 182

Description of grantor.—A person leading the ordinary life of a country gentleman, but being a "sleeping" or inactive partner in several businesses, in some only of which his name appeared, and in none of which he took any active part whatever, granted a bill of sale on furniture and other effects, forming part of his separate estate. He was described in the affidavit to be filed with the registrar (under sect. 10 of the Bills of Sale Act 1878) as "of Kingsdown House, Sittingbourne, in the county of Kent, a gentleman of no occupation." Held, that under the circumstances mentioned the description of the grantor was correct, and the bill of sale good. (*Feast v. Robinson and Fisher.*) ... 168

Sale of goods—Receipt for purchase money—Sale by husband to wife—Change of possession—Apparent possession.—A wife who was living in the same house with her husband agreed to buy from him the furniture and plate which was in the house and was being used by them, and she accordingly paid him a fair price for the goods. Afterwards she asked her husband for an ordinary receipt, and he gave her a receipt for the purchase money, to which was added an acknowledgment that the goods were the absolute property of his wife. Held, that the receipt being no part of the bargain or sale, it was not a bill of sale within the Bills of Sale Act 1878. *Semble*, per Lord Esher, M.R. and Davey, L.J., that, if the receipt had been a bill of sale within the Act of 1878, the goods would not have been in the "apparent possession" of the husband within sect. 8, because, since the fact that the goods remained in the house was consistent with the possession of either husband or wife, the possession must be attributed to the person, namely, the wife who had the legal title to them. (*Ramsay v. Margrett.*) ... 788

Validity—Construction—Ambiguity—Installments—Rate of interest—Covenant to produce receipts for rent, rates, and taxes.—A bill of sale given by way of security for the repayment of 150*l.* contained covenants by the grantor that he would pay the principal sum by yearly payments of 30*l.* "until the whole of the principal and interest is fully paid;" and that he would pay "interest on the said sum of 150*l.*" quarterly at a certain rate, and also a covenant to produce upon demand in

writing the last receipts for his rent, rates, and taxes, followed by a proviso that the mortgaged chattels should not be liable to seizure for any cause other than those specified in sect. 7 of the Bills of Sale Act 1882, and a further proviso that, if the mortgaged chattels should be seized "in consequence of any breach of any of the covenants herein contained," the grantee should be at liberty to remove and sell the same. The Queen's Bench Division held the bill of sale void for ambiguity. Held, by the Court of Appeal, that the true construction of the covenant for the payment of interest was that interest should only be paid on so much of the principal sum as might from time to time remain unpaid. Held also, that the second proviso read with the covenant to produce the last receipts for rent, rates, and taxes, and with the first proviso was not inconsistent with sect. 7 of the Act. (*The Weardale Iron and Coal Company v. Hodson; A. Hodson, Claimant.*) page 632

(See BANKRUPTCY.)

BUILDING LINE.

Erecting—Completion by tenant after line laid down of building begun by owner before—Metropolis Management Act 1862.—In 1890 the owner of a piece of land laid out a road on it for building, and laid down "the footings" of a house adjoining on the road, and built up one wall of it to a height of twelve feet. In 1892 he erected a row of houses ten feet further back, and in the same year granted a building lease of the piece of land with the unfinished building on it to the appellant, who without obtaining the consent in writing of the London County Council, built up the house to a height of two storeys. In 1893 the superintending architect of the London County Council decided the general line of buildings to be the front of the row of buildings ten feet further back. Held, that an order of a metropolitan police magistrate for the demolition of that part of the house which was built by the appellant, and which was in front of the building line, was right, and that the building up by the appellant from the already existing foundations was "erecting" within the meaning of sect. 75 of 25 & 26 Vict. c. 102. (*Wendon v. The London County Council.*) ... 94

BUILDING SOCIETY.

Contributories—Redemption of mortgages—Liability of advanced and unadvanced members—Borrowing powers—Costs of winding-up and realisation.—The doctrine of principal and agent, and not that of partnership, applies to building societies. The directors are the agents of the members who are the principals. In a society therefore which is not registered under the Building Societies Act 1874, every member, whether advanced or unadvanced, must contribute towards the payment of the ordinary debts of the society. The advanced members of such a society cannot redeem their mortgages without contributing to the ordinary debts unless they are expressly exonerated from liability either by the rules of the society, or by the conditions of their mortgages. A rule enabling the directors to personally bind the members for money borrowed would be *ultra vires*. Where members have authorised the borrowing of money, a claim for contribution towards the payment of the ordinary debts of the society cannot be resisted on the ground that but for such borrowing the assets of the society would be sufficient for their payment. The costs of winding-up such a society are payable by the advanced and unadvanced members, and those of realising the assets out of the assets of the society. (*Re West London and General Permanent Benefit Building Society.*) ... 796

Contract between society and members—Rules for time being in force—Withdrawals—Dissolution—Priorities.—By the rules of a building society registered under the Building Societies Act 1874, the amount of each share was 12*l.*, and any unadvanced member desiring to withdraw from the

SUBJECTS OF CASES.

society became entitled, after giving one month's written notice to the directors at any one monthly meeting, to have the amount of his monthly payments returned to him, provided that in the case of notices of withdrawal by more than one such member, they were to be paid in rotation according to priority of their notices, and the directors were not compelled to pay more than one withdrawing member at any one monthly meeting. At the beginning of 1889 it was discovered that the society had suffered a serious loss through the dishonesty of the secretary. This was made known at the annual meeting in April of that year; and in July an accountant issued a balance-sheet showing a deficiency of 7000*l.* on the 28th Feb. 1889, and a report advising a reduction of the shares from 12*l.* to 10*l.*, which balance-sheet and report were adopted by the members on the 30th July 1889. In Feb. 1890 the reduction of the shares to 10*l.* was confirmed, and new rules were adopted under which any unadvanced member became entitled, on giving one month's written notice, to withdraw the amount standing to his credit in the books of the society, but the amount due from the society to any member in respect of any share or shares held by him on the 28th Feb. 1889 was to be five-sixths of the net amount of his payments in respect of such share or shares, and no more. In Nov. 1892 a deed of dissolution of the society was executed and registered. Some members of the society had given notices of withdrawal before the loss was known; others had given such notices after the loss was known, but before the reduction in the amounts of the shares. An action was brought for the purpose (*inter alia*) of ascertaining the rights of the different classes of members. Held, that all the members were bound by the rules for the time being in force, including those regulating the amount of each share, and that those members whose notices of withdrawal had matured before the date of the deed of dissolution were entitled to priority of payment under the rules for the time being in force. (*Barnard v. Tomson*)page 306

Loans on deposit—Withdrawal of deposits—Condition—"To be paid in rotation according to the priority of their notices"—"Available balance in hand" insufficient—Suspension of right of action.—One of the conditions upon which the plaintiff deposited money at interest with a building society was, that "withdrawals of deposits are made upon the same principle as applies to the withdrawal of shares, viz., if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation according to the priority of their notices." The deposit note given to the plaintiff by the society stated that the deposit was received subject to fourteen days' notice of withdrawal. The plaintiff gave due notice of withdrawal, but at that time the available balance in hand was not sufficient to pay the depositors who had given notices of withdrawal prior to the plaintiff. Held, that the condition was not limited to the mode of dealing with the available balance in hand, but suspended the depositor's right of action to recover his deposit until there was a balance sufficient to pay him in rotation according to the priority of his notice. (*Brett v. Monarch Investment Building Society.*) 146

CARRIAGE OF GOODS.

Foreign ship—Construction of charter-party—Sale of part of cargo at port of distress—Right of shipowner to full freight—Conflict of English and foreign law—Law of the flag.—The plaintiffs, who were German subjects domiciled in Germany and owners of a German steamship, entered into a charter-party with the defendants, who were British subjects, through their (the plaintiffs') agent, a German subject, whereby the defendants chartered the steamship *Industrie* for the carriage of a cargo of rice in bags from abroad to a port in England for orders. The charter-party, which was made in London, and was in the English

language, contained all the provisions usually found in English charter-parties; and also the following words, "freight being payable at and after the rate of 35*s.* sterling per ton of 20*cwt.* delivered . . . all freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary, if on the Continent in cash at the exchange of the day of final discharge without discount." The ship proceeded to her port of loading, and there took on board a cargo of rice belonging to the defendants, and on her homeward voyage, having encountered bad weather, put into a port of distress, when it was found that the cargo had sustained damage, and the master, acting under the advice of surveyors, sold part of the cargo as being unfit for reshipment. In an action by the shipowner to recover full freight on the damaged cargo which was sold: Held, by the Court of Appeal (reversing the decision of *Barnes, J.*), that the defendants were not liable, as the charter-party must be construed as an English contract according to English law, and that the law of the flag did not apply, and that the payment of freight being dealt with in the charter-party, none was recoverable in respect of cargo not delivered at the port of destination. (*The Industrie.*)page 791

CARRIAGE OF PASSENGERS.

Shipowner—Conditions on ticket limiting liability—Notice—Evidence.—The respondent became a passenger by a steamship owned by the appellants, and received a ticket upon which were printed in small type certain conditions limiting the liability of the shipowners for loss or injury to the passengers or their luggage. This ticket was handed to the respondent folded up, so that the conditions were not visible, and her attention was not called to them. Held, that there was evidence upon which the jury might find that the appellants had not done what was reasonably necessary to give the respondent notice of the conditions, and that she was not bound by them. (*Richardson, Spence, and Co., and others v. Bowntree.*) 817

CHARITY.

Railway—Compulsory sale of lands—Voluntary subscriptions and donations—Endowment—Consent of Charity Commissioners—Costs.—Land belonging to a charity had been taken by a railway company under the power conferred by a section of their special Act whereby the purchase money was fixed at 40,000*l.* The Charity Commissioners having intervened, the sum of 5000*l.*, part of the purchase money, had been paid into court. The land had originally been bought by the charity out of moneys produced by the sale of consols, which were derived from voluntary contributions, and were available for the general purposes of the charity, and could be dealt with as income. The charity had power under their Act of Incorporation to purchase land, but there was no provision empowering them to sell or let the land so purchased, but a power of sale was conferred by the section of the special Act of the railway company above referred to. This was a petition presented by the charity for payment of the 5000*l.* to them as being absolutely entitled thereto. Held, that, if once a fund consisted of voluntary contributions, it retained that character notwithstanding any changes of investment, and being available for the general purposes of the charity, was taken out of the Charitable Trusts Act 1853 by force of the exception contained in sect. 62 of the Act; and that the consent of the Charity Commissioners was not required. (*Re The Clergy Orphan Corporation.*) 619

CHURCH RATE.

Assessment—"Full annual rent or value."—The words "full annual rent or value" of premises rateable to the relief of the poor in a private Act of Parliament authorising the raising of a

SUBJECTS OF CASES.

church rate. Held, to mean full net annual value, and not the gross estimated rental of the premises. (*Rose and another, appxs., v. Watson, resp.*)page 908

COLONIAL LAW.

British Columbia—Unoccupied Crown lands—"Settler."—A right of settlement under the Land Act 1875 of British Columbia, and the consolidating Acts, can only be obtained in respect of unoccupied, unsurveyed, and unreserved Crown lands, and not in respect of any land reserved as a town site; and there is nothing in the Island Railway Act 1883 giving any further right of settlement, or any new or extended sense to the word "settler." (*Hoggan v. Esquimalt Railway Company*)... .. 888

Canada—British North America Act 1867, s. 91, sub-sect. 21—Powers of provincial Legislature—Bankruptcy and insolvency—Revised Statutes of Ontario 1887, c. 124, s. 9—Assignment for the benefit of creditors—*Ultra vires*.—By the British North America Act 1867, s. 91, sub-sect. 21, the exclusive power of legislation with reference to bankruptcy and insolvency is conferred upon the Dominion Parliament. Held, that an enactment in the Revised Statutes of Ontario 1887, c. 124, s. 9, postponing judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act, was not *ultra vires* of the provincial Legislature, as it relates to a purely voluntary assignment. (*The Attorney-General for Ontario v. The Attorney-General for Canada*) 538

Cyprus, law of—Legitimacy—Legitimation of children born before marriage—Canon law—Mahomedan law.—The legitimacy of a Christian Ottoman subject in Cyprus is to be ascertained by the Christian, and not by the Mahomedan law. (*Parapano and others v. Hapaz and others*) ... 254

New South Wales—Real Property Act (26 Vict. No. 9), ss. 22 and 23—Amending Act (41 Vict. No. 18), ss. 4 and 21—Caveat—Lapse—Waiver.—Where an application has been made to bring land under the Real Property Act of New South Wales (26 Vict. No. 9), and a caveat has been entered, but no proceedings have been taken under it within three months, as required by sect. 23 of the Act, it is competent for the applicant to waive the limit of time, and the lapse of the caveat; and stating a case for the opinion of the court more than three months after the lodging of the caveat will be held to operate as a waiver. (*Wilson v. McIntosh*) 536

Queensland, law of—Dividend Duty Act 1890 (54 Vict. No. 10), s. 8—Assets in Queensland—Mortgage securities.—The Queensland Dividend Duty Act 1890 imposes a duty upon the dividends declared by companies carrying on business in Queensland, and requires, in the case of companies whose head office is not in Queensland, a return of the average amount of the assets of the company in Queensland during the preceding year. Held (affirming the judgment of the court below), that advances made by a company outside the colony upon the security of real and personal property within it, were assets in Queensland, within the meaning of the Act, though the debtors did not reside in the colony, and neither principal nor interest was payable in it. (*Walsh v. The Queen*) ... 257

COMPANY.

Call—*Ultra vires*—Amalgamation—Sale—Under-taking—Death of shareholder—Notice—Liability of personal representatives.—Where the memorandum of association of a company empowers it to sell its undertaking, the company can, as a preliminary to and as one of the terms of the sale, call up its unpaid capital and transfer the same to the purchaser. Until something is done to transfer the interest of a member of a company who has died, the deceased—that is his estate—remains a member of the company, and his legal personal representatives are in their representative capacity

liable for calls, so long as his name remains on the register without notice to the company of his death. (*The New Zealand Gold Extraction Company (Newbery-Vautin Process) Limited v. Peacock*)page 110

Creditor—Disputed debt—Petition to wind-up—Injunction.—This was a motion by the plaintiff company for an injunction to restrain the defendants, the late solicitors of the company, from presenting a winding-up petition, threatened on account of the alleged nonpayment by the company of certain expenses incurred by the defendants in the promotion of the company. On the 10th Jan. 1894 the defendants gave the company formal notice demanding payment of their debt, and stating, "This demand is in compliance with the provisions of the Companies Acts." The company, however, considered that under an agreement the existing liabilities of the company ought to be paid before any part of the preliminary expenses, and as they believed that the defendants were about to commence winding-up proceedings, they issued the writ in this action, and gave notice of this motion. Held, that the court had jurisdiction to grant an injunction to restrain the presentation of a winding-up petition; and in this case, assuming that there was a debt, it appeared that it was not a debt presently payable, therefore the injunction must be granted with costs. (*The New Travellers' Chambers Limited v. Messrs. Cheese and Green*) 271

Debenture—Covenant for payment on specified day—Company wound-up before such day—Principal becoming due.—Upon the occurrence of a winding-up of a company, the debenture-holders become entitled to realise their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital has not arrived. (*Wallace v. Automatic Machine Company Limited*) 497, 852

Equitable mortgage—Foreclosure.—The plaintiff, the holder of the whole of the first issue of the debentures of a company, took out a summons asking for an account, and that the said debentures might be enforced by foreclosure or sale, and for a receiver and manager. The debentures created a charge on all the property, funds, assets, and effects of the company, whatsoever and wheresoever, both present and future, including its uncalled capital. By the conditions indorsed on the debentures such charge was to be a floating security, and the principal money was to become immediately payable if default was made in payment of interest or in the case of the winding-up of the company. The interest was in arrear, and the company was in voluntary liquidation. Held, that the doctrine that an equitable mortgage by deposit of title deeds is entitled to foreclosure extends to a debenture-holder, and that there should be an order declaring the plaintiff entitled to foreclosure, and directing the company at the plaintiff's request to assign to him the several items of property comprised in the debentures. (*Sadler v. Worley*) 494

Power to sanction compromise of rights—Difficulty in enforcing rights—Special resolution to accept shares in lieu of debentures—Power of majority to bind minority of debenture-holders—Estoppel by matter of record—Under what circumstances persons not parties to an action may be estopped by the judgment. (*Mercantile Investment and General Trust Company v. River Plate Trust, Loan, and Agency Company*) 131

Director—Fiduciary character—Contract—Declaration of interest—Penalty—Notice—Injunction.—Article 70 of the articles of association of a company provided that the office of any director should be vacated if, among other things, he contracted with the company, or was concerned in or participated in the profits of any contract with, or work done for the company, without declaring his interest at a meeting of the directors,

SUBJECTS OF CASES.

and that no director so interested should vote on any question relating to such contract or work. The plaintiff was a director, and at a meeting of the board on the 14th April 1893 he informed the chairman, prior to the commencement of the business, that he was "jointly interested" with M. in a contract, concerning which some question was on the agenda paper for discussion, but he did not specify the precise nature or extent of his interest. The plaintiff took no part in the business, and was recorded on the minutes as "neutral." At a meeting of the board, on the 17th Aug. 1893, no notice of which was given to the plaintiff, a resolution was passed declaring that his seat as a director had been vacated under article 70. On motion, treated by consent as the trial of the action: Held, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that the plaintiff had an interest in the matter; but, Held also, that notice should have been given to the plaintiff, and a board meeting summoned to give him an opportunity of justifying himself. Perpetual injunction granted, without costs. (*Turnbull v. The West Eiding Athletic Club Leeds Limited.*)page 92

Director—Qualification shares—Implication of agreement to acquire—Entry of name on register—What constitutes register—Estoppel—Acting—Resignation—Rectification of register.—The articles of association of a company provided that the first directors should be appointed by a majority of the subscribers of the memorandum of association; that the qualification of a director should be the holding of 200l. of share capital, in respect of which all calls for the time being due should have been paid, and that this qualification should apply as well to the first directors as to all future directors; but that such first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification. The articles further provided that the office of a director was to be vacated if he ceased to hold the requisite number of shares; or, in the case of a first director, if he failed to obtain them within the prescribed time; or, if he should send in a written resignation to the board, and the same should not be withdrawn for seven days or be previously accepted. C. signed the memorandum of association for one share, and was appointed a first director. He attended a few meetings of the directors, but was not present at a meeting on the 29th March 1893, when resolutions were passed for an allotment of shares, and forty 5l. shares, for which he had not applied, were allotted to him. His name had been entered for the forty shares on certain sheets of paper called allotment sheets, which were laid before the board and signed by the chairman and secretary when the shares were allotted. The month prescribed by the articles ended on the 29th April 1893. After that date C. did not act as a director, and until the middle of May 1893 did not become aware that his name was on the register. On the 1st May 1893 he received a form of application for shares, and a request for payment of the amount due on application. On the 7th May 1893 he wrote resigning his office of director, and thereafter did not act in that capacity. On the 23rd May 1893 the entries in the allotment sheets were copied into the formal register of members. C. applied, under sect. 35 of the Companies Act 1862, to have his name removed from the register in respect of all the shares except the one for which he signed the memorandum of association. The company was not in liquidation. Held, that the allotment sheets were never intended to be the formal register of the company such as was required by sect. 25 of the Companies Act 1862, but merely contained materials to be used in making up that register; that they did not constitute the register; and that C.'s name was therefore not really on the register until after he had resigned. Held also, that the company had no implied authority under its articles to place C.'s name on

the register after the month had elapsed from the date of the first allotment of shares; that his name was entered without sufficient cause; and that, therefore, he was entitled to have it removed. (*Re The Printing Telegraph and Construction Company of the Agence Havas; Ex parte Cammell.*)... ..page 74, 705

Dividends—Excess of income over expenditure—Depreciation of capital—Reduction of capital—*Ultra vires*.—A motion was made to restrain the directors of a company from declaring a dividend on the ground that, although there was an excess of receipts over expenditure, there was at the same time a depreciation of capital. The company's capital of 600,000l. had all been issued and fully paid up, and converted into stock of two classes—preferred and deferred. It had also borrowed 800,000l. on debentures. These funds had all been invested in accordance with the memorandum of association, and the present market value of the investments was nearly 655,000l. Of this depreciation it was stated that 75,000l. was absolutely lost. Changes of investment had been made from time to time, with the result that 27,000l. had been realised and carried to a reserve fund. During the past year the receipts of the company from investments exceeded the expenditure by 23,000l., and the directors proposed to declare a dividend out of this excess. The company was formed to raise money and invest it in certain securities, and to receive the dividends and income thereof and apply them according to the articles. The articles provided for investment and for change of investment, and maintaining as nearly as possible the relative rights between capital and income. The receipts of the company in respect of income from investments were to be applicable (1) to the payment of a dividend at 5 per cent. per annum on the preferred stock; (2) to the payment of such a dividend on the deferred stock as the same should suffice to pay. The trustees had power to create a reserve fund to meet contingencies, or for equalising dividends, or for other purposes, and to declare interim dividends. Surplus assets in a winding-up were to be applied in repaying the amount paid up on preferred stock, and then on deferred stock, and the residue divided in proportion to the nominal capital held by members. Held, that the payment of the dividend was not *ultra vires*. (*Verner v. The General and Commercial Investment Trust Limited.*) 516

Reduction of capital—Dissentient shareholder.—It is not beyond the statutory jurisdiction of the court, under the Companies Acts 1867, 1877, to sanction a scheme for the reduction of the capital of a limited company which does not deal in the same way with all shares of the same class. A company carried on business in the United Kingdom and in America, and a portion of its investments and some of its shareholders were in that country. Differences having arisen between the directors in England and the American committee, it was agreed that the American shareholders should take over the American investments upon terms, that the company should cease to carry on business in America, and that the capital of the company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was duly passed and confirmed. All the creditors of the company had either been paid or had assented to the arrangement. Held, that the arrangement was not *ultra vires* of the company, and should be sanctioned by the court. (*British and American Trustee and Finance Corporation v. Couper.*) 882

Petition—Trading—Cessation of—Assets—Distribution among shareholders.—This was a petition presented by the company for the confirmation of resolutions for the reduction of the capital. The petition stated that the company had carried on business until May 1888, when it ceased to trade, and had not since traded. The company had no creditors. Held, that the

SUBJECTS OF CASES.

- company if not defunct was in a comatose condition, and the whole object of the petition was to enable the available assets to be distributed among the shareholders in proportion to the amount paid on their shares; the power given by the Companies Acts being discretionary, the court would make no order. (*Re The Wallasey Brick and Land Company Limited.*)page 870
- Reserve capital—Companies Act 1879—Alteration of articles—Power to call up capital declared by articles and prospectus to be reserve. (*Malleon v. The National Insurance and Guarantee Corporation.*) 157
- Scheme of arrangement sanctioned—Right of appeal by creditor not appearing on petition. Where an order has been made sanctioning a scheme of arrangement under the Joint Stock Companies Arrangement Act 1870, a creditor who has not appeared on the petition cannot appeal from such order without leave. (*Re The Securities Insurance Company Limited.*) 609
- WINDING-UP.
- Contributory — Application for shares — Underwriting agreement.—A. wrote and sent to the vendor to a company an underwriting letter in which he agreed for a certain consideration "at any time within three months after the date hereof, if and as called upon by you, to subscribe or find responsible subscribers for any number of shares of 1l. each of this company you may require, not exceeding 1000 in accordance with the terms of the prospectus. . . . This agreement is to be irrevocable, and to be sufficient in itself to authorise you, in the event of my not subscribing or finding responsible subscribers as above mentioned, to subscribe for the said shares in my name, and to authorise the directors of the company to allot such shares to me, and to enter my name in the company's register of members in respect thereof. Held, that the letter did not amount to an application for the allotment of the shares, but only to an authority to subscribe for such shares in A.'s name in the event of A. neglecting to subscribe or find responsible subscribers after having been called upon to do so. (*Re Harvey's Oyster Company Limited; Ex parte Ormerod and others.*) 795
- Directors—"Trustees"—Breach of trust—Companies (Winding-up) Act 1890—Statute of Limitations—Trustee Act 1888.—Directors of companies established under the Companies Acts are "trustees" within the meaning of the Trustee Act 1888, and by virtue of sect. 8 of that statute they are entitled to the benefit of the Statute of Limitations as a bar to a claim in respect of an alleged breach of trust by reason of the misapplication, through mistake or carelessness, of funds or property of the company in their hands or under their control. Where, therefore, directors of a company, apparently acting *ultra vires* of their powers, but not fraudulently, invested funds of their company in the shares of another company, and more than six years afterwards the liquidator in the winding-up of the company applied under sect. 10 of the Companies (Winding-up) Act 1890 for a declaration that the directors had committed a breach of trust, and consequently were liable for the amount expended in the purchase of the shares, it was held that, assuming that the purchase of the shares was *ultra vires*, which point was not free from doubt, yet, as the misapplication of the money was not a fraud in any sense, the directors were protected by the Trustee Act 1888. A director who is not a party to a misapplication of the funds of a company cannot be held liable for not taking legal proceedings to upset the transaction after the matter is concluded. (*Re The Lands Allotment Company Limited.*) 286
- List of contributories—Director's qualification shares—Implied contract to take shares.—The articles of association of a company which was incorporated in July 1891 provided that the qualification of a director should be the holding of shares of the nominal amount of 250l.; that the first directors might act before acquiring their qualification; but that, unless within one month from their appointment they acquired such qualification, they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly. E. was one of the persons named as the first directors in the articles. On the 21st July 1891, after the registration, he wrote to the consulting engineer of the company a letter in which he referred to the fact of his having signed the articles and a prospectus, in which his name appeared as a director. On the 8th Sept. 1891 he wrote to the secretary resigning his appointment as director. The directors accepted his resignation, but allotted to him qualification shares to the nominal amount of 250l. E. never attended any of the meetings of the directors, or otherwise acted as a director. In the winding-up of the company the liquidator settled E. on the list of contributories in respect of those shares. A summons was taken out by E. to have his name removed from the list. It was decided by Wright, J. (sitting as an additional judge of the Chancery Division, *ante*, p. 236) that the fact that E. authorised the company by the letter of the 21st July 1891 to hold him out to the world as a director, and that he allowed himself to be named as a first director, was evidence that he had agreed to take the shares; that that conclusion was fortified by the letter of the 8th Sept. 1891; and that his name must therefore remain on the list. On appeal: Held, that the inference to be drawn from the fact that E. had assented to the articles and to the prospectus was that he agreed to become a director on the terms of the articles to which he had assented; and that therefore his name was rightly placed on the list of contributories in respect of his qualification shares. (*Re The Hercynia Copper Company Limited; Ex parte Richardson.*)page 236, 709
- Property abroad—Foreign judgment—Embargo on property abroad by English creditor.—After an English company, carrying on business and with property situated in Brazil, had been ordered by the English court to be wound-up, an English creditor who had not proved in the winding-up obtained judgment against the company for the amount of his debt in the Brazilian courts, and laid an embargo on the property of the company situated in Brazil, thereby preventing the carrying out of an agreement sanctioned by the English court for the sale of the assets of the company. On the motion of the liquidator of the company the creditor was ordered to remove the embargo on the company's property in Brazil, on having a sufficient part of the purchase money set apart to answer any claim he might establish in the English courts against the company. (*Re Central Sugar Factories of Brazil Limited; Flack's case.*) 645
- Public examination—Report of official receiver—Statement in report that fraud has been committed—Companies (Winding-up) Act 1890, s. 8.—In order to obtain an order for public examination under sect. 8 of the Companies (Winding-up) Act 1890, the official receiver should, in his further report under sub-sect. (2), state matters of information and belief, and should pledge himself that such matters in his opinion constitute a *prima facie* case of fraud by some person—not defining which person—in the promotion or formation of the company or in relation to the company since the formation thereof. Whether or not the expression of such opinion is a condition precedent to the making of such an order, it is convenient in practice that the opinion of the official receiver should be so expressed. (*Re General Phosphate Corporation Limited; Re Northern Transvaal Gold Mining Company Limited; Re Delhi Steamship Company Limited.*)627
- Voluntary winding-up—Action against company stayed—Costs.—Where the court had granted an application by a company in voluntary liquidation for stay of proceedings in an action brought against it by a plaintiff, the full amount of whose claim

SUBJECTS OF CASES.

had been admitted by the liquidator: Held, that the court had jurisdiction to order the plaintiff to pay the costs of the application. (*Freeman v. The General Publishing Company.*)page 845

Voluntary winding-up—Distribution of surplus assets
—Calling up unpaid capital—Adjustment of rights of shareholders *inter se*—Companies Act 1862.—By one of the clauses of the articles of association of a company, which was in course of being wound-up voluntarily, it was provided that, if the company should be wound-up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be first applied in repaying to the preference shareholders *pro rata* the amount of capital paid up on the preference shares held by them respectively at the commencement of the winding-up, so far as such surplus assets should extend, and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders. Held, that the general rule established by *Birch v. Cropper* (61 L. T. Rep. N. S. 621; 14 App. Cas. 525) and previous authorities, that the surplus assets of a company were divisible among all the shareholders in proportion to their nominal interest in the subscribed capital of the company, was not affected by the above clause. And that there was no reason for giving the words "surplus assets" in that clause any other than its *prima facie* meaning, namely, all the capital of the company, including unpaid calls which might remain after the debts, liabilities, and costs of the company had been discharged. (*Re Sheppard's Corn Malting Company Limited; Ex parte Lowenfeld.*)page 845

—Liquidation under supervision—Liquidator—Statement to Registrar of Joint Stock Companies.—Sect. 15 of the Companies (Winding-up) Act 1890 applies as well to voluntary liquidations and liquidations under supervision as to compulsory liquidations. (*Re Stock and Share Auction and Banking Company Limited. Re Spiral Wood-cutting Company Limited. Re Hull Land and Property Investment Company Limited.*) 235

—Stannaries Court—Jurisdiction—Companies (Winding-up) Act 1890, ss. 1 (sub-sects. 1, 4), 3, 32.—A company formed for working mines "in Cornwall and elsewhere in England" was in voluntary liquidation. The company had originally been engaged in working a mine in Cornwall, but it did not appear from the evidence that it had at any time been engaged in working a mine out of Cornwall. Held, that the court having jurisdiction to entertain applications in the winding-up was the Stannaries Court, until it was shown that the company was actually working mines beyond the limits of the Stannaries. (*Re New Terras Tin Mining Company Limited.*) 625

Withdrawable share capital—Suspension of right of withdrawal—Business carried on at a loss—Winding-up order "just and equitable."—On a petition by three shareholders to wind-up an industrial society, the County Court judge found as a fact that the society was solvent as regards outside creditors, but that it could only continue to carry on business by a suspension of the right of withdrawal of share capital. The rules of the society empowered the committee to suspend the right of withdrawal for a limited time. The petitioning shareholders had given notice of withdrawal, but the committee had exercised their right of suspension by successive resolutions for a period of nearly two years prior to the presentation of the petition. The winding-up was opposed by a majority of the shareholders. Held, that, it not having been proved to be impossible to carry on the business of the society, it was not "just and equitable" within the meaning of sect. 79, sub-sect. 5, of the Companies Act 1862 that the society should be wound-up. (*Re The Horsham Industrial and Provident Society Limited.*) 801

CONTEMPT OF COURT.

Ex parte statement on merits of case—Deterring witnesses—Injunction.—A firm of manufacturers

of sewing cotton issued a writ against a rival firm claiming an injunction restraining the defendants from infringing their registered trade mark, and also from representing by means of wrappers, labels, tickets, or otherwise, that the defendants' goods were those of the plaintiffs. On the same day the plaintiffs sent out a circular to the trade stating that the defendants had attempted to injure the plaintiffs' trade by adopting a label which so clearly resembled that of the plaintiffs as to produce the result of their goods being passed off as the goods of the plaintiffs, and that there could not be any doubt that this was intended, as the defendants had previously and for some years sold their goods with a label of their own which in no way resembled the plaintiffs'; that being apparently unsuccessful in selling their goods with their own label, the defendants had now adopted the device of imitating the plaintiffs' in order more readily to find purchasers for their thread; and stating also that they had commenced proceedings against the defendants, and also against retail dealers, selling the defendants' goods bearing the imitation label. On a motion by the defendants to restrain the plaintiffs from issuing the circular: Held, that it was calculated to prejudice the defendants in their defence, and was therefore a contempt as interfering with the course of justice; and injunction granted. (*J. and P. Coats Limited v. Chadwick and Brother Limited.*)page 228

CONTRACT.

Agreement in consideration of marriage—Promise by intended husband to leave property to intended wife—Breach during life of husband—Action for damages—Measure of damages.—The defendant wrote a letter to the plaintiff, whom he was then desirous of marrying, saying: "You thoroughly understand the terms, which are, that I leave house and land to you for your lifetime." This referred to the proposed marriage. The plaintiff shortly afterwards married the defendant upon the faith of the above letter. The defendant made a will, leaving the house and land to his wife for her life. He subsequently destroyed that will, and conveyed the house and land to his daughters absolutely. Held, that there was a binding promise to leave the property to the plaintiff, which could be enforced; that there was a breach of the contract, by the conveying away of the property, which entitled the plaintiff to sue at once for damages; and that the measure of damages was the present value of the possible life estate to which the plaintiff would have been entitled if she had survived her husband. (*Synge v. Synge and others.*) 221

Construction—Condition precedent—Collateral agreement—Exchange contracts—Agreement to finance goods.—The circumstance that one of the conditions of a contract affects only part of the consideration is not *per se* sufficient to make it collateral to the main contract, unless it appears that the condition was not intended by the parties to go to the root of the whole contract. The respondent company had entered into "exchange contracts" with the appellant bank, by which the bank undertook at the respective dates of settlement to pay to the company sterling money in exchange for silver at an agreed rate of exchange. Upon the face of each contract note were written the words "Goods financed through Bank of China." The company gave the bank the option of financing goods upon reasonable terms, but the bank declined to do so; and the rate of exchange having fallen, refused to pay sterling money for silver in accordance with the exchange contracts as they became due, and the company incurred a loss. Held, that, although the agreement to finance goods through the bank was a condition precedent to the fulfilment of the exchange contracts, the company had done all that was required of them in giving the bank a reasonable opportunity of financing the goods, and were entitled to recover on the contracts. Judgment of the court

SUBJECTS OF CASES.

below affirmed on different grounds. (Bank of China, Japan, and the Straits Limited v. American Trading Company.)page 849

CONVEYANCE.

Conveyance of land adjoining highway—Presumption as to ownership of soil *ad medium filum viæ*—Circumstances rebutting presumption.—The defendant sold a wood to the plaintiff which was bounded on one side by a grassy lane, on which were trees and underwood, in which game was accustomed to lie and to nest. There was a public right of way over the lane, though it was seldom used. The wood was described in the conveyance by referring minutely to its acreage, and to a plan indorsed on the conveyance. The boundary marked on this plan did not include any part of the lane, nor did the acreage. In the schedule to the conveyance the land purchased was described by reference to the Ordnance map and there the lane was shown as a distinct plot from the wood, and was distinguished by a different number, the number of the wood only being referred to in the schedule. It was recited in the conveyance that one of the conditions of the contract for sale was that, in addition to the purchase money, the purchaser should pay for all trees on the land agreed to be sold, at a valuation, and that a valuation had been made, and the value was stated and added to the purchase money. Held, that evidence was admissible to show that none of the trees on the grassy lane were included in the valuation. Held also, that the circumstances of the case were sufficient to rebut the presumption of law that the soil of the land *ad medium filum viæ* passed by the conveyance. (Pryor v. Petre.)... 331

COPYHOLD.

Admittance of tenants not required—Lapse of time—Seizure *quousque*—Implied admittance—Statute of Limitations (3 & 4 Will. 4. c. 27).—The lords of a manor received the quit rents due in respect of certain copyhold lands and premises from the heir of the last tenants upon the court-rolls, and other quit rents from the devisees of other lands forming part of the manor, for more than twenty years. It could not be shown that the heir or devisees of the lands had been admitted as tenants. Upon their refusal to be now admitted, and to pay the fines demanded, the lords of the manor seized *quousque*. Held, that the right of the lords of the manor to seize *quousque* was barred, because in the circumstances an admittance of the heir and devisees of the lands ought to be implied; and further, that such a right was barred by the Statute of Limitations. (Ecclesiastical Commissioners of England v. Parr and others.)... 171

COPYRIGHT.

Foreign paintings—Illustrations in newspapers of *tableaux vivants* which were imitations of the paintings, but not infringements of the copyright therein—Application of foreign law to determine extent of copyright.—The defendants, the proprietors of certain newspapers, sent artists to a theatre of varieties to make sketches of *tableaux vivants*, or "living pictures," from which sketches drawings were made, and reproductions of these drawings were published in the defendants' newspapers. The idea of the *tableaux vivants* was taken from certain paintings painted in Germany by foreign artists, the copyright in which was the property of the plaintiff. The production of these *tableaux vivants* had been decided by the Court of Appeal (*ante*, p. 459; (1894) 2 Ch. 1) not to be an infringement of the plaintiff's copyright. The drawings in the newspapers were rough and incomplete, and did not represent any of the artistic merits of the plaintiff's pictures. They merely conveyed a rough idea of the subjects of the pictures, and of the grouping of their main features. Held, that the drawings were not intended to be, and were not in fact, copies of the pictures, neither were they intended to be, nor were they in fact, reproductions of the designs of

the pictures, and therefore they were not copies of the plaintiff's pictures, or reproductions of the designs thereof, within the Fine Arts Copyright Act 1862. Held also, that, by virtue of sect. 2, sub-sect. 3, of the International Copyright Act 1886, if the German law of copyright conferred upon the plaintiff a less extensive right in his pictures than the right conferred on British authors by the Fine Arts Copyright Act 1862, the extent of the plaintiff's right was restricted to his right under the German law. A copy of a picture may be an infringement of the copyright thereof, although it may in no way compete with the commercial value of the picture. (Hanfstaengl v. The Empire Palace Limited and others; (No. 2); Hanfstaengl v. Newnes.)page 854

Infringement—Paintings—Reproduction—Living figures—Painted backgrounds.—The owner of the copyright in certain paintings moved to restrain the defendants from reproducing the pictures in a series of "living pictures" at a theatre. The defendants produced their "living pictures" by grouping living persons posed and attired in a suitable manner, with painted backgrounds and the necessary properties. The defendants admitted that the idea of the representation was taken from the plaintiff's pictures. Held, that the exhibition, so far as regarded living persons, was not a reproduction of the plaintiff's pictures within sect. 1 of the Copyright Act 1862, and was not an infringement of his copyright, as a reproduction within the meaning of that section must be something in the nature and character of a picture; but the question with reference to the painted backgrounds was ordered to stand over until the trial, the respondents being put upon terms. (Hanfstaengl v. The Empire Palace Limited and others.) 459

CORPORATION.

Sale of land—Building scheme—Restrictive covenant—Conditions of scheme not submitted to Treasury—Approval of sale by Treasury—Rights of purchasers—Municipal Corporations Act 1882. (Davis v. The Corporation of Leicester.) ... 599

COUNTY COURT.

Interpleader—Goods taken in execution—Deposit by claimant of value of goods—Judgment on issue for execution creditor—Deposit paid out to execution creditor—Re-seizure of goods by creditor for the same judgment debt—Estoppel.—Upon an interpleader issue between an execution creditor and a claimant to goods seized in execution, the claimant deposited the value of the goods in court, under sect. 156 of the County Courts Act 1888. The execution creditor succeeded at the trial of the issue, and the money deposited by the claimant was ordered to be paid over to him. The execution creditor then seized the same goods again in respect of the unpaid balance of the same judgment debt. The claimant claimed the goods again, and again deposited the value of the goods in court. Upon the trial of the second interpleader issue: Held, that, by taking out of court in the first interpleader issue the money deposited by the claimant, the execution creditor was estopped in the second interpleader issue from denying that as against himself the goods were the goods of the claimant. (Haddow v. Morton; Trout, claimant.) 470

Jurisdiction—Winding-up of company—Writ of *fi. fa.* addressed to sheriff.—The sheriff of the county is not the proper person to levy the amount of a debt in a matter arising out of the County Court under the Companies (Winding-up) Act 1890. The proper persons are the officers of the County Court, and a writ of *fi. fa.* should have been issued under the circumstances addressed to the high bailiff. (The Bassett's Plaster Company Limited.) 658

Practice—Default summons issued out of the jurisdiction—Affidavit—Claim exceeding 5*l.*—Where the claim in a County Court action exceeds 5*l.* and the plaintiff asks for leave for the issue of a default

SUBJECTS OF CASES.

summons out of the jurisdiction, it is not required of him that in his affidavit he should swear that the defendant is not of any of the occupations or descriptions mentioned in Order V., r. 10, of the County Court Rules 1889. (*Gordon v. Evans*.) page 70

Practice—Judge's note—When judge is bound to take note—County Courts Act 1888.—A County Court judge is only bound to take a note when a question of law is raised and he is asked to take a note of that question of law; then it is his duty to take a note of the question of law raised and of the evidence in relation thereto, and of his decision thereon and of his decision of the action or matter. If there be more questions of law than one, the request to take a note must be made in respect of each. (*Reg. v. His Honour Commissioner Kerr and Hives*.) ... 595

Registrar—Jurisdiction—Default summons—Notice of defence and counter-claim—Hearing before registrar—Non-appearance of defendant—No proof of debt—Judgment for plaintiff, and counter-claim struck out—Irregularity—Prohibition.—The plaintiff sued the defendant in the County Court to recover the amount of a bill of costs, and issued a default summons under sect. 86 of the County Courts Act 1883; the defendant gave notice of a defence, and of a counter-claim. The return day of the summons was the 14th Sept., and notice was sent to the plaintiff that the action would be tried on that day. It was known that the judge would not sit upon that day, but the registrar sat to hear undefended cases under sect. 90 of the County Courts Act 1888. This action was called on, and, no one appearing on behalf of the defendant, the registrar gave judgment for the plaintiff on the claim, and struck out the counter-claim. No proof was given "of the debt being due and owing" as required by sect. 90. Held, that the registrar had jurisdiction to make the order, and that there had been only an irregularity in not requiring proof that the debt was due and owing, which was a matter for appeal and not for prohibition. (*Hooper v. Hill*.) ... 224

COVENANT.

Fixtures—Chattels—Operative machinery—Switch-back railway.—The defendant was bound by the restrictive covenants of a building estate that no "operative machinery" should be fixed or fastened on the land held by him, and also that "no hut, tent, shed, caravan, house on wheels, or other chattel," should be "erected, made, placed, or be allowed to remain upon any lot." Held, that a switchback railway erected upon piles driven into the ground was "operative machinery," and was also a "chattel" within the meaning of the covenant. (*Chamberlayne v. Collins and another*.) ... 217

CRIMINAL LAW.

Aiding and abetting—Soliciting and inciting—Offence against Criminal Law Amendment Act 1885—Criminality of girl under sixteen—48 & 49 Vict. c. 69, s. 5.—A girl under the age of sixteen cannot be convicted of aiding and abetting the commission upon herself of an offence against the Criminal Law Amendment Act 1885, nor can she be convicted of soliciting and inciting a male person to commit such an offence upon her. (*Reg. v. Tyrell*.) ... 41

Cruelty to animals—"Domestic animals"—Lions in confinement.—Five full-grown lions were confined in a cage and were kept in subjection by a man armed with a whip while performance of dancing was given for profit in the cage by a lady dancer. Feats of jumping were also performed by one of the lions. Held, that the lions were not "domestic animals" within the Cruelty to Animals Acts 1849 and 1854. (*Harper, app., v. Marks, resp.*) ... 804

Embezzlement—Clerk or servant—Director of company employed to collect moneys on behalf of company.—The fact that a person employed to collect moneys on behalf of a company of which

he is a shareholder is also a director of such company does not prevent such person from being convicted of embezzling moneys collected by him on behalf of the company, as a servant of the company, within the meaning of 24 & 25 Vict. c. 96, s. 68. (*Reg. v. Steward*.) ... page 44

Extradition warrant—Alleged stolen articles produced by purchaser of them under *subpoena duces tecum*—Power of magistrate to retain articles to send abroad.—Upon an application to a magistrate for the extradition of a fugitive criminal upon a charge of stealing certain articles in France, a purchaser of the articles in England produced under a *subpoena duces tecum* before the magistrate the articles alleged to have been stolen in France. The police magistrate, after committing the accused to prison to await the Secretary of State's warrant for his extradition, directed the articles to be retained by the police for the purposes of the prosecution, but made no order. Sect. 9 of the Extradition Treaty 1870, says: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." The person who produced the articles under the subpoena applied under 11 & 12 Vict. c. 44, s. 5, for an order directing the police magistrate to order the articles to be delivered to him. Held, that under 11 & 12 Vict. c. 44, s. 5, the High Court had no jurisdiction to make the order asked for, the section only enabling the court to order the police magistrate to perform his duty. He was *functus officio* as soon as the person accused was committed; Held, further, that, assuming there was jurisdiction to make the order, the purchaser's possessory title (if any) to the articles had lawfully passed out of his possession under the *subpoena duces tecum*, and therefore the purchaser of these articles was not entitled to the relief asked. (*Reg. v. Lushington, Esq. (Metropolitan Police Magistrate); Ex parte Otto*.) ... 412

Indictment—Illegal association—Beneficial ownership of members—Embezzlement.—The members of an unregistered club, having for its object the acquisition of gain by such members, which is illegal owing to non-compliance with the requirements of sect. 4 of the Companies Act 1862, are the beneficial owners of the property of such club. It is therefore right, in an indictment for stealing or embezzling moneys paid to the treasurer on behalf of such a club, to lay the property in the moneys in the individual members of the club as beneficial owners. (*Reg. v. Tankard*.) ... 42

Obstruction of highway—Conviction for—Right to new trial—Evidence—Map annexed to inclosure award—Admissibility of map for purpose of showing boundaries of property.—Upon an indictment preferred in the Queen's Bench Division for obstructing a highway, a defendant, who has been found guilty, may have a new trial on the grounds of misreception of evidence and that the verdict was against the evidence; though, if there had been a verdict of acquittal, a new trial could not have been granted against the defendant. Upon the trial of such an indictment, when the allegation is that the defendant, an owner of land adjoining the highway, has inclosed a strip of land which formed part of the highway, a map annexed to an inclosure award made under an Inclosure Act for inclosing certain commons, when the commissioners had no jurisdiction to deal with, and had not in fact dealt with, the strip of land in question, is not admissible in evidence for the purpose of showing what were the limits of the highway or the defendant's property respectively at the time when the map was made. (*Reg. v. Berger*.) ... 807

Practice—Criminal law—Criminal Law and Evidence Amendment Act of New South Wales (55 Vict. No. 5)—Prisoner competent to give evidence in his own behalf—Comments of judge.

SUBJECTS OF CASES.

—It is no ground for interfering with the verdict of a jury in a criminal case that the judge in his summing up commented upon the fact that the prisoner might have given evidence in his own behalf, but had not done so. Petition for leave to appeal refused. (*Kops v. The Queen.*) ... page 890

Practice—Evidence—Previous conviction—Meaning of “convicted”—Finding of jury—Prisoner released on recognisances.—The prisoner having been found guilty by the verdict of a jury of any of the misdemeanours, crimes, or offences mentioned in sects. 9, 10, and 11 of 24 & 25 Vict. c. 99 (the offences relating to Coinage Act 1861), is sufficient to satisfy the word “convicted” in sect. 12 of that Act, which enables the conviction of a person for felony who has committed any of the misdemeanours, crimes, or offences mentioned in sects. 9, 10, and 11, after having been convicted previously of any of such misdemeanours, crimes, or offences. Evidence therefore of such finding is sufficient to support an indictment under sect. 12, and it is not necessary to prove that final judgment was given upon such finding. (*Reg. v. Blaby.*) ... 879

DEBTOR AND CREDITOR.

Partnership debt—Retirement of one partner—Taking over debt by new firm—Liability of retiring partner—Principal and surety—Giving time to principal debtor—Release of surety.—The plaintiff was in partnership with his three brothers, the defendants being the bankers of the firm. In May 1883 a mortgage was executed by the firm to secure the account current to the bank which contained a joint and several covenant by the members of the firm for payment of the debt to the bank. In 1884 the plaintiff retired from the firm, and the business was thenceforward carried on by his three brothers, who thus constituted a new firm, and the plaintiff by the deed of dissolution assigned all his interest in the old firm to the new, they covenanting to discharge all the debts and liabilities of the old firm, and to indemnify the plaintiff against them. There was a stipulation that he should not be entitled to require payment of any of the debts so long as he should be so indemnified. Among the liabilities taken over was a large overdraft due from the old firm to the bank. The banking account was continued with the bank. The account with the old firm was closed except for the purpose of calculating interest on the debt, and was kept distinct and separate from the account with the new firm. But, in ascertaining the balance due to the bank, the bank set the credit balance of the new firm against the overdraft of the old firm. On the 16th Feb. 1889 the bank passed a resolution allowing the new firm to continue the overdraft until the 14th March 1889. In Aug. 1890 an agreement was entered into between the three members of the new firm (the plaintiff not being a party) and a surety on the one hand, and the bank on the other, for guaranteeing payment to the bank of any balance due on the account beyond a certain sum. In Aug. 1892 the new firm stopped payment, a large overdraft being still due to the bank. The bank then claimed a lien for the amount on certain shares in the bank held by the plaintiff; and thereupon he brought an action, claiming a declaration that he was entitled to the shares free from any lien by the bank, and an injunction to restrain them from dealing with the shares. Held, that the stipulations in the deed of dissolution precluded the plaintiff from objecting to the giving of time by the bank to the continuing partners; and that therefore the bank were entitled to the lien claimed. (*Rouse v. The Bradford Banking Company Limited.*) ... 427

DEFAMATION.

Libel—Privileged occasion—Publication to a person having no duty, interest, or power in the matter—Belief of defendant as to duty, interest, or power of the person to whom publication is made.—Where a defendant has published a defamatory

document to a person who has no duty, or interest, or power in the subject-matter of the libel, the occasion is not privileged by reason that the defendant had at the time of the publication a *bond fide* and reasonable belief that the person to whom the publication was made had some duty, interest, or power in the subject-matter of the libel. (*Hebbditch v. MacIlwaine and others.*) page 826

Rival traders—Proprietary article—Advertisement—Trade libel—Injunction.—The plaintiff was the proprietor and manufacturer of the food known as “Mellin’s Infants’ Food,” which he supplied wholesale to the trade. The defendant was a chemist and the proprietor of “Dr. Vance’s Food for Infants and Invalids.” The defendant was a “customer of the plaintiff, and was in the habit of affixing to the wrappers in which the plaintiff’s goods were sold the following label: “Notice.—The public are recommended to try ‘Dr. Vance’s Prepared Food for Infants and Invalids,’ it being far more nutritious and healthful than any other preparation yet offered.” The plaintiff alleged that the statement in the label was made with the object of depreciating his food, and inducing the public to believe that his food was inferior to that of the defendant; and the plaintiff claimed an injunction to restrain the defendant from selling or offering for sale the plaintiff’s food otherwise than under the original wrappers, and from selling or offering for sale such food under the plaintiff’s wrappers with any unauthorised additions thereto or alterations thereof. It was decided by Romer, J. that the plaintiff was not entitled to relief; that although what the defendant had been doing was no doubt most annoying to the plaintiff, it could not be said to amount to a trade libel, but was merely the puff of a rival trader; and that therefore the action must be dismissed with costs. On appeal: Held, that Romer, J. had gone too far in giving judgment for the defendant on the materials laid before him, for, if it should be proved that the statement in the defendant’s notice was false, and that the disparagement therein of the plaintiff’s food caused damage to or was calculated to injure him, then an action would lie. Held, therefore, that the order made by Romer, J. must be discharged; and that there must be a new trial. (*Mellin v. White.*) ... 775

(See LIBEL.)

DEPOSIT.

Insurance—Deposit in bank for term of years—Failure of bank—Reconstruction—Discharge of bank’s liability to the depositor—Accord and satisfaction—Suretyship—Liability of insurers.—The plaintiff having deposited a sum of money for a term of years, repayable at a fixed date, in an Australian bank, entered into a contract with the defendants in London to secure to herself the repayment of the deposit. By this contract, called therein a “policy of insurance,” the “assured” agreed to pay certain premiums, and the defendants agreed to pay the plaintiff the sum deposited “if the debtors shall have made default in paying the same.” The bank afterwards failed and made default in repaying the deposit on the agreed date. Afterwards a scheme for the reconstruction of the bank was made in Australia, and under an Australian Act the plaintiff was compelled to accept in satisfaction and discharge of her claim against the bank certain rights and claims against the new bank as reconstructed. The plaintiff sued the defendants upon their contract. Held that, upon the bank making default in payment on the agreed date, a right of action against the defendants was vested in the plaintiff to be indemnified against her loss, and this right of action was not taken away by any of the events which happened afterwards. (*Dane v. The Mortgage Insurance Corporation Limited.*) ... 83

“DISUSED BURIAL GROUND.”

Partial user of burial ground—Order in Council—Restrictions.—By virtue of the Metropolitan Open

SUBJECTS OF CASES.

Spaces Act 1881, s. 1, the Disused Burial Grounds Act 1884, s. 2, and the Open Spaces Act 1887, ss. 2, 4, and the schedule, the term "disused burial ground" includes any ground, whether consecrated or not, which has at any time been set apart for the purposes of interment, whether interments have taken place in it or not, and which has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused; and therefore the prohibition against erecting any building upon a disused burial ground contained in sect. 3 of the Disused Burial Grounds Act 1884 applies to a part of a cemetery which has been closed, though interments have not taken place in that particular part. (*Ponsford v. The Newport District School Board.*)page 502

DIVORCE.

Adultery and cruelty—Decree nisi—Collusion and condonation after decree—Intervention—"Material facts not brought before the court"—Pleadings—Adultery subsequent to condonation—Revival—Rescission of decree—Practice—Costs.—A wife obtained a decree nisi for the dissolution of her marriage upon the grounds of her husband's adultery and cruelty. The Queen's Proctor intervened to show cause why the decree should not be made absolute, alleging that the decree had been obtained, contrary to the justice of the case, by the suppression of material facts; that the petition had been prosecuted in collusion with the respondent; and that, since the date of the decree, the petitioner had condoned the adultery and cruelty upon which the decree was based. The petitioner denied the allegations of the Queen's Proctor, and also pleaded that, if she had condoned the acts of adultery and cruelty upon which the decree was founded, such condonation had been cancelled, and her right to complain of the said offences had been revived by the acts of adultery committed by the respondent subsequently to such condonation. Upon findings of fact that there had been condonation and collusion since the decree nisi, and that the respondent, after the said collusion and condonation had taken place, had committed adultery: The court, in rescinding the decree and dismissing the petition, held, that the collusion was a sufficient ground for refusing to make the decree absolute, and was a "material fact" within the Matrimonial Causes Act 1860 (23 & 24 Vict. c. 144), s. 7, which had been suppressed, and which the Queen's Proctor was right in bringing to the knowledge of the court, inasmuch as the decree nisi being only the inchoate part of the decree, and the suit not being completed until after the decree absolute, the petition, although not presented, had been prosecuted in collusion, and on this ground should be dismissed; but held, that where there has been adultery which has been condoned by the petitioner, and where that condonation has been followed by other acts of adultery on the part of the respondent, such condonation is not a "material fact" within the terms of sect. 7, and is not a ground for rescinding a decree nisi. (*Rogers v. Rogers* (the Queen's Proctor showing cause.) 699

Adultery of wife—Evidence—Denial of charge by co-respondent—Cross-examination of wife by co-respondent.—An application was made by the co-respondent in divorce proceedings instituted by a husband against his wife for judgment or a new trial of the suit as regarded himself. The suit was instituted by the husband on the ground of his wife's adultery with the co-respondent and a person unknown. The co-respondent denied the charge against him. The jury found that the respondent and the co-respondent had been guilty of adultery, and that she had also committed adultery with a man unknown. Sir Francis Jeune accordingly made a decree nisi for the dissolution of the marriage, with costs against the co-respondent. There was no appeal by the respondent. It appeared that Sir Francis Jeune, in the course

of the trial, had refused to allow any cross-examination of the respondent by the counsel for the co-respondent, holding, on the authority of *Glennie v. Glennie* (3 S. & T. 109), that there was no such right; and in his summing up the learned President, in a marked way, contrasted the evidence of the respondent with that of the co-respondent, observing that there was a complete discrepancy between the story told by the respondent and the story told by the co-respondent in two most important points. On appeal: Held, that it was not right to deal with the evidence of the respondent as admissible against the co-respondent, and the evidence of the co-respondent as admissible against the respondent, without an opportunity being afforded of testing its truthfulness by cross-examination; and that the learned President was wrong in contrasting the evidence as he did after refusing liberty to cross-examine the respondent. Held, therefore, that there must be a new trial, the costs thereof to abide the event. (*Allen v. Allen and Bell.*)page 783

Molestation—Motion to restrain respondent—Injunction.—The Court granted an injunction to restrain the respondent in a divorce suit from molesting the petitioner by going to and remaining in the petitioner's house, contrary to the expressed wish of the petitioner. (*Northledge v. Northledge.*) 815

Petitioner engaged abroad—Leave to solicitor to sign petition on his behalf—Order for proof of marriage and cohabitation to be given by affidavit.—Where it appeared that a proposed petitioner was engaged as an engine-driver at the Diamond Fields at Kimberley, in South Africa, and that the acts of adultery to be alleged against his wife in the petition had been committed after he left England; and it further appeared that he could not come to England without risking the loss of his situation: The Court gave leave to the solicitor to sign the petition and swear the affidavit verifying the same on behalf of the petitioner; and also gave leave to prove the marriage and cohabitation by affidavit. (*Ex parte Hobson.*) 816

Pleadings—Wife's answer—Undue familiarities alleged against petitioner—Motion to strike out—Refusal—Matrimonial Causes Act 1857, s. 31.—A husband petitioned for a divorce upon the ground of his wife's adultery. The wife, in her answer, denied the adultery, pleaded condonation, and alleged as follows: "That in and since the year 1887 the petitioner has paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house, and corresponded with her notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has absented himself from the respondent's society in order to enjoy the society of the said lady, and has frequently told the respondent that he has been fascinated by the said lady, and that he would have run away with her if she had consented; that in and since the year 1890 the petitioner has paid marked attention to another lady, and has refused to give up his intimacy with her, notwithstanding the respondent's objections and remonstrances, and that he has been guilty of acts of undue familiarity with the said lady;" and that the petitioner, by such wilful neglect and misconduct, had conduced to the adultery (if any) of the respondent. The following particulars were subsequently filed in respect of the statements: "The name of the unmarried lady was Miss A., and the flirtation extended from the year 1887 to the filing of the petition. The name of the unmarried lady was Miss B., and the flirtation extended from the 12th Nov. 1892 to the filing of the petition; and the act of familiarity spoken of, the petitioner putting his arm round her waist, and she sitting on his knee at . . . in the month of Dec. 1892, and his arm round her waist on the 2nd Jan." Held,

SUBJECTS OF CASES.

that, if the facts alleged were proved, it was not impossible that the judge might come to the conclusion that the husband had by his neglect conduced to the wife's adultery, and therefore the court would not order them to be struck out. (*Cox v. Cox.*)page 200

Variation of settlements—Petitioner's power to appoint to her second husband or children of second marriage.—The wife obtained a final decree dissolving her marriage with her first husband, and petitioned the court to vary the settlement made upon the said marriage. Under the said settlement the petitioner had power to appoint the settled fund, or any part thereof, after the death of her first husband in favour of any future husband and the children of any future marriage which she might contract. The Court refused to vary the settlement in such a way as to enable her to appoint to her second husband and the children of her second marriage during the lifetime of the divorced husband. (*Pollard v. Pollard.*)... .. 815

Verdict of adultery against respondent and co-respondent, and of cruelty against petitioner—Discretionary bar—Decree nisi.—Petitioner ordered to secure maintenance for respondent *dum sola et casta viveret*.—In a suit by a husband for divorce the jury found that the respondent and co-respondent had committed adultery, and that the petitioner had been guilty of cruelty towards his wife, but they were not asked to give and did not give any verdict as to whether the cruelty of the petitioner had conduced to the adultery of the wife. The Court, being satisfied that the adultery of the respondent had not been brought about by the cruelty of the petitioner, pronounced a decree nisi, in virtue of the discretion conferred by the Divorce Act 1857, but directed that the decree should not be made absolute unless and until the petitioner executed a deed, securing to his wife, for her maintenance, a sum of 36l. per annum—the deed to contain a clause that the said allowance should only be payable *dum sola et casta viveret*. (*Edwards v. Edwards and Francis.*) ... 39

Wife's costs—Wife in possession of separate estate more than sufficient to pay her costs—Liability of husband—Relative incomes of husband and wife—Rules and Regulations in Divorce and Matrimonial Causes, r. 158.—Where an application is made by a wife under the Rules and Regulations in Divorce and Matrimonial Causes, r. 158, for an order directing her husband to pay her costs already incurred, and to give security for her future costs, the judge has a discretion to be exercised having regard to all the circumstances of the case; and he may take into account the relative incomes of the husband and wife, and is not bound to refuse the application because the wife has separate property much more than sufficient to pay her costs. (*Allen v. Allen.*) ... 326

ELECTION LAW.

Municipal election—Validity of votes—Salary attached to office—Right of candidate to vote for himself—Right of chairman to first vote—Disqualification.—At an election for the mayor of a municipal borough the votes for each of the two candidates being equal, the chairman gave a casting vote for the respondent, and declared him duly elected. There was a small salary attached to the office of mayor. The chairman, who was otherwise entitled to vote, had given a first vote for the respondent, and the respondent had voted for himself. One of the votes for the respondent was given by T., who had let a building to the council for a polling station at an election of councillors held some days before the election for mayor. T. was to receive and did receive payment for the use of the building for that purpose. One of the votes for the other candidate was given by G., who, at the date of his election as councillor some days before the election for mayor, was chemist to the council, and as such had supplied goods to the council, but after the date of his election as councillor he had supplied

to the council only half a gallon of oil, which cost fourpence. Upon an election petition under the Municipal Corporations Act 1882 objections were taken to the above votes. Held (1) that the vote of the respondent for himself was bad, upon the ground that, there being a salary attached to the office, the respondent had a "pecuniary interest" in the result within the meaning of sect. 22 (3) of the Act; (2) that the vote of T. was good, as his contract for the letting of the building was within the exception in sect. 12 (2) (a), as a lease of land; (3) that the vote of G. was bad, as at the time of election as councillor he, as chemist to the council, held an "office or place of profit in the gift of the council" within the meaning of sect. 12 (1) (a), and also had a "share or interest in a contract" within sect. 12 (1) (c), and had after his election as councillor sold to the council four-pennyworth of oil, and was therefore disqualified for being a councillor; (4) that the first vote of the chairman was good, as the chairman, being otherwise entitled to vote, did not lose his right to a first vote by reason of his being chairman. The petition did not raise the question as to the disqualification of the voter T. Upon an objection taken to that effect: Held, that to raise the question an amendment of the petition was necessary, and that in the absence of any explanation of the omission no amendment, even if possible, ought to be made, but that in this it was not necessary. (*Re The Louth Municipal Election; Nell and others, pets., v. Longbottom, resp.*)page 499

Parliament—Municipal—Registration—Occupation of unrated but rateable premises—The revising barrister placed the appellant P. upon the Parliamentary franchise (No. 2 list) but excluded him from the municipal franchise (No. 3 list), and so removed him from No. 1 list, which consists of Parliamentary and municipal voters. On the revision of No. 1 list the appellant's name appeared as occupier, "place of abode G.-street," dwelling-house, successive description of qualifying property, N.-street. P. was inhabitant occupier of N.-street from July to Dec. 1892, when he went to G.-street, and remained inhabitant occupier there until July 1893. The poor rate was made by the guardians and allowed by the justices between Aug. 1892 and Aug. 1893. The owner of N.-street compounded for and was duly rated as owner during P.'s occupancy. The name of P. remained as occupier. The house in G.-street, where P. had gone to, had been newly built on vacant land; there had been no previous occupation by the owner, and neither the site nor house had been included in any poor rate made during the qualifying period, nor any claim by the owner or P. to be rated, and no tender or payment of rates made by them. Held, that, without overruling the case of *M'Guffan v. Riddall* (28 L. Rep. Ireland, 257), it would be impossible to hold that the appellant P. was entitled to the Parliamentary franchise, therefore the barrister was wrong in placing appellant on that franchise, but that the barrister was right in excluding the appellant P. from the municipal franchise. (*Palmer, app., v. Wade, resp.; Wade, app., v. Palmer, resp.*) 407

Registration—Borough vote—Service of notice of objection—Ordinary course of post—By sect. 10 of 6 & 7 Vict. c. 18, an objector to a person claiming a Parliamentary vote may serve his notice of objection by post, and in that case a duplicate notice shall be stamped by the postmaster of the office where the notice is posted, and "the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would, in the ordinary course of post, have been delivered to such place." Held, that "the ordinary course of post" refers to the general rules of the post-office as to the delivery of letters to the inhabitants of a postal district taken as a body; and an objector, when posting his notices of objection, need only take into consideration such general rules, without inquiring into the mode in which,

SUBJECTS OF CASES.

by special arrangement, some particular inhabitants in the district may have their letters delivered. (*Kemp v. Wanklyn.*)page 478

Parliament—Registration of voters—Description of qualification—Power to amend claim—Parliamentary and Municipal Registration Act 1878.—The nature of the qualification of a Parliamentary and municipal voter to be placed on the occupiers list was described in the claim as "dwelling-house successive"; and the qualifying property as "13, D.-road, from 31, E.-road." The claimant had occupied 13, D.-road, only throughout the qualifying period. Held, that the qualification in respect of the occupation of one house being a different qualification from that in respect of two houses in succession, the revising barrister had no power to amend the claim by striking out the words "successive" and "from 31, E.-road." (*Huroum v. Town Clerk of West Ham.*) 505

EMPLOYEE AND WORKMAN.

Conduct of workman amounting to absenting himself from employment—Breach of contract—Damages.—The contract of service of a workman employed in a colliery was determinable on fourteen days' notice on either side. One of the rules of the colliery provided that the banksman should regulate the manner in which persons should enter and leave the cage, subject to the direction of the manager. A notice was sent to the owners by the workmen belonging to the trade union that after fourteen days from that date all non-unionists must descend and ascend the colliery by themselves. On the expiration of this notice several of the workmen refused on three following days to go down the pit to work in the same cage as a non-unionist, when requested to do so by the manager. The cage, which held eight men at one time, was then sent down with the non-unionist alone. When the next cage came up, a few seconds later, the unionists were willing to go down in it, but the manager refused to allow them to do so. The employer then summoned the men under the Employers and Workmen Act 1875, claiming damages in consequence of their having absented themselves from their employment on those three days without giving the required fourteen days' notice. Held, that the men had been guilty of a breach of contract, and that the refusal to enter the cage being a preconcerted course of action, they did for the three days refuse to go to their work except on terms which they had no right to impose, and the employer was entitled to substantial damages. (*Bowes v. Press.*) 116

ENDOWED SCHOOLS ACT 1869.

Welsh Intermediate Education Act 1889—Instruction according to doctrines of particular denomination—Modern endowment so mixed with old endowment that it cannot conveniently be separated—Fitting up of chapel.—The fact that the scholars of an endowed school have for a long period, under the bye-laws or regulations from time to time in force, been instructed according to the doctrines or formularies of a particular church, does not lead to the necessary inference, in the absence of further evidence, that such practice had its origin in some express regulations made by the founder, so as to bring the case within sect. 19 of the Endowed Schools Act 1869. A "modern endowment" consisting of a fund raised by subscription and applied in fitting up part of the school buildings as a chapel considered as so mixed with the old endowment that it could not conveniently be separated from it within sect. 25 of the Endowed Schools Act 1869. (*Governors of Swansea Grammar School v. Charity Commissioners.*) 738

EXECUTOR.

Administration—Business—Indemnity—Creditors.—Executors and trustees, in pursuance of a power contained in a will, carried on the business of a

licensed victualler after the death of the testator, and incurred debts to trade creditors. An action was commenced for the administration of the estate of the testator. The trade creditors took out a summons in the action asking for an order declaring that they were entitled to the trustees' right of indemnity against the estate so as to get payment out of the estate. The trustees had made default in rendering proper accounts, but not in payment of money. There was a sufficient fund in court to pay all the debts. Held, that, in order to deprive the trustees of their indemnity, there must be a default in payment of money, and not merely a default in the rendering of accounts, and as in this case there was no default in payment of money, the creditors were entitled to prove against the estate through the right of the trustees to indemnity, and there would be a declaration to that effect. (*Re Kidd; Kidd v. Kidd.*)page 648

Liability of, for default of co-executor—Bonds placed under sole control of defaulting executor—"Necessary" act.—Part of the estate of a testator consisted of American railway bonds, of which he was the registered holder. The bonds were issued payable to bearer, but the holder had power to register them, after which they could only be transferred by entry in the books of the company. The owner could nevertheless unregister them so as to make them again payable to bearer. The executors and trustees of the testator were his wife and two stockbrokers, J. and C., and the will of the testator empowered J. and C. to charge for business done by them as stockbrokers for his estate. J. had been employed by the testator in his lifetime as his stockbroker. The bonds not being securities authorised as an investment by the will, the executors had to take steps to convert them, and for that purpose two courses were open to them: either to sell and transfer the bonds as registered bonds, or to unregister them and then sell. The former course being extremely unusual, the executors unregistered the bonds and placed them in the hands of J. to sell. J. sold them and from time to time paid various sums into a bank to the account of the testator's estate. But within eleven months after the testator's death J. absconded, having misappropriated a considerable part of the proceeds of the converted bonds. Held, that an act was not "unnecessary" if it was done by executors in the ordinary course of business in administering their testator's estate; that the unregistering the bonds and handing them to J. to sell were therefore not "unnecessary;" and that the co-executors were not liable for J.'s misappropriation. Held also, that, as J. was trusted by the testator, and his co-executors had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make them liable. (*Re Gasquoine; Gasquoine v. Gasquoine.*) 196

EXPLOSION.

Boiler for domestic purposes—Boiler Explosions Act 1882—Boiler Explosions Act 1890.—By sect. 5 of the Boiler Explosions Act 1882, when any explosion occurs from any boiler to which the Act applies, notice shall be sent within twenty-four hours to the Board of Trade. Sect. 4 exempts all boilers used exclusively for domestic purposes. This exemption comes within sect. 2 of the Boiler Explosions Act 1890. The respondent was a merchant upon whose premises was a boiler used for the purpose of putting hot water through a range of pipes to heat the clerks' offices, and it was used by the office caretaker and his family who lived upon the premises. An explosion occurred. An information was laid under sect. 5 of the Act of 1882, a notice of the explosion not having been given to the Board of Trade. The magistrate dismissed the information, holding that the boiler was "used exclusively for domestic purposes," within the meaning of sect. 4 of the Act of 1882. Conviction affirmed. (*Smith, app., v. Muller, resp.*) 170

SUBJECTS OF CASES.

FISHERY ACTS.

Freshwater fishery—Water bailiff—Right to prosecute without the authority of board of conservators.—The Fisheries Act 1891, s. 13, provides that the powers conferred by the Fisheries Acts upon any authorities or officers to enforce them shall not limit or take away the power of any other person to take legal proceedings for their enforcement. Held, that, under this section, a water bailiff can institute proceedings for an offence against the Fisheries Acts without being authorised so to do by the board of conservators of the district. (*Pollock v. Moses.*) ... page 378

GAMING.

Bets made through agent—Right of principal to recover—Gaming Act 1892.—The Gaming Act 1892 does not prevent a principal from recovering from an agent through whom he has made bets money paid to the agent by a third party in respect of the bets. (*De Mattos v. Benjamin.*) ... 560

Place kept or used for purposes of gaming—Conviction—Stakes not deposited—Preamble of Act.—Sect. 1 of the Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119) provides that "no office, room, or other place shall be open, kept, or used for the purposes of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business there of betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Sect. 3 provides for the penalty for such offence as aforesaid if committed. An information was laid before the magistrates charging the appellant under the above sections with keeping a room (he being the occupier) for the purpose of betting with persons resorting thereto, and the magistrates so found; but it was not shown that the appellant kept the room for the purpose of receiving deposits on bets. Held, that sect. 1 creates two separate and distinct offences: first, keeping a house, office, room, or other place for the purpose of betting with persons resorting thereto; and, secondly, keeping a house, office, room, or other place for the purpose of receiving deposits on bets. (*Bond, app., v. Plumb, resp.*) ... 405

HACKNEY CARRIAGE.

Omnibus—Licence—"Plying for hire"—No charge for carriage of passengers.—Sect. 45 of the Towns Police Clauses Act 1847, incorporated in the Public Health Act 1875, provides that if the proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within a prescribed distance without obtaining a licence he shall be liable to a penalty. By sect. 4 of the Towns Police Clauses Act of 1889, "hackney carriage" is to include an omnibus. Two ordinary omnibuses were run in the following way: It was intimated by several notices upon the omnibuses that the omnibuses were placed at the disposal of the public free of charge, and also notices stating that voluntary contributions to support the omnibuses would be welcomed. There was a conductor on each of the omnibuses to supply change. Many persons using the omnibuses placed money in the boxes, but some did not. The magistrates, upon an information laid before them, held that this was not a "plying for hire" within the meaning of the statute under

which the proceeding were taken. Held, that this was an attempt to evade the statute, that there was a "plying for hire" within the meaning of the statute, and that the case must be remitted to the magistrates to rehear and convict. (*Cooks, apps., v. Mayner, resp.*) ... page 403

HIGHWAY.

Encroachment—Conviction—Defect—Question of title—*Certiorari*.—By sect. 51 of the Highway Act 1864, if any person shall encroach by making any fence on the side of any carriage-way, within fifteen feet of the centre thereof, he shall on conviction be liable to a penalty. The defendant was convicted under this section. The conviction did not state that the defendant had "encroached" on the highway. A writ of *certiorari* having been granted in chambers in vacation, and a rule nisi to quash the conviction having been drawn up, on motion to make it absolute: Held, that there was power to amend the conviction, if necessary, under 12 & 13 Vict. c. 45, s. 7, but that, *certiorari* having been taken away by sect. 107 of the Highway Act 1835, which Act by sect. 42 of the Highway Act of 1862, and sect. 2 of the Highway Act of 1864, is to be read as one with the Act of 1864, the omission of the word "encroach" did not render the conviction bad, and that *certiorari* would not lie for such a defect, and therefore the court would not quash the conviction on that ground. The defendant, being charged with an offence under sect. 51 of the Highway Act 1864, contended that he was the owner of the land on which a fence had been erected, and that it did not form part of the highway, and that the justices had no jurisdiction to adjudicate in the matter, on the ground that title to land came in question. Held, that the justices had jurisdiction, the question for them being whether or not the land in question formed part of the highway. Rule nisi to quash the conviction accordingly discharged. (*Reg. v. Bradley.*) ... 379

Property exempt from payment of highway rate—Liability to repair *ratione tenuræ*—Determination of liability.—The Highway Act 1835, s. 83, confers an exemption from the payment of the highway rate imposed by that Act, upon property which was previously to the passing of the Act legally exempt from the payment of highway rate. Held, that the exemption no longer continues when the grounds upon which the exemption rested prior to the Act have since the Act ceased to exist. (*Heath and others v. Overseers of Weaverham.*) ... 729

HUSBAND AND WIFE.

Divorce—Permanent maintenance—Income of respondent—Profits of partnership business—Undrawn profits—Matrimonial Causes Act 1857—Matrimonial Causes Act 1866—Order for security.—In a petition for maintenance by a wife who had obtained a decree absolute for the dissolution of her marriage, it appeared that the husband's income was derived from a share in the profits of a firm of which he was one of the partners. The petitioner moved to vary or add to the report of the registrar on her petition upon the basis that the undrawn profits of the business formed part of the income of the respondent. It was decided by Sir Francis Jeune that the respondent must be ordered to secure permanent maintenance for the wife, upon the basis of one-third of the whole of his share of the average profits to which he had been entitled during the three preceding years, viz., £3300l., although by the terms of the partnership he was only entitled to draw a limited amount of the profits, unless with the consent of his partner. The respondent appealed. Held, that too high an estimate had been formed of the average profits of the business when taking them at £3300l. a year, but that the proper amount would be £2400l.; that circumstances might occur, the order being final, to reduce the amount of the profits, and the health of the respondent might

SUBJECTS OF CASES.

prevent his continuing in the business. Held, therefore, that an order must be made under sect. 32 of the Matrimonial Causes Act 1857, that the sum of 300*l.* (in addition to the 500*l.* a year already secured by the marriage settlement), instead of 600*l.* a year as fixed by Sir Francis Jeune, should be secured by way of permanent maintenance for the petitioner. (*Hanbury v. Hanbury*.)page 569

Divorce—Order for permanent alimony—Agreement for compromise of such order—Payment of smaller sum in satisfaction of larger sum.—After a decree of dissolution was granted on a wife's petition, an order was made, under the Matrimonial Causes Act 1866, s. 1, for payment by the respondent of permanent alimony. Some years afterwards an agreement was entered into between the petitioner and the respondent, whereby the former agreed to take 10*l.* in full satisfaction of all present and future claims under the order. All that time a sum was owing for arrears of alimony. The 10*l.* was duly paid, but subsequently the petitioner put in an execution under a writ of *f. fa.* for the arrears due to her in pursuance of the order. Held, that the agreement must be treated as invalid for want of consideration, and that, therefore, the writ of *f. fa.* was legally issued. Decision of Sir Francis Jeune reversed. (*Underwood v. Underwood*.) 390

INCOME TAX.

Short loans for purpose of buying for cash—Interest on—Right to deduct interest—Profits and gains.—A foreign firm had a branch house in London, which was carried on as a separate business, with a separate capital. To enable the London house to buy goods more advantageously for cash, instead of on credit at a higher price, the London house obtained short loans from the foreign house and from bankers, and paid interest on such loans to the foreign house, and in making up the return of their profits assessable under the Income Tax Acts, they claimed to deduct the interest paid for the sums so borrowed as being necessary expenditure in the business. Held, that the interest paid by the London house on these short loans could not be deducted by them in ascertaining their profits assessable under the Acts. (*The Anglo-Continental Guano Works v. Bell, Surveyor of Taxes*.) 670

INDUSTRIAL AND PROVIDENT SOCIETY.

Winding-up—County Court—Jurisdiction.—The Industrial and Provident Societies Act 1876 enacts, by sect. 17, that a society may be dissolved by an order to wind-up the society made as directed in regard to companies by the Companies Act 1862, and that the court having jurisdiction in the winding-up shall be the County Court. By the Companies (Winding-up) Act 1890 it is provided, by sect. 1, that the County Courts shall have jurisdiction to wind-up companies, and by sect. 10 that where in the course of the winding-up of a company under the Companies Acts it appears that any officer of the company has misapplied any moneys of the company, the court may examine into the conduct of such officer and compel him to repay any moneys so misapplied. By Order XLII., r. 9, of the County Court Rules 1892, the provisions of the Companies Acts 1862 to 1890, so far as they relate to winding-up, are applied to the winding-up of societies registered under the Industrial and Provident Societies Act 1876. The Industrial and Provident Societies Act 1893 repeals the Industrial and Provident Societies Act 1876, and provides by sect. 58 that a society may be dissolved by an order to wind-up the society made as is directed in regard to companies by the Companies Acts 1862 to 1890, and by sect. 59, that any proceedings in the winding-up of a registered society, which at the passing of this Act are pending in any County Court, may, on the application of the registrar, be transferred to the High Court. Held, that the County Court judge had jurisdiction to order the examination of an

officer of an industrial and provident society, the winding-up of which society was pending in the County Court at the time when the Industrial and Provident Societies Act 1893 came into force. (*Re Ferndale Industrial Co-operative Society Limited*.)page 448

INDUSTRIAL SCHOOLS ACT 1866.

Child living in house resided in by prostitutes—Order for removal to industrial school—Right of private person to apply for order.—The Industrial Schools Act 1866 provides by sect. 14 that any person may bring before two justices any child apparently under the age of fourteen years that comes within certain descriptions therein specified, and the justices may order the child to be sent to a certified industrial school. The Elementary Education Act 1880 enacts by sect. 13 that where the local authority are informed by any person of any child in their jurisdiction, who is stated by that person to be liable to be ordered by a court to be sent under the Industrial Schools Act 1866 to an industrial school, it shall be the duty of the local authority to take proceedings under the Industrial Schools Act 1866 accordingly, unless the authority think it is inexpedient to take such proceedings. The Industrial Schools Acts Amendment Act 1880 extends the descriptions of children under the Industrial Schools Act 1866 to children living with common prostitutes. Held, that any private person might bring a child before the justices with a view to the justices sending such child to an industrial school, and that it was not necessary to show that an application had been made to the local authority requiring such local authority to bring the child before the justices. (*Walker, app., v. Laxton, resp.*) 690

INFANT.

Contingent interest—Maintenance—Intermediate income—Conveyancing, &c., Act 1881.—A testator, who died in July 1888, by his will dated in that year gave his residuary estate, consisting of a mixed fund comprising the proceeds of sale of real estate and of personal estate, to trustees upon trust for the child or children of T. H. living at his (the testator's) decease, and who should attain the age of twenty-one years, in equal shares if more than one, and if but one the whole to be in trust for that one child. The will contained no maintenance clause. At the testator's death there were living six children of T. H., who were all infants. One daughter had recently come of age and had settled her interest under the will. The income of the residuary estate was very large, and the accumulations of income during the period which had elapsed between the death of the testator and the time when the eldest daughter came of age, and not expended in maintenance, amounted to about 40,000*l.* The daughter and her trustees claimed to be entitled to her sixth share of the original residuary estate, and of the fund accumulated during her minority; also to the whole of the income of the residuary estate accruing from the time she came of age until the next child came of age, and from that time to one half of the same income until another child came of age, and so on until the youngest child attained its majority and to the income of the accumulated fund in the same manner. Held, that the daughter was entitled to receive her one-sixth share of the original capital and of the accumulated fund and income down to the time of her taking a vested interest; but that she was not entitled to receive the income of the remaining five-sixths of the original capital and accumulated fund during the suspense of vesting, such income being applicable during the suspense to the maintenance of the infants. (*Re Holford; Holford v. Holford*.) 482, 777

Contract—Benefit of infant—Carriage of infant by railway company—Company not to be liable for negligence.—Under an arrangement with a colliery owner, a railway company agreed

SUBJECTS OF CASES.

to issue passes by their railway to persons employed in the colliery. They accordingly gave a free pass to the plaintiff, a boy employed in the colliery, who was between thirteen and fourteen years of age, and the plaintiff at the same time signed an agreement by which, in consideration of being carried by the defendant company, he agreed that neither he, his executors, his administrators, or relatives, should have any claim against the defendant company by reason of any accident, injury, or loss which might happen to him or his property while travelling on the defendants' railway, notwithstanding such accident, injury, or loss might be occasioned by the negligence of the defendants or their servants; and that he, his executors and administrators, would indemnify the defendant company against all loss, costs, damages, and expenses which they might incur by reason of any such accident, injury, or loss, or by reason of any claim or legal proceedings instituted or taken by him or them against the defendants or any of their officers or servants in respect thereof; and that he would desist from exercising his privilege of using the pass whenever required by the defendants or any of their agents so to do. Held, that the agreement taken as a whole was so prejudicial to the plaintiff, being an infant, that it was unfair that he should be bound by it, and it was therefore not binding upon him. (*Flower v. The London and North-Western Railway Company.*) page 829

Contract of service—Contracting out of Employers' Liability Act—Insurance society—Benefit of infant.—The plaintiff, when an infant, entered into the service of the defendant company as a railway porter at weekly wages. One of the terms of his contract of service was, that he should become a member of the L. and N.W.R. Insurance Society, the object of which was "to provide pecuniary relief in cases of temporary or permanent disablement arising from accident occurring while in the discharge of duty and also in cases of death." Under this term of his contract of service he became bound to subscribe a small sum to the society, and the defendant company also became bound to contribute to it, and the plaintiff agreed "to accept such contribution, and any advantages to which he may be entitled under the rules of the society, in satisfaction and in lieu of any claims which he (or his representative in case of death) might or otherwise would have under the Employers' Liability Act 1880 or any Acts amending it." The society was managed under a number of rules. An injury having been accidentally caused to the plaintiff in the course of his employment, he, while still an infant, brought an action to recover damages under the Employers' Liability Act after he had received compensation in accordance with the rules of the society. The defendant company relied on the plaintiff's contract with them. Held, that, in the opinion of the court, the plaintiff's contract of service with the defendant company, when considered as a whole, was for his benefit, and that he was therefore bound by it, and judgment must therefore be for the defendants. (*Clements v. The London and North-Western Railway Company.*) 531, 896

INSURANCE.

MARINE.

Collision clause—Sunken wreck.—Where a steamship ran aground and rested on an old sunken wreck, and then moved forward on to iron ore, which had some years before formed part of a cargo of another vessel, and sustained damage by the contact with the wreck and ore, the underwriters were held liable for such damage under a policy covering "loss or damage through collision with any sunken wreck." (*The Munros.*) 246

Freight—Valued policy.—Plaintiffs, owners of a steamship, then on an outward voyage, took out a policy of insurance on freight, at an agreed valuation, in the said vessel on her homeward voyage, the insurance to commence from the loading of

the cargo. The vessel met with an accident on her outward voyage, and was detained at the port of discharge for repairs. Some cargo was then engaged, before the date of the policy, for the homeward voyage, part being loaded at the original rate of freight, and the remainder cancelled. More cargo was from time to time shipped at much lower rates than were current at the time the policy was effected, and the vessel eventually sailed with a full cargo. She was destroyed by fire in the course of the voyage, and whatever freight was at risk was consequently entirely lost. Held, that the policy covered the freight at risk, and that the valuation was binding upon both parties with regard to what actually came at risk under the policy. (*The Main.*) page 247

Policy—Collision clause—Proviso—Removal of obstructions under statutory powers—Expenses of removing wreck.—Both ships to blame—Liability of insurers.—At the time of a collision in foreign waters, between the ships *N.* and *P.*, the plaintiffs, the owners of the *N.*, were insured in the defendant company by a policy of insurance which contained a collision clause, to which the following proviso was attached: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the injured vessel, or for loss of life or personal injury." In consequence of the collision the *P.* sank, and was ultimately removed by the local authorities acting under statutory powers. The expenses of such removal were directed to be paid by the *P.* to the local authority, and were so paid. In cross-actions for damages in respect of the said collision both ships admitted liability, and, on the damages being referred to the registrar and merchants for assessment, the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the *P.* the sum so paid by the owners of the *P.* whereby the owners of the *N.* became liable to pay as part of the damages, to the owners of the *P.*, a moiety of such sum. In an action by the owners of the *N.*, against the underwriters of the *N.*, to recover moneys alleged to be due under the said policy, in respect of the removal of the *P.*: Held, that the assured could not recover, as the underwriters were exempted from liability by the terms of the proviso to the collision clause. (*Roberts and Son v. Ocean Marine Insurance Company. The North Britain.*) 210

INTERNATIONAL LAW.

Foreign sovereign—Immunity from jurisdiction.—Evidence of submission to jurisdiction—Proof of independent sovereignty—Statement by the Secretary of State.—The Court will not entertain an action against an independent foreign Sovereign unless he voluntarily submits himself in that particular action to the jurisdiction of the court. Such a submission cannot be made until the court is asked to exercise its jurisdiction, and the court will therefore, in considering whether any such submission has been made, refuse to take into consideration his conduct before that time. A certificate from a responsible Minister of the Queen as to the relations between Her Majesty and a foreign sovereign is conclusive in Her Majesty's courts. (*Mighell v. The Sultan of Johore.*) 64

JOINT TENANCY.

Severance—Covenant to settle after-acquired property.—A covenant in a marriage settlement to settle after-acquired property of the wife will sever the joint tenancy in personal property to which the wife becomes entitled jointly with others under an instrument executed after the date of the settlement. By their marriage settlement, dated in Oct. 1880, *M.* and her husband covenanted to settle all after-acquired property of *M.* above the value of 300*l.* By a voluntary

SUBJECTS OF CASES.

settlement executed in 1883 P. settled certain personal property upon the trusts therein mentioned, with an ultimate trust for his own next of kin. P. died in 1891, leaving M. and her sister and H. his next of kin. H. died within a few months of P. without having severed the joint tenancy of the next of kin under the voluntary settlement, and on his death all the trusts prior to that for the next of kin determined. Held, that the joint interest of M. and her sister was severed by the covenant in M.'s marriage settlement. (*Re Hewett; Hewett v. Hallett.*) ...page 393

JOINTURE.

Rentcharge—Charge on rents and profits—Right to have arrears raised by sale.—By a settlement dated the 3rd April 1861, and made on the marriage of Baron H. and his wife, certain lands and hereditaments were assured to R. to the use of Baron H. for his life, and after his death to the use, intent, and purpose that his said wife should during her life receive and take by and out of the rents and profits thereof one clear yearly rentcharge or sum of 3000l. at common law or by custom, with full powers, in case of nonpayment for twenty-one days, of entry, and perception of rents and profits and distress from time to time, to secure payment of the said rentcharge and all arrears thereof. There was no term limited to secure this rentcharge, but the hereditaments were limited subject to the rentcharge to trustees for a term of 1000 years to raise portions, and subject to the said term, and charged and chargeable as aforesaid, to certain uses and trusts under which H. C. H. a son of Baron H. by his first marriage, was at the date of this summons entitled in fee simple. Baron H. died in 1877; the jointure was paid in full to his widow until Michaelmas 1893, but no payment was made in Dec. 1893, the owner alleging that the rents were insufficient. The widow took out a summons for a declaration that her jointure was charged on the corpus as well as on the rents, that the arrears might be raised by sale or mortgage, and for a receiver. It was admitted that the jointure was a continuing charge on the rents. Held, that it was unnecessary to decide whether the jointure was charged on the corpus as well as on the rents, for, even if it were a simple charge on the rents, the court had jurisdiction to order the arrears to be raised by sale or mortgage, but that at the present time and under existing circumstances a sale ought not to be directed nor a receiver appointed. The summons was therefore ordered to stand over, with liberty to apply. (*Re Hambro; Hambro v. Hambro.*) ... 684

JUDICIAL INQUIRY.

Disqualification of member of tribunal—Judge and accuser—Evidence of bias—Medical register—Medical practitioner—Infamous conduct in a professional respect.—Where the decision of a person who has acted in a judicial capacity is impugned on account of bias, other than in the nature of a pecuniary interest in his decision, the only question for the court to consider is, whether his relation to the matter before him was such as to form a reasonable and substantial ground for suspecting him of bias. By sect. 29 of the Medical Act 1858, if any registered medical practitioner shall after due inquiry be judged by the General Council of Medical Education and Registration to have been guilty of "infamous conduct in any professional respect," the council may cause his name to be erased from the register which they are by the Act directed to keep. Held, that, if a medical man in the pursuit of his profession has done something with respect to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, that is evidence of "infamous conduct in a professional respect." (*Allinson v. The General Council of Medical Education and Registration.*) ... 471

JUSTICES.

Jurisdiction—Appeal against assessment to poor rate—Disqualification by interest—Special sessions.—Justices at special sessions are not disqualified from hearing and determining an appeal against an assessment to poor rate by reason of their being themselves liable to the rate in question. (*Ex parte The Overseers of Workington.*) ... page 143

LANDLORD AND TENANT.

Telephone wires—Agreement—Yearly tenancy—Rent—Waiver—Notice to terminate agreement—"forthwith" and disconnect wires—Injunction.—This was a motion by the plaintiffs to restrain the defendant company from disconnecting the wires used by the plaintiffs in their business. By an agreement to terminate in three years from the 1st July 1889 the defendants agreed to supply wires to the plaintiffs, the plaintiffs paying a quarterly rent. Clause 8 of the agreement provided that if the rent was in arrear for fourteen days the company might determine the agreement by notice to the renters, and such agreement should determine as from the time of giving such notice. On the 30th June 1892 the agreement expired by effluxion of time, but the parties went on by mutual consent as before, the rent being paid quarterly, but no fresh agreement in writing was entered into. On the 29th Dec. 1893 the plaintiffs gave notice to the company to terminate the existing arrangement or tenancy at the expiration of six months from the "31st Dec. 1893." In reply the company sent to the plaintiffs notice dated Saturday, "30th Dec. 1893," terminating the existing agreement "forthwith," and demanding rent up to the 31st Dec. 1893, and informing the plaintiffs that the company would on Monday, 1st Jan. 1894, proceed to disconnect the wires and remove the instruments. The plaintiffs paid the rent. Held, that the essence of the agreement was that the wires should be open to the use of the plaintiffs, and though the court could not compel complete specific performance of an agreement of this kind, it could grant an injunction to restrain the disconnection of the wires; that the relation of landlord and tenant was established as regarded these chattels; that the company by accepting rent for the 31st Dec. had waived their notice; injunction granted restraining the company from interfering with the private wires pursuant to their notice, until trial or further order, the costs to be costs in the action. (*Keith, Prowse, and Co. Limited v. National Telephone Company Limited.*) ... 276

Underlease—Breach of covenant to repair—Landlord's costs of solicitor and surveyor under Conveyancing Act—Liability of under-lessee.—By sect. 2 of the Conveyancing and Law of Property Act 1892 a lessor is entitled to recover as a debt due to him from a "lessee," and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, "or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act 1881 or of this Act." Held, that a lessor has no right of action under this section against an under-lessee of the demised premises. (*Nind v. The Nineteenth Century Building Society.*) ...316, 331

LANDS CLAUSES ACTS.

Compensation for land actually taken—Injury to surrounding property—Tenancy less than a year—Magistrate's jurisdiction.—The respondent rented land from the Crown on lease of thirty years, the Crown reserving the right to determine the lease as to any portion of the land on giving three months' notice. The appellants railway

SUBJECTS OF CASES.

company gave the respondent notice to treat as to a small portion of the land. The Crown gave the respondent three months' notice to terminate the lease as to that small portion required by the railway company. The learned police magistrate (G. G. Kennedy, Esq.) awarded the respondent compensation for the loss of the land actually taken, viz., for the remainder of the three months' tenancy, and, in addition, he allowed compensation for injury and damage by the severance to and injuriously affecting of the remainder of the lands held on the lease of thirty years. Held, that, as the case of *Reg. v. Kennedy* (68 L. T. Rep. 454; (1893) 1 Q. B. 533), in which the same parties appeared, decided that the magistrate had jurisdiction to assess compensation under sect. 121 of the Lands Clauses Consolidation Act 1845, the land taken being in the possession of a person having no greater interest therein than as a tenant from year to year, compensation in the present case could only be for the loss of right to occupy land for the remainder of the three months' tenancy, and not for damage done by severance to and injuriously affecting of the remainder of the lands held on a thirty years' lease. (*Bexley Heath Railway Company, app., v. North, resp.*)page 503

LIBEL.

Imputation on manager of newspaper—Wilful falsehood—"Ananias."—An imputation upon a newspaper is not necessarily a personal imputation upon everybody connected with it. A newspaper, of which the respondent was manager and part proprietor, published in an evening edition an erroneous statement as to the winner of a race which had taken place the same day. A newspaper, of which the appellants were proprietors, in a paragraph commenting on the mistake, spoke of the respondent's paper as "the M.-street Evening Ananias." Held, that this was not necessarily to be understood as an imputation of wilful deliberate falsehood upon the respondent as manager of the paper, and that a verdict of a jury in favour of the appellants in an action of libel brought against them should be set aside as unreasonable. (*Australian Newspaper Company v. Bennett.*) 597

Interlocutory injunction—"Just and convenient"—Jurisdiction of the court.—Some time previously to this action being brought, the plaintiff had been tried in Scotland for the murder of a person who had died under suspicious circumstances at a place called Ardlamont, and at this trial the jury returned a verdict of "Not proven." The defendants in the first action placed in their waxwork exhibition a portrait model of the plaintiff with a gun, said to be the plaintiff's, near it; and in another part of the establishment a representation of the "scene of the Ardlamont mystery" was set up. Sixpence extra was charged for admission to the room in which the plaintiff's model was exhibited, and the admission was through a turnstile at which was a notice, "To the Chamber of Horrors." Upon these facts, coupled with the nature of the models of other persons exhibited in the same room as, and near, the plaintiff's model, he brought an action of libel. The facts in the second case were somewhat similar. The plaintiff applied for an interim injunction pending the trial of the action. Held, by the Queen's Bench Division, that the exhibition was libellous, and the case was one in which, according to the decision in *Bonnard v. Perryman* (65 L. T. Rep. N. S. 506; (1891) 2 Ch. 269), an interim injunction ought to be granted. Upon an appeal by the defendants, certain additional evidence was referred to which raised a question whether the plaintiff had not in fact acquiesced in and agreed to the exhibition. Held, by the Court of Appeal, that upon the additional evidence the case was not one in which an interim injunction ought to be granted. (*Monson v. Madame Tussaud Limited; Monson v. Louis Tussaud.*) 335

Privileged occasion—Defamatory statements by solicitor in interests of client—Publication to clerks.—If a solicitor, in the discharge of his duty to, and in the interests of, his client, dictates a defamatory letter to one clerk which is copied by another clerk, the publication to the clerks is upon a privileged occasion, because it is reasonably necessary and usual in the course of a solicitor's business. (*Boxsius v. Goblet Frères and others.*)page 363

—When a solicitor has been instructed by a client to recover a debt alleged to be due to him, a letter containing defamatory statements written by the solicitor for the purpose of protecting his client's interests in respect of the alleged debt is published upon a privileged occasion. When defamatory statements are published upon a privileged occasion, the plaintiff does not satisfy the onus which lies upon him of proving malice in fact, if the evidence is as consistent with the absence of, as with the existence of, malice in fact. (*Baker v. Carrick.*) 366

LICENSING ACTS.

Licensee formerly convicted of selling spirits without licence—Disqualifications—Full publican's licence granted—Jurisdiction of justices.—An application was made before the licensing justices, under sect. 50 of the Licensing Act 1872, for an order for a full publican's licence to sell beer, wine, and spirits. The applicant had formerly been convicted of selling spirits without a licence. The licensing justices, notwithstanding this admitted fact, granted the applicant an order "to apply for and hold any excise licences that may be held by a publican." The applicant took out an excise spirit licence, under which he might also sell beer or wine by retail. The appellant, the objector, having applied for and obtained a rule nisi for a writ of *certiorari* to quash the order granted by the justices, on the ground that the applicant was disqualified from ever selling beer or wine by retail under the provisions of sect. 7 of the Beer House Act 1840, and sect. 22 of the Wine (Refreshment) Act 1860. The respondent, the licensee, showed cause against the rule nisi. Held, that the justices had not exceeded their discretionary jurisdiction, inasmuch as there was nothing in the earlier Acts to disqualify the applicant from holding a spirit licence, and that the order of the justices merely authorised the applicant to obtain any licence which as a publican he was entitled to hold. (*Reg. v. Roper and others (Justices) and J. H. Ellis; Ex parte Price.*) 409

Notice of intention to apply for a certificate of justices—Notice to be given twenty-one days "before he applies"—Computation of the twenty-one days—Adjournment.—It is required by sect. 7 of the Wine and Beerhouse Act 1869, that "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days, at least, before he applies, give notice in writing of his intention to one of the overseers of the parish. Held, that a notice given twenty-one days before an adjourned meeting, at which the application is actually heard, but less than twenty-one days before the first day of the general annual licensing meeting, is in time. (*Reg. v. Pownall and others, Justices of the County of London.*) 133

"Permitting drunkenness" to take place on licensed premises—Ignorance of licensee.—Sect. 13 of the Licensing Act 1872 provides that, if any person permits any drunkenness on his premises or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty. The respondent, a licensed person, was charged under the above section with permitting drunkenness upon his licensed premises. The evidence before the justices satisfied them that the respondent did not know that the person found drunk on his premises was drunk. Held, that the justices were justified in dismissing the information. (*Somerses, app., v. Wade, resp.*) 45

SUBJECTS OF CASES.

LIGHT.

Future injury—Injunction or damages—Jurisdiction—Lord Cairns' Act (21 & 22 Vict. c. 37), s. 2.—The plaintiff, a lessee with about thirty years of his term unexpired, brought an action to restrain the defendant from interfering with his ancient lights by rebuilding a house higher than the house which he had pulled down, and he also claimed damages. The judge found that the plaintiff had sustained, and when the intended building was completed would further sustain, material injury entitling him to substantial damages, but refused to grant the injunction, and awarded damages only. Held, that the plaintiff's legal right and its infringement and threatened further infringement to a material extent being established, and there being no circumstances on which he ought to be deprived of his *prima facie* right, he was entitled to an injunction restraining the defendant from continuing to build higher than the old building, and to an inquiry as to the damages sustained by reason of the building already erected beyond that height. Whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, *quære*. (*Martin v. Price*.) 202

LIVERPOOL COURT OF PASSAGE.

Practice—Appeal—Court of Appeal—Liverpool Court of Passage Act 1893.—Under sect. 10 of the Liverpool Court of Passage Act 1893, an appeal from a decision of that court lies to the Court of Appeal, not to the Queen's Bench Division. Upon a motion in the Court of Appeal for a new trial of an action tried in the Liverpool Court of Passage, the judge of that court should supply the Court of Appeal with a note of the evidence. (*Anderson v. Dean*.) 830

LOCAL GOVERNMENT.

Clerk to the justices in non-quarter sessions borough, with a separate commission of the peace—Payment of clerk's salary.—The city of T. is a non-quarter sessions borough, with a population of over 10,000, and having a separate commission of the peace and a justices' clerk. Held, that the clerk's salary is payable by the county council of C. by virtue of sect. 84 of the Local Government Act 1888, which is not restricted in its application, but affects alike petty sessional divisions in counties and boroughs which have a separate commission of the peace, but no separate court of quarter sessions. (*County Council of Cornwall v. Town Council of Truro*.) 354

Liability for expenses incurred for use of fire-engine—"Owner of lands and buildings"—Town Police Clauses Act 1847.—Sect. 33 of 10 & 11 Vict. c. 89, enacts that, where fire-engines and their appurtenances and the firemen are sent beyond the limits of the special Act for extinguishing a fire, the owner of the lands and buildings where such fire shall happen shall defray the expense incurred. Sect. 171 of the Public Health Act 1875 incorporates the provisions of 10 & 11 Vict. c. 89, with respect to fires with that Act; and sect. 4 of the same Act defines the word "owner" as the person receiving the rack-rent of the lands or premises in connection with which the word is used. Held, that the definition of "owner" in sect. 4 of the Public Health Act 1875 applies to the "owner of lands and buildings" in sect. 33 of 10 & 11 Vict. c. 89, and therefore that a yearly tenant of lands and buildings outside the limits of the urban district to which a fire-engine has been sent is not liable for the expenses incurred. (*Sale v. Phillips*.) 559

Lighting and watching rate—Coal mines—Property other than land rateable to the relief of the poor.—Coal mines are property (other than land) rateable to the relief of the poor under the Poor Relief Act 1601, and are therefore liable to pay the higher rate imposed on such property by the Lighting and Watching Act 1833. (*Thursby and another,*

apps., v. The Churchwardens and Overseers of the Parish of Briercliffe with Extwistle in the County of Lancaster, resps.) 618

Metropolis Management Acts—Repair of carriage-road—Expenditure by district board on "necessary works of repair"—Apportionment and recovery of expenses—Power of local authority to decide as to necessity of works—Metropolis Management Amendment Act 1890.—Under sect. 3 of the Metropolis Management Amendment Act 1890 (which empowers any vestry or district board to execute any necessary works of repair upon any carriage-road within their parish or district, and to apportion and recover the expenses from the owners of the houses and land abutting on such road) it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses. (*Stroud v. The Wandsworth District Board of Works*.) 190.

Sewers made by landowner for his own profit—Voluntary sewer rate.—A landowner, intending to compensate himself for his outlay, constructed sewers at his own expense for the purpose of draining a town, of which he was the principal owner. He, in fact, demanded and received for many years a voluntary sewer rate from those who made use of his sewers, whether his own tenants or not. Held, that the sewers were made by the landowner "for his own profit," within the meaning of sect. 13, sub-sect. (1) of the Public Health Act 1875, and did not therefore vest in the local board for the district. (*The Local Board for the District of Minehead v. Luttrell*.) 446

LUNATIC.

Scheme of maintenance—Allowance to wife—Execution creditor—Receiver—Priority.—Under sect. 117 of the Lunacy Act 1890 the court has no power to sanction an allowance for the future maintenance of a lunatic's wife out of his property in priority to the payment of his debts. On the 16th March creditors of a lunatic recovered judgment against him in an action for their debt. On the following day a writ of *fi. fa.* was lodged with the sheriff, and he on the 19th March took possession of the lunatic's goods. On the same day the lunatic's wife was appointed interim receiver of his property until a summons taken out by her on the 12th March for the sanction of a scheme of maintenance had been dealt with. The sheriff withdrew. Held, that the property of the lunatic was by reason of the appointment of the receiver placed under the control of the court; and that the creditors could only be allowed to take it subject to proper provisions being made for his maintenance; but that the order for maintenance would be made so as not to affect any priority which the creditors might have obtained by lodging their writ with the sheriff; and that no variation would be made in the scheme of maintenance without notice to them. (*Re Edward Winkle, jun.*) 710

MARKET.

Statutory market—Private sale-yard—Disturbance—Injunction.—By virtue of a consolidating statute of 1883 the corporation of Birmingham had the sole right to establish, and had, in fact, a market for pigs. Under sect. 90 of this Act penalties were imposed upon any person selling, or exposing for sale within the borough, any animals or articles (in respect of which tolls were authorised to be taken) "except in some market or fair lawfully authorised, or in his own dwelling-place, shop, or place of business, . . . or on any farm or land in his occupation." The defendants were an association of six individuals, who had set up within the borough a sale-yard, or private market for pigs, to which the public had access during market hours, and at which the pigs of anyone might be sold. In this sale-yard there were common ways,

SUBJECTS OF CASES.

and a common room provided for the frequenters of the market. All the sales of pigs were, however, effected through the individual members of the association, to whom alone the various stalls were let as yearly tenants; and a charge of 2d. had to be paid by them to the association for every pig sold, whether on the premises or not. There was evidence that sales took place on portions of the yard not let to the individual defendants. Held, that what the defendants were doing as an association and as individuals was not within the exceptions in the Act of 1883, but amounted to a disturbance of the market rights of the plaintiffs, which must be restrained by an injunction. (*The Mayor, Aldermen, and Citizens of the City of Birmingham v. Foster.*)page 371

MARRIAGE SETTLEMENT.

Wife's property—Ultimate trust for next of kin—Die "without having been married"—Child of marriage.—By a marriage settlement certain property belonging to the wife was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default to pay the income thereof to her for life, and after her death for such persons as she should by deed or will appoint, and, subject to any such appointment, in trust for the persons who under the statutes for the distribution of intestates' estates would on her decease have been entitled thereto if she had died possessed thereof intestate and "without having been married." The wife died without having made any appointment, leaving one child of the marriage. Held, that the words "without having been married" were satisfied by confining them to the exclusion of the husband, and that the trust funds went to the child. (*Stoddart v. Savile.*) 532

MARRIED WOMAN.

Contract—Separate property—General power of appointment—Debts—Liabilities—Assets.—A testatrix married in 1879, and since Jan. 1, 1883, had contracted engagements with certain creditors. She had a life interest under her father's will, with a general power of appointment by will, and with that exception she had no separate estate at the time she contracted the engagements with her creditors. She executed the general power of appointment by her will, and died, leaving her husband her surviving. The creditors, in the administration of testatrix's estate, claimed to have the debts paid out of the property which she had appointed. Held, that sub-sects. 3 and 4 of sect. 1 of the Married Women's Property Act 1882 ought to be read into sect. 4, and that the proper reading of sect. 4 was that, when the will of a married woman made in exercise of a general power had come into operation by the death of the donee of the power, thenceforward the property so appointed became liable to her debts and liabilities in the same manner as if it had been separate estate at the time she entered into the contracts. Held, therefore, that the appointed property must be treated as assets of the testatrix just as if it had been separate estate at the time she contracted the debts in question. (*Re Ann; Wilson v. Ann.*) 273

Judgment against—Execution—Separate estate with restraint on anticipation—Income not due at date of judgment.—A judgment against a married woman cannot be enforced against any income of her separate estate, as to which she is restrained from anticipation, which is not due at the date of the judgment; and, therefore, an order for a receiver of income of such separate estate, which becomes due after the date of the judgment, cannot be made by way of equitable execution, though the income is due and in arrear when the order is applied for. (*Hood-Barrs v. Cathcart* (No. 1.) 862

Judgment—Separate property subject to restraint on anticipation—Execution—Receiver—Arrears

of income accrued due after the date of the judgment.—Where judgment has been obtained against a married woman who has separate estate subject to a restraint on anticipation, the judgment creditor cannot obtain an appointment of a receiver of arrears of her income from such separate estate which accrued due after the date of the judgment. (*Hood-Barrs v. Cathcart* (No. 2) page 865

Restraint on anticipation—Sequestration—Arrears of income—Married Women's Property Act 1882.—By an order made by North, J. on the 15th Jan. 1894, as varied by the Court of Appeal, leave was given to H. to issue a writ of sequestration against C., a married woman, limited to her separate estate not subject to any restraint on anticipation, to enforce payment of 115*l.*, the amount of costs of proceedings taken by her, which she had been ordered to pay by three previous orders. C. was entitled, under her marriage settlement, to a life interest in real estate for her separate use, without power of anticipation, settled upon her directly, without the intervention of a trustee. A writ of sequestration, limited as above, was issued on the 8th Feb. The money was not paid. On the 29th March H. moved for an injunction restraining C. from receiving the rents due on the 25th, and for an order that her agent, who had already received a portion of those rents, should pay the moneys he had received to the sequestrator, or, in the alternative, for leave to issue a fresh writ of sequestration: Held, that H. was only entitled to have the costs paid out of such separate estate of C. as was at the date of the order for payment free from restraint on anticipation, not out of that which might have become free from such restraint at the time of the issue or the enforcing of a writ of sequestration. The sequestrators were therefore not entitled to the rents which had become due on the 25th March, nor was H. entitled to a fresh order for sequestration. (*Re Lumley; Hood-Barrs v. Cathcart.*)... .. 622

Reversionary interest in personality—Will executed before and codicil executed after Act—Disposition by deed acknowledged—Malins' Act (20 & 21 Vict. c. 57).—A testatrix, by her will made before the 31st Dec. 1857, the date of the coming into operation of Malins' Act (20 & 21 Vict. c. 57), bequeathed her residuary personal estate, after payment of the legacies thereinbefore bequeathed, or which she might bequeath by any codicil, upon certain trusts under which H., a married woman, took a reversionary interest therein. After the 31st Dec. 1857 the testatrix made a codicil, which was expressed to be a codicil to her last will and testament, and by such codicil she bequeathed additional pecuniary legacies to other persons. H., by a deed, duly acknowledged in accordance with the Act, purported to assign her reversionary interest under the will to a purchaser. Held, that H. did not become entitled to the reversionary interest "under any instrument made after the 31st Dec. 1857," within the meaning of the Act; and that consequently the deed of assignment executed by her was not effectual to pass the property. (*Re Elcom; Re Hamilton; Layborn v. Groves-Wright.*)... .. 54

MASTER AND SERVANT.

Common employment—Negligence of seaman employed to assist in unloading ship—Liability of owner.—The appellants contracted with a stevedore to unload their ship, and the contract provided that the owners should "provide for each hatch being discharged, one winch-driver, and one hatchman." The respondent, who was one of the stevedore's labourers, was injured during the unloading by the negligence of one of the winchmen, who was one of the crew of the ship. Held, that the winchman and the respondent were not in a common employment, and that the appellants were liable for the negligence of the winchman. (*Union Steamship Company v. Claridge.*) 177

Scope of servant's authority—Duty of concert-hall keeper—Care of musical instrument—Evidence

SUBJECTS OF CASES.

of negligence—Bailment—Bare licensees.—A concert-hall having been hired for an evening performance, a rehearsal was held there in the afternoon without opposition from the proprietors, or the keeper of the hall. After the rehearsal, one of the performers left his double-bass fiddle in an ante-room, in such a position that when the hall-keeper, whose duty it was to turn on the gas, came to turn on the gas in the ante-room, it was impossible for him to reach the tap without first moving the fiddle. Immediately after he had moved it, the fiddle fell, and was badly damaged. Held, that there was no contract of bailment between the parties; that the care of musical instruments was outside the scope of the hall-keeper's authority, and that there was no evidence that he had been guilty of any negligence in the course of his employment. (*Newwirth v. Over Darwen Industrial Co-operative Society.*) ...page 374

MERGER.

Joint contract—Cheque given by one joint contractor—Judgment on cheque—Merger of right of action on the joint contract.—Judgment obtained on a cheque given by one of two joint guarantors for the debt due under the joint guarantee does not operate as a merger of the cause of action on the guarantee against the other guarantor. (*Wegg-Prosser v. Evans.*) ... 664

METROPOLIS MANAGEMENT ACTS.

"Building used either wholly or in part for the purposes of trade or manufacture"—Party wall—Metropolitan Building Act 1855.—Sect. 27, rule 4, of the Metropolitan Building Act 1855, which provides that every warehouse or other building used either wholly or in part for the purposes of trade or manufacture, containing more than 216,000 cubic feet, shall be divided by party walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet, is not confined to warehouses and buildings *ejusdem generis* with warehouses. The appellants erected a building consisting of eight floors. The basement was intended to be used for the packing of goods, the ground floor as a retail shop, and the floors above for dining-rooms and kitchens. The two upper storeys were supported by a concrete floor 9½ inches thick, with four openings in it for the purposes of lifts. The cubical contents of the whole building were 239,456 feet, including a staircase which was 16,836 cubic feet, and the cubical contents above the concrete floor were 62,087 feet. Held, that the building was a building used partly for the purposes of trade, and that the provisions of rule 4 of sect. 27 of the Metropolitan Building Act 1855 had not been complied with. (*Holland and another v. Wallen.*) ... 376

istrict surveyor's requisition—Non-compliance—Building completed and left before magistrate's order requiring compliance—Order of magistrate made in ignorance of the facts—Refusal to enforce.—The respondent, while engaged in erecting a building, was served with a notice under sect. 45 of the Metropolitan Buildings Act 1855 requiring him to do certain works specified by the district surveyor. He did not comply. Subsequently a summons was taken out against him, and an order was made by the magistrate under sect. 46, requiring him to do the works. At the time that order was made the respondent had in fact completed and left the building, but the magistrate was not aware of it until, on the further non-compliance of the respondent, he was asked to impose penalties for such non-compliance. Had he known it at the time he would have refused to make the order; learning it now, he refused to enforce it. Held, that the magistrate's decision was right. That, as the respondent was not, at the time the order was made, engaged in erecting the building, there was no jurisdiction to make the order; and even assuming that there had been jurisdiction, the magistrate exercised a

sound discretion in refusing to enforce an order made in ignorance of facts which rendered it impossible that it could be obeyed. (*Wallen, app., v. Lister, resp.*)page 343

General line of buildings—Erection of building beyond general line—Work begun before general line existed—Metropolis Local Management Act 1862.—The Metropolis Local Management Act 1862, by sect. 75, provides that "no building, structure, or erection shall, without the consent of the [London County Council] be erected beyond the general line of buildings in any street in which the same is situate; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent," beyond the general line of buildings, a magistrate may order it to be demolished. The owner of land, adjoining a street where there was no general line of buildings, built thereon the footings of the external walls of two sides of a shop, and upon the footings on the side adjoining the street he built a wall twelve feet high. A general line of buildings, ten feet further back than the wall from the street, then came into existence. The owner then built the shop upon the footings and wall in the way in which he had always intended to build it. A magistrate ordered him to demolish so much of the shop as he had built since the general line of buildings came into existence. Held, that the owner had erected a building or structure beyond the general line of buildings, because the footings and wall built before there was a general line of buildings were not a building or structure within the meaning of the Act; and that the order of the magistrate was rightly made. (*Wendon, app., v. The London County Council, resps.*) 410

Obstruction of streets—Coastermongers—Statute—Conflicting provisions—Repeal by implication.—The plaintiff, a coastermonger, sued the defendants, who were the street authority of the district, for damages for seizing his truck. Notice had been given to the plaintiff to remove his truck, as it caused an obstruction to the traffic, and on his refusal to do so it was seized. The defendants purported to act under the powers conferred by sect. 65 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.). At the time when the truck was seized the plaintiff was plying his trade in accordance with the police regulations relating to coastermongers. Held, that, under the Metropolitan Streets Act of 1867, coastermongers were at liberty to ply their trade in the way in which they invariably did carry it on—viz., with truck and barrows—so long as they conformed to the police regulations, and could not be interfered with under Michael Angelo Taylor's Act; and that to that extent, and to that extent only, sect. 65 of Michael Angelo Taylor's Act was not impliedly repealed; but that, if they violated those regulations, they could be proceeded against under that Act, or the Acts of 1867. (*Keep v. The Vestry of St. Mary, Newington.*) 509

Paving rate—Owners of land—Land consecrated for purposes of Christian burial.—A cemetery company bought some land, and a part of this land was consecrated for purposes of burial. By 6 & 7 Will. 4, c. 136, the company are prohibited from selling or disposing of the land so consecrated. On a claim being made on the company for contribution to a paving rate in respect of the land they had bought, they resisted the claim on the ground that so much of the land as had been consecrated was *extra commercium*, and that they were not the owners of it within the meaning of sect. 250 of 18 & 19 Vict. c. 120. Held, that the company were the owners of the land within the meaning of the section, and were therefore liable to contribute to the rate. (*Vestry of St. Giles, Camberwell, v. London Cemetery Company.*) 734

MORTGAGE.

Consolidation—Several properties mortgaged by one mortgagor to different mortgagees—Equity of redemption in one of the properties assigned

SUBJECTS OF CASES.

—Several mortgages subsequently united in one person—Equity of redemption of the one property afterwards vests in a person who is a puisne mortgagee of all the properties. (*Minter v. Carr.*)page 583

Consolidation—Several properties mortgaged by one mortgagor to different mortgagees—All the equities of redemption subsequently conveyed to one assignee—All the mortgages ultimately united by transfer in one person.—The owner of several properties mortgaged them to different mortgagees for distinct sums. The mortgagor afterwards, in 1868, mortgaged all the properties by one deed to one mortgagee, the plaintiff's predecessor in title, subject, as to the different properties affected, to the prior mortgages thereon, some of which at that time still remained vested in different mortgagees. In 1885 the mortgage of 1868 was transferred to the plaintiff. All the prior mortgages were ultimately transferred to, or became vested in, the defendants before the plaintiff brought this action for redemption of some of the properties included in the mortgage of 1868 without the rest. The defendants claimed to consolidate all the prior mortgages as against the plaintiff. Held, that, if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, or one of his securities without the other, and that the right to consolidate was enforceable as a rule, not only against the original mortgagor, but against his assignee of the equity of redemption; and that, applying these principles to the present case, if the original mortgagor had come to redeem the defendants after all the mortgages had become vested in them, he could not have redeemed one of their securities without redeeming the others; and the plaintiff, being his assignee by one deed of all the properties, subject to the defendants' mortgages, was in no better position. (*Pledge v. Carr.*) 586

Prior charter—Sale by mortgagees—Right of purchaser with notice of ship's engagements—Delivery up of certificate of registry—Merchant Shipping Act 1854, s. 50.—A shipowner agreed with the defendants to provide a ship (then building) which should be run and worked by them in their line under their control and discretion. The agreement was to continue in force for five years, and was to be binding on the owner's executors and administrators. The ship was completed and registered on the 3rd Jan. 1891. On the 5th Jan. in the same year she was mortgaged by the owner to a company to secure an account current. The mortgagees had no notice of the engagements subsisting with the defendants. On the 30th Nov. 1892 the owner gave a second mortgage on the ship to the plaintiff to secure an account current. The plaintiff was aware of the existence of the contract with the defendants, and inferred that the terms were onerous. On the 17th Oct. 1893 the owner died, and the first mortgagees took possession of the ship, and transferred her by a bill of sale to the plaintiff. At the time of the sale the plaintiff knew the terms of the agreement under which the ship was being worked in the defendants' line. Subsequently the plaintiff entered into a contract to sell the ship to a firm which knew the nature of the contract with the defendants. The plaintiff moved for an order that the defendants should deliver up to him the certificate of registry of the ship. It was agreed to turn the motion into the trial of the action without pleadings, and that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in a manner contrary to the provisions of the agreement. Held, that the plaintiff was entitled to have the certificate of registry delivered up to him. The defendants' application for an injunction refused upon the ground that the first mortgagees, who had no notice of the ship's engagements, were entitled to realise their security by selling the ship free of her engage-

ments, and that the plaintiff, although he had notice of her engagements, was entitled to the same rights as were possessed by his vendors, the first mortgagees. (*The Celtic King.*)page 562

Priorities—Charge of annuity—Receivership deed—Notice.—To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used, but it is sufficient if the court can gather from the instrument an intention by the parties that the property referred to should constitute a security. By virtue of a marriage settlement of the 7th March 1875, C. C. was entitled to an annuity of 300l., charged upon the life estate of C. in certain family property, and secured by a term vested in trustees. By a receivership deed of even date with and reciting the settlement, C. covenanted to pay the annuity to C. C. for her sole and separate use. And it was witnessed that C. appointed W. as receiver to receive the rents of the property in the name of C. during his life, and thereout, after paying all outgoings, to pay the annuity of 300l. The deed also contained a covenant by C. not to revoke the appointment of the receiver during the life of C. C. In 1880 the defendant institution became mortgagees of the life estate of C. They had notice of the receivership deed, but declined to pay the annuity to C. C., alleging that no charge was created by the deed. Held, that by the receivership deed the annuity of C. C. was in equity charged upon the life estate of C., and had priority over the mortgage of the defendants. (*Craddock v. The Scottish Provident Institution.*) 718

Trade machinery—Fixtures—Bill of sale—Bills of Sale Act 1878, ss. 4, 5.—S. by deed mortgaged to the defendants certain hereditaments, "together with the fixed and movable plant, machinery, and fixtures . . . now or hereafter fixed to or placed upon or used in or about the said hereditaments" to secure certain advances, and covenanted to keep the buildings which should from time to time be standing upon the hereditaments thereby assured, and "the said plant and machinery and fixtures, &c., in good repair, and insured against loss or damage by fire." The deed was not registered as a bill of sale. S. subsequently executed a deed of arrangement for the benefit of his creditors, of which the plaintiff was the trustee. The defendants, acting under their power of sale, had advertised the property and the fixed machinery for sale. On a motion by the plaintiff for an injunction to restrain the defendants from selling the fixed machinery: Held, upon the construction of the mortgage deed, that the fixtures had been assigned as chattels, and not as incident to land; and that the deed was therefore void as regards the fixtures for want of registration. (*Small v. National Provincial Bank of England.*) 492

MORTMAIN.

Corporation bond—Charge on rents of real estate—Borough fund—Pure personality.—H. P. by will gave her residuary estate to charities. Part of her residue consisted of bonds of the Leeds Corporation Debenture Stock. This stock was by the Act under which it was created charged on the borough fund account and also on the revenues of all real estates belonging to the corporation. Held, that, as the holder of the stock could not in any case enforce his charge against the land, but could only appoint a receiver to receive the rents after they were due, the bonds were pure personality, and passed to the charities. (*Re Pickard; Elmsley v. Mitchell.*) 395

MUNICIPAL CORPORATION.

Bye-law—Validity—Reasonableness—Noise in the streets—Annoyance of inhabitants—Complaint by only one inhabitant.—A municipal corporation passed a bye-law by which any person making any violent outcry, noise, or disturbance in any street to the annoyance of the inhabitants of the borough should be liable to a penalty. An in-

SUBJECTS OF CASES.

habitant of the borough complained to a police constable of a boy who was making an incessant and violent outcry in the street by shouting the name of a newspaper. The constable summoned the boy before the justices, who refused to convict him upon the ground that there was no proof that more than one inhabitant was annoyed by the shouting of the boy, and that therefore the case did not fall within the bye-law. Held, that the justices were wrong, as it was sufficient to prove that one inhabitant had been annoyed. (*Innes v. Newman*.)page 689

Resolution by—*Ultra vires*—Borough fund—Mis-application—Municipal Corporations Act 1882—Power under local Act to subscribe capital sum for site and building of a college—Sum given by way of interest on capital sum instead.—A municipal corporation were empowered by their local Act of Parliament to contribute towards the funds of a college to be situated in their borough any sum or sums not exceeding 10,000*l.*, and to appropriate the whole or any portion of such sum or sums to the acquisition of a site for the college, and, if a suitable site could be obtained for less than that amount, they were empowered to contribute the balance, or any part, towards the cost of erecting college buildings on the site. This was not done, but the college rented some existing buildings for the purposes of their institution. A sum of 400*l.*, intended to represent interest on the 10,000*l.*, was voted by the council in 1892 as additional mayor's salary for that year, and was paid out of the borough fund to the credit of the college, and another sum of 350*l.* (also intended to represent interest on the 10,000*l.*) was in 1893 recommended by the finance committee for payment to the college, the recommendation having been since confirmed by the corporation, but the money not having been yet paid over. A sum of 650*l.* was also voted by the council in 1893 as an increase of the mayor's salary, but intended to be spent in celebrating the marriage of H.R.H. the Duke of York, and actually spent chiefly in providing teas and commemorative medals for children attending schools within the borough. The plaintiffs said the payments practically came out of the rates, the borough fund being insufficient by itself for the purposes for which it was formed. The action was brought at the relation of certain burgesses and ratepayers of the borough against the mayor and corporation, for a declaration that such an application of money out of the borough fund was unlawful, *ultra vires*, and a breach of trust, and for an injunction restraining the defendants from so applying it. Held, that the corporation was not entitled to make a colourable addition to the salary of the mayor in order that the addition might be applied in making payments indirectly which could not lawfully be made directly; that there was nothing in their local Act which authorised payment of interest on the 10,000*l.* before that sum was paid; that the sums paid as interest, not being payments "for the public benefit of the inhabitants and improvement of the borough," within the meaning of sect. 143 of the Municipal Corporations Act 1882, were not authorised by that section, which, moreover, where there was no surplus of the borough fund, could not authorise even payments which did come within its meaning; but that the corporation were entitled to make a reasonable addition to the mayor's salary, where there was an anticipation that, in consequence of some event of national importance, his expenditure as mayor in festivities and so forth might be increased; and, that, accordingly, any resolution passed *bonâ fide*, increasing his salary in such a case, could not be impeached. (*Attorney-General v. Mayor of Cardiff*.) 591

NEGLIGENCE.

Dangerous operation—Liability for act of contractor—Contract to fell timber in November and burn underwood "about February." A person

who authorises another to perform an operation on his land, which is necessarily attended with danger to his neighbours, is bound not only to stipulate that all reasonable precautions should be taken to prevent damage, but to see that they are observed. The respondents agreed with a contractor in July 1890 to clear some forest land belonging to them by felling the timber and burning the underwood. The contractor undertook to "complete the felling by the 30th Nov. 1890, and burn in a favourable time about February next." The contractor was to take all responsibility, and make good all damage. He sublet the contract, and the sub-contractor completed the felling in November, but burnt the underwood on the 23rd Dec., when the fire spread to adjacent land of the appellant, and damaged his crops and fences. Held, that, even assuming that the contractor had broken the terms of the contract by burning as early as December, the respondents were liable. (*Black v. Christchurch Finance Co.*) page 77

NUISANCE.

Adjoining owners—Trees overhanging neighbour's land—Abatement of nuisance—Removal of branches—No obligation on part of owner of land to give notice to owner of trees—Injunction—Damages.—The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land; and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface. (*Lemmon v. Webb*.) 712

Electric lighting—Freeholder—Leaseholder—Noise and vibration—Structural damage—Injunction—Damages.—Two actions were brought by the freeholders and the leaseholder of a public-house respectively against an electric lighting company for an injunction to restrain the defendants from the use of any dynamo or other engine or machinery, so as by vibration or otherwise to injure the plaintiffs' premises, and as to the plaintiff, the leaseholder, from causing a nuisance by vibration or noise, and for damages. Held, that power given by Act of Parliament to do a particular thing does not justify the undertakers so to do that thing as to commit a nuisance unless by express language or by necessary implication; unless Parliament has so declared, the undertakers remain liable. As to sub-sect. 2 of sect. 12 of the Electric Lighting Act 1882, the express allowance to break up streets goes to show that other nuisances are not allowed. Sect. 17 of the same Act refers to the execution of works, not to the use of the works when executed. Held, on the evidence, that the defendants were guilty of a nuisance, and had damaged the plaintiffs' premises so as to make them less comfortable, so as to injure the structure, and so as to decrease the value. As to the leaseholder, damages were a fair compensation, and he would have the costs of his action. As to the freeholders, if the defendants by withdrawing the water had withdrawn the support, the freeholders had a right of action, and there must be an inquiry as to damages; but so far as the freeholders sought an injunction their action must be dismissed with costs. (*Meux Brewery Company Limited v. City of London Electric Lighting Company Limited; Shelfer v. The Same*.) 762

PARLIAMENT.

Petition to—Refusal by member to present—Action against member of Parliament—Statement of claim—F frivolous and vexatious.—Plaintiff, a voter in defendant's constituency, had on two

SUBJECTS OF CASES.

occasions sent petitions to defendant (a member of Parliament) to present to the House of Commons. A committee on public petitions had returned them to defendant. Plaintiff sent a third petition to defendant to present, contending it differed from the other two. Defendant refused to present the petition. Plaintiff brought an action against the defendant for having refused to present the petition, and claimed damages. Held, that the action was frivolous and vexatious. The right to petition Parliament does not imply a right of action for damages against a member for refusing to present the petition. (*Chaffers v. Goldsmid.*)page 24

Registration of voters—Nature of qualification—Dwelling-house—"Houses in succession"—Distinct qualification—Power to amend.—The nature of the qualification of a Parliamentary and municipal voter to be placed upon the occupiers list was described in the notice of claim to be "dwelling-houses in succession," and the description of the qualifying property in the fourth column of the list as "Oliver-terrace, and 11, Moorgate-street." The claimant had occupied 11, Moorgate-street, as an inhabitant householder during the whole of the qualifying period, and had not occupied Oliver-terrace during any part of that period. Held, that, having regard to the dicta of the Court of Appeal in *Foskett v. Kaufman* (54 L. T. Rep. N. S. 64; 16 Q. B. D. v. 279), it must be taken that the revising barrister had no power under sect. 28 of 41 & 42 Vict. c. 26, to amend the claim by substituting the word "dwelling-house" for "houses in succession," and by striking out Oliver-terrace from the fourth column. The Court intimated, however, that they dissented from the dicta in the Court of Appeal in *Foskett v. Kaufman*, and adhered to the construction placed upon the statute by this court in *Blosse v. Wheatley* (53 L. T. Rep. N. S. 49; 14 Q. B. Div. 504) (*Mann v. Johnson; Hurcum v. Town Clerk of West Ham.*) 29

PARTITION.

Party wall—Tenants in common—Trespass injurious to reversion—Injunction—Damages.—An action was brought by the owners and tenants of a mansion at Hyde Park Gate, against the owners and tenants of the adjoining mansion, for partition of the wall which separated the gardens in the rear of the two mansions, and of which the plaintiffs and defendants were tenants in common in equal shares. The plaintiff owners were rebuilding and enlarging their mansion, and, in so doing, had pulled down a portion of the old wall and built in its place a thicker wall to form the flank wall of their new building in such a manner that the foundations and footings of the thicker wall extended into the defendants' premises, beyond the site of the old wall, and thus had trespassed on the defendant's property. The plaintiffs claimed partition on the ground that it was expedient and desirable. The defendant owners opposed the claim for partition, and counter-claimed for an injunction to restrain the plaintiffs from permitting the new foundations and footings to continue upon the defendant's land, and for damages for the wrongful acts of the plaintiffs, but did not make their own tenants parties to their counter-claim. Held, that the plaintiffs were entitled as of right to partition, that the foundations and footings placed on the defendants' ground belonged to them, and could be removed by them, so that no injunction should be granted; but that the trespass being of a permanent nature affecting the reversion, the defendant owners were entitled to sue for and obtain damages in respect of it, although their lessees did not join in the claim. (*Mayfair Property Company v. Johnson.*) 485

PARTNERSHIP.

Bankers—Current account—Death of one partner—Transfer of part of balance to deposit account—Liability of estate of deceased partner—Novation. A. and B. were in partnership as bankers, and C.

had a current account with them. A. died, and C., knowing of his death, went to the bank and intimated his intention to draw 500*l.*, but at the suggestion of B. he decided to leave it on deposit, with interest at 3½ per cent., and subject to twenty-one days' notice of withdrawal. A deposit receipt was given to C., but he did not draw a cheque for the amount, which was merely transferred from his current account to the deposit account. The bank afterwards stopped payment, and B. became bankrupt. Held, that there was a new contract, and therefore the liability of A. was discharged as to the 500*l.*, and C. was not entitled to prove against his estate in respect of that sum. (*Re Head; Head v. Head* (No. 2.) page 608

Business carried on for benefit of firm by surviving partner at a loss—Remuneration for services in carrying it on—Loss of capital.—Two brothers carried on a business in partnership, the elder supplying the capital, and the younger managing the business, but having no capital therein. The elder brother died, and with the approval of his executors, the surviving brother continued to carry on the business with a view to its sale as a going concern. The business, however, proved unsalable; and consequently at the end of nearly two years the survivor, who had been carrying it on at a loss, discontinued to do so, and the assets were realised by the executors of the elder brother, but did not produce sufficient to pay the capital supplied by him. On a summons being taken out by the executors of the elder brother for the determination of the questions how the loss was to borne, and whether the survivor was entitled to any remuneration for carrying on the business at a loss with a view to its sale as a going concern: Held, that the loss of the capital must be borne by the estate of the elder brother who advanced it, and that the survivor was not entitled to any remuneration for his services in carrying on the business, since he had earned no profits thereby. (*Re Aldridge; Aldridge v. Aldridge*) 724

Dissolution—Insanity—Possibility of recovery.—In an action for dissolution of partnership against a lunatic not so found, the Court refused to decree an immediate dissolution, the evidence showing that there was a possibility of the defendant's ultimate recovery, but directed the cause to stand over till after the Long Vacation, in order that a better conclusion might then be arrived at. (*J. — v. S. —* (No. 1.) 757

Interim injunction against interference in business—Insanity of partner—Jurisdiction.—The plaintiff in an action for dissolution of partnership against the defendant, a lunatic, not so found (which action had stood over that a better conclusion as to the defendant's prospects of recovering might be arrived at), moved to continue till trial or further order an interim injunction restraining the defendant from dealing with the partnership assets, or interfering with the business. The Court made the order asked for. (*J. — v. S. —* No. 2.) 758

Tenants in common—Manufacturing business—Freehold houses—Partnership Act 1890.—A fan manufacturer, by his will, gave his residuary real and personal estate to his two sons in equal shares as tenants in common. The gift included his three freehold houses, and the goodwill, stock-in-trade, and machinery of the business carried on by him at two of his freehold houses. The two sons continued to carry on the business under the same style and at the same two houses for their own profit without entering into any agreement for a partnership or even mentioning it. No accounts were kept between them and no annual balance-sheet was prepared, but once a week, and sometimes oftener, each drew out the same sum for his own use, and there was no other division of profits. They obtained money by mortgaging the third freehold house, which was let to a tenant, and employed the money in enlarging their workshops at the two houses where the business was carried on. Subsequently they mortgaged the two last-mentioned houses to provide new plant and machi-

SUBJECTS OF CASES.

nery. The rent of the third freehold house was from time to time, as received from the tenant, divided equally between them. Each of them paid succession duty on his share of the freehold houses devised to them by their father. One died intestate, without issue, leaving a widow and a sister, besides his brother who became heir-at-law, and who, with the sister, constituted the next of kin. Held, that there was a partnership between the two sons with respect to the business, but that such partnership did not include the three freehold houses or any of them, and that the moiety of the deceased son in the three freehold houses vested, upon his death, legally and beneficially, in his brother as heir-at-law of the deceased, subject to any rights of the widow therein under the Intestates Estates Act 1890. (*Davis v. Davis.*)page 285

PATENTS, DESIGNS, AND TRADE MARKS.

Patent—Revocation—Petition—Revocation order consented to on special grounds—Costs.—On a petition by the Pharmaceutical Society, with the leave of the Attorney-General, for revocation of a patent for a medicinal compound on certain grounds including absence of novelty, the respondent consented to an order of revocation, but solely for want of novelty. Stirling, J. made an order for revocation with costs of the petition. (*Re Rendell's Patent.*) 756

Practice—Patent—Petition for revocation of Service out of jurisdiction.—A petition for revocation of a patent was served on two of three patentees, the third being abroad. The petition was ordered to be put into the witness list, but not to come on for hearing without leave, unless the absent patentee appeared by counsel on notice to him of the presentation of the petition, following *Re King and Company Limited* (66 L. T. Rep. 489; (1892) 2 Ch. 462). (*Re Kay's Patent.*) 756

Patent—Revocation of patent—Petition—Mode of trial—Foreigner—Security for costs.—In the case of a petition for the revocation of a patent, the patentee was out of the jurisdiction, but on his attention being called to the proceedings, he issued a summons for further and better particulars of objections, and for directions that the petition should be heard on oral evidence. The petitioner issued a summons that the patentee be ordered to give security for costs. An order was made on the patentee's summons in chambers, for delivery of further and better particulars of objections, and the rest of the summons was adjourned into court, as was also the petitioner's summons. Held, that the patentee's summons for directions as to the mode of trial of the petition was unnecessary, and he must pay the costs. Held, on the petitioner's summons, that the principle upon which the court acted in requiring security for costs was, that a person resident out of the jurisdiction is not allowed under ordinary circumstances to institute proceedings in the Supreme Court here without reasonably satisfying the opposite party that if the application fails there will be an opportunity of recovering the costs of it; here the patentee was brought before the court as a defendant to defend his right; he had made no application to the court whatever, and could not be ordered to give security for costs. (*Re Miller's Patent.*) ... 270

Trade mark—Mark resembling another already on register—"Calculated to deceive"—"Person aggrieved"—Expunging—User.—B. and Co. carried on business in London as dealers in window-glass, which they purchased in Belgium and shipped to Australia and other colonies. In 1876 they registered as a trade mark the device of a star, which they had used in connection with their glass since 1875, and their glass was known in the trade by the designation of "Star Brand." In 1885 a Belgian glass manufacturing company registered in Belgium, as a trade mark for glass, the device of a red star, which they had used there since 1880. In 1890 they registered in England, as a

trade mark for window-glass, the words "Red Star Brand." They consigned large quantities of glass to England in cases marked with a red star, but did not deal directly with the Colonies. B. and Co., having discovered that glass was being sold in New Zealand under the description of "Red Star Brand," applied to expunge the Belgian company's mark from the register. Held, that, inasmuch as B. and Co. had the right, under sect. 67 of the Patents, &c. Act 1883, to use their mark in whatever colour they deemed proper, the mere fact that the Belgian company's mark consisted of words instead of a device did not prevent it from being calculated to deceive; and that therefore B. and Co. were "persons aggrieved" within the meaning of sect. 90 of the Act, and were entitled to have the mark expunged from the register. (*Re The Trade Mark of La Société Anonyme des Verrières de l'Etoile, Marchienne, Belgium.*)page 295

Trade mark—Rectification of register—Descriptive word—Invented word—Persons aggrieved—Delay.—The applicants had since the year 1869 manufactured, and still manufactured, a preparation or dressing for softening harness, &c. and all kinds of leather, called "Molliscorium." This name they in 1876 registered for this preparation in Class 50 as an old mark. The respondent in 1886 registered in the same class, as a new mark, a label, with the distinctive word "Emolliolorum," for a fluid preparation for rendering harness, &c. and all kinds of leather, waterproof and supple. Held, that "Emolliolorum," being likely to convey to an ordinary English mind the notion of a preparation for softening purposes, is descriptive and not a "fancy word" within the meaning of sect. 64, sub-sect. 1 (c) of the Patents, &c. Act 1883, as settled by the Court of Appeal in *Re Van Duzer's Trade Mark* (56 L. T. Rep. N. S. 236; 31 Ch. Div. 623). That the fact that the word is an invented word within sect. 10, sub-sect. 1 (d) of the Patents, &c. Act 1883 does not entitle it to registration, if it is descriptive, and consequently falls within the prohibition in sect. 10, sub-sect. 1 (e) of the same Act. That the applicants being in the same way of business as the respondents and liable, it might be, to be hampered in their future business by the respondent's mark remaining on the register, were "persons aggrieved" within sect. 90 of the Patents, &c. Act 1883. (*Re Talbot's Trade Mark.*) 119

Rectification of register—Person aggrieved.—When a trade mark has been improperly registered, any person who is in the same trade as the person who has registered it, and deals in the same class of goods, is *prima facie* a "person aggrieved" within sect. 90 of the Patents, Designs, and Trade Marks Act 1883, although he may not in fact, up to that time, have manufactured, or dealt in, the exact article to which the trade mark applies, as the effect of the registration is to restrain his legal rights. The use of words upon the outside of packing cases containing the articles dealt in is not a use of such words as a trade mark. (*Powell v. Birmingham Vinegar Brewery Company.*) 1

Registration—Label—Essential particular—Disclaimer.—Motion on behalf of a company that the Comptroller-General might be directed to proceed with an application by the company for the registration of a trade mark, consisting of a red label with two shields in each top corner, and a shield with a representation of St. George and the Dragon in the centre at the top, also a large white H. & Co. on the red ground, and words descriptive of the article, then the name of the company, "successors to Holbrook and Co." The Comptroller refused the application to register, "because you decline to state the device to be essential particular of the mark, and to disclaim any right to the exclusive use of the added matter except the name of your company." Held, that a label of this complex character could not be considered an "essential particular" within sect. 64, sub-sect. 1 (c) of the Patents, De-

SUBJECTS OF CASES.

signs, and Trade Marks Act 1883; that the applicants ought to disclaim Holbrook and Co. Motion dismissed with costs. (*Re Birmingham Vinegar Brewery Company's Trade Mark.*) ... page 646

Trade mark—Registration—"Somatose"—Invented word—Word having no reference to the character or quality of the goods—Refusal to register.—An application was made for registration of a trade mark consisting of the word "Somatose." The article for which the mark was intended to be used was called a "pharmaceutical production," coming within Class 3. The article was made from meat, and was described as a "yellow, tasteless, and odourless product." Its principal constituents were said to be "primary albumoses," and its object was nourishment of the human body. The Comptroller objected to register the word on the ground that "Somatose" was not an "invented word" within the meaning of sub-sect. (d) of sect. 10 of the Patents, &c., Act 1888; and further, that it had reference to the character or quality of the goods in respect of which registration was sought, and so was excluded by sub-sect. (e). It was admitted by the applicants that the word was derived from the Greek word "Soma" (body); but it was contended that it was an "invented word," and that it was in no way descriptive of the article to which it was to be applied. Held, that "Somatose" was not within either of the sub-sections, and was not capable of being registered. (*Re The Trade Mark Application of Farbenfabriken, Vormals Friedr. Bayer, and Co.*) ... 186

Registration—Sufficiency of disclaimer—Costs.—J. J. Colman and Co., manufacturers of mustard and other goods, applied to register as a trade mark a label containing the words "Colman's Mustard." In their application they stated the essential particulars, and disclaimed any right to the exclusive use of the word "mustard." The Comptroller required the applicants to amend their application and disclaimer in a specified manner, but they declined to do so on the ground that such amendment would involve a disclaimer of the name "Colman." Held, that the applicants were not bound to disclaim "Colman's," it being their name within the meaning of proviso 3 (i.) of sect. 64 of the Patents, Designs, and Trade Marks Act 1883, altered by sect. 10 of the Patents, Designs, and Trade Marks Act 1888. No costs. (*Re J. and J. Colman's Application to register a Trade Mark.*) ... 396

PHARMACY ACTS.

Sale of poisons—Compound containing scheduled poison. In an action for a penalty under the Pharmacy Act 1868 against the vendor of a compound containing as one of its ingredients a scheduled poison, the question for the court is not simply whether the compound contained a scheduled poison, but whether it contains it in such a quantity as to make the compound in its entirety a poison within the Act. The defendant, a grocer, sold a compound which contained as one of its ingredients one-tenth of a grain of morphine, a scheduled poison, in one ounce of liquid. Directions for use were affixed to the bottle stating the proper dose to be taken respectively by adults, children, and infants. Evidence was given that a bottle of the compound, if taken at one time by a child or infant, would certainly be injurious, and might be fatal, but not in the case of an adult, except under special circumstances of ill-health. Held, that there was evidence to support the finding of the County Court judge that the compound was in its entirety a poison within the Pharmacy Act 1868. (*Pharmaceutical Society v. Armson.*) ... 733

Medicine containing a scheduled poison—Small quantity sold.—By sect. 15 of the Pharmacy Act 1868, any person who sells or keeps an open shop for the retailing, dispensing, or compounding poisons, not being a duly qualified chemist, or chemist and druggist, is made liable to a penalty of 5*l.* By sect. 2, the articles described in schedule A. are to be deemed poisons within

the meaning of the Act. The schedule includes, amongst other articles, opium, and all preparations of opium. The drug sold was morphine, which is the active principle of opium. The County Court judge held that there was not evidence of a sufficient amount of morphine to make the drug sold a poison within sects. 2 and 15 of the Pharmacy Act of 1868. Held, that the finding of the County Court judge could not be dissented from. (*Pharmaceutical Society v. Delve.*) ... page 139

POISONOUS TREE ON NEIGHBOUR'S LAND.

Trespassing animal injured.—The plaintiff's horse was poisoned by eating the leaves of a yew tree which grew upon land of the defendants adjoining the plaintiff's field in which the horse pastured. No part of the yew tree projected over the plaintiff's land, but some branches could be reached by the horse stretching its neck over a ditch which belonged to the defendants, and which divided their land from the plaintiff's field. No duty on the part of the defendants to fence their land from the plaintiff's cattle was proved. The plaintiff having brought an action for the value of the horse: Held, that, in the absence of any intention to injure the plaintiff's horse by placing something in the nature of a trap for him, the defendants were not liable for injury sustained by the horse through its own wrongful intrusion. (*Ponting v. Noakes and others.*) ... 842

POOR LAW.

Friendly society—Weekly allowance—Pauper member—Right of guardians of union to pauper's allowance—Dispute—Arbitration.—Justices have power under sect. 23 of the Divided Parishes and Poor Law Amendment Act 1876 to make an order for the payment to the guardians of any union or parish of any periodical payment to which a pauper may be entitled. Guardians applied to the justices under this section for an order for payment to them of a weekly allowance which they alleged that a pauper was entitled to under the rules of a friendly society. The trustees of the society disputed the claim. The rules of the society provided that all disputes arising between any member or any person claiming an account of any member and the society should be referred to arbitration. Held, that the guardians were claiming the payment on account of a member, and that the dispute between the guardians and the trustee as to whether or not the pauper was entitled to the payment must be settled by arbitration, in accordance with the rules of the society, and that until the dispute had been so settled the justices had no jurisdiction to make an order for the payment of the weekly allowance to the guardians. (*Reg. v. Richardson and others.*) ... 805

Settlement—Test of removability—Residence apart from parent while under sixteen.—The test of the removability of a person who has not gained a settlement of his or her own in any parish is whether the parent or husband of such person would or would not be removable from the parish. A pauper had resided in domestic service from the age of fourteen to the age of eighteen, in a parish in the appellant union. Her father was dead, and her mother resided outside the appellant union. Held, that she had not acquired a settlement in the appellant union, not having resided for three years under such circumstances as to make her irremovable therefrom. (*Guardians of West Ham Union v. Churchwardens of St. Matthew, Bethnal Green.*) ... 818

POWER OF APPOINTMENT.

General power of appointment—Appointment by will—Death of appointee in lifetime of donee of power—Destination of appointed property.—A freehold house was conveyed to a trustee to such uses as E. J. should by deed or will appoint, and in default of appointment to the use of her husband R. J., his heirs and assigns. E. J. by

SUBJECTS OF CASES.

her will devised the above house by the description "my messuage" to E. J., who predeceased her. Held, that E. J. had shown an intention to make the property her own, and that it therefore passed to her heir-at-law. (*Coxen v. Rowland*.) page 89

PRACTICE.

Action—Relief sought by defendant in respect of matter not arising out of nor incidental to plaintiff's cause of action—No counter-claim delivered, nor writ issued in cross action.—Where an action is brought against a defendant, and he also seeks relief against the plaintiff in respect of a matter which is not in any way arising out of nor incidental to the plaintiff's cause of action, he is not entitled to apply by way of motion in the plaintiff's action, but must deliver a counter-claim or issue a writ in a cross-action. (*Carter v. Key*.) ... 786

Administration—Action—Persons served with notice of judgment—Notice of hearing on further consideration.—As a general rule persons served with notice of a judgment or order under Order XVI., r. 40, who have not entered an appearance, need not be served with notice of the hearing on further consideration. In an action by one beneficiary against the trustees of a will, the usual judgment was given for administration and execution of the trusts of the will. This judgment was served upon the other beneficiaries under Order XVI., r. 40. None of them entered an appearance. Held, that it was not necessary to serve them by filing or otherwise with notice of the hearing on further consideration, the order asked for not requiring them to pay money or otherwise affecting them personally. (*Re Rolfe; Tyson v. Johnson*.) ... 624

Continuing cause of action—Injunction—Inquiry as to damages—Assessment of damages down to date of chief clerk's certificate.—A continuing cause of action, in respect of which damages can be assessed down to the time of the assessment, within the meaning of Order XXXVI., r. 58, is a cause of action which arises from the repetition of a series of acts of the same kind as that for which the action was brought; the object of the rule being to prevent the necessity of bringing repeated actions in respect of repeated acts of the same nature. (*Hole v. The Chard Union*.) ... 52

Costs—Compulsory purchase—Payment of purchase money out of court—Re-investment—Erection of new buildings—Lands Clauses Consolidation Act 1845.—The costs, charges, and expenses of an investment of a fund paid into court by a public authority, under the Lands Clauses Consolidation Act 1845, in the erection of new buildings, and of obtaining the order, and the costs, charges, and expenses, including the architect's fees, properly incurred in or about or in relation to the contract for the execution of the works, were ordered to be paid by the public authority. (*Re Arden*.) ... 506

Investment of purchase money—Supplemental petition—Improvement—Settled Land Act 1882.—In Aug. 1893 an order was made on the petition of persons interested under a settlement, approving the investment of certain moneys paid into court, for land compulsorily taken by the Metropolitan Board of Works in constructing sewers necessary for developing the land taken as a building estate. The estimated cost of the proposed works was 3968*l.* When specifications and detailed plans were prepared, it was found necessary to alter the line of the proposed sewer, and tenders having been obtained for the work, as altered, the lowest tender was 4343*l.*, 375*l.* above the estimate on which the former order was made. The petitioners now presented a supplemental petition, asking that the construction of the altered sewer might be approved as an investment, and the moneys raised out of the funds in court. No objection was made to the order, but the London County Council objected to pay the costs of both petitions, on the ground that the second petition was only made necessary by the blunder of the petitioners, and that the investment of the

additional sum required, being only 375*l.*, might have been obtained on summons under R. S. C. Order LV., r. 2 (7). Held, that, as the application was in effect to vary an order made on petition, it could not properly be made by summons, and the council must pay the costs of both petitions. (*Re Sanders*.)

 ... page 753

Costs—Jurisdiction—Prohibition—Judicature Act 1890.—The Queen's Bench Division has jurisdiction, upon making absolute a rule nisi for a prohibition, to give costs to a successful applicant. (*Reg. v. The Justices of the County of London and the London County Council*.) ... 148

Money paid in under special Act—Costs of petition for payment out—Jurisdiction—Rules of Supreme Court 1883.—The Commissioners of Sewers, acting under the powers of a private Act, compulsorily purchased certain trust hereditaments, and paid the purchase money into court. The trustees now applied for payment out to them of this sum, and asked that the commissioners should pay the costs of the petition. The private Act made no provision for the payment out of court of money paid in under the Act. Held, that, under sect. 5 of the Supreme Court of Judicature Act 1890, jurisdiction has been conferred on the court to exercise its discretion with regard to these costs, and to order the commissioners to pay them. (*Re Fisher*.) ... 62

New trial—Costs of former trial to abide the result of new trial—Meaning of "result."—The Court of Appeal having made an order for the new trial of an action, "costs of former trial to abide the result of new trial": Held, that "the result" in this order meant "the result as to costs." (*Brotherton v. The Metropolitan District Railway Joint Committee*.) ... 218

Taxation—Interlocutory order—Interest on taxed costs—Date from which interest is to be calculated.—Sect. 18 of 1 & 2 Vict. c. 110 applies to an interlocutory order of the Chancery Division, by which costs are ordered to be paid by one party to another, and such costs when taxed carry interest from the date of the order. (*Taylor v. Roe*.) ... 232

Debenture-holders—Sale of undertaking—Debenture-holders' action.—The West Metropolitan Tramways Company was incorporated in 1882 by a special Act of Parliament. It had issued debentures which became due in June 1893, but were not paid. Some of the holders brought an action for the realisation of their security. A receiver and manager had been appointed in the action (69 L. T. Rep. N. S. 560; (1893) 3 Ch. 437). The receiver now moved for a sale of the undertaking as a going concern, and at the same time applied for leave to spend 4000*l.* in his hands in the repair of old and purchase of new rolling stock, in order to enable the undertaking to be sold favourably. Held, that the court had power to sell the undertaking. The fact that the Tramways Act 1870, sects. 42 and 44, contemplates a sale by the promoters, and in case of insolvency a determination of their powers by the Board of Trade, shows that the Legislature were not providing for a perpetual control of the undertaking by the body of directors created by the Act, and distinguishes the case of a tramway company from railway or other companies, within the principle of *Gardner v. The London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 494, 552; L. Rep. 2 Ch. 201). Leave was also given to spend 4000*l.* in the receiver's hands as asked. (*Bartlett v. The West Metropolitan Tramways Company*.) 491

Discovery—Interrogatories—Discretion of judge.—An action was brought by the plaintiff against the defendants, R. and A., the executors of a testator who died in April 1888, with whom the plaintiff had been in partnership. The action arose out of a dispute as to what was the amount which the estate of the testator was entitled to receive for his share in the partnership business. E., besides being an executor of the testator, was a partner of the plaintiff. Therefore A., the other executor, obtained leave to defend the action on behalf of

SUBJECTS OF CASES.

- himself and R., and all the subsequent proceedings in the action were consequently conducted by A. alone. Under the Rules of Court of Nov. 1893, the plaintiff obtained leave to administer interrogatories for the examination of both the defendants. The summons for leave to deliver the interrogatories came before North, J. in chambers, and his Lordship ordered certain of the interrogatories objected to by the defendants to be struck out, but as regarded the remainder of them made the order as asked, notwithstanding the opposition of the defendants to any interrogatories at all being administered. A. appealed from that order on the ground (1) that the plaintiff had no right to administer interrogatories to R. as well as to A., because his answers might be prejudicial to A., who was alone defending the action; and (2) that the interrogatories were premature, inasmuch as to order the defendants to answer the greater part of the interrogatories would be equivalent to compelling them at the present stage of the proceedings to prepare for trial on the merits and to disclose their case; and that, therefore, the interrogatories were unnecessary and oppressive. Held, that the fact that A. had obtained liberty to defend the action alone was no ground for objecting to the delivery of interrogatories to R.; and that the plaintiff could not, on that account, be deprived of his ordinary remedy to interrogate both defendants. Held also, that North, J. having exercised his discretion as to the allowance of the interrogatories, his order could not be disturbed, for no appeal ought to be entertained from an order for leave to administer interrogatories under the Rules of Nov. 1893, unless there was some material error, or some serious question of principle involved, or some substantial injustice done, it not being the function of the Court of Appeal to look through the interrogatories allowed by a judge of first instance to see whether they had or had not been properly allowed, and rule 6 of Order XXXI. of the Rules of Court 1883 being still in force to enable objections to be taken in answer. (Peeke v. Ray.) ... page 769
- Discovery—Postponement of inspection—Question of law to be determined—Amendment of pleadings.—A common order for discovery was made against defendants, who made an affidavit of documents, of which there were a large number, and then applied by summons that inspection might be postponed until certain questions of law mentioned in the summons had been determined. These questions of law were not raised by the pleadings. Held, that the statement of defence should be amended so as to raise the points of law which the defendants desired to have determined, and that the court then had jurisdiction under Order XXV., r. 2, to order the points of law to be set down for hearing, and to postpone the inspection until they had been disposed of. (Lever v. Land Securities Company Limited. De Carteret v. Land Securities Company Limited.) ... 323
- Action for maintenance — Interrogatories — Refusal to answer.—Maintenance is an indictable offence at common law, and the defendant in an action in which he is charged with supporting a previous plaintiff in litigation in which he had no common interest is entitled to refuse to answer interrogatories on the ground that they may criminate him. (Alabaster and others v. Harness) ... 375
- Evidence—Commission—Examination of defendants resident abroad—Order XXXVII., r. 5.—The principles applicable to the case of a plaintiff asking for a commission to examine himself are not applicable to the case of a defendant; and where defendants were resident in South Africa, an application by them to have their evidence taken in that country, under the circumstances, allowed. (Ross v. Woodford.) ... 22
- Execution—Receiver.—The Judicature Act 1873, s. 25, sub-sect. 8, has not given to the court power to appoint a receiver in a case in which the Court of Chancery formerly was unable to do so. (Harris v. Beauchamp Brothers.) ... page 636
- Further consideration—Report of official referees—No motion to vary report—Evidence on which referee based report—Rules of the Supreme Court 1883, Order XXXVI., r. 54.—If, upon the further consideration of an action, one of the parties asks the court to adopt the report of the official referees made in the action, the court will not, at the request of the opposite party, go behind the report and vary it by looking into the evidence on which the referee based it, where that party has given no notice of motion to vary the report or remit the cause or matter for rehearing. (Re Fitton's Estate; Hardy v. Fitton.) ... 397
- Habeas corpus—Costs—Jurisdiction to award.—The effect of sect. 5 of the Judicature Act 1890 is to extend the jurisdiction of the court over costs by placing within its discretion the costs of all proceedings except those exempted by virtue of sect. 4. The costs of an application for a writ of habeas corpus awarded. (Reg. v. Mansel Jones.) ... 845
- Husband and wife—Conveyance by wife—Application to dispense with concurrence of husband—Jurisdiction in Chancery Division.—Under the existing arrangements for the distribution of the business of the courts, an order under sect. 91 of the Fines and Recoveries Act 1833 will not be made in the Chancery Division in an ordinary case, though there may be jurisdiction in the Chancery Division to make it, and a judge of that division might exercise such jurisdiction under special circumstances. (Re Ellen Giles and the Fines and Recoveries Act 1833.) ... 757
- Interpleader order—Power of district registrar to issue—Order XXXV., r. 6.—A district registrar has no power to make an interpleader order. (Hood and Sons v. Yates; Derrett, claimant.) ... 557
- Irregular judgment—Setting aside—Default of appearance—Judgment signed for more than due when judgment signed—Under Order XIII., r. 3, which provides that, where the writ is indorsed for a liquidated demand and the defendant fails to appear, the plaintiff "may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest . . . and costs," judgment in default of appearance must be signed only for the amount actually due at the time of signing judgment. A judgment signed for more than the amount actually due is an irregular judgment, which the defendant is entitled to have set aside *ex debito justitiae*. (Hughes v. Justin.) 385
- Judgment—Application by executors of deceased judgment creditor for a receiver and an injunction—"Parties entitled to execution."—The executors of a deceased judgment creditor applied for the appointment of a receiver of the judgment debtor's property, and for an injunction against the judgment debtor dealing with his property. Held, that the executors of a deceased judgment creditor cannot obtain an order for the appointment of a receiver of the judgment debtor's property and an injunction against the judgment debtor dealing with it. The appointment of a receiver of the property or interest of the judgment debtor is not "execution" within the meaning of Order XLII., rr. 8 and 23. (Norburn v. Norburn.) ... 411
- Judgment-roll erroneously made up—Estoppel in subsequent proceedings—Court of equity—Injunction.—Where the judgment-roll in an action, as made up, does not accurately represent that which really was found at the trial, a court of equity ought not, in a subsequent proceeding between the same parties, to grant the plaintiff an injunction to enforce a right which was not established by any finding of the jury in the former proceedings, notwithstanding what appears on the face of the judgment roll. (Want v. Moss and Wife.) ... 178
- Lands Clauses Act (8 & 9 Vict. c. 18)—Re-investment—Costs—Apportionment—Surveyor's fee—Scale fee.—On a petition by the charities known as the Bishopsgate Foundation, which, by arrange-

SUBJECTS OF CASES.

- ment between the petitioners and the respondents, certain public bodies who had purchased different portions of the charity lands, was treated as one for re-investment in land as far as the costs were concerned, the question arose whether these should be borne rateably or equally as between the respondents. Held, that, as the general rule laid down in *Ex parte The Bishop of London* (2 L. T. Rep. N. S. 365, and 3 L. T. Rep. N. S. 224; 2 De G. F. & J. 14), that these costs should be borne in equal shares, only applied to such costs as were not readily apportionable, and not to the *ad valorem* stamp duty and the surveyor's fee, which should be paid rateably, the fact that the scale fee had been adopted on the purchase of the land for re-investment in the present case readily furnished a means of apportionment, and there being a great inequality in the amounts of purchase money, these costs should be apportioned to the extent of the scale fee. (*Re Bishopsgate Foundation*.)page 231
- Order for payment of costs—Leave to issue writ of sequestration—Four-day order.—Under Order XLIII., r. 7, of the Rules of Court 1883, an order giving leave to issue a writ of sequestration forthwith to enforce the payment of costs, no four-day order being necessary, is substituted for the subpoena according to the old Chancery practice, under which payment of costs where no time was fixed was enforced by subpoena, upon proof of service of which and nonpayment a writ of sequestration might issue as of course. (*Re Lumley; Hood-Barrs v. Cathcart*.) 780
- Order XIV.—Ejectment—Estoppel.—An action of ejectment, brought by a landlord against a tenant, in which the circumstances under which the tenant came into possession are in dispute is not a case in which the plaintiff should be allowed to sign judgment under Order XIV. of the Rules of the Supreme Court (Australia), which is identical with the English order. A plaintiff in ejectment cannot rely upon an alleged estoppel on the part of the defendant to relieve him from the necessity of proving his own title, when the facts out of which such estoppel arises are in dispute in the case. (*Jones v. Stone*.) ... 174
- Originating summons—Summons for an order upon a solicitor to deliver up papers.—A summons for an order upon a solicitor to deliver up papers to his client, not taken out in any pending proceeding, is not an "originating summons." (*Re Holloway; Ex parte Pallister*.) 615
- Partners—Action against copartners in firm name.—Judgment against the firm—Execution—Retirement of one partner before action brought—Non-liability of retired partner unless served with writ.—In an action on promissory notes the defendants, copartners, were sued in the name of the firm, and the writ of summons was served at the house of business of the firm. Before the plaintiff commenced the action, and to his knowledge, one of the partners, the appellant, retired from the partnership. The retired partner was not served with the writ, he did not appear to the writ, nor did he admit he was a partner, nor had he been adjudged to be a partner. The plaintiff obtained judgment against the firm by default. Held, that the plaintiff was not entitled to take out a summons for an order to obtain leave to issue execution against such retired partner, or to have his liability tried and determined under Order XLVIII., r. 8, as he had not served him with the writ of summons in accordance with the proviso to rule 3 of that order. (*Wiggin v. Cox, Sons, Buckley, and Co.*) 656
- Payment into court—Action for libel in newspaper—Payment in under statute—Damages awarded less than sum paid in—Who entitled to money in court.—Payment into court by the defendant under the 8 & 9 Vict. c. 75, in an action for a libel in a newspaper, is subject to the ordinary rules as to payment into court when there is no denial of liability, and, accordingly, where, in such an action, the defendant pleaded that there was no actual malice, no gross negligence, and that an apology had been inserted, and paid 50*l.* into court as amends, and the jury found this plea proved, and awarded the plaintiff one farthing damages, the plaintiff was held entitled to the 50*l.* in court, notwithstanding that the jury had awarded one farthing only. No change has been made in the practice as to payment out in such cases by the rule (r. 22 of Order XXII.) which forbids the amount paid into court to be communicated to the jury. (*Dunn v. The Devon and Exeter Constitutional Newspaper Company Limited*.) ...page 593
- Payment into court—Admission—Admission by parol—Order XXXII., r. 6.—F. and her children, the plaintiffs in this action, were entitled to a share of the residuary estate of a testator who died in 1872. Defendant, the surviving trustee of the testator, had never given the plaintiffs any account, but down to Christmas 1892 had paid what he alleged to be the income of the share to F. After that date he paid nothing. The plaintiffs having applied in vain for accounts, took out a summons for administration of the testator's estate. After service of this summons the defendant called on the plaintiff's solicitors and said that if the summons was adjourned for a short time he would appoint new trustees, and pay over to them the plaintiff's share. Being questioned as to the investment of the trust funds, he admitted that the trust funds, the plaintiff's share of which he said amounted to about 535*l.*, were not invested, but that part of them was in a bank, and the remainder in his own hands. The defendant failed to find the money as promised, and the plaintiffs then commenced this action to have their share ascertained and paid. They now moved, under Order XXXII., r. 6, that the defendant might be ordered to pay into court the 535*l.* admitted to be in his hands as aforesaid. The defendant did not appear. The affidavits containing the above statement had been served upon him with the notice of motion. Held, that an admission under Order XXXII., r. 6, need not be in writing, and as the statement that he had made such an admission had been brought to the defendant's attention and not denied, he must be ordered to pay the money into court. (*Re Beeny; French v. Sproston*.) 160
- Person suing in *forma pauperis*—Action dismissed for non-appearance at trial—Action restored on condition of paying costs—No solicitor acting for pauper—Notice of motion not signed by a solicitor—Order XVI., r. 29.—A person suing in *forma pauperis*, to whom no solicitor has been assigned, and for whom no solicitor is acting, may serve a notice of motion which is not signed by a solicitor. When an action by a person suing in *forma pauperis* has been dismissed upon his non-appearance at the trial, he may be ordered to pay costs as a condition of having his action restored. (*Jacobs v. Crusha and others*.) 524
- Receiver—Real estate in Ireland—Discretion of English court.—On an application for the appointment of a receiver of real estate in Ireland great weight ought to be given to the provisions of the Legislature for dealing with such matters under the Supreme Court of Judicature Act (Ireland) 1877, and sect. 57 thereof. But where the applicants were willing that the present agent of the Irish estates, who had never experienced any difficulty in collecting the rents, should be appointed receiver, the court considering that the difficulties attending the appointment of a receiver of Irish estates by the English court were considerably modified by that circumstance, appointed him receiver. The trustees of a marriage settlement dated the 25th July 1877, at the instigation of the husband and wife, sold certain rentcharge stock representing property settled by the wife, and advanced the proceeds of such sale to the husband upon the security of an equitable mortgage of certain Irish estates, subject to other incumbrances, and thereby committed a breach of trust. The husband had brought into settlement a sum of 5000*l.* secured by mortgage of the said

SUBJECTS OF CASES.

- estates. By deed of the 12th Aug. 1893 the husband for value assigned his life interest under the settlement in the said mortgage debt to C. J. S. There was a remainderman under the settlement in existence. There was little evidence as to the circumstances of the assignment. Held, that at the date of the assignment there was an equity in the remaindermen against the husband, which vested in the trustees on payment into court of 4000*l.* Rentcharge Stock. Apart from special circumstances which had not been shown, the assignment was subject to that equity. The appointment of the receiver must therefore extend to the interest of C. J. S. in the assignment till trial or further order. (*Bolton v. Currie and others.*)page 759
- Security for costs—Foreign plaintiff—Action upon foreign judgment.—The rules by which a foreign plaintiff is usually required to give security for costs is equally applicable when the action is upon a foreign judgment as when the action is upon any other claim. (*Crosat v. Brodden and others.*) ... 522
- Specially indorsed writ—Landlord and tenant—Recovery of land—Notice to quit on forfeiture—Order III., r. 6 (f).—The writ in an action by a landlord against his tenant for the recovery of land cannot be specially indorsed when the notice to quit relied upon by the plaintiff is founded upon a forfeiture. (*Arden v. Boyce.*) 480
- Stay of execution upon terms—Payment of costs to solicitor upon undertaking to repay if appeal successful—Power of court to enforce undertaking—Appeal successful, but execution stayed.—The Court of Appeal, upon the application of the defendant, granted a stay of execution, pending an appeal to the Divisional Court from the judgment of an official referee, upon the terms that the defendant should pay into court the amount for which judgment had been given against him, and also pay the costs, as soon as taxed, to the plaintiff's solicitor upon his personal undertaking to repay the same if the appeal should be successful. The defendant complied with these terms. The appeal succeeded, but execution was stayed pending an appeal by the plaintiff to the Court of Appeal. The defendant applied to the Court of Appeal for an order that the plaintiff's solicitor should pay the costs. Held, that the court had power to enforce the undertaking given by the solicitor, and to order him to repay the costs, and that the stay of execution granted by the Divisional Court did not affect that undertaking. (*Swyny v. Harland.*) ... 227
- Tenant for life—Leaseholds—Possession—Title deeds—Summons—Mortgagee—Trustee—Reversioner.—Originating summons issued by two ladies, tenants for life of certain leaseholds and railway stock, asking for possession and delivery up to them by the defendants, the trustees, of the muniments of title. The plaintiffs had mortgaged their life interest. Held, that the application could be made by originating summons; if one trustee is a beneficiary, he should transfer his duty, and the other trustee should be separately represented; a reversioner is not a necessary party, but is entitled to appear at his own expense; a mortgagee ought to be made a party, and is entitled to his costs. Held, that the applicants ought to be put into possession upon giving undertakings to protect the trustees, and paying their costs; that the applicants were not entitled to have the muniments of title handed over to them; that the refusal to give the powers under the Settled Estates Act 1877 in *Re Peake's Settled Estates* (69 L. T. Rep. 281; (1893) 3 Ch. 430) to two ladies must not be construed generally, but only with reference to that particular case; that no trustee having a fiduciary power to appoint trustees can exercise that power by appointing himself alone, or with any other person. (*Re Newen; Newen v. Barnes.*)... .. 653
- Third-party notice—Action for accounts—Plaintiff beneficiary of testatrix—Defendants executors of testatrix.—An action was brought by beneficiaries under a will for accounts, the defendants being the two executors of the will and other beneficiaries thereunder. The two defendant executors claimed to be entitled to an indemnity out of the estate of the late tenant for life under the will in respect of losses arising out of certain investments of trust moneys under the will, and before delivering their defence moved, on appeal from an order made in chambers, for leave to issue a third-party notice under Order XVI., r. 48, against one of the plaintiffs, and a stranger, as co-executors with one of the two defendant executors of the late tenant for life under the will, in order to raise the claim of the defendant executors to an indemnity out of the estate of the late tenant for life; but it was not proposed to serve the defendant executor, who was also the third executor of the late tenant for life, with the third-party notice. Held, that the motion was premature, being before delivery of any defence in the action; and that the case did not come within Order XVI., r. 48; and the motion was dismissed with costs. (*Re Gilson; Gilson v. Gilson.*)page 723
- Trial—Witness called by judge—Right of cross-examination—Discretion of judge.—If the judge at a trial calls as a witness a person who has not been called by either side, counsel have no right to cross-examine such witness; but if such witness gives any evidence which affects either party, the judge will generally, in the exercise of his discretion, give leave to cross-examine upon such evidence, but not to cross-examine at large. (*Coulson v. Disborough.*) 617
- Writ—Foreign firm with English agent—Writ against firm in firm name—Setting aside writ—Carrying on business within jurisdiction.—A writ was issued, under Order XLVIII., r. 1, against a firm in the firm name. The firm was a foreign firm carrying on business abroad, but the members of the firm were British subjects. They employed the plaintiff to purchase goods in England for shipment to them abroad, and one of the partners was generally in England and chose the goods to be purchased. The plaintiff ordered and paid for these goods in his own name and forwarded the same to the defendant firm abroad, and he received from the defendants sums of money on account from time to time, leaving a balance for which the writ was issued. The writ having been served personally on one of the partners while in England: Held, that, upon the facts, the defendant firm did not carry on business within the jurisdiction, and that consequently there was no authority for issuing the writ against the firm in the firm name, and that the issue and service of the writ ought to be set aside. (*Singleton v. Roberts, Stocks, and Co.*) 637
- Writ issued without leave against firm in firm's name—Foreign firm carrying on business within jurisdiction—Partners out of jurisdiction—Service of writ—Substituted service.—Order XLVIII., r. 1, provides that "any two or more persons . . . being liable as copartners, and carrying on business within the jurisdiction, may be sued in the name of the firm of which they were copartners at the time of the accruing of the cause of action;" and rule 3, that where persons are so sued, "the writ shall be served either on any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having then the control or management of the partnership business there, and such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary." The plaintiffs issued a writ against the defendants in the name of their firm, without leave. The defendants were a Natal firm carrying on business within the jurisdiction, the partners being out of the jurisdiction. The plaintiffs obtained an order for substituted service upon one of the partners by serving it upon his brother in London, and the writ was so served. Held, that the writ was properly issued against the defendants

SUBJECTS OF CASES.

in the name of their firm; but that the order for substituted service, and the service thereunder, must be set aside because the writ could not be served personally upon a partner out of the jurisdiction, and therefore could not be served upon him by substitution. (*Worcester City and County Banking Company v. Firbank, Pauling, and Co.*) page 102, 443

Writ of sequestration—Recovery of judgment.—An ordinary judgment for the recovery of a debt is not an order to pay money into court or do any other act in a limited time within the meaning of Order XLIII., r. 6, nor a judgment for the recovery of any property other than land or money within Order XLII., r. 6, and therefore cannot be enforced by a writ of sequestration. Sequestration is a proceeding not applicable in a case in which there has been no contempt. (*Hulbert and Crowe v. Cathcart.*) 558

PRINCIPAL AND AGENT.

Authority of agent—Payment to agent by cheque—Dishonour of cheque—Liability of agent.—The plaintiff was owner of a house let for a term of years on a lease which provided that the tenant should not assign without the consent in writing of the plaintiff. The tenant wished to assign the lease to A. The defendant, who was an auctioneer and estate agent, acted in the matter for the plaintiff, who gave him his written consent to the assignment, but told him not to part with it until the tenant had paid him the rent for the last quarter, which was in arrear. A. had agreed to pay the tenant the sum of 300l. for the lease. The tenant and A. met the defendant for the purpose of completing the transfer on a Saturday afternoon after banking hours, and neither of them came provided with cash. A. and the then tenant both banked at the same bank. A. gave the tenant a cheque for 300l., and after some demur the defendant accepted a cheque from the outgoing tenant payable to himself, and handed him the licence to assign. This cheque was for 25l. 9s., of which 22l. 15s. was the amount of rent in arrear, and the balance was the defendant's charges in the matter. The cheque was dishonoured, and the outgoing tenant had since disappeared. He had removed his furniture from the house on Saturday morning, and A. had afterwards moved his furniture into it. Held, that no usage or custom for an agent to take a cheque in such a case had been proved; that the defendant had exceeded his authority in giving up the licence before receiving the arrears of rent in cash; and that he was liable to pay the plaintiff the full amount of that rent as damages. (*Papé v. Westacott.*) 18

PROHIBITION.

Want of jurisdiction apparent upon face of proceedings—Consent to jurisdiction by applicant—Discretion of Superior Court.—Where the want of jurisdiction is apparent upon the face of the proceedings the grant of a writ of prohibition is of course, and the applicant cannot be precluded by any consent or acquiescence. By a lease it was provided that all the provisions as to procedure contained in sects. 7-28 of the Agricultural Holdings Act 1883 should be applicable to all claims for compensation under the lease. The tenant having claimed compensation in respect of matters which were, and also in respect of matters which were not, the subject of compensation under the Act, an arbitrator made an award giving the tenant compensation in respect of claims within the Act, and also in respect of claims not within the Act, specifying the several matters in respect of which compensation was awarded. The tenant applied for and obtained an order from the County Court to enforce the whole award under sect. 24 of the Act. The landlord, who had acquiesced in the exercise of jurisdiction by the County Court, applied for a writ of prohibition against the enforcing of the award under sect. 24 of the Act,

which was refused as a matter of discretion by the Queen's Bench Division. Held, that, as the want of jurisdiction was apparent upon the face of the award in respect of the claims which were not within the Agricultural Holdings Act 1883, the writ of prohibition must be granted against enforcing that part of the award under sect. 24 of the Act. (*Farquharson v. Morgan.*)page 152

PUBLIC HEALTH.

Diseased meat—Guilty knowledge of defendant need not be proved.—In a summary prosecution under sect. 117 of the Public Health Act 1875 against the owner of unsound meat, exposed for sale, and intended for the food of man: Held, that the absence of positive proof that the defendant was aware of the condition of the meat was no bar to a conviction. (*Blaker v. Tilletone.*) 31

Highway—Nuisance—Sewer gratings—Projection by reason of wearing away of road—Negligence as to road only—Injury—Highways and sewers both vested in local authority—Liability—Public Health Act 1875.—In consequence of a defect in a highway a sewer grating projected above it, and caused damage to the plaintiff's horse. The grating was in good repair and properly inserted in the road. Both the highways and sewers of the district were vested in the local authority under the Public Health Act 1875. Held, that, the damage being caused by the defect in the highway, for which no action for damages could be maintained against the local authority, as they were in the same position as surveyors of the highway, the fact that they had control both of the highways and sewers did not render them liable. (*Oliver v. Horsham Local Board; Thompson v. Mayor and Corporation of Brighton.*) 206

Sewer—Definition of—Drain to three houses—A drain passing under, and receiving the sewage from, three houses in a sewer within the meaning of the Public Health Act 1875. (*Travis v. Uttley.*) 242

Urinal—Proper and convenient situation—Nuisance—Where a site has been selected by an urban authority acting under sect. 39 of the Public Health Act 1875, as proper and convenient for a public urinal, the burden of showing that the site selected is not a proper and convenient site within the meaning of the section lies on the person complaining of the particular site, and it is not sufficient for him to suggest other sites as being more proper and more convenient. (*Pethick v. Mayor, &c., of Plymouth.*) 304

Width of street—Laying out "new street" as carriage road—Right of way—Bye-laws of local authority—Sect. 157 of the Public Health Act 1875 provides that every urban authority may make bye-laws with respect to the level, width, and construction of new streets. Two bye-laws made, arising out of the above section, provided that every person who shall lay out a new street exceeding 100 feet in length, as a carriage road, shall lay out such street of a width of not less than thirty-six feet, and shall lay out on each side of such new street a footway, &c. The appellant became lessee of a piece of land on which he commenced to build two houses; with this piece of land he also obtained a right of way fifteen feet wide over a road more than 100 feet in length, which led past the piece of ground on which he had commenced to build. The appellant, after commencing to build, did not widen this right of way over the adjoining road to the width of thirty-six feet. The appellant was summoned by the respondents for laying out a new street of a width of less than thirty-six feet. The magistrates, finding that commencing to build two houses, and other facts, constituted a laying out of a new street as a carriage road of a less width than thirty-six feet in contravention of the respondents' bye-laws, convicted the appellant. Held, that what the appellant had done did not amount to laying out a new street contrary to the respondents' bye-laws, and the conviction ought to be quashed.

SUBJECTS OF CASES.

(Gozzett, *s.p.*, v. The Maldon Urban Sanitary Authority, *reps.*)page 414

QUARTER SESSIONS.

Continuing court—Practice—Consent to tax costs out of sessions.—A court of quarter sessions is a continuing court, and may determine the effect of an order made at a previous sessions. Where nothing has been said to the contrary, consent to tax the costs of an appeal to quarter sessions out of sessions may be implied from the universal custom so to do. (*Midland Railway Company v. Edmonton Union.*) 355

Practice in licensing appeal—Beerhouse licence—Grounds of refusal.—Where licensing justices refused a beerhouse licence without specifying upon which of the grounds mentioned in 32 and 33 Vict. c. 27, s. 8 (which were the only grounds upon which they could act), they did refuse it, as required by the section, and the applicant appealed to the quarter sessions: Held, that he was not entitled to a renewal of his licence as of course, but that the Court of Quarter Sessions were entitled to go into the merits of the case on the appeal, without further adjournment. (*Ex parte Gorman*) 46

—Court equally divided—Alehouse Act 1828—Where, on an appeal from licensing justices, the magistrates composing the Court of Quarter Sessions are equally divided, the decision appealed against must be affirmed, for sect. 9 of the Alehouse Act 1828, which provides that questions respecting licences shall be determined by a majority of the justices present, only applies to licensing meetings, not to proceedings at quarter sessions. (*Ex parte Evans.*) 45

RAILWAY COMPANY.

Goods on hire-and-purchase system—Goods deposited in cloak-room by hirer—Goods claimed by owner—Lien of railway company for charges—Railway and Canal Traffic Act 1854—"Reasonable facilities"—Cloak-room.—A person, having obtained a machine from the plaintiffs upon the hire-and-purchase system, deposited the same at the cloak-room of one of the stations of the defendants. The machine was left at the cloak-room for several months, when the hirer gave the ticket, which he had received at the cloak-room, to the plaintiffs, who thereupon demanded that the defendants should deliver up the machine to them. The defendants declined to give up the machine until their charges for warehousing it had been paid. The Railway and Canal Traffic Act 1854 requires railway companies to afford reasonable facilities for receiving and forwarding passengers' luggage. Held, that as the defendants were required to afford reasonable facilities for receiving passengers' luggage, and a cloak-room at a railway station was such a reasonable facility, the defendants were entitled to a lien upon the machine for their charges. (*Singer Manufacturing Company v. London and South-Western Railway Company.*) 17

Tramway converted into railway—Mines—Subsidence—Adjacent and subjacent supports—Injunction—Damages—Railways Clauses Act 1845.—An action by a railway company to restrain the defendants, the lessees of certain mines under the plaintiff's line of railway, from working their mines in such a way as to injure the railway by taking away the necessary support, and for damages. By a private Act of Parliament in 1825 a company was incorporated with power to make and maintain a "railway or tramroad," and to take lands for that purpose. By sect. 25, all mines were to be deemed to be excepted out of any conveyance, and might be worked by the owners, though in such a manner as not to injure the company's works. In 1830 certain surface lands were conveyed to the company. In 1855, by an Act of Parliament, there being only a horse tramroad then in existence, the Act of 1825 and subsequent Acts were repealed, and provisions were

made for altering the line so as to be suitable in curves and inclines for locomotive engines. The Lands Clauses Act 1845 and the Railways Clauses Act 1845 were incorporated with the Act, but it was provided that anything done before the passing of the Act of 1855, under the repealed Acts, should be as valid as if they were not repealed, and that the Act should be subject and without prejudice to everything so done, and to all rights consequent on anything so done. The company was eventually amalgamated with the plaintiff company. The defendants in working their mines had caused subsidences on and near the railway, and they insisted on their right to continue working unless the mines were bought by the railway company under the provisions of the Railways Clauses Act 1845. The plaintiffs contended that their right to subjacent and adjacent support was preserved by the Act of 1855. Held, that the subsidences were caused by the defendants' works, and on the evidence the subsidences had been very little accelerated by the working of the railway; the defendants' predecessors had made their bargain in 1830 under the Act of 1825, and there was no reason for saying that, because the railway was used in a somewhat different manner, the rights then reserved to the plaintiffs' predecessors were gone; the plaintiffs were governed by the Railways Clauses Act 1845 from the date of the Act of 1855, so far as the general Act was applicable to any particular case; but the Act of 1855 had, neither by express words, nor by implication, altered the express contract entered into in 1830 under the Act of 1825, the rights under which Act were reserved by the Act of 1855. Injunction granted and inquiry directed as to damages. (*Great Western Railway Company v. The Cefu Cribbwr Brick Company.*)page 279

Valuables not declared—Theft by company's servant—No negligence on part of company—Liability of company—Carriers Act 1830—Railway and Canal Traffic Act 1854.—By the Railway and Canal Traffic Act 1854, s. 7, "the company are to be liable for loss or injury to goods in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants." Held, that this section does not include loss by the theft of the company's servants without negligence, and therefore that, by a contract or notice brought home to the consignor, the company can exempt itself from liability for such loss, notwithstanding sect. 8 of the Carriers Act 1830. (*Shaw v. The Great Western Railway Company.*) 218

Construction—Compensation—Accommodation works.—Where the Legislature imposes upon the promoters of an undertaking an obligation to construct and maintain works, they must bear the cost of construction and maintenance, in absence of provision to the contrary. By a colonial Act, confirming a provisional agreement for the making of a railway, power to take lands for the purposes of the undertaking was vested in the promoters, but the obligation to pay compensation was imposed on the Government, who were to conduct the proceedings for ascertaining the amount of compensation payable. The promoters were to construct and maintain such accommodation works as might be fixed by agreement with the owners of land at the time that the amount of compensation payable was settled. Held, that the person appointed under the Act to conduct the proceedings for ascertaining the compensation to be paid had power to bind the promoters without their consent, and contrary to their express instructions, to construct such accommodation works as were reasonably necessary. (*West India Improvement Company v. Attorney-General of Jamaica.*) 80

RATING.

Approval of valuation list—Notice of objection.—Sect. 18 of the Union Assessment Committee Act 1862 has not been repealed by sect. 1 of the Amendment Act of 1864, and before the valuation list can be duly approved and signed so as to be the last valuation list legally in force, twenty-eight days

SUBJECTS OF CASES.

must be allowed from the time of the public notice of the deposit of the valuation list by the overseers for receiving notices of objection from overseers or from persons feeling themselves aggrieved on the ground of unfairness or incorrectness or omission. (*Reigate Union and Churchwardens, &c., of Betchworth, apprs., v. South-Eastern Railway Company, resp.*; *Same and Churchwardens, &c., of Buckland v. Same*; *Same and Churchwardens, &c., of Chipstead v. Same*; *Same and Churchwardens, &c., of Gattou v. Same*; *Same and Churchwardens, &c., of Merstham v. Same*; *Same and Churchwardens, &c., of Reigate (Foreign) v. Same.*)page 353

Poor rate—Assessment—Docks—Docks in several parishes—"Parochial principle"—Dock railway—Statutory prohibition against letting—Hypothetical tenant.—The Hull Dock Company owned and occupied various docks, with wharves and warehouses, all forming one system of docks under one management, but situate in several parishes in the respondent union. Accounts were kept by the company which showed the expenses and earnings attributable to the part of the property situate in each parish. The rateable value of the property in each parish was ascertained by taking the value of the whole of the property and apportioning it among the several parishes according to the water area of the docks in each parish. The dock company appealed against that mode of assessment. Held, that the rateable value of the property in each parish ought to be ascertained upon what is called the "parochial principle" by ascertaining the profit-earning capacity of the property in each parish. Upon the dock company's property there were railway and tramway lines, in respect of which the company was by statute prevented from taking tolls and from letting. Held, that the rent which a tenant might reasonably be expected to give for the lines, if the company could let them, ought to be taken into account in determining the rateable value of the property. (*The Hull Docks Company, apprs., v. The Guardians of the Sculcoates Union, resps.*) 742

Rateable value—Cotton-mills—Stoppage owing to strike—Union Assessment Act 1862.—On the 7th Nov. certain cotton-mills were assessed to a poor rate for the ensuing year, according to the valuation list then in force, as going and working concerns, no allowance being made in respect of a strike, through which, on the 5th Nov. the mills ceased working, and did not resume work until the 25th March when the strike ceased. During this period they were only occupied for the purpose of keeping the machinery in good working order and condition. In June the occupiers appealed to the assessment committee, but obtained no relief; and on appeal to quarter sessions a special case was stated. Held, that the assessment committee were right in disregarding the possibility or probability of a continuance of the stoppage of the mills on account of the strike; and that no deduction or allowance could be made in respect of a stoppage occurring after the rate was made. (*Hoyle and others, apprs., v. The Assessment Committee of the Oldham Union, resps.*) 741

Sewers—Sewage works—Rateability of—Beneficial occupation—Parochial Assessment Act 1836.—The appellants were the occupiers of a sewage farm and works, which comprised a pumping station, together with a "rising main" up which the sewage was forced from the pumping station to tanks, from which the sewage was carried to different parts of the farm by "sewage carriers," and "effluent culverts" by means of which the effluent was carried through pipes underground and discharged into a natural watercourse. On behalf of the appellants it was contended that they were not rateable in respect of the "rising main," "sewage carriers," and "effluent culverts." Held, that they all formed part of the sewage works, and that the appellants were therefore rateable in

respect thereof. (*The Mayor, Aldermen, and Burgesses of Leicester, apprs., v. The Churchwardens and Overseers of the Poor of the Parish of Beaumont Leys and the Assessment Committee of the Barrow-on-Soar Union, resps.*)page 659

RESTRAINT OF TRADE.

Contract—Breach—Agreement by vendor of business not to "carry on or be in anywise interested in" any similar business—Business carried on by wife of vendor trading separately.—The defendant, who had been carrying on the business of a grocer under the style of "T. P. Hancock," sold his business to the plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. T. P. Hancock." The business was managed by the nephew, and the defendant's wife took some part in carrying it on, but the defendant took no part. The money necessary for carrying on the business was found by the wife out of her separate estate, and no money whatever was contributed by the defendant, nor did he share in the profits in any way. He, however, assisted his wife in obtaining the lease of the shop in her own name, and, as she was disabled by rheumatism from writing, he wrote for her a circular, inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own, and introduced the nephew to some provision merchants, and attended at the bank when his wife opened the banking account for the business in her own name. Held, that there had been no breach of the agreement by the defendant, inasmuch as he was neither "carrying on" nor "interested in" his wife's business within the meaning of the agreement. (*Smith v. Hancock.*) 163, 578

SALE OF FOOD AND DRUGS ACTS.

Adulteration—Food, definition of—Sale of baking powder containing injurious ingredients.—Baking powder is not an article of food or an article used for food within sect. 2 of the Food and Drugs Act 1875; and the seller of a baking powder composed of bicarbonate of soda (20 per cent.), alum (40 per cent.), and powdered rice (40 per cent.) cannot be convicted under sect. 3, although one of the results of the chemical action between the alum and the bicarbonate of soda is to leave in the bread, &c., into which the baking powder has been introduced, a residue of hydrate of alumina, a substance which is injurious to the health of man. (*Jones, app., v. James, resp.*) 351

Milk—Amendment of summons—Summary Jurisdiction Act 1848.—A consignor of milk having been summoned under sect. 6 of the Sale of Food and Drugs Act 1875, the evidence against him disclosed an offence under sect. 3 of the Amendment Act 1879. Held, that the variance was curable by sect. 1 of the Summary Jurisdiction Act 1848, and that the appellant was rightly convicted. (*Hiett, app., v. Ward, resp.*) 374

Milk—Particulars of offence—Summons—Insufficiency of particulars—Jurisdiction of justices.—Sect. 10 of the Sale of Food and Drugs Amendment Act 1879 provides that "in all prosecutions under the principal Act . . . particulars of the offence or offences against the said Act of which the seller is accused . . . shall be stated on the summons." Held, that the omission of such particulars from the summons does not deprive the justices of jurisdiction, but merely entitles the defendant to an adjournment of the hearing of the case, in the event of the justices being satisfied that he is prejudiced by such omission. (*Neal, app. v. Devenish, resp.*) 628

Diluting rum—Certificate of analyst—Form of—"Excess of water beyond that allowed by Act of

SUBJECTS OF CASES.

Parliament"—Food and Drugs Amendment Act 1879.—In an information against the respondents under sect. 6 of the Food and Drugs Act 1875, for selling to the prejudice of the purchaser one pint of rum, which was not of the nature, substance, and quality of the article demanded, the certificate of the analyst was as follows: "I find that the sample contains an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of opinion that the said sample is not a sample of genuine rum." By sect. 18 of the Act the analyst's certificate must be in the form contained in the schedule to the Act. By sect. 21 the certificate of the analyst is sufficient evidence of the facts therein stated, unless the defendant require that the analyst be called as a witness. In this case the analyst was not called as a witness. Held, that the certificate was not in such a form as to amount to evidence upon which the defendant could be convicted. The duty of the analyst was to state the proportion of water in the rum, leaving it to the justices to decide whether it was in excess of that allowed by Act of Parliament. (*Newby v. Sims.*) ...page 105

SALE OF GOODS.

Hire-and-purchase agreement—Power to terminate hiring by return of goods—Agreement to buy—Goods pawned by hirer—Factors Act 1889.—The plaintiff entered into a written agreement with B. by which he let on hire to B. a piano upon certain terms by which (*inter alia*) B. agreed that he would pay the plaintiff instalments of 10s. 6d. a month until eighteen guineas were paid, and that if he did not duly perform the agreement the plaintiff might terminate the hiring and retake the piano; and the plaintiff agreed that B. might terminate the hiring by delivering up the piano to him, and that if the full sum of eighteen guineas should be punctually paid, the piano should become the sole and absolute property of B., but until that sum was paid it should continue to be the sole property of the plaintiff. After receiving the piano, and paying a few of the monthly instalments, B. pawned the piano with the defendant. Upon B. failing to pay the next instalment the plaintiff claimed the piano, and brought this action against the defendant to recover it. The defendant relied on sect. 9 of the Factors Act 1889, by which it is provided that, where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods, the delivery by that person of the goods under a pledge to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery were a mercantile agent in possession of the goods with the consent of the owner. Held, that the agreement between the plaintiff and B. was an agreement to buy within sect. 9. (*Helby v. Matthews.*) ... 837

Price—Nonpayment—Cause of action—County Court—Jurisdiction.—In an action for money payable for goods sold and delivered, nonpayment of the money is part of the cause of action. Therefore, under sect. 74 of the County Courts Act 1888, such an action may be commenced by leave of the judge or registrar in the County Court in the district of which the price of the goods is to be paid. (*The Northey Stone Company Limited v. Gidney.*) ... 82

Sale of wheat to be shipped—"3000 tons, 10 per cent. more or less"—Option of vendors to ship more or less—Payment by cash against bill of lading—Tender of bill of lading for 3800 tons—Refusal to accept.—By a contract in writing K. bought from B. "about 3000 tons of wheat (10 per cent. more or less) to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause: "Sellers have option of shipping less than the minimum

quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account." B. informed K. that 3800 tons had been shipped on the *Bombay*, and that he appropriated 3000 tons of that shipment to the contract with K., and he subsequently sent K. an invoice for 3000 tons *ex Bombay*. The bills of lading of the 3800 tons were two for 1750 tons each and two for 250 tons each. K. offered to deliver to B. either all the bills of lading or two for 1750 tons each, but B. refused to accept the tender or to pay any part of the price. Held, that the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought, and were entitled to refuse the tender made by the sellers. (*Re An Arbitration between Keighley, Marted, and Co. and Bryan, Durant, and Co. (No. 2.)*page 155

SCHOOL BOARD.

(See *BANKRUPTCY*.)

SETTLED LAND ACTS.

Equitable tenant for life—Married woman—Trust for sale—Possession.—Summons by Mrs. B., who was twenty-four, and her husband thirty, to be let into possession or receipt of the rents and profits of a settled estate, vested in trustees in trust for sale, with power to postpone; the income of the proceeds of sale, or the rents and profits of the estate till sale, being held in trust for Mrs. B. for her separate use, without power of anticipation, and the trustees having extensive powers of management under the settlement; and also to be allowed to exercise all the statutory powers of a tenant for life, except those of sale and exchange. Held, that, in the exercise of the judicial discretion of the court, the plaintiff was entitled, upon paying the costs of the application, and upon giving proper undertakings for the protection of the estate and the trustees, to be let into possession, and to exercise all the statutory powers asked for. The Settled Land Acts afford an additional ground for the court's exercising its discretion favourably to the tenant for life under those Acts. (*Re Bagot's Settlement; Bagot v. Kittoe.*) ... 229

Mansion-house — Rebuilding — Annual rental — Capital money in hand applicable to rebuilding.—A tenant for life of settled land pulled down part of the old mansion-house on the estate, and erected on the old site and on fresh ground a building containing a billiard-room, a smoking-room, and other rooms and offices, and also a kitchen, servants' hall, and other domestic accommodation, converted the old kitchen into a hall, added the old hall to the drawing-room, raised the ceilings of the other rooms, made other internal re-arrangements, and raised the roof of the house. To provide funds for the work, he borrowed on the security of the settled land a sum repayable by annual instalments. A summons was taken out by him, asking that capital money in hand forming part of the settled property might be applied to an amount not exceeding one-half the annual rental of the settled land, in paying off the annual instalments of capital as they became due. Held, that whether a "rebuilding" within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890, of a mansion-house, had taken place, was a question to be determined upon the circumstances of each case, and that, in the case in question, there had been such a "rebuilding" of the mansion-house. Held also, that the "annual rental" within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890 did not include anything in respect of the mansion-house and park in the occupation of a tenant for life, nor in respect of a farm held and farmed by him, but did not include the rental value of a farm unoccupied temporarily, though usually let to a tenant. (*Re Walker's Settled Estate.*) 259

SUBJECTS OF CASES.

Settled land—Application of capital money—New roof to house—Heating apparatus—"Addition to or alteration in" building.—The placing of a new roof on a house in substitution for an old roof, which, at the time the tenant for life succeeded to the settled estate, was so dilapidated that it was useless to repair it: Held to be an "alteration" within sect. 13. sub-sect. ii. of the Settled Land Act 1890, and, being reasonably necessary and proper to enable the house to be let, the cost of the new roof allowed to be paid out of capital money; but the erection of a heating apparatus for the purpose of rendering the house more comfortable and convenient for occupation held not to be an "addition to or alteration in" the building within the same sub-section, and the cost thereof not allowed to be paid out of capital money. (*Re Gaskell's Settled Estates.*)... page 554

Tenant for life—Sale by several tenants for life—Solicitors—Costs.—An order for the appointment of trustees for the purposes of the Settled Land Act was made on the application of all the parties (twenty-five in number) who constituted the persons entitled to exercise the power of a tenant for life under the Settled Land Act 1882. The property was sold, and on such sale F. acted as solicitor of the vendors, being instructed for that purpose by about four-fifths of the several parties. The others instructed independent solicitors. This was a motion on behalf of two sets of independent solicitors, to vary an order made in chambers disallowing their costs out of the proceeds of sale. Held, that the independent solicitors were not entitled to their costs out of the proceeds of sale: Motion refused with costs. (*Re Smith; Smith v. Lancaster.*) ... 871

SETTLEMENT.

Equitable estate—Limitations—No words of inheritance—Life interest—Construction.—In 1845 W. voluntarily settled an equity of redemption in certain freehold estates in trust for his wife for life, with remainder to himself for life, and after his death in trust for his children. The question now arose, what interests the children took, W. and his wife being both dead. Held, that an equitable limitation, by way of trust executed, now has the same construction as a legal limitation, and in the absence of words of inheritance the children took life estates only. (*Re Whiston's Estate; Lovatt v. Williamson.*) ... 681

Settlement of personality—Construction—Power of appointing income—Power to appoint capital.—By a settlement of personality made on marriage the trustees were to stand possessed of the "dividends, interest, and income" of the trust funds in trust for such person or persons as the wife should by her will or codicil appoint, and subject to such appointment (if any) of "the said dividends, interest, and income," to stand possessed of "the said trust premises, and the dividends, interest, and income thereof," in trust for such person or persons as under the statutes of distribution would have become entitled thereto at the death of the wife if she had died possessed thereof intestate and without having been married. The wife, by her will, appointed the trust funds in trust, as to the income, for her husband for life, and after his death upon trusts which disposed of the whole interest in the trust funds. She died first, and afterwards the husband. On a summons for the determination (*inter alia*) of the question whether the power of appointment given to the wife by the marriage settlement extended to the capital of the trust funds: Held, that the power of appointment over the dividends, interest, and income of the trust funds, given her by the settlement, extended over the capital thereof. (*Re J. Herminier; Mounsey v. Burton.*) ... 727

SHIPPING.

Bill of lading—Loss by perils of the sea—Negligence—Burden of proof.—Where a bill of lading

contains the customary exception of loss by perils of sea, and an action is brought by the shipper against the shipowner for damage to goods shipped thereunder, the burden will rest upon the plaintiff of proving that the damage was caused by the negligence of the defendant's servants. (*The Glendarroch.*) ... page 344

Charter-party—Chartered freight a lump sum—Sub-charter—Bill of lading freight less than chartered freight—Cesser clause, construction of—Liability of charterers.—Where, under the provisions of a charter-party, a ship was re-chartered, and the original charter-party contained a clause that the captain should sign bills of lading for the cargo at any rate of freight required without prejudice to the charter-party, and also a clause for the cesser of the charterer's liability, coupled with a stipulation, "the owner having a lien on the cargo for all freight and demurrage under this charter-party:" Held, that, there being no express agreement to the contrary, the cesser of liability did not apply so far as the lien given to the owner was not equivalent to the liability of the charterers. (*Hansen v. Harrold Brothers.*) ... 475

— Clause as to advance of freight—Construction of—Liability of shipowner.—Where a clause in a charter-party provides for "cash for steamers' ordinary disbursements at port or ports of loading . . . to be advanced . . . on account of freight (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash;" the fair meaning is, that the ship-owners are to be in a position to ask through their master for sufficient to pay the disbursements if they require it, but not otherwise. (*The Primula.*) ... 253

— Construction—Captain's signature to bills of lading—Penalty.—A charter-party entered into between plaintiffs and defendants contained a clause in the following terms: "Captain to sign bills of lading (at plaintiff's office) without responsibility as to weight, and as presented to him, without prejudice to the tenor of this charter-party, within twenty-four hours after the cargo is on board, or pay 4d. per register ton per day (the first day's payment being due on the expiration of the said twenty-four hours) for each day's delay." The captain refused to sign for seventeen days, but the owners offered to sign on his behalf within twenty-four hours. In an action by the charterers against the owners: Held, that the signature of the owners was not sufficient to satisfy the provision in the charter-party. Also that the clause was one for a penalty, and not for liquidated damages. (*The Princess.*) ... 388

— Discharge of cargo — Despatch money — Sundays and fête days. — Where a charter-party provided that a steamer was to be "discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour saved," it was held that Sundays and fête days were not to be taken into account in computing the number of hours saved in discharging, and hence despatch money was payable on the difference between the number of hours actually taken to discharge the ship and the total number of hours allowed by the charter-party. (*The Glendevon.*) ... 416

— Full cargo not loaded — Damages — Freight on cargo loaded by shipowner.—By a charter-party the defendants contracted, except prevented by fire, to load the plaintiffs' ship with a full cargo of jute at 1l. 17s. 6d. per ton, but the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owner's lien, provided the bill of lading freight in the aggregate fully covered the freight due under the charter-party. The defendants had shipped 7545 bales of jute, when a fire broke out and destroyed 5458 of the bales and delayed the sailing of the ship. The freight specified in the

SUBJECTS OF CASES.

- bills of lading for the goods burnt was 11. 5s. per ton. The defendants then refused to ship any more goods, and the plaintiffs filled the ship with cargo, some at 11. 5s. per ton, and some at a lower rate. The plaintiffs having brought this action to recover damages for breach of the charter-party by the defendants in not having loaded a full cargo: Held, that with regard to the bales burnt, each party had *pro tanto* fulfilled their respective obligations under the charter-party, and the defendants were under no liability to pay freight for the bales burnt, nor bound or entitled to reload cargo to take their place; and that the freight received by the plaintiffs for the cargo shipped by them in the space formerly occupied by the burnt bales ought not to go in reduction of any damages payable by the defendants. Held also, that the fire only absolved the defendants from payment of so much of the freight as would have been actually received for the goods burnt, viz., 11. 5s. per ton, and not 11. 17s. 6d. per ton. (*Aitken, Lilburn, and Co. v. Ernathausen and Co.*) ... page 822
- Charter-party—Restraints of princes and rulers—Demurrage—Customary mode of loading.—The defendants chartered the plaintiffs' vessel to proceed to Iquique, in Chili, and there to load for the United Kingdom a cargo of 3000 tons of nitrate of soda at the rate of 200 tons per working lay day, and after provisions as to the lay days came the usual clause mutually excepting restraints of princes and rulers, political disturbances, or impediments during the said voyage. At the trial of the action the learned judge found as a fact that the ordinary and recognised mode of loading nitrate at Iquique was to send the required amount of nitrate down by railway from the mines direct to the ship at the quay when she was ready for loading. When the ship arrived at Iquique considerable delay was caused in the loading by reason of a civil war having broken out, and the mines and the railway being for a time in possession of the troops, so that no nitrate could be sent down by railway to the ship. In an action for demurrage: Held, that the delay was within the exception in the charter-party. (*Smith and Service v. The Rosario Nitrate Company Limited.*) ... 68
- Consignee for sale—Receipt of goods under bill of lading—Liability for freight—Deposit.—A mere consignee for sale of a cargo shipped abroad and delivered to him in England out of a warehouse under a bill of lading, is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act 1862, as the deposit is not equivalent to payment, but is only security for payment. (*Furness, Withy and Co. v. White and Co.*) ... 463
- Managing owner—Authority to order repairs—Liability of co-owners.—Where the co-owners of a vessel depute the managing owner or ship's husband to employ the vessel for their benefit he has authority to give orders for the necessary repair, fitting, and outfit of the vessel, and the fact that the vessel is insured does not limit such authority. *Semble*, those who execute the repairs to the vessel do not discharge any claim they may have against the co-owners by reason of the fact that, they being unable to get cash, they have taken and renewed bills on account in their dealings with the managing owner in respect of such repairs. (*The Huntsman.*) ... 386
- Master and seamen—Common employment—Negligence—Unseaworthiness.—The captain and crew employed by a shipowner in the navigation of a ship are fellow-servants engaged in a common employment, and therefore the owner is not liable for negligence of the captain which causes injury or death to one of the crew. A ship which is properly equipped for encountering the ordinary perils of the sea is not unseaworthy within sect. 5 of the Merchant Shipping Act 1876 because the captain negligently omits to make use of part of her equipment. A ship was constructed with an opening in her bulwarks which could be readily closed by fixing a movable railing and stanchions. The ship sailed with the railing unfixed, and a storm came on, and one of the crew fell through and was drowned. Held, that the owners were not liable for a breach of the obligation to keep the ship seaworthy during the voyage created by sect. 5 of the Merchant Shipping Act 1876. (*Hedley v. Pinkney and Sons Steamship Company Limited.*) ... page 630
- Necessaries—Priority—Practice.—Where a vessel has been sold and the proceeds brought into court, and the judgment is, in the usual form, expressed to be without prejudice to other claims against the vessel, and reserving all questions of priority of such claims, the practice of the court now is to order a *pro rata* distribution among the claimants for necessaries, as the court holds the property not only for the first plaintiff, but at least for all creditors of the same class who assert their claims before an unconditional decree is pronounced. *Semble*: So long as the funds remain in the hands of the court, an unconditional decree can be modified so as to let in others who, without laches, put forward claims of a like character. *Quære*: Whether if a judgment has been obtained in the County Court, and the action is afterwards transferred to the High Court, such a judgment would give priority, or whether the plaintiff in the County Court action should only be admitted to share in the proceeds in the High Court on terms of equality with the suitors in that court. (*The Africano.*) ... 250
- Overloading—Vessel in foreign port—Owner resident in this country—Liability of owner.—The Merchant Shipping Act 1876 provides by sect. 28 that any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc, shall for each offence incur a penalty not exceeding one hundred pounds. The appellant, the owner of a British ship, was resident and carried on business in this country. His ship, while in a foreign port, was so loaded by the master as to submerge the centre of the disc. The master was appointed by the appellant, who was not informed and was not aware of the overloading of the ship. The appellant was convicted for having allowed his ship to be so overloaded. Held, that the conviction was wrong, as there was no evidence to show that the appellant had allowed the ship to be overloaded. (*Massey, app., v. Morris, resp.*) ... 873
- Salvage—Duty of shipowner—Expenditure for benefit of all concerned—General average—Brokerage.—Reasonable expenditure incurred by a shipowner in salvage operations may be distributed over the interests protected and benefited, and need not fall upon the ship alone. A ship of the appellants containing a valuable cargo of a perishable nature was stranded on the coast of France, while on a voyage to the United Kingdom, and eventually became a total loss. The owners incurred expenditure in removing the cargo from the ship, drying it, and carting it to a port from which it could be shipped to the port of destination. For these purposes they employed persons who were skilled in salvage operations, and also a French agent on the spot. Some of the cargo could not be identified, and was sold by auction, and a brokerage commission was paid. In an action brought by the owners against consignees of cargo to recover general average, particular average, salvage, and other charges: Held, that the expenditure above mentioned, though of an extraordinary character, was reasonably incurred for the benefit of all parties, and that the respondents were liable for their proportion of it. (*Rose and others v. Bank of Australasia.*) ... 422
- (See CARRIAGE OF PASSENGERS.)
- SOLICITOR.
- Charging order—Costs—Assignment of judgment debt—"Purchaser for value without notice."—By sect. 28 of the Solicitors Act 1860, in every case where a solicitor is employed to prosecute or

SUBJECTS OF CASES.

defend any suit or proceeding, the court may declare such solicitor entitled to a charge upon the property recovered or preserved, "and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bond fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right." The plaintiff in an action, having recovered judgment for a sum of money against the defendant, assigned the judgment debt to a purchaser for valuable consideration. The purchaser gave notice of the assignment to the solicitor who acted for the plaintiff in the action, and the solicitor thereupon obtained a charging order for his costs upon the sum recovered. Held, that, as the purchaser had notice that the money had been recovered in an action, he had notice of the solicitor's right to a lien; that he was therefore not a purchaser for value "without notice" within the meaning of sect. 28 of the Solicitors Act 1860, and that the solicitor's charge had priority over his assignment. (*Cole v. Eley*.)page 892

Costs—Agreement in writing between solicitor and client—Agreement signed only by the party to be bound—Money retained by consent of client equivalent to payment.—A solicitor agreed to conduct certain litigation for his client for a fixed sum of money. In the course of the litigation the client paid the solicitor certain sums amounting in all to more than the sum agreed. The litigation terminated in a settlement favourable to the client, and a fresh arrangement was made that the solicitor should retain the amount he had received from his client, though in excess of the amount originally agreed. This arrangement was embodied in a receipt signed by the client, on payment to her by the solicitor of the amount recovered for her in the action. Held, that the receipt, though signed only by the client and not by the solicitor, was "an agreement in writing," within sect. 4 of 33 & 34 Vict. c. 28. Held also, that the money retained by the solicitor was, in view of his client's consent as contained in the receipt, a payment by the client to the solicitor within sect. 41 of 6 & 7 Vict. c. 73. (*Re B. G. Thompson; Ex parte Baylis*.) 238

—Solicitor's lien—Title deeds held personally —Costs of firm.—A solicitor practising in partnership with another solicitor, acted as the solicitor of a purchaser of property, in carrying out the purchase, and at the request of the purchaser the property was conveyed to the solicitor as if he were the sub-purchaser thereof. The title deeds of the property were handed over to the solicitor, and continued to remain in his possession. Three years afterwards the partnership between the solicitor and his partner was dissolved, but the solicitor retained the title deeds in his possession. The purchaser died within six years of the date of the purchase. An action was brought for the administration of the purchaser's estate, and the solicitor on behalf of the old firm and himself claimed against the purchaser's estate a considerable sum for general costs, some of which were incurred previously to the purchase. The chief clerk, however, allowed only the sum claimed for costs incurred within six years of the purchaser's death, the remainder being barred by the Statute of Limitations. The solicitor, when asked to deliver up the title deeds, claimed to have a lien on them for the amount of costs disallowed by the chief clerk as statute-barred. On a summons for the determination of the right of the solicitor to the lien he claimed: Held, that he was not entitled to the lien, as the costs of the purchase of the property had been allowed by the chief clerk, and the solicitor, to whom the property had been conveyed, was not entitled to a lien on the title deeds handed to and retained by him personally for the general costs of the old firm. (*Re Gough; Lloyd v. Gough*.) 725

—Taxation—Agency charges—London agents of country firm—London firm having common partners with country firm—Rules of Court 1893, App. N., Costs, r. 119.—In taxing a bill of costs,

certain agency charges for work done by a London firm of solicitors, as agents for a country firm, were disallowed. Two of the partners in the country firm were also partners in the London firm, and held certificates for practising in London as well as in the country. Held, that, it having been the long-settled practice of the taxing masters not to treat cases of two firms having certain partners in common as agency cases at all, the court could not disturb that practice; and that the charges were properly disallowed. (*Re The Borough Commercial and Building Society*.)page 51

Costs—Taxation—Claim for delivery of bill of costs resisted on the ground of maintenance and champerty in the proceedings—Illegal transactions—Doctrine as to, not applicable to the exercise of the jurisdiction of court over its own officers.—The doctrine laid down by Lord Mansfield in *Holman v. Johnson* (Cowp. 341, 343), and recently acted upon by the Court of Appeal in *Scott v. Brown and Co.* (67 L. T. Rep. N. S. 782; (1892) 2 Q. B. 724)—that no court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality—has never been applied, and ought not to be applied, to the exercise of the jurisdiction of the court over its own officers. One of the defences by a solicitor to a claim for the delivery of a bill of costs, and an account of moneys paid in connection with certain litigation, was that the work which the solicitor was employed to do was illegal, on the ground of maintenance and champerty, and that no assistance ought therefore to be afforded by the court to either party as against the other. Held, that such a defence in the case of a solicitor could not be set up as a ground of immunity from the jurisdiction of the court, and must be regarded as wholly untenable, and that the order asked for must be made. (*Re Howell Thomas; Jacques v. Thomas*.) 567

—Taxation—Disbursements in respect of business done while uncertificated.—The Attorneys and Solicitors Act 1874 provides, by sect. 12, that "no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any suit or matter by any person or persons whomsoever." A solicitor, during a time when he was not duly qualified, because he had not taken out a certificate, delivered briefs to counsel, and the trial took place during that period, and refreshers became payable. After he had taken out his certificate he paid fees in respect of those briefs and refreshers. He sued his client to recover the amount due upon his bill of costs, which included those fees, and judgment was given for the amount appearing to be due upon the bill, the bill to be taxed. Held, that these fees were "disbursements on account of or in relation to an act or proceeding done or taken" while the solicitor was not duly qualified, and that they ought to have been struck out of the bill on taxation. (*Kent v. Ward*.) 612

—Taxation—Several retainers by co-plaintiffs in action.—Where the retainer of a solicitor is a several retainer by a number of persons, each is entitled to have the whole bill of costs taxed, although each has only to pay a proportion of the entire amount. And there is an absolute right to have the bill taxed without serving anyone except the solicitor. (*Re Salaman*.) 772

Managing clerk—County Court—Right to address the court—"A solicitor acting generally in the action."—The County Courts Act 1838 provides, by sect. 72, that it shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for

SUBJECTS OF CASES.

- a barrister, or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor. Upon the hearing of an action in a County Court a solicitor, who was managing clerk to a firm of solicitors retained by the defendant in the action, appeared for the defendant. Judgment was given in favour of the defendant, and upon a motion for a new trial the same solicitor appeared to oppose the motion on behalf of the defendant, and claimed the right to address the court. The County Court judge refused to allow the solicitor to address the court as of right. Held, that the County Court judge was right, as the solicitor was not a solicitor acting generally in the action or matter for the defendant. (*Reg. v. His Honour Judge Snagge.*)page 874
- Marriage settlement—Costs—Trustee—Lien.**—In 1889 A. B., in contemplation of marriage, instructed C. D. and E. F., a firm of solicitors, to prepare a settlement. In 1891 the solicitors sent in a bill of costs to A. B., the bill including stamp duty and other disbursements. In 1892 A. B. became bankrupt. The settlement and other deeds and documents remained in the hands of the solicitors. On summons taken out by the trustees: Held, that the solicitors had no lien on the settlement, deeds, and documents in respect of their costs. Order for delivery up of the box containing the settlement, deeds, and documents, to the trustees to be placed in a bank. (*Re Lawrence; Bowker v. Austin.*) 91
- Practice—Solicitor and client—Costs—Taxation—Common order—Mistake in order—Right to obtain second order of course—Suppression of material facts.**—T. and Co. acted as solicitors for F. in an arbitration and other matters. On the 27th Oct. 1892 they delivered to him a list of counsel's and witnesses' fees in the arbitration, and on the 10th May 1893 they delivered their bill of costs other than those fees. On the 24th Oct. 1893 F. obtained an order of course to tax both bills. The taxing master, without formally extending the month within which the order, as usual, required the certificate to be given, fixed the 7th Dec. for the attendance of the parties. He then decided that the list of fees delivered on the 27th Oct. 1892 was not a bill of costs at all, and could not be taxed, and that he could not under the order to tax the two bills proceed to tax the bill of the 10th May 1893 alone. On the 19th Dec. 1893 the parties again attended before the taxing master, and he decided that his power to make any order had expired before the first appointment, and that he had no power to make any order or deal with the costs of the application; but he expressed an opinion that the applicant ought to pay the costs, and that 2l. 2s. would be a proper amount. F.'s solicitors wrote offering to pay T. and Co. 2l. 2s.; but, before they received any definite answer, obtained on the 8th June 1894 a second order of course to tax the bill of the 10th May 1893 only. F. now moved to discharge this order as improperly obtained, because the applicants had not disclosed the existence of the former order. Held, that the order of course was improper; that the applicants would have been entitled to an order for taxation on special summons, but that such order would have provided for the costs of the former application. The taxing master was ordered to proceed under the present order, but to tax also the costs of the former proceedings and of this motion, and that these costs should be brought into the account. (*Re Taylor, Sons, and Tarbuck (Solicitors, &c.).*) 162
- Professional misconduct—Client just of age—Borrowing from client—Suspension from practice.**—A solicitor borrowed the sum of 69,500l. from a client, who had, shortly before the first transaction between them, attained the age of twenty-one years. The client had no independent advice, and left the conduct of his affairs entirely to his solicitor. Held, that, although the solicitor had not been guilty of actual dishonesty by misappropriating the money to his own use, he had been guilty of such professional misconduct as to require his suspension from practice for a period of two years. (*Re A Solicitor; Ex parte The Incorporated Law Society.*)page 27
- Retainer in an ordinary common law action—Duty of solicitor to carry on the action to its end—Refusal to do so without good cause—Action on bill of costs.**—A solicitor, retained in an ordinary common law action, cannot, without good cause, give his client notice determining his retainer before the action is finished and sue for his charges up to such notice of determination. (*Underwood v. Lewis.*) 833
- Trustee—Professional charges—Settled account—Release—Re-opening and setting aside—Lapse of time.**—The defendants, who were solicitors, were trustees and executors of a will with power to charge for professional services. Having wound-up the estate, they sent a letter to the residuary legatees containing an executorship account, and saying that, if they would call at their office three days later, they would give them any explanation they might require and hand them a cheque for their share of the residue. The account contained an item of 116l. for costs relating to the executorship. The residuary legatees attended as requested, approved of the account, received a cheque for their respective shares of the residue, and executed a release to the defendants. The defendants did not deliver any detailed bill of costs to the legatees, nor did they inform them that they were entitled to have one delivered and to have it taxed. Nine years afterwards the legatees brought an action claiming a declaration that the release was not binding on them, and delivery and taxation of a bill of costs. Held, that, although it was the duty of the defendants to have told the plaintiffs that they were entitled to have a bill of costs and to have it taxed, the omission to do so was not a sufficient ground for setting aside the release and opening the settled account in the absence of proof that some injustice had been done, that some unfair advantage had been taken, or that excessive charges had been made. (*Re Webb; Lambert v. Still.*) 318
- SPECIFIC PERFORMANCE.**
- Agreement for sale of business, &c.—Stipulation for formal contract—Contract contained in letter**—"Subject to a detailed contract to be entered into"—Negotiation.—By a letter, dated the 17th April 1893, and signed by the plaintiffs, they offered the defendants 145,000l. for their business, including "the freehold brewery and premises at Deptford, the forty-six freehold and six leasehold houses enumerated in the list given to us, the book-debts amounting to 5000l. and the loan 7800l., and all consumable and rolling stock, fixed and loose plant, horses, drays, carts, and other effects now used in connection with the business." The letter contained the following condition: "This offer is made subject to our approving a detailed contract to be entered into." The letter also mentioned the date for completion, and referred to the payment of the purchase money in cash and preference and debenture stock of a brewery company to be formed. The defendants accepted the terms contained in the letter by signing it. They also had the letter stamped as an agreement. Subsequently they refused to complete. No company was ever formed. An action was brought by the plaintiffs for specific performance. Held, that the above letter was not a binding contract between the parties, inasmuch as not only was it expressed on the face of it to be made subject to the parties "approving a detailed contract to be entered into," but also because it was evident that various important

SUBJECTS OF CASES.

details were left to be discussed and agreed on—matters that could not be settled without a further document. Held, therefore, that specific performance could not be ordered. (*Page v. Norfolk.*)page 781

STAMP ACTS.

Coupons on foreign loans—Subsequent issue of coupons—Liability of coupons to stamp duty as bill of exchange.—In the year 1881 the Hungarian Government issued a number of bonds forming a State loan, bearing interest payable half-yearly at certain specified places, one of these places being London, at the offices of Messrs. R. and Sons. The bonds were of perpetual obligation, and were provided with talons and interest coupons for ten years, and the talon provided that the Hungarian Government would deliver to the bearer of the talon, after the 1st July 1891, new coupons and another talon. Accordingly, in 1891, new talons with coupons for the ensuing ten years' service of interest were issued, and one of these new coupons, payable on the 1st Jan. 1892, was stamped with a penny stamp as a bill of exchange payable on demand. Held, that the new coupon was a bill of exchange within the meaning of sect. 48 of the Stamp Act 1870, and that it did not come within the exemption in the schedule to the Act, or in sect. 16 of the Revenue Act 1889, as a "coupon or warrant for interest attached to and issued with any security," and was therefore properly stamped as a bill of exchange. (*Messrs. N. M. Rothschild and Sons v. The Commissioners of Inland Revenue.*) 667

Duty chargeable—"Conveyance or transfer on sale"

—Dissolution of railway company and transfer of its undertaking to another by Act of Parliament—Duty chargeable on copy of Act.—By the Stamp Act 1891 an *ad valorem* duty is payable on a conveyance or transfer on sale of any property, and by sect 54 the expression "conveyance on sale" includes every instrument, and every decree or order of any court whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser. By a private Act of Parliament a railway company was dissolved and its undertaking transferred to the Great Western Railway Company, the Great Western Company paying and issuing to the shareholders of the dissolved company a certain amount of consolidated guaranteed stock in the Great Western Company. Under the Act a Queen's printer's copy of the Act was to be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act had been effected by an executed instrument in writing, and the copy were the instrument. Held, that a Queen's printer's copy of the Act was chargeable with an *ad valorem* duty, as upon a conveyance on sale, upon the value of the stock in the Great Western Railway Company issued to the shareholders of the dissolved company. (*The Great Western Railway Company v. Commissioners of Inland Revenue.*) 86

Medicine "held out or recommended to the public"—"Public notice or advertisement."—Sect. 2 of the Medicine Stamp Act 1812 imposes a penalty upon any person who "shall utter, vend, or expose to sale . . . or buy or receive, or keep for the purpose of selling by retail . . . any packet, &c., containing any of the drugs, &c. mentioned and set forth in the schedule annexed to this Act" without a paper cover provided by the Commissioners of Inland Revenue, duly stamped for denoting the duty charged on such packet, &c. The schedule of the Act—after setting out all the different kinds of medicines for the prevention, cure, or relief of disorders affecting the human body which shall, "by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, &c. upon any packet, box, &c. held out or recommended to the public by the makers, vendors, &c., as nostrums or pro-

prietary medicines, &c., or as beneficial to the prevention, cure, or relief of any distemper, malady, &c., incident to or affecting the human body"—specified under the head of "Special Exemptions" "all medicinal drugs whatsoever which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient whatsoever, by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship . . . or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty." The respondents, a limited company, sold a powder and a tincture without stamps. They had issued a price list describing the articles sold as beneficial for certain ailments, and one of the articles, the tincture, was wrapped in a handbill similarly describing the article. Informations were preferred against the respondents. The justices dismissed the informations. Held, that, as the respondents had held out or recommended the medicines by public notice or advertisement as beneficial to the cure of disorders by issuing a price-list, &c., and that as the respondents did not come within the "special exemptions" of the schedule, the informations ought not to have been dismissed. (*Smith, app., v. Mason and Co., resps.*)page 809

Voluntary settlement of land—Trust for sale—No actual sale of land—Liability of property to account stamp duty—Customs and Inland Revenue Act 1881; Customs and Inland Revenue Act 1889.—Where freehold property, passing under a voluntary settlement which contains a trust for sale, is to be considered in equity as converted into money, it is liable as personal property to account stamp duty under the provision of sect. 38, sub-sect. 2 (c) of the Customs and Inland Revenue Act 1881. By a post-nuptial settlement, made in the ordinary form, for carrying out conversion land was assigned by the husband to trustees upon trust that they should, on the request in writing of the husband and wife or the survivor of them, and after the death of the survivor at their discretion, sell the property and hold the moneys arising from such sale upon certain trusts. The husband died, leaving his wife and children surviving. No request was made for sale, and no sale had actually taken place. Held, that, although no request was made for the sale of the property, by reason of the trust for sale, the land was to be considered as converted into money, and was liable to account stamp duty as personal property passing under the settlement. (*The Attorney-General v. Dodd.*) 660

SUMMARY JURISDICTION.

Public health—Nuisance—Summons to unknown owner or occupier of premises—Form of—How to be served.—Sect. 117, sub-sect. (1) of the Public Health (London) Act 1891, provides that summary proceedings under the Act may be prosecuted in manner directed by the Summary Jurisdiction Acts. By sect. 128, sub-sect. (1), any "notice, order, or other document," required or authorised to be served under this Act may be served . . . where addressed to the owner or occupier of premises, by delivering the same, or a true copy thereof, to some person on the premises, or if there is no person on the premises who can be so served, then by fixing it on some conspicuous part of the premises. The third schedule to the Act contains a form of summons addressed "To A. B., of [or to the owner or occupier of] describe premises. . . ." A sanitary authority having served a notice under sect. 4, sub-sect. (1) of the same Act, upon the owner or occupier of premises who was unknown, requiring him to abate a nuisance thereon, and the notice not having been complied with, made a complaint under sect. 5, by summons directed to the "owner or occupier," and served in the manner prescribed in sect. 128 for the service of any "notice, order, or other document." Held, that the summons was sufficiently directed, and

SUBJECTS OF CASES.

properly served. (*Reg. v. Mead, Esq.; Ex parte Anthony.*)... ..page 766

Statutory direction to provide and fix weights and scales in baker's shop—Absence of penalty—Proceedings for breach not cognisable in court of summary jurisdiction.—Sect. 8 of 3 Geo. 4, c. cvi. (and therefore sect. 6 of 6 & 7 Will. 4, c. 37, which is in the same terms), though directing that every baker, &c., shall fix in his shop proper weights and scales, &c., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a court of summary jurisdiction. (*Reg. v. Horace Smith, Esq., and the Asrated Bread Company.*)... .. 373

TRADE FIXTURES.

Machinery supplied under hire-and-purchase agreement—Mortgage of land—Default of hirer in payment of instalments under agreement—Removal of fixtures—Right of mortgages as against owner of fixtures.—The plaintiff claimed damages against the defendants for the removal of a boiler and pipes from certain greenhouses on grounds belonging to E., of which the plaintiff was mortgagee. E., the mortgagor, was a nurseryman, and he was tenant of the premises on a long lease. The boiler and pipes were the subject of a hire-and-purchase agreement made in Nov. 1889, by which the defendants agreed with E. that the boiler and pipes should become his property on the payment of the price by certain instalments, but that until complete payment they were to remain the property of the defendants. E.'s lessor joined in the agreement. The mortgage was made after the agreement, and without notice of it, but before the boiler and pipes were fixed upon the premises. The boiler and pipes were fixed in brickwork. E. made default in payment of the instalments, and the boiler and pipes were removed by the defendants under the agreement while E. was still in possession of the premises. The ground of the plaintiff's claim was, that the boiler and pipes had been affixed to the mortgaged property without his consent, and had become part of the soil, and were irremovable against him. Held, that the plaintiff, by allowing E. to remain in possession, impliedly authorised him to carry on his business of nurseryman, which would properly include the hiring and bringing on to the premises of fixtures necessary to his business, upon the terms that the owner should be at liberty to remove them on the determination of the hiring agreement. Held also, that, having regard to this implied authority, to the fact that the fixtures were not the property of E., and that E. was in possession at the date of their removal, the plaintiff's claim failed (*Gough v. Wood and Co.*)... .. 297

TRADE NAME.

Assignment—Validity of—Goodwill—Injunction.—The right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public. C. and Co., a firm of watchmakers, granted to another firm for seven years a licence to put a particular name upon watches, and after the expiration of the licence practically ceased themselves to sell or manufacture watches so marked. Held, that C. and Co. had lost all right to prevent other persons from marking their watches with the particular name, and could not therefore assign any such right, even if it was one capable of being validly assigned. (*Thorneloe v. Hill.*)... .. 124

TRAMWAYS.

Compulsory purchase of undertaking by local authority—Principle of valuation.—In determining the value of the undertaking of a tramways company which was being compulsorily purchased by the London County Council, under sect. 44 of the London Street Tramways Act 1870, the referee

appointed in accordance with that section treated the value as being the cost of construction less depreciation. Held, that the purchasers were not to pay for the profit which they might make by the use of what they bought, and were not to compensate the vendors for their loss of profit; and that, therefore, the referee had rightly estimated the value in determining that only that portion of the undertaking represented by the cost of constructing the tramways *in situ* was to be paid for. (*Re An Arbitration between the London County Council and the London Street Tramways Company.*)... ..page 97, 573

TREES.

Residential property—Trees—Overhanging branches—Adjoining owners—Nuisance—Cutting of overhanging branches—Ancient trees—Trespass—Injunction—Damages.—The plaintiff claimed a declaration that the defendant was not entitled to cut the branches of the plaintiff's trees, which had overhung the defendant's land for over twenty years, but was only entitled to cut the recent growth; further, that the defendant was not entitled to enter the plaintiff's land for the purpose of cutting overhanging branches, or at all events not until after due notice to the plaintiff. The plaintiff also claimed an injunction and damages. Held, that to allow the branches to overhang the adjoining property was a nuisance, which the person suffering from the nuisance was entitled to abate, but only upon giving reasonable notice. It appearing that the defendant had no further intention of entering the plaintiff's property or cutting branches, there would be no declaration, and no injunction, but the Court ordered the defendant to pay 5*l.* damages and the costs of the action. (*Lemmon v. Webb.*)... .. 273

TRESPASS.

Damage feasant—Impounding—Election of remedy—Right to recover damages.—A pony belonging to the defendant having got into the plaintiff's field and kicked a horse belonging to him, the plaintiff seized the pony and refused to give it back to the defendant unless he paid for the injury inflicted on the plaintiff's horse. The defendant having refused to pay the amount demanded, the plaintiff detained the pony and sued him for the injury caused by the defendant's pony galloping over his field, for the damage caused to his horse, for veterinary expenses incurred, and for the keep of the pony. Held, that the plaintiff, having elected to seize and impound the defendant's pony, could not recover damages for the injury caused either to his freehold or to his horse. (*Roscoe v. Boden.*)... .. 450

TRUST.

Trust money—Following trust money—Money received by bankers as bankers.—Trustees kept a banking account for the trust at the bank of H. and Co. Debentures forming part of the trust estate became payable, and the trustees authorised H. and Co. to receive the amount 1600*l.* on their behalf as bankers. H. and Co. had to pay to the company, which was paying off the debentures, a larger sum than 1600*l.*, and, on a settlement of accounts with the company, received no money, but paid 300*l.* The account of the trustees with H. and Co. was credited with 1600*l.* One of the trustees was a partner in H. and Co., and knew that the bank was not in a sound financial position. H. and Co. shortly afterwards failed, and the partners were adjudicated bankrupts. The solvent trustee applied in the bankruptcy for a declaration that the sum of 1600*l.*, being trust money, did not form part of the assets of H. and Co. Held, that the trust money could not be followed, inasmuch as H. and Co. had not in fact received it, and even assuming that they had received it, had received it only as bankers. (*Re Hallett; Ex parte The Trustee.*)... .. 361

SUBJECTS OF CASES.

TRUSTEE.

Appointment of new trustees—Personal representatives of surviving trustee—General executors—Special executors—Probate—Conveyancing and Law of Property Act 1881.—By his will, made in 1875, Cornelius Parker appointed two persons to be trustees thereof. He died in 1879. In 1881 one of the trustees died, and a sum of consols belonging to the estate became vested in the surviving trustee. In 1885, by will, the surviving trustee of the will of 1876 appointed A. and B. his general executors, and C. and D. executors for "the purpose of executing in continuation" to himself the trusts of the will of 1876. A. and B. obtained a grant of probate of the will of the surviving trustee (who had died) to themselves as general executors, and by a deed dated April 1893 they appointed C. and E. to be trustees of the will of Cornelius Parker. C. and D., the special executors, subsequently obtained two separate grants of probate of the will of the surviving trustee, "for the purpose only of executing in continuation to the surviving trustee the trusts of the will of Cornelius Parker, which vested in" the surviving trustee at the time of his decease, and they were sworn well and faithfully to administer "the same." A. and B. required D. to concur with them in transferring the consols to C. and E., and, on his default in so doing for twenty-eight days, presented a petition for a vesting order and transfer of the consols. Held, that the will of 1885 did not operate as an exercise of the power conferred by sect. 31 of the Conveyancing and Law of Property Act 1881; but that, as A. and B. were in possession of a general grant of probate at the time of the execution by them of the deed of 1893, they were for the time being personal representatives of the last surviving trustee of the will of 1876 within the meaning of the section, and that, therefore, the appointment of C. and E. to be trustees of the will was valid. Order directing D. to transfer his interest in the consols to C. and E. (*Re Parker's Trusts.*)page 165

Breach of trust—Fraud of agent—Liability of trustees—"Party or privy" to fraud—Trust property "still retained" by trustee—Trustee Act 1888.—The defendants, as trustees of a marriage settlement, were first mortgagees of leasehold hereditaments. The plaintiff was transferee of a second mortgage of the same premises. In 1878 the defendants sold the mortgaged premises under their power of sale. A solicitor who acted for the defendants and plaintiff in the matter fraudulently represented himself to the defendants as the plaintiff's agent to receive the balance of the purchase money due to the plaintiff as second mortgagee, and the defendants accordingly allowed him to receive it, but he never paid it over to the plaintiff, though he continued down to 1891 (when he became bankrupt) to pay the plaintiff interest as on the amount due on his second mortgage. Subsequently the plaintiff brought this action against the defendants for accounts, and for payment of what should be found due to him. Held, that the solicitor, in paying the interest as on the amount of the second mortgage to the plaintiff down to 1891, had not acted as the defendants' agent, or on their behalf; that the plaintiff's claim was accordingly not kept alive against the defendants by such payment; that the fraud of the solicitor could not be treated as perpetrated or concealed by the defendants; that the defendants had not been "parties or privy" to the fraud; and that the money was neither "still retained by" them nor had been "converted to their own use" within the meaning of subsect. 1 of sect. 8 of the Trustee Act 1888, and therefore, by virtue of that section, the claim was barred by the Statute of Limitations. (*Thorne v. Heard.*) 541

Trustee and *cestui que trust*—Investment—On deposit in hands of a particular firm—Change of partners—Liability of trustees—Payment of interest on debt in name of firm—Liability of

retired partner—Statute of Limitations.—By his will, dated in 1870, a testator empowered his trustees to invest certain moneys by placing the same "on deposit in the hands of the firm of B., T., and Co.," should they be willing to receive it, at interest. At the date of the testator's death a considerable sum belonging to him was on deposit with the said firm, which then consisted of W. and H. The trustees left it in the hands of the firm, and subsequently added other sums to it. H. died in 1875; and W., later on in the same year, admitted two new partners into the firm. By a deed of dissolution of April 1883 W. retired from the partnership by arrangement, and the continuing partners agreed to pay the debts and liabilities of the firm, including the debt due to the testator's trustees. Down to March 1891 the continuing partners paid interest on the debt, in the name of the firm of B., T., and Co., to the person beneficially entitled. In an action by the beneficiaries under the testator's will, to have the money restored: Held, that W. was liable for the debt due from the firm, inasmuch as the payment of interest since the deed of 1883 must be regarded as a payment made by the continuing partners for or on behalf of W., and therefore the Statute of Limitations was no bar. Held also, in the event of loss arising, that the testator's trustees were liable for not having got in the debt when the firm of B., T., and Co. became dissolved on the death of H., since the will only authorised the lending of the money to the firm as constituted at the date of the testator's death. (*Re Tucker; Tucker v. Tucker.*)page 128

VENDOR AND PURCHASER.

Covenants for title—Defect appearing on the conveyance—Liability under the covenants.—A vendor is liable to a purchaser under his covenants for title for any defect which comes within the words of the covenants, although the defect is disclosed in the conveyance or is otherwise known to the purchaser. (*Page v. The Midland Railway Company.*) 14

Delay in completion of contract—Payment of interest by purchaser—Delay not attributable to "wilful default" of vendors—Conditions of sale.—In March 1892 T. agreed to buy from the Corporation of London certain freeholds; and the conditions of sale provided that the purchase should be completed on the 24th June 1892, and that if from any cause whatever than the "wilful default" of the vendors, the purchase money should not be then paid, the purchaser should pay interest thereon from that date. The particulars of sale stated that the property was acquired by the vendors in 1824 under a private Act of Parliament, and was being sold under the powers of that Act. On the 16th June the purchaser inspected the plans, and discovered that the sale plan comprised land which the vendors had not acquired until 1864. An abstract of this part of the property was delivered on the 25th June, and eventually the title was accepted on the 30th Sept., and the purchase was completed on the 13th Feb. 1893. The purchaser paid interest on the purchase money from the 30th Sept., but he declined to pay interest for the period between the 24th June and the 30th Sept. on the ground that the delay was caused by the "wilful default" of the vendors, inasmuch as by their own admission they had not examined the documents in their possession before making the misstatements as to their title. There was evidence that the purchaser was not ready with his purchase money by the 29th Sept. Held, that the omission of the vendors to verify the statement in the particulars of sale was not, under the circumstances, tantamount to "wilful default" on their part. But held, by all the Lords Justices, that that omission was not the real cause of the delay in completing the purchase, inasmuch as the real cause was the inability of the purchaser to find the purchase money at the time specified; and that, therefore, the purchaser was liable to pay the interest claimed by the vendors. (*Re A*

SUBJECTS OF CASES.

- Contract between Tabbs and the Mayor, &c., of London.)page 719
- Leaseholds—Title—Requisition—Sale** long after testator's decease by executor not appearing to be such on the face of the deed with ordinary covenants—Presumption.—A contract of sale of leaseholds stipulated that the title should commence with a lease of the 29th Sept. 1852. The contract stated that this lease was granted in consideration (*inter alia*) of a surrendered term, and required that the purchasers should assume that all necessary parties concurred in the surrender, and should not require an abstract or production of such surrendered term or evidence thereof, or of any title before the lease, or make any objection or requisition in connection therewith. The abstract showed that the lease was granted to T. as executor of P. in consideration (*inter alia*) of a surrendered term, and that, by deed of the 7th May 1878, T., who did not appear on the deed as executor, and entered into ordinary covenants of title, assigned to V., the predecessor in the title of the vendor. Held, that an objection on the part of the purchasers that the lapse of twenty-six years between the lease and the sale by T. *prima facie* destroyed T.'s power to sell as executor could not be maintained, the rule in *Re Tanqueray-Willams and Lendau* (48 L. T. Rep. N. S. 542 : 20 Ch. Div. 465) not being applicable to the case of an executor selling leaseholds. (*Re Venn and Furze's Contract*.) 312
- Specific performance—Contract by letter—Subject** to approval of detailed contract to be entered into—Negotiation.—The court will not enforce the specific performance of an agreement by letter in which the main heads of agreement are specified, but which contains a provision that the offer is made subject to the approval by the intending purchaser of "a detailed contract to be entered into." (*Page v. Norfolk*.) 23
- Memorandum drawn by auctioneer's clerk—Agency—Statute of Frauds** (29 Car. 2, c. 3), s. 4.—In a sale by public auction, the auctioneer is the agent, not only of the vendors, but also of the purchaser, to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum of the particulars of the contract sufficient to satisfy the Statute of Frauds. Where, at the conclusion of a sale, an auctioneer's clerk was authorised by a purchaser to enter his full name and address in a printed form of memorandum of sale, but the purchaser did not himself sign it, and afterwards repudiated the contract: Held, that there was a sufficient signature by the authorised agent of the purchaser to satisfy the requirements of the Statute of Frauds, and specific performance of the contract must be directed. (*Sims v. Landray*.) 530
- Statute of Frauds—Conditional acceptance—Offer and acceptance contained in letters—Formal contract referred to in letters and tendered for signature.** (*Jones v. Daniel*.) 588
- VOLUNTARY ASSIGNMENT.**
- Assignment of leaseholds by wife to husband for a limited purpose—Admissibility of parol evidence to show the true transaction—Statute of Frauds** (29 Car. 2, c. 3), ss. 7, 8.—Shortly after the marriage of the Duke and Duchess of M., the duchess purchased a leasehold house with moneys forming part of her separate estate. Shortly after the duchess executed what purported to be an absolute voluntary assignment of the house to the duke. The duke mortgaged the house for 16,000*l*. There was parol evidence to show, and the Court found, that the assignment was made merely for the purpose of enabling the duke to borrow money, the duchess not wishing her name to appear on the mortgage deed, and that, subject to this, it was intended that the house should continue to belong to the duchess, and the duke was always willing and intended to reconvey. Held, that, as the late duke, if he had refused to reconvey the equity of redemption to the duchess, could not have set up the Statute of Frauds, his creditors claiming under him were in no better position; the equity of redemption in the house, therefore, belonged to the duchess. (*Re Duke of Marlborough; Davis v. Whitehead*.)page 314
- WATERCOURSE.**
- Artificial channel—Riparian owner—Implied grant—Diminishing flow of water—Injunction.**—The owner of land in which water flows through an artificial channel has no right to appropriate all such water. Nor is he entitled to diminish the flow of water down the stream by abstracting water from the springs which feed that stream. (*Bunting v. Hicks*.) 455
- WATERWORKS COMPANY.**
- Bursting of main—Damage—Liability of company.**—A main belonging to a waterworks company burst, and the water flooded the plaintiffs' premises, causing considerable damage. Held, that the company being authorised by Act of Parliament to lay the main, and having been guilty of no negligence, were not liable in damages to the plaintiffs. (*Green v. The Chelsea Waterworks Company*.) 547
- Notice by local board—Arbitration—Action to restrain local board from constructing works and from proceeding to arbitration—Costs.**—Under the plaintiff company's special Act of 1891 (modifying sect. 52 of the Public Health Act 1875), it was, as the court construed the provision, unlawful for the defendant local board to construct waterworks within the plaintiffs' limits of supply during four years from the passing of the special Act, so long as the plaintiffs were able and willing to supply water proper and sufficient. The plaintiffs made some unsuccessful attempts to find water, and before they succeeded in doing so the defendant board served them on the 20th May 1893 with notice of the board's desire to supply water within their own district, and their intention of constructing waterworks under the provisions of the Public Health Act 1875. The notice further stated that, if not informed within a month of the plaintiffs' ability and willingness the board would construct works. The matter was referred to arbitration, but the company becoming aware that the board were still forwarding a scheme of water supply, moved in an action to restrain the board from commencing or threatening to construct works and from proceeding to arbitration. The motion stood over on terms to await the award. The arbitrators found that the company were "able and willing," and that the water was proper and sufficient. Held, that the defendants must pay the costs of the action, setting off any costs incurred by the defendants by reason of the plaintiffs seeking an injunction to restrain the arbitration. (*The Bognor Water Company v. The Bognor Local Board*.) 428
- WILL.**
- Accumulations—Income—Charities—Thellusson Act** (39 & 40 Geo. 3, c. 98).—A testator, who died in 1865, by his will dated in 1860, after bequeathing several annuities, and directing that they should be paid out of the income of his personal estate, and that the surplus income, after providing for the annuities, should be invested and accumulated until the death of the surviving annuitant, bequeathed the residue of his personal estate "in trust to pay and divide the same unto the several public charities hereinafter named, according to the amounts set opposite to their respective names, that is to say," and then followed the names of five charities with the sum of 100*l*. against each. After provision had been made for the annuities there remained a large surplus. In 1865 a suit was instituted for the administration of the testator's estate, which came on upon further consideration in 1871, when it was decided (25 L. T. Rep. N. S. 200; L. Rep. 12 Eq. 559) that the charities were entitled to the whole of the surplus;

SUBJECTS OF CASES.

- but, without any decision as to the future rights of anyone to the accumulations, the accumulations were directed to continue until further order. Two of the annuitants subsequently died. A petition was then presented by the next of kin of the testator asking for payment to them of so much of the surplus income as had accumulated since the expiration of twenty-one years from the death of the testator. Held, that the principle of *Saunders v. Vautier* (Cr. & Ph. 240) was applicable; and that the charities were entitled to the whole of the accumulations of income. (*Harbin v. Masterman*.)page 357
- Construction—Clause appointing executor—Chain of representation.—M. B., the testatrix, by her will appointed her friend C. S. to be her sole executor, but, in case the said C. S. should predecease her, or should die before having fully performed his functions as executor, then she appointed her son A. B. to be sole executor of her will. C. S. survived the testatrix, and took probate of her will, but died in 1873, before having completed his functions as executor, leaving a will, which was duly proved by his executors. A. B. survived the testatrix, but predeceased C. S. Held, that the chain of representation to M. B.'s estate was not broken, and that her legal personal representatives were the executors of her deceased executor C. S., who were entitled to administration with the will annexed, in respect of the unadministered portion of her estate. (In the Goods of Maria Bond, deceased.) 813
- Contingent remainder—Devise to trustees—Direction to pay debts—Legal estate in trustees.—By her will, E. B., who died in 1875, after directing her just debts, and funeral and testamentary expenses, and legacies, to be paid by her executors thereafter named, specifically devised a freehold messuage to her sons, H. B. and W. J. B., and their heirs, upon trust to allow the said H. B. to use and enjoy the same for life, and after his decease to stand possessed thereof upon trust for all and every one or more of the children of the said H. B., as he should by deed or will appoint, and, in default of appointment, in trust for all and every one or more of the children of the said H. B., who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares as tenants in common. The will contained a residuary devise and bequest unto and to the use of her said son H. B. and to E. W. R., thereafter called her said trustees, upon trust for sale and conversion. After declaring the beneficial trusts of the sale and conversion, the testatrix appointed her said son H. B. and the said E. W. R. trustees of her will, and her said sons, H. B. and W. J. B., her executors. H. B. died in Nov. 1892, without having exercised his power of appointment, and leaving two children, both infants and unmarried. The question arose whether, on the true construction of the will, H. B. and W. J. B. took the legal estate in the specifically devised freehold messuage, in which case only the contingent remainder to the children would be valid as an equitable remainder supported by a freehold; otherwise the children's estate would fail to take effect according to the rule established in *Festing v. Allen* (2 L. T. Rep. N. S. 150; 12 M. & W. 270). Held, that the direction to pay debts was sufficient to show that, in the specific devise to her two sons and their heirs in trust for her son H. and his children, the testatrix did not mean to avail herself of the machinery of the Statute of Uses, or to make them mere conduits of the legal estate, but that, on the contrary, she intended that the legal estate should pass to and not through them, in trust, according to the modern signification of the term "trust," and that the estates given to the infants were equitable and did not fail. (*Re Brooke; Brooke v. Brooke*.)... .. 71
- Estate for life or in fee—Words of reference.—A testator, by his will made in 1821, after making various bequests of realty and personalty, proceeded, "I do give and bequeath unto my daughter A. fifty acres of land, being part of one hundred acres situated on the P. road, known by the name of T. farm, and to my daughter E. fifty acres of land, being the remainder of the above-named hundred." After the specific bequests followed the words, "and whose names are in the schedule named, and property specifically mentioned to each of their respective names." There was a schedule to the will which contained the names of the various devisees named in the will, but did not contain the particulars of any property given to them. Held, that the words mentioning the schedule were words of reference, not of gift, and that the daughters only took a life interest in the real estate. (*Hill v. Brown*.)page 175
- Construction—Gift of share to person dying before testator—Settlement of share—Lapse. (*Re Pinhorn; Moreton v. Hughes*.) 901
- Gift of such part of residue "as may by law be given for charitable purposes"—Alteration of law—Will made before passing of Act—Death of testator after passing of Act.—B., by will dated the 29th June 1891, gave all his residuary estate to trustees upon trust to pay the income to his wife for life, and after her death to pay such part of his residuary trust estate as might by law be given for charitable purposes to the B. Hospital, and as to the remainder upon trust for W. absolutely. The Mortmain and Charitable Uses Act 1891 was passed on the 5th Aug. 1891. The testator died on the 20th Feb. 1892. Held, that the Act of 1891 applied; and, in the absence of any indication in the will of an intention to the contrary, the hospital was entitled to all the residue which the testator had power to give to it by virtue of that Act. (*Re Bridger; Brompton Hospital for Consumption v. Lewis*.) 204
- Gift to "children"—Illegitimate children.—A testator bequeathed his residuary estate in trust for his four children A., B., C., and "Ann Jane H. the wife of James H.," and declared that his trustees should stand possessed of the share of Ann Jane H., and invest the same and pay the income to the said Ann Jane H. during her life, "and so that during any coverture she should not have power to anticipate the same," and after her death, "in trust for the children or child of the said Ann Jane H. who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and if more than one in equal shares as tenants in common." James H. had gone through the ceremony of marriage with Ann Jane H., but his deceased wife was the sister of the testator, so that his marriage with Ann Jane H. was invalid. At the date of the will Ann Jane H. had had one child by James H., and after the death of the testator two other children were born. The testator was aware of the facts. Upon the death of Ann Jane H., a summons was taken out in the Liverpool District Registry to determine who was entitled to her share of the residuary estate. Held, that the illegitimate child born at the date of the will was entitled, and that the illegitimate children born afterwards were not entitled. (*Re Harrison; Harrison v. Higson*.)... .. 868
- Infant—Mansion-house—Devise in strict settlement—Condition subsequent requiring residence—Limitation over—Refusal or neglect to fulfil condition.—A testator devised a mansion-house and other real estate in strict settlement, with a proviso that every person who should become entitled to the possession or to the receipt of the rents and profits thereof, should reside in and occupy the mansion-house for a least nine months in every year, and with a limitation over, in case any such person should refuse or neglect so to do, to the person or persons next entitled in remainder under the provisions of her will. Subsequently the person who in the events that happened became entitled to the possession, or to the receipt of the rents and profits, of the property devised by the will was an infant. In a special case for

SUBJECTS OF CASES.

the opinion of the court the question was raised, whether the condition as to residence was binding on the infant. Held, that as, under the provisions of the will, the estate was vested in the infant with a limitation over on the refusal or neglect to fulfil a condition subsequent as to residence which an infant could not be said to refuse or neglect to fulfil, the limitation over did not take effect during the minority of the infant. (*Partridge v. Partridge*.) page 261

Construction—Legacy—Residue—"Not otherwise disposed of"—Real estate—Mixed fund—Debts—Insufficiency of personal estate.—This was a summons taken out by a legatee to vary the chief clerk's certificate, who had found that the pecuniary legacies given by the will of the testator were not charged on his residuary real estate. The testator after certain specific gifts bequeathed several specific legacies, including one to the applicant, and continued: "I give, devise, and bequeath all the real and personal estate to which at my death I shall be beneficially entitled, or of which at my death I shall have any general power to dispose beneficially by my will, and not otherwise disposed of, unto C. for his own use and benefit absolutely." The personal estate not specifically bequeathed was insufficient for payment of debts. Held, that the legatee was entitled to be paid out of the residuary real estate. Held also, that, as between the pecuniary legatees and the residuary devisee, the pecuniary legatees were entitled to their legacies out of the residuary real estate, without any liability to contribute to the payment of debts; that the residuary devisee was bound to contribute ratably with specific legatees and devisees; and, in ascertaining the proportion of his contribution, the value of the residuary real estate must be measured, not by the value less the legacies to be paid thereout, but by its value independently of the legacies. (*Re Bawden*; *Bawden v. Cresswell*. National Provincial Bank of England v. *Cresswell*.) 528

Niece—Grand-niece of wife—Illegitimacy—Extrinsic evidence.—A testator gave his residuary estate to his "niece E. W." Neither the testator nor his wife had any niece, but his wife had two grand-nieces named "E. W.," of whom one was legitimate and the other illegitimate. Held, that the illegitimate grand-niece could not come into competition with the legitimate grand-niece; therefore there was no latent ambiguity, and the illegitimate grand-niece was not entitled to produce evidence to show that she was the person referred to. (*Re Fish*; *Ingham v. Rayner*.) 825

Payment out of court—Petition—Summons.—This was a petition by the applicants, who claimed to be entitled under the will of W. H. deceased to one-fifth of a sum of 2437*l.* 1*s.* 9*d.* Consols in court, being the purchase money of freehold land belonging to the testator, and they asked for payment out to them. The title of the applicants depended on the proof of their identity and age, and of the deaths of the testator's widow and of the applicant's father. There was also a question upon the construction of the will. The application was first made by summons in chambers, but Kekewich, J. held that he had not jurisdiction under Order LV., r. 2, sub-sect. 1, to deal with the matter by summons in chambers, and a petition was then presented. Held, that Order LV., r. 2, sub-sect. 1, did not contemplate such a case as the present when there was a question of construction involved, nor was it a case in which the matter could be heard on summons under the discretion of the judge given by sub-sect. 18 of the same rule, and that therefore a petition was necessary. (*Re Hicks*; *Ex parte North-Eastern Railway Company*.) 529

Specific legacy.—A testatrix bequeathed to one daughter "800 pounds invested in 2½ Consols," to another daughter "700 pounds in vested in 2½ Consols," and to her grandson "800 pounds invested in 2½ Consols." Neither at the date of her will, nor at the time of her decease, did the testatrix possess any 2½ per Cent. Consols; but

there was at the date of her will and thenceforth to her death a sum of 1800*l.* 2½ Consols standing in the joint names of her deceased husband and herself. Held, that the legacies were specific, not demonstrative, and did not fail, but were answered by the 1800*l.* 2½ per Cent. Consols, and must abate in the proportion of 1800*l.* to 2300*l.* (*Re Pratt*; *Pratt v. Pratt*.) page 489

Contingent legacy—Specific gift to trustees—Intermediate income—Infants—Maintenance—Conveyancing and Law of Property Act 1881.—A testator, by his will made in 1886, bequeathed the sum of 4000*l.* Victoria Four per Cent. Stock, held by him at the date of his will, or which might be held by him at his death, or the like sum out of any larger amount of the stock which might be held by him at his death, or any sum of that stock less than 4000*l.* in nominal value held by him, and such a sum of cash as with the nominal value of such stock would make 4000*l.*, or, in the absence of any such stock then held by him, the sum of 4000*l.* cash, to the trustees of his will, in trust for two granddaughters contingently on their surviving him and attaining twenty-one, in equal shares; and he devised and bequeathed the residue of his estate to his trustees upon trusts for conversion and distribution as therein mentioned. At the testator's death, in 1892, a sum of 4000*l.* Victoria Four per Cent. Stock was standing in his name. This was an application by the grandchildren, who both survived him and were still infants, for maintenance out of the intermediate income of this stock. Held, that, as on the principle of the decision in *Re Medlock*; *Ruffie v. Medlock* (54 L. T. Rep. 823), the fund being both segregated from the estate and vested in trustees for the benefit of the objects of the gift on the happening of the contingency, the intermediate income accruing from it would belong absolutely to the granddaughters on attaining twenty-one, they were entitled, under sect. 43, sub-sect. 1, of the Conveyancing and Law of Property Act 1881, as interpreted by *Re Dickson*; *Hill v. Grant* (52 L. T. Rep. 707; 29 Ch. Div. 331), to maintenance out of such income. (*Re Clements*; *Clements v. Pearsall*) 633

Direction for payment of annuities "clear of all deductions whatsoever except income tax"—Codicil—Direction for payment of annuities—"Free of legacy duty and every other deduction."—A testator, who died in Nov. 1886, by his will dated in Feb. 1877, devised and bequeathed his real and residuary personal estate to trustees upon trust (*inter alia*) to pay certain annuities, including one to the plaintiff; and he directed that all the annuities should be paid "clear of all deductions whatsoever except income tax." By a codicil to his will, dated in Feb. 1892, the testator directed that every legacy and other interest, as well derivable under his will as any codicil thereto, should be "free of legacy duty and every other deduction." Held, that, the testator having thought proper to treat income tax as a deduction, there was no reason why it should not be so treated; and that therefore the plaintiff's annuity was payable free from income tax. (*Re Buckle*; *Williams v. Marson*.) 115

False demonstratio—Gift of residence and premises "as now occupied by me."—Testator devised "my residence called S. House and premises thereto as the same are now occupied by me" to his wife during widowhood. A stable adjoined the house, over which was a room, the only access to which was through the house. The testator let to two of his sons, for the purposes of their business, an office standing in the yard of the house, together with the stable, and they were in the sons' occupation at the date of his death. Held, that the devise included the room over the stable, but not the other part of the stable nor the office, as the property which was in the testator's occupation answered the whole of his description, and therefore the words "as the same are now occupied by me" could not be rejected as a *false demonstratio*. (*Re Seal*; *Seal v. Taylor*.) 329

SUBJECTS OF CASES.

Infants—Maintenance clause—Trust or power—Discretion of trustees—Interference by court.—A testator gave his residuary estate to five trustees (of whom his wife was one) upon trust to pay the income to his wife during widowhood, and in the event of her marrying again he directed his trustees to pay her 400*l.* a year out of the income, and subject thereto the capital and income were to be held for such of his children as being sons attained twenty-five, or being daughters attained that age or married. And the testator directed that, after the decease or marriage again of his wife, his trustees should apply the whole or such part as they should think fit of the income of the share to which any child should for the time being be entitled, or contingently entitled, for or towards the maintenance and education or otherwise for the benefit of such child, and whether under or over the age of twenty-one years. The testator's widow married again, and there were three young children of the testator who continued to reside with and were maintained by her, although shortly after her marriage she applied to her co-trustees to make her an allowance of 300*l.* a year out of the income towards their maintenance and education, but they in the exercise of their discretion declined to make any allowance. On an application by the infant children for an order directing the trustees to pay a sum for their maintenance out of the income: Held, that there was no imperative trust to apply any part of the income for the maintenance of the infants; that the four trustees having honestly exercised their discretion not to make any allowance for maintenance, the court could not overrule their discretion; and that, if in consequence of all the trustees not being agreed the discretion was to be exercised by the court, the court exercised the discretion adversely to the application. (*Re Bryant; Bryant v. Hickley.*)page 301

Intermeddling executor—Failure to take probate—Citation—Disobedience—Peremptory order.—An intermeddling executor is bound to prove, and where, after he has been cited, he has still failed to prove, a peremptory order will be made against him, upon motion, calling upon him to take probate within a certain time. (In the Goods of Elizabeth Lister, deceased.) 812

Mistake in Christian name of executor—Ambiguity—Extrinsic evidence—Probate.—The testator devised his real estate "to Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," and to two other persons, upon certain trusts, and gave a certain house and garden "to the said Robert Taylor, of Warmley Hill aforesaid," provided he accepted the executor and trusteeship of the said will; and, in the event of his refusal to act, the testator gave the said house and garden to Henry Arthur Williams, upon the like consideration and condition; and he appointed the said Robert Taylor, and, in default, the said Williams and the two persons previously named as trustees, to be executors of his will. There was no Robert Taylor living at Warmley Hill, but there was a James Alfred Taylor, a bootmaker, who lived there; and the said James Alfred Taylor had a brother, Robert Britton Taylor, also a bootmaker, who lived at Hanham, which was in the same parish as Warmley Hill. The Court allowed extrinsic evidence to show that James Alfred Taylor was an intimate friend of the testator, and that Robert Britton Taylor was little acquainted with the testator; and, upon that evidence, the Court granted probate of the will to James Alfred Taylor, and not to Robert Taylor. Evidence of declarations by the testator, as to his intentions, held inadmissible. (In the Goods of Chappell, deceased.) 245

Paper pasted over legacies and names of legatees—Wills Act (1 Vict. c. 36), s. 21—Writing on will "apparent"—Probate of writing as deciphered by experts.—When pieces of paper or other substance are pasted over a will by a testator, the court is at liberty to ascertain what is written underneath the superimposed paper or other substance by

focussing sunlight upon the back of the particular portion of the will in question by means of a framework of brown paper, cardboard, or other opaque substance, and by drawing down the blinds of the room. (*Efnch and others v. Combe and others.*)page 695

Probate—Circumstances exciting suspicion of the court—Onus on beneficiary propounding the will—Proof of fraud or undue influence.—The rule laid down in *Barry v. Butlin* (2 Moo. P. C. 490, 492), *Fulton v. Andrew* (32 L. T. Rep. N. S. 209; L. Rep. 7 E. & I. App. 448, 460), and *Brown v. Fisher* (63 L. T. Rep. N. S. 485), that those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction, does not merely apply to cases where a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases in which circumstances exist that excite the suspicion of the court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion or doubt, and to prove affirmatively that the testator knew and approved of the contents of the document. It is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely upon, to displace the case made for proving the will. (*Tyrell v. Painton.*) 453

Married woman's will—Wife of naturalised French subject.—Although by the Naturalisation Act 1870 (33 Vict. c. 14), s. 10, sub-sect. 1, the wife of a foreign subject is deemed to be herself a foreigner, by French law the act of naturalisation is purely personal, and effects a change of status solely in regard to the person naturalised. Therefore, in a case where the testatrix had married a British subject, a native of Mauritius, and, by a settlement made upon the said marriage and declaring the English domicile, power was given to her to appoint, by will or codicil, the income and corpus of the settled fund; and, after her husband had become a naturalised Frenchman, she, while on a temporary visit to this country, made her will, in English form, pursuant to the power her thereto enabling, and died domiciled in France: the Court, upon evidence that the will, though not made in accordance with the law of France, would be operative in that country, granted probate thereof to the executors therein named. (In the Goods of Brown-Séguard, deceased.) 811

Probate and legacy duty—Bequest to executors of another testator.—A testatrix bequeathed a share of her residuary personal estate to M., and in the event of his predeceasing her, which he did, to his "executors and representatives whom I do hereby appoint to be my residuary legatees." Held (affirming the judgment of the court below), that only one probate and legacy duty was payable, namely, under the will of the testatrix, and that no second duty under the will of M. was payable, as the property in question was not part of his estate at the time of his death, nor personal estate which he had "power to dispose of" within the Stamp Duties Act of 1845. (*The Lord Advocate v. Bogie and others.*) 533

Settlement—Tenant for life—Expiration of limitations—Power of sale—Duration of power—Reasonable time for purpose of distribution—Discretion of trustees.—A testator gave his trustees a power to sell his residuary estate, at such times as they should think fit, for the purpose, as held upon the true construction of the will, of its more convenient distribution among the objects of his bounty, after certain life estates had come to an end. Held, that the power was not void as infringing the law against perpetuities, but could be exercised within a reasonable time after the death of the life tenants, and that the trustees could give a good title to the purchaser of the property. (*Re Lord Sudeley and Baines and Co.*) 549

SUBJECTS OF CASES.

Tenant for life—Remainderman—Investments—Risky securities—Trustees—Duty of—Conversion.
 —A testator gave the residue of his estate to his executors upon trust to permit his wife to receive and take the rents, issues, profits, and annual income thereof for her sole and separate use during her life, and after her death testator declared that the trustees of his will should hold all his residuary estate and the investments or income thereof in trust for his nephew absolutely. There was no trust for conversion and no investment clause. Part of the estate consisted of stocks in a gas company. The question was raised whether the gas stock should be sold, and the proceeds invested in New Consols; and whether the testator's widow was entitled to retain the whole of the income of the testator's estate which she had actually received and any accruing income of the gas stock. Held, that the tenant for life under a will could not take in specie the income of property which was of a perishable or wasting nature; in order to give the wife the income of the property as it stood, you must find something equivalent to a specific gift: there being no specific gift here, the rule in *Meyer v. Simonsen* (5 De G. & Sm. 723) applied, and the trustees should be required not to convert the stocks, but set a value upon them, and give the tenant for life 4 per cent. upon the value. (*Re Eaton; Daines v. Eaton.*)page 761

Testamentary papers—Validity—Incorporation—Refusal of probate.—The testator called two witnesses into his room, informed them that he had made certain alterations in his will which he said was in a drawer of the writing-table, at which he was sitting, and he asked them to witness his signature. The document lying before him, written by himself upon blue paper, was then duly executed and attested as a will. The witnesses never saw and never attested any other document for the deceased. The document appointed no executor, and contained no bequest, but referred to "papers No. 1, 2, 3, 4, 5, and 6," as having been signed by the deceased in the presence of the witnesses. After the death, certain holograph papers, bearing those respective numbers, and with various dates antecedent to the blue paper, were found along with the latter in an envelope, outside of which was written, "My last will, 1890," also in the testator's handwriting. Upon application by the executors for probate of all the documents: Held, that, as the numbered papers were not identified with the description given in the attested paper, in such a way as to exclude the possibility of mistake, they were not incorporated with that paper: Held also, that, as the attested paper, by itself, was inoperative, probate of it, as well as of all the other documents, should be refused. (In the Goods of Garnett, deceased.)... ..page 37

THE LAW TIMES REPORTS:

COMPREISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT OF JUDICATURE, AND THE
RAILWAY AND CANAL COMMISSION COURT.

FROM MARCH TO AUGUST 1894.

H. OF L.]

POWELL v. BIRMINGHAM VINEGAR BREWERY COMPANY.

[H. OF L.

House of Lords.

Nov. 17 and 20, 1893.

(Before the LORD CHANCELLOR (Herschell),
Lords WATSON, ASHBOURNE, and SHAND.)

POWELL v. BIRMINGHAM VINEGAR BREWERY
COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Trade mark — Rectification of register — Person
aggrieved — Patents, Designs, and Trade Marks
Act 1883 (46 & 47 Vict. c. 57), s. 90.*

*Where a trade mark has been improperly regis-
tered, any person who is in the same trade as
the person who has registered it, and deals in
the same class of goods, is prima facie a "person
aggrieved" within sect. 90 of the Patents,
Designs, and Trade Marks Act 1883, although
he may not in fact, up to that time, have
manufactured, or dealt in, the exact article to
which the trade mark applies, as the effect of
the registration is to restrain his legal rights.*

*The use of words upon the outside of packing cases
containing the articles dealt in is not a use of
such words as a trade mark.*

Judgment of the court below affirmed.

This was an appeal from a judgment of the
Court of Appeal (Lindley, Bowen, and Kay,
L.J.J.), who had affirmed a judgment of Chitty, J.
The case is reported under the name of *Re
Powell's Trade Mark* in 69 L. T. Rep. N. S. 60;
(1893) 2 Ch. 388. The respondents took pro-
ceedings for the purpose of having removed from
the register a trade mark which had been regis-
tered by the appellant. The appellant, trading
as Goodall, Backhouse, and Co., had registered,
amongst other trade marks, in the year 1884, one
consisting of the words "Yorkshire Relish,"
which the respondents sought to have removed
from the register.

Chitty, J. held that the respondents were—
"persons aggrieved," so as have a *locus standi* to
be heard, and that the words "Yorkshire Relish"
had not been used as a separate trade mark
before the 13th Aug. 1875, and his judgment was
affirmed by the Court of Appeal, as above stated.

Aston, Q.C., Sir R. Webster Q.C., and Cutler
appeared for the appellant.

Moulton, Q.C., Farwell, Q.C., and Fothergill,
who appeared for the respondents, were not
called upon to address their Lordships.

At the conclusion of the arguments for the
appellant their Lordships gave judgment as
follows:—

The LORD CHANCELLOR (Herschell). — My
Lords: The first question raised is whether the
respondents were "persons aggrieved" within the
meaning of the 90th section of the Patent Act of
1883. That section provides that "the court
may on the application of any person aggrieved
by any entry made without sufficient
cause in any such register" (that is, a "register
kept under this Act") "make such order for
expunging or varying the entry as the court
thinks fit." The respondents are in the same
trade as the appellant; like the appellant they
deal amongst other things in sauces. The courts
below have held that the respondents are "persons
aggrieved." I should be very unwilling unduly
to limit the construction to be placed upon these
words, because, although they were no doubt
inserted to prevent officious interference by those
who had no interest at all in the register being
correct, and to exclude a mere common informer,
it is undoubtedly of public interest that they
should not be unduly limited, inasmuch as it is a
public mischief that there should remain upon the
register a mark which ought not to be there,
by which many persons may be affected who
nevertheless would not be willing to enter upon
the risks and expense of litigation. Wherever
it can be shown, as here, that the applicant is in
the same trade as the person who has registered

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.
Vol. LXX, N. S. 1790.

H. OF L.]

POWELL v. BIRMINGHAM VINEGAR BREWERY COMPANY.

[H. OF L.]

the trade mark, and wherever the trade mark if remaining on the register would or might limit the legal rights of the applicant so that by reason of the existence of the entry upon the register he could not lawfully do that which but for the appearance of the mark upon the register he could lawfully do, it appears to me that he has a *locus standi* to be heard as a "person aggrieved." In the present case I do not think it can be doubted that the rights of any person who was in the trade and might desire to make use of the words "Yorkshire Relish" would be less if this mark were upon the register than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person. Both courts below have come to the conclusion that in that sense the present applicants, the respondents here, are "persons aggrieved," and I can see no reason to differ from the conclusion at which they have arrived. The only other question is whether these words "Yorkshire Relish" had been used as a trade mark by the appellant before the year 1875. That they had been used by being put on the outside of the packing cases in which his goods were sent out is not disputed, but the controversy is whether they were so used as a trade mark. That is a pure question of fact involving no legal difficulty, and that question of fact has been resolved in favour of the respondents against the appellant by two courts. Under those circumstances it would need a very strong case indeed to induce your Lordships to depart from the conclusion at which the courts below have arrived. I do not propose to discuss the evidence in this case; I can see no ground for supposing that any cardinal fact has been overlooked, or that any fact has had undue or unreasonable weight attached to it, and I content myself therefore with saying that I see no reason for differing from the conclusion at which the courts below have arrived. I therefore move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—My Lords: This appeal is taken in an application at the instance of the respondent company to have the words "Yorkshire Relish," which were registered as a trade mark by the appellant in the year 1884, removed from the register. The appellant maintains that the respondents have not shown any statutory title to insist on the application; and assuming them to have title, that the entry ought not to be expunged because the words in question were used by him as a trade mark before the 13th Aug. 1875. Chitty, J. and the Court of Appeal unanimously decided against the appellant on both points. In my opinion neither of them raises a pure question of fact, but a mixed issue of law and fact. In so far as the learned judges in both courts have concurred in taking the same view of the facts, and of the inferences of fact to be derived from them, your Lordships will not, except upon very strong cause shown, disturb their conclusions. But the rule is strictly confined to questions of fact, and has no reference to questions whether the law has been rightly laid down or rightly applied to the facts found. In disposing of the appellant's contention that the respondents were not "aggrieved persons," it appears to me that the courts below

proceeded on the right construction of sect. 90 of the Act of 1883. In my opinion, any trader is, in the sense of the statute, "aggrieved" whenever the registration of a particular trade mark operates in restraint of what would otherwise have been his legal rights. Whatever benefit is gained by registration must entail a corresponding disadvantage upon a trader who might possibly have had occasion to use the mark in the course of his business. It is implied, of course, that the person aggrieved must manufacture or deal in the same class of goods to which the registered mark applies, and that there shall be a reasonable possibility of his finding occasion to use it. But the fact that the trader deals in the same class of goods and could use it, is *prima facie* sufficient evidence of his being aggrieved, which can only be displaced by the person who registered the mark, upon whom the onus lies, showing that there is no reasonable probability that the objector would have used it, although he were free to do so. That reading of the statute appears to me to be in substantial conformity with the construction adopted by the Court of Appeal in *Re Rivière's Trade Mark* (50 L. T. Rep. N. S. 763; 26 Ch. Div. 48); and also in *Re Apollinaris Company's Trade Marks* (65 L. T. Rep. N. S. 6; (1891) 2 Ch. 186). In this case the trade mark which the appellant claims as his own is registered "in respect of sauce;" and it is not disputed that the respondents' trade embraces the manufacture of sauces. If, as they allege, the appellant had not at the date of registration acquired a right to use the words "Yorkshire Relish," such as the Act of 1883 recognises, they have a *prima facie* statutory title to challenge the entry in the register. The appellant maintains that it is established by the evidence that, even if the words had not been appropriated as a trade mark for his goods, there would have been no reasonable probability that the respondents would ever have found occasion for their use. Whether they would or would not is a mere question of fact, upon which the opinion of all the learned judges is against him; and I need only add that I have been unable to discover any good ground for rejecting their decision. The second point argued, relating to the user of the words "Yorkshire Relish" as a trade mark by the appellant, appears to me to involve still less of the legal element than the first. I listened to the argument with the view of learning whether the decisions of the courts below were to any and, if so, to what extent tainted by legal error; but so far as I could gather no legal defect was pleaded by the appellant. All the learned judges assumed, in my opinion rightly, that the appellant might use, and acquire right to use, as his own, a trade mark affixed to cases intended for his wholesale trade, as well as another trade mark affixed to each bottle of sauce which was packed in these cases, and upon which the retail customers admittedly relied. The real and only substantial objection which the appellant made to the judgments appealed from appeared to me to be this, that in deciding the question of fact the learned judges undervalued the general testimony given by certain witnesses and gave undue weight to evidence which did not directly contradict it. I think in so doing the learned judges were perfectly justified. General statements by witnesses that particular words were used as a trade mark do

H. OF L.] *Re SHEPPARD'S CORN MALTING COMPANY; Ex parte LOWENFELD.* [CT. OF APP.]

not express pure fact; they express the belief of those witnesses that the facts which came under their observation justified the inference that those words were used as a trade mark. In this case there is an abundance of these general statements, and there are undoubtedly circumstances proved (notably in the cross-examination of the appellant himself) which, when taken *per se*, point very strongly in another direction. The duty of weighing those two classes of evidence the one against the other was a duty imposed upon the learned judges, which they have fulfilled in a manner which precludes me from finding that their decision is wrong.

Lord ASHBOURNE.—My Lords: I concur. I think that the respondents clearly come within the description of "persons aggrieved." It is manifest that no exact or exhaustive definition is possible; but, if the respondents are not entitled to claim the status of "aggrieved persons," it would be difficult to suggest anyone who could more aptly be so designated. They are not common informers or strangers proceeding wantonly; they are persons who believe (on grounds accepted by Chitty, J. and the Court of Appeal) that, they are interested substantially in contesting this claim of the appellants; and might be damaged if the mark is retained. It has been pointed out in *Re Apollinaris* case (*ubi sup.*), that people in the same trade and dealing in the same article would be regarded as aggrieved. In the present case, if free, the respondents might wish to deal in a similar article, and the existence of this mark may hamper and impede them in considering how they would develop and work their business. I do not see any reasons of public policy rendering it at all desirable to unduly narrow the definition of this class of "persons aggrieved." The second question turns upon the facts. Had the term "Yorkshire Relish" been used as a trade mark before the 13th Aug. 1875? Two courts have on the evidence arrived at a conclusion against such a contention, and the Lord Chancellor has pointed out how slow this House is to reverse or interfere with such conclusions. Personally, I entirely concur in the views of Chitty, J. and the Court of Appeal on the subject. The date of registration is immensely against the claim of the appellant; and the words only, used separately on packing cases, signified simply, in my opinion, what the contents were.

Lord SHAND.—My Lords: I also am of opinion that the judgments complained of should be affirmed. It appears to me that, where a person is engaged in the same trade as the trader claiming the exclusive right to a registered trade mark consisting, as here, merely of words describing or designating the article manufactured, and where in the development of his business he may find it advantageous to use the words claimed, he is within the meaning of the statute a "person aggrieved." On the second question raised in the case it has not been maintained that the learned judges who have dealt with it took any erroneous view of the law, and on the question of fact that the words "Yorkshire Relish" were used as a description of the contents of the boxes merely, and not as a trade mark, I agree in thinking that the concurrent judgments of the two courts which have considered the case should be held

conclusive. Accordingly I agree in thinking that the judgment should be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, J. S. Salaman.
Solicitors for the respondents, Cooper, Thorowgood, and Tabor, for Cooper and Co., Newcastle-under-Lyme, Staffordshire.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 6, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re SHEPPARD'S CORN MALTING COMPANY LIMITED: Ex parte LOWENFELD. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Voluntary winding-up—Distribution of surplus assets—Calling up unpaid capital—Adjustment of rights of shareholders inter se—Companies Act 1862 (25 & 26 Vict. c. 89), s. 133.

By one of the clauses of the articles of association of a company, which was in course of being wound-up voluntarily, it was provided that, if the company should be wound-up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be first applied in repaying to the preference shareholders pro rata the amount of capital paid up on the preference shares held by them respectively at the commencement of the winding-up, so far as such surplus assets should extend, and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders.

Held, that the general rule established by *Birch v. Cropper* (61 L. T. Rep. N. S. 621; 14 App. Cas. 525) and previous authorities, that the surplus assets of a company were divisible among all the shareholders in proportion to their nominal interest in the subscribed capital of the company, was not affected by the above clause. And that there was no reason for giving the words "surplus assets" in that clause any other than its *prima facie* meaning, namely, all the capital of the company, including unpaid calls which might remain after the debts, liabilities, and costs of the company had been discharged.

Decision of Williams, J. reversed.

THE above-named company was registered as a company limited by shares under the Companies Acts 1862 to 1890 on the 4th March 1892. Its nominal capital was 45,000*l.* divided into 45,000 shares of 1*l.* each, of which 20,000 were preferred shares, and 25,000 were ordinary shares.

By the 5th clause of the memorandum of association of the company it was provided that the preference shares should rank preferentially to the ordinary shares as to return of capital on the company being wound-up.

By clause 6 of the memorandum of association, it was provided that the net profits in each year should be applied: (1) in payment of a dividend at the rate of 10 per cent. per annum on the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.] *Re* SHEPPARD'S CORN MALTING COMPANY; *Ex parte* LOWENFELD. [CT. OF APP.]

amount for the time being credited as paid up on the 20,000 preference shares, and any other preference shares ranking *pari passu* therewith upon an increase of capital; (2) in forming a reserve fund; (3) in distributing the balance as dividend on the amount for the time being credited as paid up on the ordinary shares.

By clause 147 of the articles of association of the company it was provided that if the company should be wound-up, and the surplus assets should be more than sufficient to repay the whole of the paid-up capital, the excess should be distributed among the members in proportion to the amount of capital paid up on the shares held by them respectively at the commencement of the winding-up; and that if the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus should be first applied in repaying to the preference shareholders *pro rata*, the amount of capital paid-up on the preference shares held by them respectively, at the commencement of the winding-up, so far as such surplus assets should extend; and that the balance of such surplus assets (if any) should be distributed amongst the ordinary shareholders.

On the 10th March 1892 Henry Lowenfeld applied to the company for 6000 of the preference shares, and the same were duly allotted to him.

Lowenfeld paid 4000*l.* in respect of such preference shares, leaving a balance of 2000*l.* remaining unpaid thereon.

It appeared that 7993 of the 20,000 preference shares were issued as fully paid-up shares.

In Feb. 1893 it was resolved that the affairs of the company should be wound-up voluntarily, and a liquidator was appointed.

The liquidator, in settling the list of contributories of the company, placed the name of Lowenfeld thereon in respect of his 6000 preference shares.

The liquidator stated that the assets of the company (not including therein the capital remaining unpaid on the 12,007 preference shares) were more than sufficient to pay the expenses of the liquidation and all unpaid liabilities of the company of which he had any knowledge or notice; and that he had therefore no doubt that there would be a surplus applicable towards payment of the preference shareholders after discharging all the expenses and liabilities, &c. He further stated, however, that the surplus would not be sufficient to repay to the preference shareholders the whole of the capital credited as paid on their shares, but that there would be a deficiency of at least 15,000*l.*

For the purpose of adjusting the rights of the preference shareholders *inter se*, some of those shareholders (other than Lowenfeld) required the liquidator to call up the balance remaining in respect of the preference shares.

Lowenfeld, however, contended that he was not liable, and that the liquidator was not entitled to call upon him to pay, having regard to the terms of art. 147 of the articles of association of the company.

He contended that, under the provisions of art. 147, he was not liable to make any further contribution in respect of his shares for the purpose of the adjustment of the rights of the preference shareholders *inter se*, and that that article meant that any profit or loss of capital which might be shown on a winding-up should be

received or borne by members holding preference shares in proportion to the amount of their capital paid up at the commencement of the winding-up; and that, except for the purpose of discharging the debts and liabilities of the company, no call should be made upon the shareholders.

A summons was accordingly taken out by the liquidator, asking that it might be determined whether he was entitled to make and should make a call on Lowenfeld requiring him to pay the sum of 2000*l.*, being the amount remaining unpaid on his 6000 preference shares.

On the 4th Aug. 1893 the summons came on to be heard before Williams, J., when his Lordship delivered judgment as follows:

WILLIAMS, J.—I am of opinion that I must construe "surplus assets" here to mean surplus assets without calling up capital for the adjustment of the rights of the contributories amongst themselves. It seems to me that it would be very unjust in the first instance, in the case of the assets being insufficient, to call up uncalled capital for the purpose of equalising the payments, and then to distribute the fund so called up unequally in accordance with the amount of capital paid up at the commencement of the winding-up. I cannot suppose that that is what the parties meant. It seems to me that article 147 is ambiguous. Although, undoubtedly, the term "surplus assets," generally speaking, would mean what Sir Arthur Watson says it does mean, yet I am driven to put a different construction on the words here, because I cannot think that the parties could have intended such a grave injustice as would result from the other construction.

From that decision Paul Krell, one of the holders of fully paid-up preference shares, now appealed.

Sir Arthur Watson, Q.C. (*E. C. Macnaghten* with him) for the appellant.—The winding-up in this case being voluntary, sect. 133 of the Companies Act 1862 applies. We submit that in the distribution of the surplus assets the general rule should be followed, which was established by

Birch v. Cropper, 61 L. T. Rep. N. S. 621; 14 App. Cas. 525.

Swinfen Eady, Q.C. and *Eve* for the respondent Lowenfeld.—[DAVEY, L.J.—The case of *Re The Anglesey Colliery Company* (15 L. T. Rep. N. S. 127; L. Rep. 1 Ch. App. 555) shows that liquidators are entitled to make a call for the purpose of adjusting the rights of the members, without regard to the amount which they have paid on their shares respectively.]

Alexander Young for the respondent, the liquidator.

Sir Arthur Watson, Q.C., in reply.—Where some of the shareholders of a company had paid 20*l.* and others 25*l.* a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets 5*l.* to each shareholder who had paid 25*l.* before distributing the surplus rateably:

Ex parte Maude, 23 L. T. Rep. N. S. 749; L. Rep. 6 Ch. App. 51.

LINDLEY, L.J.—This is an appeal by the holder of some preference shares against an order of Williams, J., who declared that, upon the true construction of the articles of association of the

CT. OF APP.] *Re SHEPPARD'S CORN MALTING COMPANY; Ex parte LOWENFELD.* [CT. OF APP.]

company, the words "surplus assets" in article 147 did not include uncalled capital; and that the liquidator ought not to make any call upon the shareholder in respect of his 6000 preference shares. The company is a limited company with a capital of 45,000*l.*, divided into 45,000 shares of 1*l.* each, 25,000 being ordinary and 20,000 preference. Clause 5 of the memorandum of association provides as follows: [His Lordship read the clause and continued:] So that there is to be a preference, not only as regards dividend, but in the event of winding-up with respect to the distribution of the surplus. By clause 6 the net profits of the company in each year are to be divided, the preference shares receiving 10 per cent. before the others. Turning to the articles of association, clause 23 relates to calls on shares; clauses 28 to 48 to new shares which might be issued on special terms. Then there are clauses respecting dividend, 116 to 119, which I need not read, and then I come to clause 147, which is the important clause for consideration. Before I read that clause I will state the position of affairs. The company has been wound up voluntarily. The liquidator makes this statement as to the present condition of the company: [His Lordship read the liquidator's statement as above set forth, and continued:] Now it appears that of the 20,000 preference shares 8000 are paid up in full; 12,000 have had calls made upon them in respect of which 13*s.* 4*d.* has been paid up, so that on those 12,000 shares there is a liability of 6*s.* 8*d.* per share. The question is, what is to be done with regard to the distribution of the surplus assets. Sir Arthur Watson's client, who is the holder of some of the fully paid-up shares, says that there ought to be a call on those preference shareholders who have not fully paid up their shares; and that the surplus assets when so ascertained should be distributed amongst the preference shareholders in proportion to the shares which they will then have paid up. That involves the whole question. Art. 147 says this: [His Lordship read the article and continued:] The state of things contemplated in the first part of that article is that you do not want a call at all for the purpose of adjusting the rights of the contributories. The assumption there is that, without any call, you have got surplus assets more than sufficient to pay the whole of the capital. Then you come to the next assumption, namely, that the surplus assets shall not be sufficient. That means that they may possibly be not sufficient, and that is the second assumption, and that is the assumption which we have got to deal with in the present case. Now, what is the true meaning of that provision? I cannot help thinking that in the matter of a call—which call is applicable as I have pointed out to a case in which a call may be wanted to adjust the rights of the contributories—the surplus assets include that call if it is wanted. I do not think it is possible to read, in this contingency, "surplus assets" in such a sense as to exclude a call whether or not it is wanted at all. Now, Mr. Swinfen Eady's contention amounts to this: He says that, even as amongst the preference shareholders themselves, there is to be an inequality of distribution. Now I cannot find that. I see plainly enough in the memorandum of association that there is to be a preference as regards the distribution of assets—two classes of

shareholders, the preference to be paid first before the ordinary are paid anything. But I look in vain to find anywhere the slightest evidence of intention that any portion of the preference shareholders shall be in any better position than any other. Is it to be got out of this clause? It appears to me that this clause falls far short of making such a distinction. I read it, and I think the only possible way of working it out according to the constitution of the company and the language of the clause is this: In the case of surplus assets, if required for the purpose of adjusting the rights of the contributories amongst themselves, such surplus assets, including the produce of those calls, shall first be applied in repaying to the preference shareholders *pro rata* the amount of capital paid up on the preference shares held by them—not paid up at the commencement of the winding-up, but after the call has been made and after all payments have been made. I see no difficulty in that. It does not follow that all calls made will be paid, and the distribution is to be made *pro rata* and according to the capital which the shareholders do pay up, and not merely that which they ought to pay. That is a perfectly plain signification, and any surplus after that is to go to the ordinary shareholders. I therefore think that Williams, J. has arrived at an incorrect construction of this clause. The absurdity which he points out will not arise if you construe the clause as we are inclined to construe it, although it would if construed as he has done. The mistake he has fallen into is, that he has regarded the amount of capital paid as the amount of capital paid up at the commencement of the winding-up. That is not what is stated. It is the amount of capital held at the commencement of the winding-up. For these reasons, bearing in mind that the consequence of Mr. Swinfen Eady's argument would be to create two classes of preference shareholders, which to my mind is entirely contrary to the constitution of the company, I think that this appeal should succeed.

SMITH, L.J.—It appears to me, having heard the arguments on both orders, two points are necessary to be considered in the present case. The first is, what is the meaning of "surplus assets," and the next is, to what period of time do the words "paid up" in article 147 apply. The learned judge in the court below held that *prima facie* "surplus assets" meant the surplus of assets that the liquidator might have or the company might have after it had paid all its debts and liabilities, including all the costs of the winding-up, if there was a winding-up, and that what was over and above would be called "surplus assets"; and that *prima facie* if there was amongst those assets unpaid calls due from shareholders, that would form part of the surplus assets; but that at the same time you must take care that this 147th article has not cut down what is the ordinary meaning of "surplus assets." Mr. Swinfen Eady says that in this 147th article there is a special contract that on the winding-up the shareholders are not to be called on to pay up calls not due on fully paid-up shares which they might hold. The question is, is that made out? Williams, J. based his judgment upon this, that the words "paid up on the shares held by them respectively at the commencement of the winding-up" must be read as "paid up at the commencement of the winding-up." He said it

would be most absurd to make a call on a shareholder to pay up so much as to make a non-paid-up share a fully paid-up share, and then distribute the assets to him as if it had been a fully paid-up share. He says that would be so unjust that he really cannot think the words "surplus assets" could have the meaning which *primâ facie* they would otherwise have. Is Williams, J. well founded in that? I do not think he is. I agree with Lindley, L.J. that the words "shall be distributed amongst the members in proportion to the amount of capital paid up on the shares held by them respectively at the commencement of the winding-up," mean paid up not necessarily at the commencement of the winding-up, but paid up at any time, whether under a call or not. And having arrived at that conclusion, it seems to me that I must necessarily differ from the judgment of my learned brother Williams, and hold that the construction he has put on that part of the article is erroneous. I come to the conclusion, therefore, that it is not made out that there is a context in this article cutting down what is the ordinary and general meaning of "surplus assets," and that a call ought to be made, and that the shareholder on whom the call is made will be entitled to participate in what is coming—that is to say, by paying the 6s. 8d. in addition to the 13s. 4d. he has already paid.

DAVEY, L.J.—I am of the same opinion, and if we were not differing from the judgment of the court below, I do not think I should add anything to the reasons already given. There is no doubt about the general rule, that where there are assets of the company which may be called "surplus assets" they are after the discharge of all debts and liabilities. That rule is stated in *Re The Anglesey Colliery Company (ubi sup.)*, in which it was held that the liquidators were entitled and justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders. The same proposition was also maintained in *Ex parte Maude (ubi sup.)*, and subsequently and recently has received the approval of the House of Lords in the case, which has also been referred to, of *Birch v. Cropper (ubi sup.)*. So that there is no doubt about the general rule. Do we find anything in the present case excluding the general rule? We find that excluded as between the preference and the ordinary shareholders. But Mr. Swinfen Eady, as I understand, seeks to go further, and say that there are two classes of preference shareholders; and that the coses of the company ought to fall in a larger proportion on those whose shares are fully paid up than on those whose shares are not fully paid up. The question, therefore, is, whether that is so according to the true construction of this article 147. The learned judge has held—and I certainly do not quite understand the declaration; I understand the substance of it, but I do not quite understand the form—that the surplus assets do not include uncalled capital. I suppose he means by that, and from his judgment, to say, that surplus assets do not include capital which has been called up, or may be called up, for the purpose of adjusting the rights of the contributories *inter se*, because undoubtedly the surplus assets conceivably consist wholly of capital which was uncalled at the commencement of the winding-up, and had been called during the winding-up.

If, for example, the case which was put in *Ex parte Maude (ubi sup.)*, and again put in *Birch v. Cropper (ubi sup.)*, was that, where the exigencies of the winding-up required immediate payment (although the assets required some time for realisation), it would be the duty of the liquidator to call up the uncalled capital, and afterwards to realise the property. If the property, when realised, were sufficient to discharge all the debts and liabilities, it is perfectly obvious that the so-called surplus assets would consist of entirely uncalled capital. Therefore I can only understand the learned judge's declaration as meaning that it does not include capital to be called up for the purpose of equalising the rights of the contributories *inter se*. Now, I wish to observe that it is just as much a purpose of the liquidation and the duty of the liquidator to equalise the rights of the contributories *inter se* as it is to pay the debts and liabilities; and he has equal power to make a call for the one purpose as the other. Indeed, I would say that it is equally his duty to make a call for the one purpose as for the other. Therefore, if you get to this, that surplus assets include capital which has been or may have been called up for the purpose of paying the debts and liabilities, I cannot see on what rational ground you can exclude from the surplus assets capital called up for another purpose of the liquidation. *Primâ facie* surplus assets include all capital which has been realised by means of either selling the assets or of enforcing the liability of the shareholders during the progress of the liquidation after the debts and liabilities in the course of the winding-up have been discharged. Now, it will be observed that the first limb of the sentence as between the preference shareholders gives exact expression to what I have said is the general rule of law to be deduced from the authorities to which I have referred. Then do we find anything in the second limb of the sentence which alters the meaning? I think not. It may be said that in the first limb of the sentence surplus assets do not include capital called up for the adjustment of the rights of the parties, but that is on account of the context, because *ex hypothesi* such a call may not be wanted. But, in the second limb of the sentence, where a call might be wanted, as Lindley, L.J. has said, I see no reason for giving the term "surplus assets" any other than its *primâ facie* obvious and well-established meaning in such cases. Then it is said by Mr. Swinfen Eady that the surplus assets are to be applied in paying the preference shareholders *pro ratâ* on the amount paid up by them—that is to say *pro ratâ* on the amount of capital paid up on the shares held by them. It seems to me perfectly accurate. One shareholder might hold 100 shares and another might hold ten, and another 500, and the payment would be *pro ratâ* on the amount of capital paid up on the shares respectively held by them. What does "paid up" mean? The learned judge in the court below has construed the words "at the commencement of the winding-up" as applicable to the words, "paid up." I agree with the rest of this court that that is not the right construction, and having arrived at that construction the learned judge has said there would be a manifest absurdity if he held the "surplus assets" as including calls made upon the shareholders. As I do not agree in his premises, I need not say anything about the absurd-

[Ct. of App.]

PRESCOTT, & CO., AND CO. LIMITED v. BANK OF ENGLAND.

[Ct. of App.]

dity. But I wish to point out that this would be the result if it was so, that if calls have been made for the purpose of paying debts and liabilities the shareholders who paid those calls would not get them back at all, because the distribution is to be according to the amount paid up at the commencement of the liquidation. Therefore, if these shareholders whom Mr. Swinfen Eady represents paid only 13s. 4d. on their shares, and had the other 6s. 8d. called up for the payment of debts and liabilities, they would still, according to the learned judge's construction, not have been entitled to share in the surplus assets in respect of that 6s. 8d. which they had paid during the liquidation for the purpose of the debts and liabilities. Therefore I cannot help thinking that the learned judge's construction really involves, I will not say an injustice, but something which the parties could not have agreed to, and which it is extremely unlikely to suppose that any sane man of business would agree to. I should construe the words "paid up" as that which has been properly called up and paid either before or in course of the liquidation. And if we are right in thinking that there is nothing to exclude the duty of the liquidator to make such calls which are necessary for the purpose of adjusting the rights of the parties *inter se*, then this called capital which is paid up for that purpose will constitute part of the amount paid up on the shares, that is to say, the amount paid up on the shares after everything has been done which ought to have been done. I think, therefore, the learned judge's order cannot be maintained, and that we ought to make a fresh order.

Appeal allowed.

Solicitors for the appellants, *Milne and Milne*.
Solicitors for the respondents, *A. Arnold Hannay; Last and Sons*.

Nov. 22, 24, and Dec. 1 1893.

(Before LINDLEY, SMITH, and DAVEY, L.J.J.)
PRESCOTT, DIMSDALE, CAVE, TUGWELL, AND
CO. LIMITED v. THE GOVERNOR AND COM-
PANY OF THE BANK OF ENGLAND. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bankers—Issue of notes—Country banks—Composition for issuing Bank of England notes—Annulment with other banks—Subsequent right to composition—Bank Charter Act 1844 (7 & 8 Vict. c. 32), ss. 23, 24, 25—19 Vict. c. 20.

An action was brought to recover from the Bank of England 1625l., the agreed amount of three several compositions alleged to be payable under the Bank Charter Act of 1844. That Act gave for the future to the Bank of England a monopoly of the issue of bank-notes, reserving, however, the rights of other bankers who on the 6th May 1844 were legally entitled to issue notes.

Prior to 1891 the Bank of England had paid a composition of 100l. a year to bankers at Winchester, 630l. a year to bankers at Bath, and 895l. a year to bankers at Bristol. The Winchester and Bath banks were included in Schedule C. to the Act of 1844, and the compositions were paid under sect. 23. The composition paid to the Bristol bank was paid in pursuance of an agreement

entered into under sect. 24. In Dec. 1890 an agreement was entered into between P. and Co., bankers in London, D. and Co., also bankers in London, the Bristol Bank, the Bath Bank, and a trustee for a proposed company (which afterwards became incorporated as a limited company under the Companies Acts) that these four businesses should be bought up by the proposed company in consideration of certain shares in that company. The Winchester Bank was subsequently bought up by the company upon like terms, and stood in the same position as the Bath and Bristol banks. Neither of the two London banks bought up was entitled to a composition from the Bank of England.

Held, that, the company being an entirely new company, and having no rights or obligations except such as it acquired or incurred after registration, could not itself acquire a new right to be paid a composition under the Act of 1844; and that the old banks had by ceasing to carry on business lost their right to its continuance, and, having done so, they had no right to any composition which they could enjoy themselves or transfer to others.

Decision of Cave, J. reversed.

BEFORE the passing of the Bank Charter Act 1844, Messrs. Deane, Littlehales, and Deane, bankers, at Winchester, and Messrs. Tugwell and Co., bankers at Bath (both of whom were named in schedule C. annexed to that Act), ceased to issue their own bank-notes under agreements with the Governor and Company of the Bank of England; and shortly after the passing of that Act Messrs. Baillie, Ames, and Co., bankers at Bristol, who were entitled to issue their own bank-notes, agreed with the Bank of England to discontinue such issue in consideration of a composition payable by the Bank of England.

It was afterwards agreed between the Bank of England and Messrs. Deane, Littlehales, and Deane, that the composition payable by the Bank of England to them should be 100l. per annum; and between the Bank of England and Messrs. Tugwell and Co. that the composition payable by the Bank of England to them should be 630l. per annum; and between the Bank of England and Messrs. Baillie, Ames, and Co., that the composition payable by the Bank of England to them should be 895l. per annum.

The banking businesses carried on by Messrs. Deane, Littlehales, and Deane at Winchester, by Messrs. Tugwell and Co. at Bath, and by Messrs. Baillie, Ames, and Co. at Bristol, were afterwards carried on at the same places by Messrs. Deane and Co., Messrs. Tugwell, Brymer, Clutterbuck, and Co. (herein called Messrs. Tugwell), and Messrs. Miles, Cave, Baillie, and Co. (herein called Messrs. Miles), respectively, and the Bank of England paid the agreed composition to them respectively up to and including that payable for the year 1890.

In the year 1890 Messrs. Prescott, Cave, Buxton, Loder, and Co. (herein called Messrs. Prescott), bankers at London, Messrs. Dimsdale, Fowler, Barnard, and Dimsdale (herein called Messrs. Dimsdale), bankers at London, and Messrs. Miles and Messrs. Tugwell, agreed to consolidate their businesses, and for that purpose to form and incorporate a company under the Companies Acts 1862 to 1890, to carry

(a) Reported by F. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

PRESCOTT, &C., AND CO. LIMITED v. BANK OF ENGLAND.

[CT. OF APP.]

on their several businesses as bankers as from the 31st Dec. 1890. And on the 3rd Dec. 1890 they entered into an agreement for that purpose with a trustee for and on behalf of the proposed company, which was accordingly formed and incorporated on the 23rd Dec. 1890, under the name of Prescott, Dimsdale, Cave, Tugwell, and Co. Limited (herein called the company), with the object of continuing to carry on the respective businesses carried on by the above-mentioned bankers. And by an agreement dated the 5th Jan. 1891, and made between them and the company, the agreement of the 3rd Dec. 1890 was made binding on Messrs. Prescott, Messrs. Dimsdale, Messrs. Miles, Messrs. Tugwell, and the company.

By an agreement dated the 8th June 1891, and made between Messrs. Deane and Co. and the company, it was agreed that the company should acquire and carry on the business of Messrs. Deane and Co. as from the 31st Dec. 1890.

In pursuance of the agreements of the 3rd Dec. 1890, and the 5th Jan. 1891, and the agreement of the 8th June 1891, the company continued to carry on the several businesses carried on by the above-mentioned bankers at Bristol, Bath, and Winchester respectively.

The Bank of England having refused to pay the several agreed compositions payable for the year 1891, an action was brought against them by the company, Messrs. Miles, Messrs. Tugwell, and Messrs. Deane and Co., claiming 1625*l.*, being the amount of the agreed three several compositions payable for the year 1891; and in the alternative the plaintiffs, other than the plaintiff company, severally claimed the several agreed compositions payable for the year 1891.

The plaintiffs further claimed a declaration that the several compositions had not been determined by the acts of the plaintiffs, other than the plaintiff company, respectively or otherwise; and that the plaintiff company was entitled to payment of the several compositions from time to time, if not previously determined by its own act, until Parliament should prohibit the issue of bank-notes as defined by sect. 28 of the Bank Charter Act 1844, or until the exclusive privileges of the defendants mentioned in sect. 27 of that statute should be determined in pursuance of such section, or otherwise be determined or altered by authority of Parliament.

In July 1893 the action came on for trial before Cave, J., when his Lordship delivered the following written judgment:—

CAVE, J.—This is an action by a limited company, Messrs. Prescott, Dimsdale, Cave, Tugwell, and Co. Limited, and by three firms of bankers who are now represented to some extent by that company, to recover from the Governor and Company of the Bank of England certain sums which they allege are payable to them under the Act of 1844. Counsel for the plaintiffs called my attention to the case of *The Capital and Counties Bank v. The Governor and Company of the Bank of England* (61 L. T. Rep. N. S. 516), decided by Bowen, L.J. some time ago, and claimed that that decision governed the present case. Of course, if that decision does govern the present case, there is an end of the matter, because, although the counsel for the Bank of England contended that that judgment could not be supported, that is not

at all a question for me. It is binding upon me if it is in point, and any attempt to overrule that decision must be made to quite a different court, namely, the Court of Appeal. The first point therefore is, whether the decision in the case of the Capital and Counties Bank is in point. In that case the action was brought by the Capital and Counties Bank, who alleged that they represented the Hampshire Banking Company. The Hampshire Banking Company are exactly in the same position as that in which Messrs. Deane, Littlehales, and Deane, and Messrs. Tugwell and Co. are in the present case, in this way, that all three of them are included in schedule C. of the Act of 7 & 8 Vict. c. 32. The contest there as here was, whether the Hampshire Banking Company or the Capital and Counties Bank as representing the Hampshire Banking Company, were entitled to recover the amount of money which, under that Act and by virtue of sect. 23 and schedule C., was payable to the Hampshire Banking Company. The points raised appear to me to be similar to the points that are raised in the present case, namely, first, that the Hampshire Banking Company had forfeited its right to receive the money in question by having joined a London bank, and so gone to London; and, secondly, that the Capital and Counties Bank did not represent the Hampshire Banking Company; that the Hampshire Banking Company had in fact disappeared; that there was no such thing; and, consequently, that the plaintiffs in that case were entitled to succeed. Now, those are precisely, as it seems to me, so far as Messrs. Deane, Littlehales, and Deane and Messrs. Tugwell and Co. are concerned, the points which I have to deal with here. The learned Lord Justice laid it down there that the Hampshire Banking Company were entitled to recover the amount in question as a *persona designata* in the Act; and that the consideration was the determination of the agreement, and not their ceasing to issue their own bank-notes, or any other consideration that could be suggested. With regard to the second point, which he admitted to be an extremely important one, the learned Lord Justice says as follows (p. 518): [His Lordship read a description of the changes in the bank in that case.] In the course of his argument the Solicitor-General took several points which he alleged distinguished the case now before me from this case dealt with by the Lord Justice. I am not sure that I ever saw any distinction at all, but I am quite certain that I never saw and do not see any difference. There may be distinctions, of course, which do not in the least degree touch the *ratio decidendi*; and I am of opinion that there are such distinctions in this case between Messrs. Deane, Littlehales, and Deane, and Messrs. Tugwell's case and the Hampshire Banking Company, that they do not amount to differences, and that I ought not, on the ground of microscopic distinctions of that kind, to depart from the judgment of a court of co-ordinate jurisdiction. With regard to the Bristol Old Bank, there are distinctions which I am able to see. The Hampshire Bank was included in schedule C. of the Act. The Bristol Old Bank was not. The arrangement with the Bristol Old Bank was made under sect. 24 of the Act of 1844, and after the passing of that Act, instead of before, as was the case with the Hampshire Banking Company. Then again, and

[CT. OF APP.]

PRESCOTT, &C., AND CO. LIMITED v. BANK OF ENGLAND.

[CT. OF APP.]

finally, there is a provision with regard to the amount payable. It varies in the two cases. The proviso in sect. 24 is as follows: "Provided always that the total sum payable to any banker under the provisions herein contained by way of composition as aforesaid in any one year shall not exceed in the case of the bankers mentioned in the schedule hereto marked (C.), one per centum on the several sums set against the names of such bankers respectively in the list, and statement delivered to the Commissioners of Stamps as aforesaid, and in the case of other bankers shall not exceed one per centum on the amount of bank-notes which such bankers respectively would otherwise be entitled to issue under the provisions herein contained." Now it is said that there are distinctions. Are those distinctions real differences which ought to lead to a different conclusion with regard to the rights and liabilities of the parties in the action? It is undoubtedly the fact that one ground of the Lord Justice's judgment, that the Hampshire Banking Company was a *persona designata*, cannot apply here. The Bristol Old Bank was not a *persona designata*. That bank is not to be found, no doubt, in schedule C. of the Act of 1832; but, although it is not to be found there, it still has entered into an agreement with the Bank of England, under the direct sanction and authority of the statute. And it is not easy to see why the results should differ, whether the agreement was entered into before the Act was passed and directly referred to by the Act, or whether the agreement was authorised to be entered into by the Act, and is, when it is entered into, to have the same consequences and results. There is no indication of any difference which is to exist between the banks who have already made the agreement before the passing of the Act and those who are authorised to make it afterwards that I am able to see. Sect. 24 enacts: "That it shall be lawful for the said governor and company to agree with every banker who, under the provisions of this Act, shall be entitled to issue bank-notes, to allow to such banker a composition at the rate of one per centum per annum on the amount of Bank of England notes which shall be issued and kept in circulation by such banker, as a consideration for his relinquishment of the privilege of using his own bank-notes; and all the provisions herein contained for ascertaining and determining the amount of composition payable to the several bankers named in the schedule hereto marked (C.) shall apply to all such other bankers with whom the said governor and company are hereby authorised to agree as aforesaid." Therefore the arrangements for ascertaining the amount payable are made the same, and, as I have said, the only distinction that I am able to find in the statute is with regard to the maximum amount payable. It was part of the policy of the Legislature that the bank who entered into this arrangement, or who had entered into it or were going to enter into it, should never receive more than the sum which they were entitled to receive when the Act was passed in 1844. They might receive less, because they were to receive a percentage upon the amount of Bank of England notes which they put in circulation, and that, of course, might fall away or even come to nothing. But they could not receive more, because of this proviso in sect. 24, which restricted the amount in

either case. The only thing was, that the words which frame the distinction are different in the two cases, by reason that in the one case, viz., that of the bankers in schedule C., there was a list and statement delivered to the Commissioners of Stamps which contained the sums set against their names as the average amount of Bank of England notes which they had got in circulation in 1844. That, of course, would not apply to bankers who at that time were issuing their own notes, but substantially the same effect is produced by a slight change in the wording of the proviso: "And in the case of other bankers shall not exceed one per centum on the amount of bank-notes which such bankers respectively would otherwise be entitled to issue under the provisions herein contained." I apprehend that that means the fixed amount, because there is an amount fixed which bankers not in schedule C. were confined to. There was an account made and rendered showing the average amount of their own notes which they were issuing at certain specified times in 1844, and it provided that they were not to go beyond that amount. That was the amount to which they were entitled to trench upon the exclusive privilege of the Bank of England, but beyond that they were not allowed to go. With regard to banks in schedule C. not issuing their own notes, but those of the Bank of England, there was no object in restricting the amount of the issue. The only thing was to restrict the amount of the payment they were to get, and that was restricted to 1 per cent. of the amount in circulation in 1844. In the case of bankers in schedule C. who were not issuing their own notes, the same effect was produced by restricting the maximum payment to 1 per cent. of the amount of their own notes which they were issuing in 1844, and which, if they did not enter into such an agreement, would be the authorised amount which alone they would be entitled to issue. It seems to me that that is what is being referred to—the amount that they were entitled to issue in 1844, so that the statute is not at all considering or looking to the question of whether they were to continue to be able to issue that amount or not. Sect. 11 of the Act provides that "It shall be lawful for any banker who was on the 6th May 1844 carrying on the business of a banker in England or Wales, and was issuing in England or Wales his own notes . . . to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom. Provided always that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank-notes at any time after the number of partners therein shall exceed six in the whole." Now, that is a proviso with regard to banks who then were issuing their own bank-notes, and who were intending to continue and did continue to issue their own bank-notes. Then the fact that in 1852 their number exceeded six

[CT. OF APP.]

PRESCOTT, & CO., AND CO. LIMITED v. BANK OF ENGLAND.

[CT. OF APP.]

would have precluded their continuing to issue their bank-notes any longer. At all events, it is so contended. It is not necessary for me to decide that point. I only assume with the Solicitor-General that that is so. But then it seems to me that that is not one of the provisions which is introduced or intended to be introduced into the proviso at the end of sect. 24. What the Lord Justice in effect says is this: "This is a fixed payment, legalised and recognised by the Act in the case of bankers who come within schedule C." That opinion I am bound by, and it seems to me that, if that is so in the case of bankers who are named in schedule C., it must apply equally to the bankers with whom the agreement is subsequently made as soon as the agreement is made with the bank. I cannot see any reason whatever why a restriction should be put upon bankers, who enter into this agreement, after they have entered into it which should not be put upon bankers who are in schedule C. Both agreements are recognised by the statute. Those which have already been made can be and are referred to by name; those authorised to be made thereafter cannot be referred to by name, of course, because it is impossible to say which banks will think fit to enter into that arrangement and which will not. But when that has been determined by the act of the bank in coming to an agreement with the Bank of England, I can see no sufficient motive for making any difference between the two. And if in the case of the Hampshire Banking Company, which is named in the schedule, the subsequent mode in which that bank conducts itself has no effect either upon the right to receive the amount of the composition if they are able to increase their numbers without affecting their right to receive the composition, I cannot see why in the case of the Bristol Old Bank the Bristol Old Bank may not in the same way increase their numbers without affecting their right to receive the amount agreed to be paid them by the Bank of England. It is no longer a question of issuing their own bank-notes, and restricting their right to do that. By their agreement they have put an end to that. It seems to me by that agreement they have taken themselves out of the conditions and terms which are attached subsequently, if I may say so, to those banks which continue to issue their own bank-notes, and that they have instead the right to receive this composition, losing, no doubt, any right to extend it in any way, and running the risk, of course, of losing it by their bank business falling off and their not being able to issue bank-notes. But, as between them and the banks in schedule C., I cannot see the slightest reason why one rule should be applied to one of them and another rule applied to the other. If the rule laid down by Bowen, L.J. is, as I am bound to assume it is, perfectly correct with regard to the bankers mentioned in schedule C., it seems to me it must be equally correct with regard to bankers who afterwards come to an arrangement with the Bank of England—an arrangement which is directly authorised by the statute in question. There is no greater evil to my mind than to seek to establish a quantity of minute distinctions, and upon those minute distinctions to make differences in the law. It ought to be plain and simple, so that an ordinary man can understand it. I venture to think that no

ordinary man would understand why there should be a distinction, or where you are to find that distinction, between the one set of bankers and the other. The Act, no doubt, is somewhat obscure; it is not easy to construe, and possibly the reason of that is, that at the time it was never contemplated that it would last more than ten or twelve years. It was provided by the very Act itself that this payment should come to an end in 1856 if it were not sooner determined by the Legislature. It so happens that it has gone on and on; but, nevertheless, one cannot put a different interpretation upon the Act, because it has continued to live a very much longer time than those who were parties to the making of it appeared to contemplate. I think I should be introducing confusion into the law if I were to hold that in this case there was a valid difference between the two cases authorising me to come to a different conclusion with regard to them. With reference to the whole matter, I have not entered upon that—I have not considered it in the slightest way. I am bound by the decision of Bowen, L.J., and even if I had considered it, and had come to a different conclusion, I should not venture to give effect to it in the face of the decision of so distinguished a judge, especially when I am bound by a decision of a court of co-ordinate jurisdiction. He was sitting then, as I was sitting when I heard this case, at Nisi Prius. Consequently it seems to me I must follow the Lord Justice's decision, and that my judgment must be in favour of the plaintiffs with the usual result.

From that decision the defendants now appealed.

Sir John Rigby (S.-G.), H. D. Greene, Q.C., R. Bray, and H. Sutton for the appellants.—This case was decided by Cave, J. on the authority of Bowen, L.J.'s decision in

The Capital and Counties Bank v. The Bank of England, 61 L. T. Rep. N. S. 516.

Cave, J. was of opinion that the case before him was governed by that decision; but we submit that it is entirely distinguishable from the present case, as the facts are different, and the principle it establishes does not apply here. The several banks ceased to carry on business when they were bought up by the company, and have therefore lost their right to a continuance of the composition which was formerly paid to them:

Re Sax; Barned v. Sax, 68 L. T. Rep. N. S. 849;

Attorney-General v. Birkbeck and Co., 51 L. T. Rep. N. S. 199; 12 Q. B. Div. 605.

Sir Henry James, Q.C., Finlay, Q.C., and Wood Hill for the respondents, *contra*.

Sir John Rigby (S.-G.) replied. *Cur. adv. vult.*

Dec. 1, 1893.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal by the defendants against a judgment of Cave, J., deciding that the plaintiffs are entitled to be paid by the defendants certain annual sums of money under sects. 23 and 24 of the Bank Charter Act 1844 (7 & 8 Vict. c. 32). I do not propose to read those sections again, they were read and commented upon very minutely, and they are very long. It will be convenient if I refer generally to sects. 10, 11, and 12, which relate to the issue of bank-notes by private bankers, and to sects. 23, 24, and 25, which relate to the composition to be paid by the

Bank of England to bankers who give up issuing their notes, and to sect. 28, which interprets the meaning of the word "bankers," and which shows that by "bank-notes" in the Act are meant bank-notes issued by private bankers as distinguished from Bank of England notes. Then sect. 9 of the Act of 1856 I will refer to. By sect. 25 of the Act of 1844 "all compositions payable to bankers under such Act shall, if not previously determined by the act of such banker as hereinbefore"—that refers to sect. 23—"cease and determine on the 1st Aug. 1856, or on any earlier day on which Parliament may prohibit the issue of bank-notes." That was repealed and replaced in 1856 by sect. 2 of 19 Vict. c. 20, which I will read: "All the compositions payable under the said Act as amended by this Act to bankers who have discontinued, or who shall agree with the said governor and company to discontinue the issue of their own bank-notes, shall, if not previously determined by the act of such bankers"—that again throws it back on sect. 23 of the Act of 1844—"and, unless Parliament shall otherwise provide, continue in force and be payable until Parliament shall prohibit the issue of bank-notes as defined by sect. 28 of the said recited Act, or until the exclusive privileges of the said governor and company mentioned in sect. 27 of the said Act shall be determined in pursuance of such section, or otherwise be determined or altered by authority of Parliament." Now, the plaintiff company, Messrs. Prescott, Dimsdale, Cave, Tugwell, and Co., were formed under part 1 of the Companies Act 1862 in the usual way, and were registered on the 23rd Dec. 1890. The memorandum of association is signed in the usual way by several persons. The name of the company is that which I have just mentioned. The objects of the company are "to acquire and carry on the respective businesses now carried on by Messrs. Prescott, Cave, Buxton, Loder, and Co., Dimsdale, Fowler, Barnard, and Dimsdale, Miles, Cave, Baillie, and Co., and Tugwell, Brymer, Clutterbuck, and Co. respectively, to carry on the business of bankers in London, Bristol, Clifton, and Bath, and at such other places as may from time to time be determined." The capital is two millions. There are articles of association, the first of which of importance is No. 4. I shall refer to these very shortly, because really nothing turns upon the reading of them. The 4th article is to the effect that the directors shall forthwith adopt a certain agreement, to which I will refer presently. Then 6 says that the office shall be at such place in London as the directors shall from time to time appoint. Then 7 and 8 state who the first directors are to be, and they are evidently the partners or the managing partners of the banks to which I shall have occasion to refer. Then 81 states the powers of the directors, which are very general, to do all that the company can do. Art. 101 empowers the directors to delegate their powers to committees, and art. 110 empowers the directors to establish local courts. By an agreement of the 5th Jan. 1891, which is the agreement entered into by the company pursuant to the 4th article, the company undertake to carry out the agreement entered into on the 3rd Dec. 1890 for the acquisition of the banking businesses of Prescott and Co., Dimsdale and Co., both of London, Miles and Co., of Bristol, Tugwell and Co., of Bath, and on the

8th June 1891 the company agreed to purchase the business of Deane and Co., of Winchester. Now, it will be necessary shortly to refer to these agreements. The first and the main agreement is that of the 3rd Dec. 1890, which is made between Prescott, Dimsdale, Cave, and Tugwell of the first three parts, and the limited company of the other part. It recites that those firms carried on business in London, at Bristol and Bath, at the places mentioned in the schedule, and that they have determined to transfer the respective goodwill of their respective businesses, and "such of the other assets of the same businesses as are hereinafter specified to a company." Then clause 1 is that each of the firms shall sell and the company shall purchase as from the 31st Dec. 1890 the goodwill of the banking business so carried on by such firm. Then 2 is: "As the consideration for the sale the vendors shall be entitled to the rights conferred upon them by the 8th clause." Then clause 3 is, that the company shall have the right to occupy what I may call the banking places, the places of business for a twelvemonth. Clause 4 is, that the company shall take over the furniture and office fittings, stationery, and so on. Then 5 is that: "Each of the said firms parties hereto of the first four parts shall satisfy and discharge all the debts and liabilities of its said business existing on the said 31st Dec. 1890, and shall for that purpose be entitled free of cost to the services of the clerks and other officers of the company. The company shall in the ordinary course of business collect on behalf of each of the said firms the book and other debts owing to such firm in respect of its said business on the said 31st Dec. 1890 (and in collecting any such debt the company may have regard to the length of credit usually given by such firm to the person liable in respect of such debt) and pay the same to such firm free of cost, but this clause shall not impose any liability on the company to take any legal proceedings for the recovery of any such debt." Then 6: "The purchase shall be completed on the 1st Jan. 1891, when the vendors shall, at the request and cost of the company, execute and do all such assurances and things as may reasonably be required by the company for vesting in or delivering to it the property hereby agreed to be sold, and giving to it the full benefit of this agreement." Then 7: "The company shall as from the said 21st Dec. 1890 take over and adopt all the then current engagements of each of the said firms, Messrs. Prescott, Messrs. Dimsdale, Messrs. Miles, and Messrs. Tugwell, relative to the employment of clerks and others in the businesses." Then 8: "On the completion of the purchase, each of the vendors shall be entitled to and shall accept an allotment of the shares in the company set opposite his name in the 5th schedule hereto," which it is not necessary to refer to, "subject to the payment of the full nominal amounts of such shares, as and when the same shall from time to time be called up, together with a premium of 4l. per share." Then there is a proviso for subscribing to the company's memorandum of association. Then comes this clause, which is important (9): "None of the vendors shall, without the previous consent of the directors for the time being of the company, or such number of them as have authority to bind the company, at any time after the completion of the purchase, either solely or jointly with, or as

[CT. OF APP.]

PRESCOTT, &C., AND CO. LIMITED v. BANK OF ENGLAND.

[CT. OF APP.]

manager or agent or director for any other person or persons or company, directly or indirectly carry on or be engaged or concerned or interested (except as shareholder in any company) in any banking business, or in any business similar to any of the businesses whereof the goodwill is hereby agreed to be sold, and shall not permit or suffer his name to be used or employed in carrying on, or in connection with any such business in London, or within fifty miles from the Bank of England, or in any of the counties of Gloucester, Somerset, and Wilts, or within fifty miles of any of such counties, save in so far as he shall as a member of the company be interested in, or as an officer of the company be engaged in the company's business, and none of the vendors shall do or suffer to be done anything whereby the company may be injured in carrying on any of the businesses hereby agreed to be sold, but each of the vendors shall at the cost of the company do all things which the company may reasonably require for securing to it and its assigns the full benefit of the goodwills hereby agreed to be sold." Now that agreement was made before the company was formed. It was adopted afterwards as I have stated. There was a similar agreement entered into in June 1891 between the company after its formation, and Messrs. Deane, but I do not think it necessary to refer to the clauses in that agreement. They are substantially to the same effect as those in the agreement which I have just read. Now the old firms of Prescott and Co. and Dimsdale and Co. were not entitled to any compensation under the Act. The old firm of Miles and Co. were entitled under sect. 24 of the Act to a composition of 895*l.* a year, and were in receipt of this sum when their business was transferred to the new company. The old firms of Tugwell and Co. and Deane and Co. were entitled under sect. 23 of the Act to compositions which were regularly paid to them until their businesses were acquired by the plaintiff company. Tugwell and Co. and Deane and Co. are both mentioned in schedule C. The old firms of Miles and Co., Tugwell and Co., and Deane and Co. are co-plaintiffs with the plaintiff company in this action, and the question is, whether the foregoing compositions are still payable either to the plaintiff company or to those old firms. The defendants contend that the old firms ceased to carry on business when they assigned their businesses to the plaintiff company, and that the compositions thereupon ceased to be payable and in support of this view the defendants rely on *Attorney-General v. Birkbeck (ubi sup.)*. The plaintiffs contend that the new company is in fact only the old firms under another name, and that their business is still being carried on as before, and that the compositions have not ceased; and the plaintiffs rely on the decision of Lord Bowen in *The Capital and Counties Bank v. The Bank of England (ubi sup.)*. Cave, J. has adopted this view, holding that there is no material difference between the present case and that. Lord Bowen certainly decided that a composition payable under the Act did not cease on the occurrence of any event which would have terminated the right of the bank receiving it to issue notes had there been no composition. It was strongly contended before us that in this respect the decision was wrong, and we were urged to overrule it. The question is, in my opinion, one

of very great difficulty. It is not easy to see why the composition should continue longer than the right to issue notes should continue, and sect. 25 seems to substitute one for the other. Moreover, the expression "unless previously determined by the acts of the bankers" is intelligible if the composition is to cease if they increase the number of their partners or come to London; but the expression is difficult to explain on any other construction. On the other hand, the later Act says when the composition is to cease, and it does not specify any such events as those which I have referred to, and only specifies the abolition by Parliament of the right to issue notes. But, in the view I take of the facts, it is unnecessary to decide whether the decision in the case of *The Capital and Counties Bank (ubi sup.)* was right or wrong—on which I express no opinion, for I have come clearly to the conclusion that in this case the compositions have ceased to be payable. Although the statute does not say in terms that the composition is to cease if the bankers entitled to it cease to carry on business, yet, if they do, then not only does the reason for paying the composition cease, but the machinery for ascertaining the composition comes to a stop. In this way it is made plain that the composition must cease to be payable in the event supposed. Whether the firms entitled to the composition have ceased to carry on business is a question of fact, and having regard to the terms of their agreements with the plaintiff company and to Mr. Cave's evidence, I am clearly of opinion that they have. The businesses now carried on are carried on not by the old firms but by the new company, and this is so not in a merely technical sense, but in the ordinary business sense of the expression. The very forms of the cheques now in use show it. The old businesses are carried on at the old places and with the old staffs, and the old places formerly called and known as the old banks are still so called and known. But the old banks and other old places of business are the property of the new company and not of the old firms, and the old staffs are the servants of the new company and not of the old firms, and the former customers of the banks are now customers of the new company and not of the old firms. The old firms have now no customers. But the new company cannot by any legitimate method be brought within the class of bankers to whom the composition is made payable by the statute. As in the case of issue of notes (see sect. 11 of the Act) so in the case of the compositions, a firm of bankers would not lose its rights by a change of its constitution. But when a firm sells its business to somebody else and for that or any other reason ceases to carry on its business in the ordinary sense of that expression, it loses its right to any composition in future. This conclusion is not at all opposed to Bowen, L.J.'s decision, and the difference between the case before him and the present is not refined or immaterial, but is broad and all-important. The Capital and Counties Bank was an old firm which, the learned Lord Justice held, had preserved its identity notwithstanding the change of name and other changes, and which old firm was registered as an existing firm under part 7 of the Companies Act 1862, and, this being so, the rights and obligations of the old firm became the rights and obligations of the registered company, under sect. 193 of the Companies Act of 1862. But the

present company is an entirely new company, formed and registered as such under part 1. of the Act, and having no rights or obligations except such as it acquires or incurs after registration. It cannot itself acquire a new right to be paid a composition under the Act of 1844, and the old firms have, by ceasing to carry on business, lost their right to its continuance. Having done so they have no right to any composition which they can enjoy themselves or transfer to others. The appeal ought, therefore, to be allowed, and with costs here and below.

SMITH, L.J.—Learned and elaborate arguments have been presented to us by the Solicitor-General and Mr. Greene on behalf of the Bank of England as to what is or is not the true construction of many sections of the Bank Act of 1844 (7 & 8 Vict. c. 32), an Act which on all hands is admitted to be one difficult of construction. And having listened to them and to Sir Henry James, who argued for the plaintiffs, I have arrived at the conclusion that the first question to be decided is, whether the plaintiffs, Messrs. Prescott, Dimsdale, Cave, Tugwell, and Co. Limited, are “such banker or bankers” as the three old banks who are their co-plaintiffs, viz, the Bristol Bank, the Bath Bank, and Winchester Bank, were prior to the 3rd Dec. 1890. Sir Henry James admitted if it was not he could not support the judgment of Cave J, in his favour, and in this I agree. I will deal with the three co-plaintiff banks hereafter. Now, what do the terms “such banker or bankers” as used in sects. 23 and 24 of the Act mean? On the one side the Solicitor-General was inclined to argue that to constitute “such bankers” the identical members of the firms must continue to exist as at the date of the passing of the Act to entitle such bankers to a composition, a proposition which, in my judgment, is wholly untenable, and I hold this without referring to sect. 11, which may or may not be legitimate to refer to, though I think it is for the purpose of throwing light upon the term “such bankers or such banker” in sects. 23 and 24. On the other side it was urged that the term “such bankers” denoted the business carried on and not the persons who carried it on, and that if the same banking business was carried on at the present time by the plaintiff company limited as prior to the 3rd Dec. 1890 had been carried on by the three co-plaintiff old banks, apart from the other points which were raised, that would suffice to give the plaintiff company limited the right to those compositions which, prior to the year 1890, the three old banks had enjoyed. In this I agree. This raises the first question in this cause, which is one of fact. Does the plaintiff company limited carry on the same banking business as the three old banks theretofore had done? In my opinion there is no distinction to be made upon this point as to whether the banks were named in the schedule to the Act and entitled to their composition under sect. 23 as the Bath and Winchester Banks were or were not in the schedule, and entitled to composition under sect. 24 as the Bristol Bank was. The material facts are as follows: [His Lordship recited them and proceeded:] In my judgment the effect of this was to bring about a complete dissolution of the old banks, and to swallow them up in the new company limited which was brought into existence for that express purpose. The identities of the bought-up banks were obliterated, their businesses

were absorbed into that of the plaintiff company limited, and they no longer existed upon the face of the earth. It was, however, contended that the new company limited now carries on the same banking business as the three old banks. It was argued for the plaintiffs as follows: It was said, Suppose one new partner taken into an old firm, that does not change its entity. Suppose two, three, or four, or more taken in, still the same entity remains, and the same banking business is carried on. I do not dispute that this may be so in many cases. It was next said that the same result followed if two banks amalgamated with each other. It is here that I part company with the argument. I say an amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either. It must depend upon the nature and character of the businesses amalgamated, and how the amalgamated business was subsequently carried on. In each case it must be a question of fact. Whereas in the present a large banking company limited is brought into existence for the purpose of absorbing into itself any lesser banking businesses, whether metropolitan or country, which it may find willing to part with its own and sell to itself, and it does purchase and absorb it, it appears to me to be impossible with any degree of accuracy to say that the company limited after such absorption carries on the same banking business as the banks absorbed had theretofore done, for the simple fact is, it does nothing of the kind. The new company limited may have its branches in the same towns as the old absorbed banks had theretofore carried on their businesses, it may have preserved for itself the old premises and the services of the old clerks. But how do these facts make the new business the same as the old? The name is changed upon the old premises; the liabilities to customers are altered; the documents and the cheques are all changed; the new name takes the place of the old, significantly declaring as the fact is that the old bank and its business is no more, and that the new company limited reigns in its stead. Upon such a question as this each case must depend upon its own facts, and, in my judgment, this point upon the facts of the case can only be found against the plaintiff company limited, and it cannot be truly said that the plaintiff company limited is “such banker or bankers” as the old three firms formerly were, and it is not disputed that if this be so the plaintiff company limited is not entitled to the composition heretofore paid to the old banks, and which are sued for in the present action. Nor can the old firms who are made co-plaintiffs recover, for the obvious reason that they have ceased to exist, and consequently, under the sections of the Act, are no longer entitled to the composition. The conclusion I have arrived at is in accord with some observations which fell from the Lord Chief Justice in *Attorney-General v. Birkbeck (ubi sup.)*, with which I entirely agree. I do not run counter to the decision of Bowen, L.J. given whilst sitting at Nisi Prius in the case of *The Capital and Counties Bank v. The Bank of England (ubi sup.)*. He there held that the Hampshire Bank (which had the right to the composition) by absorbing other banks into itself did not lose its identity, but still carried on the same banking business, although it changed its name and place of business. Here, on the con-

trary, the banks which have the right to composition are swallowed up and absorbed in a new company limited and no longer exist, and it is here that I find myself differing from my brother Cave, when he held that the two cases were substantially identical. It is not necessary to give any opinion in this case upon the other point determined by Bowen, L.J., viz., whether the right to composition is commensurate with the right to issue notes. It is a point which I expressly leave open, it is not necessary to determine it in this case. I think this appeal for the reasons above should be allowed.

DAVEY, L.J.—I have had an opportunity of reading the judgment of Lindley, L.J., and I entirely concur in it.

Appeal allowed.

Solicitors for the appellants, *Freshfields and Williams.*

Solicitors for the respondents, *Dawes and Sons.*

Oct. 27 and Nov. 9, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

PAGE v. MIDLAND RAILWAY COMPANY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Covenants for title—Defect appearing on the conveyance—Liability under the covenants.

A vendor is liable to a purchaser under his covenants for title for any defect which comes within the words of the covenants, although the defect is disclosed in the conveyance or is otherwise known to the purchaser.

Hunt v. White (37 L. J. 326, Ch.) overruled.

By her will, dated the 19th Jan. 1852, Ann Palmer, amongst other devises and bequests, gave to her daughter Amy, the wife of Joseph Page, the sum of 60*l.*, already paid into court by the Oxford, Worcester, and Wolverhampton Railway Company, in part payment and on account of a small quantity of land, part of the "Little Piece" proposed to be taken by such company, "and all sums of money which shall hereafter be paid by the company or any other railway company in respect to any part of the said Little Piece taken for railway purposes," and subject thereto she devised the Little Piece, together with some other land, to Amy Page for life, and after her decease to all the children of Amy Page living at her death, as tenants in common.

Ann Palmer died on the 16th April 1855, and her will was duly proved by the executors named therein.

At the date of her death the testatrix was entitled to the fee simple of the land referred to in her will as the "Little Piece," with the exception of the small part which had been taken by the Oxford, Worcester, and Wolverhampton Railway Company.

Amy Page and her three children were living at the death of the testatrix.

In 1856 Amy Page, together with her husband Joseph Page and her children, mortgaged the "Little Piece" to secure a sum of 2000*l.*, and in 1857 they executed a further charge to secure the sum of 200*l.*

On the 14th July 1860 this mortgage and further

charge were transferred to J. Hazlehurst, A. P. Shelley, and T. F. Hazlehurst.

In 1879, Joseph Page being then dead, Amy Page entered into an agreement with the Midland Railway Company for the sale to them of the "Little Piece" for 5250*l.*, and the sale was carried out by an indenture dated the 26th June 1879, and made between John Hazlehurst, A. P. Shelley, T. F. Hazlehurst, of the first part, Amy Page of the second part, and the Midland Railway Company of the third part. The will of Ann Palmer was recited, and also the mortgage, the further charge, the transfer, and the death of Joseph Page. It was then recited that the company requiring and by the Midland Railway Company (New Works) Act 1877 being empowered to take and purchase for the purposes of the railway the piece of land called the "Little Piece," had "entered into an agreement with the said Amy Page for the purchase thereof for an estate of inheritance in fee simple in possession free from incumbrances, at the price of 5250*l.*"

It was also recited that the sum of 2200*l.* remained due on the mortgage and further charge, and that it had been agreed that they should be paid off out of the purchase money. It was then witnessed that, in pursuance of the said agreements, and in consideration of 2200*l.* paid to the parties of the first part, and also "in consideration of the sum of 3050*l.* to the said Amy Page, paid by the said company on or before the execution of these presents," they the said John Hazlehurst, A. P. Shelley, and Thomas F. Hazlehurst, at the request and by the direction of the said Amy Page, do, and each of them doth hereby grant and release, and she, the said Amy Page, doth hereby grant and confirm unto the said company, their successors and assigns, the piece of land called "Little Piece," and "all such estate, right, title, and interest in and to the same as the said John Hazlehurst, A. P. Shelley, Thomas F. Hazlehurst, and Amy Page, or either of them, are, or is, or shall become seized or possessed of, or are or is by the said Act or otherwise empowered to convey," to hold the same unto and to the use of the company, their successors and assigns. The indenture contained the following covenant:

And the said Amy Page doth hereby for herself, her heirs, executors, and administrators, covenant with the said company, their successors and assigns, that notwithstanding any act or thing by the said Amy Page or the said Ann Palmer deceased, or any of her ancestors or testators, or any of them, made, done, or executed, or knowingly suffered, the said John Hazlehurst, Abraham Parker Shelley, and Thomas Francis Hazlehurst, or some or one of them, now have or hath good right and full power to grant and release, and the said Amy Page now hath good power to grant and confirm, the said hereditaments and premises hereinbefore expressed to be granted or otherwise assured to the use of the said company, their successors and assigns, in manner aforesaid; and that the same hereditaments and premises shall at all times hereafter remain and be to the use of the said company, their successors and assigns, and be quietly entered into and upon, and held, occupied, and enjoyed, and the rents and profits thereof received and taken by the said company, their successors and assigns, accordingly, without any lawful interruption by the said Amy Page, or any person lawfully or equitably claiming by, from, under, or in trust for her, or by, from, or under the said Ann Palmer deceased, or by, from, or under any of her ancestors or testators, or any of them; and that free and discharged, or otherwise, by the said Amy Page, her heirs, executors, and administra-

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

tors sufficiently indemnified from and against all estates, incumbrances, claims, and demands whatsoever, either already or hereafter to be made, occasioned, or suffered by the said Amy Page or any person lawfully or equitably claiming by, from, under, or in trust for her, or by, from, or under the said Ann Palmer deceased, or by, from, or under any of her ancestors or testators, or any of them.

Then followed a covenant for further assurance.

On the same day Joseph Page the younger, a son of Amy Page, gave the company an indemnity against all damages, costs, charges, and expenses which they might sustain or be put to by reason of any claims or demands made by any children or other issue of Amy Page by reason of the purchase money being paid to Amy Page.

Amy Page died on the 27th July 1891. William Palmer Page, her eldest son, died on the 20th Oct. 1859, leaving a widow and two children, W. J. Page and Helen Page, and under the will of W. P. Page his children were entitled to all his interest under the will of his deceased grandmother, Ann Palmer, in equal shares, W. J. Page being also the heir-at-law of W. P. Page.

On the 22nd Dec. 1892 this action was commenced by W. J. Page and Helen Page against the Midland Railway Company, claiming to recover possession of one undivided third share of the "Little Piece," or in the alternative payment to them by the company of one-third of the 3050*l.* paid by the company to Amy Page. In their statement of claim the plaintiffs stated that they were willing that the conveyance to the company of the 26th June 1879 should stand upon payment to them by the defendant company of one-third part of the 3050*l.* The plaintiffs claimed on the ground that on the true construction of Ann Palmer's will Amy Page was only tenant for life of the land sold to the company.

By their defence the company contended that they obtained a good title under the deed of the 26th June 1879. They, however, obtained leave to serve a third-party notice on the executors of Amy Page, claiming to be indemnified out of her estate under her covenants for title; and also to serve a similar notice on Joseph Page, the younger, claiming to be indemnified by him under his indemnity to them. The third parties appeared and took part in the trial.

The action was tried by Romer, J., who gave judgment for the plaintiffs, directing the company to pay them one-third of the 3050*l.*, together with interest and costs, and he ordered Joseph Page the younger to repay the company the amount paid by them to the plaintiffs, together with costs. But his Lordship dismissed with costs the claim of the company against the executors of Amy Page, as he felt himself bound to follow *Hunt v. White* (37 L. J. 326, Ch.).

The company appealed against the judgment on both points.

The first appeal turned on the construction of the word "hereafter" in the will of Ann Palmer, and does not call for a report. This appeal was on the 27th Oct. dismissed, and the decision that the company were liable to pay the plaintiffs one-third of 3050*l.* was affirmed.

The appeal from the decision that the executors of Amy Page were not liable to indemnify the company was then heard.

Beale, Q.C. and *Macnaghten* for the defendant company.—The decision in *Hunt v. White* (*ubi*

sup.) is erroneous, and should be overruled. Although it was decided in 1868 it has not been referred to in any of the text-books except *Elphinstone's Interpretation of Deeds* (pp. 137, 481), and does not appear to have been cited in court. It is not supported by the older authorities:

Dart on Vendors and Purchasers, 6th edit., vol. 2, p. 886;
Jarman's Conveyancing, 3rd edit., vol. 9, p. 381;
Ogilvie v. Foljambe, 3 Mer. 53, 65;
Savage v. Whitbred, 3 Ch. Rep. 14;
Vane v. Barnard, Gilb. 6;
Butler's Note to Co. Litt. 384*a*;
Davidson's Conveyancing Precedents, 4th edit., vol. 2, p. 379.
Rawle on Covenants for Title, p. 116;
Sugden on Vendors and Purchasers, 14th edit., p. 573;
Ex parte Collins, 2 Ir. Ch. Rep. 618.

The covenant expressly refers to a claim by any person claiming under Ann Palmer, and the plaintiffs claim through her.

Bramwell Davis (*Neville, Q.C.* and *W. Shakespeare* with him) for the executors of Amy Page.—The case of *Hunt v. White* was decided in 1868, and the court will not overrule it after the lapse of so many years. *Butler's note to Co. Litt.* 384*a* is in favour of the respondents. The 4th edition of *Dart on Vendors and Purchasers* (p. 719) differs from the 6th edition, and states that it is doubtful whether the covenants extend to debts known to the purchaser. If it was intended that the covenants for title should cover any defect appearing on the conveyance, words to that effect ought to have been inserted. The company took a separate indemnity from Joseph Page, which shows they did not rely on the covenants for title.

Beale, Q.C. in reply.

Curr. adv. vult.

Nov. 9.—*LINDLEY, L.J.*—This is an appeal from a portion of a judgment of *Romer, J.*, which decided that the Midland Railway Company was not entitled to any relief in respect of a covenant for title entered into by one Amy Page, who sold some land to them. The circumstances giving rise to the company's claim were shortly as follows: One Ann Palmer devised certain lands to Amy Page, but in such language as to render it doubtful whether she was absolutely entitled to the purchase money paid by the Midland Railway Company who bought some of this land from her and took a conveyance from her in fee and paid her the price of the fee. By the deed of conveyance she entered into the usual covenants for title. Amy Page died in 1891, and an action was brought by persons claiming the land under Ann Palmer's will upon the footing that Amy Page was only tenant for life, and that on her death the land vested in the plaintiffs. The railway company contested this claim, relying on the terms of Ann Palmer's will; but the railway company also brought in Amy Page's executors as third parties and claimed to be indemnified by them under her covenants for title in the event of its being decided that Amy Page was not absolutely entitled to the purchase money. *Romer, J.* first, and this court afterwards, decided that Amy Page was not entitled to give a discharge for the purchase money. The result of this decision was, that the plaintiffs in the action recovered the value of one-third part of the land from the company, but *Romer, J.* further decided that the rail-

way company had no remedy against Amy Page's representatives under her covenants for title. This is the point which we have now to determine. Before addressing myself to this question, it is important to observe that the conveyance by Amy Page to the company was made by her as an ordinary vendor in fee. The conveyance was not made by her under the statutory powers conferred on tenants for life by the Lands Clauses Consolidation Act; nor was the purchase money paid into a bank pursuant to those sections in the same Act which apply to purchasers from tenants for life and persons whose titles are doubtful. Moreover, the railway company did not by their pleadings or at the bar claim to have acquired a good title under that statute, or contend that the plaintiffs' remedy, if any, was for compensation under sect. 68 of the Lands Clauses Consolidation Act; nor did the third parties, Amy Page's representatives, raise any such point. Both in the court below and in this court the case has been fought on different lines; and the only controversy has been respecting the true construction of Ann Palmer's will, and the true construction and effect of Amy Page's conveyance to the defendant company. I think it necessary to call attention to these facts, in order to prevent misconception as to the scope of the present decision. I say nothing on the point whether the defendant company could or could not have defended the action brought against them on the ground that the company had obtained a good statutory title, and that the plaintiffs' proper course was to proceed to obtain compensation under sect. 68 of the Lands Clauses Consolidation Act; nor do I say anything on the point whether, having regard to the Lands Clauses Consolidation Act, the plaintiffs have any title to any estate or interest in the land conveyed to the company as distinguished from a claim for compensation under sect. 68. Romer, J. decided that Amy Page's covenants for title did not protect the company from the plaintiffs' claim, because Ann Palmer's will was recited in the conveyance to the company, and because the covenants for title ought to be confined to defects in the vendor's title not shown on the conveyance. In so deciding Romer, J. followed a decision of Malins, V.C. in 1868, viz., *Hunt v. White* (*ubi sup.*), which he did not consider himself at liberty to depart from, and the question we have to determine is, whether the principle on which that case was decided ought to be upheld or not. If that case had been generally followed as correct, I for one should not think it right now to disturb it even if I did not approve it. But, singularly enough, the decision seems to have been lost sight of. The case does not appear ever to have been cited in court; nor is it to be found in the text-books on real property and conveyancing which legal practitioners are in the habit of consulting. The note in Mr. Dart's book on Vendors and Purchasers (6th edit., vol. 2, p. 886) shows that eminent conveyancers at all events regard the principle on which the Vice-Chancellor proceeded as by no means settled. Under these circumstances this court ought, in my opinion, to treat the question as still open, and to decide it on sound principles of construction. To what is a vendor's covenant for title applicable? Is it to the title shown to the purchaser, or is it to the title expressed to be conveyed to him? The answer to this question can only be found by

reading the whole conveyance including the covenant for title. If, on the true construction of the whole document, the title conveyed is clear and the covenant is so worded as to apply to the title so conveyed, then, although the recitals may show some defect or uncertainty in the vendor's title, effect ought to be given to the words of the covenant so as to give to the purchaser the title which the deed shows he was to have. In the case supposed there is no warrant for giving the words a more restricted meaning than that which they ordinarily bear; no warrant for qualifying the acts covenanted against by inserting "save as herein appears," or "save as shown by the abstract," or "save as explained before the execution of this deed," or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects; or he must insert some clause in the deed clearly explaining and controlling his covenant. This is in accordance with ordinary rules of construction and with fair dealing. No doubt a purchaser is well advised to make the matter plain by inserting words to show that even defects known to him are intended to be covered; and this is what conveyancers have advised for years (see Butler's note to Co. Litt. 384a and the other works cited by the counsel for the appellants). But they have advised this course only as a matter of prudence and precaution. Apart from *Hunt v. White* (*ubi sup.*) there is no authority for not giving effect to the clear and express words of a vendor's covenants for title, simply because a defect covered by them was disclosed by a recital in the conveyance. The principle on which that case was decided is, in my opinion, manifestly unsound. I pass now to Amy Page's conveyance itself. [His Lordship then read the material parts of it.] The words of the conveyance and covenant for title are quite clear and unambiguous, and the covenant clearly extends to claims by persons deriving title through Ann Palmer. The insertion of the words "Ann Palmer" in the covenant for title is, I think, significant. They may no doubt have been put in to cover unknown acts done by her; but they are not really wanted for this purpose; and they may well have been put in to emphasise the fact that the covenant was really intended to extend to her acts in particular as well as to those of the vendor and her other predecessors in title. The fact that in this case the company took a separate indemnity from a third person cannot affect the construction of the vendor's covenant. I am of opinion, therefore, that this appeal should be allowed, and that the order of Romer, J. should be varied by declaring that the company are entitled to be indemnified by the representatives of Ann Page; that the indemnity must be confined to the value of the land claimed by the plaintiffs, i.e., 1016*l.* 13*s.* 4*d.* and interest from the death of the tenant for life, and not extend to the costs of the plaintiffs which the defendant company have been ordered to pay. These costs could not, I apprehend, be recovered by the railway company in an action at law on the covenant. The executors of Amy Page must pay the costs of the appeal and of the proceedings against them.

SMITH, L.J.—I have had an opportunity of

reading the judgment of Lindley, L.J. I entirely agree with it, and have nothing to add.

DAVEY, L.J.—The question in this appeal is, whether the railway company have a right under the covenants for title contained in a conveyance to them of the 26th June 1879 to be indemnified by the representatives of Mrs. Amy Page against the claim of the plaintiffs in the action which, in the previous appeal, we have held to be well founded in law. The conveyance in question is made between certain mortgagees of Amy Page and her husband and children of the first part, Amy Page of the second part, and the railway company of the third part. It contains a full recital of the will of Ann Palmer under which Amy Page and the plaintiffs derive title, and under which the question of title arises. There was therefore full notice on the face of the instrument of the nature and grounds of the claim made by Amy Page and of the title of the plaintiffs. There is a recital of an agreement with Amy Page for the purchase of the land for an estate of inheritance in fee simple free from all incumbrances, but the deed contains no express recital of an intention to protect the railway company by the covenant for title from any claim by the plaintiffs. By the operative part it is witnessed that, in consideration of 2200*l.* paid to the mortgagees, and the further sum of 3050*l.* paid to Amy Page, she and her mortgagees convey to the company in fee simple, and then follow the covenants for title. We have determined in the first appeal that Amy Page had no power to give the company a discharge for the purchase money, and the plaintiffs in the events which have happened have a right to claim it against the railway company in some form of action. Under these circumstances the company claim to be indemnified by the representatives of Amy Page against the claim of the plaintiffs. It may be mentioned that at the time of the conveyance the company took an indemnity from one of the beneficiaries. Now, it is not disputed on the pleadings or by counsel at the bar that the claim of the plaintiffs is "a claim or demand made by a person claiming under Ann Palmer" against or in respect of the lands in question, or that it is occasioned by an "act or thing made, done, or executed by Ann Palmer," or (in other words) that there would be a breach of the covenant if it is to be construed literally. But it is said that, assuming this to be so, we ought to construe the covenant so as not to cover any claim or demand arising out of matters appearing on the face of the conveyance. The question which we have to decide therefore is (assuming there would otherwise be a breach of the covenant), ought we to read into the covenant by construction an exception of defects of title or incumbrances appearing on the face of the instrument, or to imply the words "save as appears by these presents," or similar words? In support of the argument of the representatives of Amy Page, a case of *Hunt v. White* (*ubi sup.*), decided by Malins, V.C. in 1868, has been referred to, and Romer, J. felt himself bound by this authority, and decided accordingly without expressing any opinion of his own. It is conceded that there is no other authority on the point, and, although it might be possible to distinguish *Hunt v. White* in one respect, I am of opinion that the Vice-Chancellor intended to decide the case before him on general grounds. He

says (37 L. J. 327, Ch.): "If the object had been that the vendor was in all events to guarantee the purchaser's title, the covenants for title should have been extended by express words to meet that case." And further on: "The covenant for quiet enjoyment can only extend to protect the purchaser from incumbrances and defects in the title, of which the purchaser has no notice;" and he concludes his judgment: "Where the title is made under a written instrument the purchaser must put his construction upon the instrument, and must be bound thereby. It would be a perversion of law to say that the covenant extended to cover such a case as this, viz., the misconstruction by a purchaser of the written instrument under which he takes his title and conveyance." The Vice-Chancellor was himself a conveyancer of considerable experience, and his opinion upon such a point is entitled to the highest respect. But still it is only the learned judge's opinion, and we are bound to express our opinion whether we agree with it. The Vice-Chancellor's proposition is certainly expressed too widely, for where the defect of title is one of which the purchaser has notice, though it does not appear on the face of the conveyance, it was held in *Levett v. Withrington* (1 Lutw. 317) that notice of the defect in title relied on as a breach is no defence to an action on the covenant in respect of the breach. And, indeed, I adopt the statement of the learned editors of *Dart on Vendors and Purchasers* (6th edit., vol. 2, p. 886), and it would, in my opinion, be contrary to principle to hold that the construction or effect of a covenant can be controllable by extrinsic evidence of notice or intention. The Vice-Chancellor's opinion, however, seems to be based on the fact of notice independently of the source from which it is derived. Various opinions of text writers on conveyancing were referred to in the course of the argument, the most important of which is Mr. Butler's note to Co. Litt 384a. He says: "It sometimes happens that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title subject to it; and that the covenants for title should not extend to warrant it against this particular defect." It does not appear to me that this passage, or the passages read from the other works, really assist the court, as they seem to me to amount to nothing more than a salutary caution by the learned authors to the practitioner, and I agree with the note in *Dart on Vendors and Purchasers*, 6th edit., vol. 2, p. 886 (g). Looking at the question, therefore, unfettered by binding authority, I am of opinion that it is safer and more consistent with principle to construe the covenant literally without importing into it any exception or qualifications which the parties have not themselves introduced by express words, and to say that, if the parties do not intend the covenant to be so construed for the protection of the purchaser, they should express their intention, instead of throwing upon those who maintain that the covenant should be read according to the ordinary use of language, the onus of finding an expressed intention to that effect. I may add that I think this construction is at least as likely to be in

[CT. OF APP.]

PAPÉ v. WESTACOTT.

[CT. OF APP.]

accordance with the intention of the parties as the construction contended for at the bar. I am therefore of opinion that the general rule laid down in *Hunt v. White* (*ubi sup.*) cannot be supported, and, notwithstanding that the case has been on the books for twenty-five years, I think we ought not to follow it. It is not even referred to in *Dart on Vendors and Purchasers* (6th edit. (1886)), and it does not appear to have been extensively known, and I cannot conceive that any titles depend upon it. The result will be that the claim of the railway company against the representatives of Amy Papé ought, in our opinion, to succeed, and we must reverse the judgment, though I do not know that we are differing from the opinion of the learned judge in the court below.

Solicitors for the company, *Beale and Co.*
Solicitors for the executors of Amy Papé,
Timbrell and Deighton, agents for *W. Shakespeare and Co.*, Birmingham

Nov. 9 and 10, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

PAPÉ v. WESTACOTT. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Principal and agent—Authority of agent—Payment to agent by cheque—Dishonour of cheque—Liability of agent.

The plaintiff was owner of a house let for a term of years on a lease which provided that the tenant should not assign without the consent in writing of the plaintiff. The tenant wished to assign the lease to A. The defendant, who was an auctioneer and estate agent, acted in the matter for the plaintiff, who gave him his written consent to the assignment, but told him not to part with it until the tenant had paid him the rent for the last quarter, which was in arrear. A. had agreed to pay the tenant the sum of 300l. for the lease. The tenant and A. met the defendant for the purpose of completing the transfer on a Saturday afternoon after banking hours, and neither of them came provided with cash. A. and the then tenant both banked at the same bank. A. gave the tenant a cheque for 300l., and after some demur the defendant accepted a cheque from the outgoing tenant payable to himself, and handed him the licence to assign. This cheque was for 25l. 9s., of which 22l. 15s. was the amount of rent in arrear, and the balance was the defendant's charges in the matter. The cheque was dishonoured, and the outgoing tenant had since disappeared. He had removed his furniture from the house on Saturday morning, and A. had afterwards moved his furniture into it.

Held, that no usage or custom for an agent to take a cheque in such a case had been proved; that the defendant had exceeded his authority in giving up the licence before receiving the arrears of rent in cash; and that he was liable to pay the plaintiff the full amount of that rent as damages.

Decision of Divisional Court (Charles and Williams, JJ.) affirmed.

On the 18th Aug. 1885 the plaintiff, Mr. Papé, granted a lease of a house and shop in Camden-road to one Caseley, for a term of twenty-one

years, at a rent of 91l. per annum, and the lease contained a condition that the tenant should not assign without the consent in writing of the lessor. Caseley paid his rent sometimes in cash and sometimes by cheque, but the rent was frequently in arrear, and he was not a very good tenant. In Feb. 1891 Caseley, who at that time owed more than a quarter's rent, proposed to assign the lease, with Papé's permission, to one Auckland, and he promised Mrs. Papé, who acted for her husband in the matter, that he would pay the arrears of rent as soon as the transfer was completed. Mrs. Papé referred the matter to the defendant, Mr. Westacott, who was an auctioneer and estate agent, and instructed him to prepare the necessary licence to assign, and told him not to part with the licence without getting the rent. But she did not say he was to insist on being paid in cash, or that he was not to take a cheque for the rent. There was evidence that Westacott was also informed that Caseley was a person not altogether to be trusted, but this was denied. Westacott further alleged that he had known Caseley for ten years, and had no reason to doubt his honesty and respectability. The plaintiff having signed the licence, Caseley and Auckland met Westacott for the purpose of completing the transfer. The price to be paid by Auckland to Caseley for the assignment was 300l. The meeting took place on the afternoon of Saturday, the 13th Feb. 1891, after banking hours, and neither Auckland nor Caseley came provided with cash. Auckland brought a cheque for 300l., which he handed to Caseley. Caseley also proposed to pay the arrears of rent by cheque. Westacott at first demurred, but it being after banking hours, and neither party having any cash, he ultimately took Caseley's cheque for the rent and his charges, and gave up the licence. Auckland and Caseley both banked at the same bank, and the defendant took it for granted that Auckland's cheque would be paid into Caseley's account on Monday. The cheque was drawn to the order of Westacott for 25l. 9s. (of which 22l. 15s. was due in respect of the rent, and the balance was the amount of the defendant's charges in the matter), and was crossed in blank. On the Monday Westacott presented this cheque, but he failed to get payment, Caseley not having paid in Auckland's cheque. Caseley had removed his furniture from the shop on the Saturday morning, and he had since disappeared. Auckland shortly afterwards took possession under the assignment, and moved his goods into the shop.

In Jan. 1893 Papé sued Westacott in the Bloomsbury County Court for 22l. 15s. as damages for negligence in accepting a cheque from Caseley instead of cash. The County Court judge gave judgment for the plaintiff, and his judgment was affirmed by the Divisional Court (Charles and Williams, JJ.), but leave to appeal was given, and the defendant appealed.

A. Powell for the appellant.—There was no negligence on the part of the defendant in taking the cheque in this case. It was a reasonable thing to do, and according to the ordinary course of business:

Russell v. Hankey, 6 T. R. 12;
Farrer v. Lacy, Hartland, and Co., 53 L. T. Rep.
N. S. 515; 31 Ch. Div. 42;
Story on Agency, s. 202.

[He was stopped by the Court.]

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

CT. OF APP.]

PAPÉ v. WESTACOTT.

[CT. OF APP.]

Poley for the plaintiff.—An agent is only authorised to accept payment by cheque where the course of business requires it:

Sykes v. Giles, 5 M. & W. 645.

He is not authorised to accept anything but cash unless there is a custom which authorises payment in some other way:

Williams v. Evans, 13 L. T. Rep. N. S. 753; L. Rep. 1 Q. B. 352;

Sweeting v. Pearce, 7 C. B. N. S. 449;
Story on Agency, 9th edit. s. 181.

In *Russell v. Hankey* (*ubi sup.*) the court took judicial notice that there was a custom in London to pay bills by cheque. The defendant had only a general authority to receive payment of the debt, and was bound to receive it in cash only. The court will not take judicial notice of a custom to pay by cheque under the circumstances of this case, unless it is proved:

Ex parte Powell, 34 L. T. Rep. N. S. 224; 1 Ch. Div. 501;

Crawcour v. Salter, 45 L. T. Rep. N. S. 62; 18 Ch. Div. 30.

No such custom has been proved in this case. Auctioneers are not at liberty to take a cheque on behalf of their clients when they part with property. *Farrer v. Lacy, Hartland and Co.* (*ubi sup.*) only shows they may take a cheque for the amount of the deposit, and in such a case no property passes. The defendant's authority was only to part with the licence on obtaining the rent. He was not merely sent to collect money. The amount of damages is the amount which the plaintiff has lost in consequence of the act of the defendant:

Mayne on Damages, 4th edit., p. 102;

Davis v. Garrett, 6 Bing. 716;

Lilley v. Doubleday, 44 L. T. Rep. N. S. 814; 7 Q. B. Div. 510.

The plaintiff is estopped from distraining on the goods of the new tenant. It would be wrong to do so, and there is a wrong-doer, the defendant against whom he can proceed. Besides, the cheque is not payable to the plaintiff, but to the defendant, and includes his charges for which Caseley was liable. *Bridges v. Garrett* (22 L. T. Rep. N. S. 448; L. Rep. 5 C. P. 451), which is relied on by the defendant, is commented on by Fry, L.J., in *Pearson v. Scott* (38 L. T. Rep. N. S. 747; 9 Ch. Div. 198), and turned on the fact that the cheque was cashed.

Powell in reply.—There was no negligence on the part of the defendant. The County Court judge did not decide the case on the facts, but on the law as stated in sect. 98 of *Story on Agency*, and he did not consider sect. 202, which modifies the statement in the former section. The court will take judicial notice that it is now usual to pay nearly everything by cheque. The defendant was merely collecting some money, and it is usual to take a cheque. He considered Caseley could be trusted as to this amount. He was not acting as an auctioneer, but as an agent. The plaintiff has sustained no damage. He has parted with no property. He has not lost his right to distrain for the amount of this rent on the goods now in the house:

Davis v. Gyde, 2 Ad. & Ell. 623.

The defendant was justified in taking the cheque, and he is not liable to the plaintiff in consequence of its being dishonoured; and the fact that the

amount of the defendant's charges was included in the cheque did not make it any less a payment to the plaintiff:

Bridges v. Garrett (*ubi sup.*).

LINDLEY, L.J.—This case involves some difficult questions; but when it is carefully thought out, I think the difficulty vanishes. The plaintiff had a house which was let to a person named Caseley upon a lease which Caseley was not entitled to assign without consent of the landlord. Caseley was a shopkeeper. He was not a very good tenant. He paid his rent sometimes by cheque, sometimes by cash, and sometimes he was in arrear. He had negotiated for the assignment of his business to a person named Auckland for 300l., and the plaintiff was willing to consent to the assignment. But Caseley owed his landlord a quarter's rent, amounting to 22l. 15s., and the change was to take place in February. Thereupon the plaintiff goes to the defendant, an estate agent, and asks him to look after this matter for him, and gives the defendant a consent in writing to the transfer of the lease by Caseley to Auckland, and tells the defendant to get in this rent and not to part with that licence without getting the rent. There is some controversy between the parties as to the extent to which the defendant was put on his guard, some controversy as to whether he was told that Caseley was a person not altogether to be trusted. The evidence of the plaintiff, his wife, and his son on this point is that the defendant was warned, but the defendant denies it. Now, what took place was this: On Saturday, the 13th Feb., Caseley and Auckland met the defendant. They met for the purpose of Auckland paying Caseley the 300l. which he was to pay, and they met also for the purpose of getting this licence to assign. It was after banking hours, and nobody came prepared with any cash. The incoming tenant did not bring 300l., but he brought a cheque. Auckland and Caseley both banked at the same bank, and Auckland paid or gave this cheque to Caseley. Then there was the rent to settle. Caseley had not got the rent which was due, and he proposed to pay by cheque, but the defendant would have preferred cash, and asked for cash. He expected the purchaser to bring cash, and if cash had been brought everything would have gone straight. But, it being after banking hours, and neither of them having cash, the defendant took a cheque from Caseley. That cheque was not a cheque for the rent, nor was it a cheque so drawn that in the ordinary course of business the defendant would have remitted that cheque to the plaintiff. The cheque was a cheque for the rent in arrear, *plus* the defendant's charges, and was made payable to the defendant's order, and it was crossed in blank. The defendant says he had no reason to suspect the cheque would not be cashed; on the contrary, he had every reason to suppose it would. He knew, as the fact was, that Caseley had been put in funds to the extent of 300l. by Auckland's cheque, which, in the ordinary course, would be paid in to Caseley's account, and the smaller cheque would be paid. But when Monday comes the defendant presents his cheque and it is dishonoured, and he cannot get the money. Caseley seems to have disappeared, and it is common ground that he cannot pay. Therefore the plaintiff has lost the rent which it was

[CT. OF APP.]

PAPÉ v. WESTACOTT.

[CT. OF APP.]

the business of Westacott to get before he parted with the licence to assign. On the other hand, Auckland has paid his 300*l.*, taken possession of this shop, put his furniture in, and is in possession. The learned County Court judge came to the conclusion that the plaintiff was entitled to recover this 22*l.* 15*s.* from Westacott. He seems to have based his decision upon a passage in sect. 98 of Story on Agency, which I will read: "So an agent authorised to receive payment has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only." The learned judge seems to have thought that the receipt of this cheque instead of cash was enough to decide the case. The passage in Story was pressed, I think, by the learned County Court judge a little too far. In sect. 202 of the same book that passage which I have read from sect. 98 is qualified in this way: The author says: "On the other hand, where the agent has given only the usual credit, or has conducted himself according to the usual course of business, and has employed the usual diligence in his agency, he will not be responsible for any loss occasioned by the subsequent insolvency or fraud of the persons whom he has trusted, or to whom he has sold the property, if at the time of the sale they were in good credit. So if payment is received in the usual manner of conducting the like business transactions, as by receiving a cheque on a bank from a person in good credit who should become insolvent before the cheque could be duly presented . . . the loss would be the loss of the principal and not that of the agent." If an agent is merely to collect money, taking a cheque upon a banking account is not a departure from his authority. That is in the ordinary case of collecting money, but it is not always within an agent's authority to take a cheque instead of money. In the case of the sale of real property, if the cheque for the deposit is not paid the person who gives it can be sued. But in a case where a solicitor is intrusted by the vendor with the completion of the transaction, is that solicitor justified by the ordinary course of business or the ordinary habits of men, in parting with the conveyance and the title deeds in exchange for a promise to pay or a cheque? Certainly not. The ordinary course is, I do not say not to take a cheque, but not to part with the deeds until the cheque is paid. Therefore you cannot say that a person who is authorised to receive money is authorised to take a cheque. What is the question which we have to consider? It is this. Was the defendant justified in parting with the licence to assign without getting the rent in arrear? That was his authority. Did he pursue that authority in getting the piece of paper which he ultimately could not cash? My answer is, that what he did was not in the exercise of his authority. He did not get cash. He did not get a cheque which in the ordinary course of business he would transmit to his principal. He got a cheque payable to himself for the rent in arrear, and other moneys, and he was the person to get in that money and remit it to his principal. If that cheque were cashed the cheque itself would be utterly unimportant. It would be described as an immaterial step; but what right had the defendant to part with that licence? There is no proof of any usage or custom that would authorise such a transaction, and it does

appear to me, having regard to the fact that he took a piece of paper which in the ordinary course he would not send to his principal at all, and above all, that that piece of paper was never cashed, he has not pursued the authority with which he was intrusted. It was argued that that is not in accordance with *Bridges v. Garrett (ubi sup.)*. That case turns upon the fact of the cheque being cashed, and if it is cashed it is a mere piece of machinery. In *Pearson v. Scott, Fry, L.J.* cites with approval a passage from the judgment of Byles, J. in *Sweeting v. Pearce (ubi sup.)*, where he said: "It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it, and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything else but cash." Fry, L.J. then says: "Now, that it will be observed is the precise point here, because the payment alleged is payment by settlement of accounts between the agent and the debtor. Willes, J. (in *Sweeting v. Pearce*) puts the same view in shorter language: 'As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent.'" Then Fry, L.J. says: "The next case is *Bridges v. Garrett (ubi sup.)*, which has caused me very considerable anxiety lest I should not give due weight to the decision arrived at." After referring to the facts of that case, Fry, L.J. says: "The jury had found as a matter of fact that Craig, the deputy steward, had authority to receive the fine for the lord, and that a crossed cheque was a good payment to the lord within the authority to pay to Craig. They found, therefore, that the payment was actually within the authority, and the short effect of the decision of the Court of Exchequer Chamber is, that they thought there was evidence for the jury, and refused to disturb their finding. They thought, moreover, that, seeing that the cheque given by the surrenderee was good, and that it was an ordinary course of business to make payments by cheque, it might be considered that that cheque so given, when cashed, became a payment of cash to the agent. It appears, therefore, to me that, in their opinion, that case came within the rule, and that the fact, which probably was unknown to all the parties at the time, that the deputy steward owed money to his bankers, was immaterial, and that the transaction, therefore, none the less remained a payment in cash." Here that would have been a very important matter. If this cheque had been cashed there would have been no difficulty at all about it. But, unfortunately, it was not paid. I return, therefore, to the question which I do not wish to lose sight of: Did the agent pursue his authority? My answer is, No. Then comes the question, What is the loss to the plaintiff? On behalf of the defendant it is said that it is nothing, because as landlord he had the right to distrain against the incoming tenant. Now, against that I do protest with all the

vehemence I can. It would be perfectly outrageous for us to hold judicially that the landlord could distrain. The incoming tenant is present when that transaction takes place. The landlord says, "I have settled with the outgoing tenant, you can bring your things in." And next day it is said the landlord can distrain. It is neither common sense or justice. If this is so, the consequence is, that by the excess of authority on the part of the defendant the plaintiff has lost his money, and the damages are what might have been got if the agent had not parted with the licence. I think, therefore, that it is impossible to disturb this judgment, and that the appeal must be dismissed.

SMITH, L.J.—This is an appeal by leave from a decision of a divisional court dismissing an appeal by the defendant from a decision of the learned judge of the Bloomsbury County Court in favour of the plaintiff, who had sued the defendant under circumstances whereby he had lost a quarter's rent due from his old tenant. What is the law to be applied to this case? It seems to me that it is indisputable, though it has been disputed by the counsel at the bar, that the law applicable to this case and to this agent, the defendant, who is an auctioneer and house agent, and was employed to hand over a licence and to collect money, is this: unless there is a usage to the contrary, his duty was to receive payment in cash, and by that I mean money. And I think this case differs to some extent from that covered by the two sections in Story, sects. 98 and 202, which have been referred to, and also from the judgment of Byles, J. in *Sweeting v. Pearce*, referred to by Fry, L.J. in *Pearson v. Scott* (*ubi sup.*). This is not a case in which an agent is sent merely to collect a debt. If such a duty had been imposed upon an agent, viz., to go and collect this debt from a debtor, and he collected it by taking a cheque which was dishonoured, I do not know that he would have exceeded his authority, because the persons would have been in the same position. The debtor would not have paid, and the creditor could have pursued the debtor. In this case Caseley was in arrear with his rent, but had got a new tenant, and was willing to give him the residue of his lease of this house for 300l. But Caseley could not get out of his landlord leave to assign to the new tenant until he had paid his arrears of rent, and it was under these circumstances that the landlord clothed the agent with this authority. "Do not hand over that authority to assign to Caseley, my tenant, who owes me money, until you have got that money from him." This was the mandate given by Papé to the defendant. Under these circumstances I ask myself, Is there a usage that the agent should receive the money otherwise than in cash, coin of the realm? I cannot sit here and judicially say that there was; on the contrary, no such evidence was given. But I go further. I say that there are traces upon the evidence, as appeared from the judge's notes, that this was not the usage. Further, in the circumstances of this case there is evidence given which to my mind leads to the conclusion that Westacott knew from what had been told him that Caseley was not, at any rate, a good paymaster, to put it no higher than that. The evidence given was that Westacott himself said he had taken a cheque from Caseley, though he objected to that mode of pay-

ment. That is strong evidence against the usage, because, if there were a usage, why should Mr. Westacott have said that he objected to payment by cheque? That piece of evidence goes to usage, and it is also some evidence that Westacott did know that this man Caseley was a man who was not a good paymaster. Then, has a usage been proved that this payment should have been made to Westacott otherwise than in cash? I say no. Therefore it appears to me that the learned County Court judge was right, though he did not give his reasons as he might have done, and that Westacott was liable for damages. Then as to the damages. In the first place, it was said Caseley was a man of small means. He had moved all his furniture on the Saturday morning, and the meeting took place on the Saturday afternoon, and Westacott says, "In consequence of my taking the cheque from Caseley and allowing the transfer to take place the landlord is in a better position now than if the change had not taken place, because the new tenant has goods and the old tenant had none, and the landlord can distrain on the new tenant." But I agree with Lindley, L.J. that if this court was to allow a distraint upon the new tenant's goods it would be nothing short of monstrous, because the new tenant, the old tenant, and Westacott were at the meeting, and it seems to me that the true view of the transaction is, that the landlord's agent intimated to the new tenant by the handing over of that licence to assign that he was satisfied that the new tenant might come in, and for the landlord to turn round after that and distrain upon the new tenant would be most unrighteous. It is said that the landlord had lost nothing; but, in my judgment, the amount of the damage is certainly the amount of the rent which was due from Caseley to the landlord. This was the position: unless the licence had been handed by the defendant to Caseley, Caseley never would have got the 300l. from the incoming tenant. It is perfectly clear, as it seems to me, that if that licence had been withheld the landlord could have put pressure by means of it upon Caseley, but the landlord having that power over him, Westacott allowed that means of pressure to go. If that means of putting pressure on Caseley had been kept the landlord would have got his rent, and when that rent was paid he would have handed over that licence to assign, and therefore the defendant is liable for the full measure of damages. It seems to me, therefore, that this judgment must be upheld, and the appeal must be dismissed.

DAVEY, L.J.—I am of the same opinion. I agree in the general statement of law to the effect that there is no authority for an agent employed to receive money to take anything but cash unless it is in accordance with the ordinary course of business to receive a cheque. In the case of *Russell v. Hankey* (*ubi sup.*), which has been referred to, the court thought that there was such a practice in the ordinary course of business, but in the absence of any usage or any ordinary course of business which would justify the agent in taking a cheque, I am of opinion that there was no authority for him to do so. Certainly there was no evidence, and in my opinion there could not be evidence, that there was any general practice or usage that an agent completing a transaction like this, where an agent is intrusted

with a duty of handing over a document of title against payment, should take a cheque. In my opinion the practice is the other way. In this case, although technically the defendant had no lien upon the licence, because it was not his own property, in point of fact the power of withholding the licence was the plaintiff's best security, and when the agent got the licence he got, as he was well aware, the most effectual means of getting the money. But in the present case it is not in my opinion, necessary to go so far even as that, because it appears to me, now that we have seen the cheque, and understand what the facts actually were, that no cheque was ever given to Westacott which belonged to the plaintiff. The cheque never belonged to the plaintiff. No payment, either in cash or cheque, was ever made to Westacott in a form which enabled him to transmit it or hand it over at once to his principal. Against that view we have been pressed with the case of *Bridges v. Garrett* (*ubi sup.*), but I entirely agree with the view taken of it in *Pearson v. Scott* (*ubi sup.*) by Fry, L.J., that it turns on the fact of the cheque having been honoured, so as to make it in fact payment in cash. That also appears from the judgments of Cockburn, C.J. and Blackburn, J. in *Bridges v. Garrett*, for Cockburn, C.J. says: "There is no doubt that, where an agent is authorised to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money. If, however, payment is made by cheque and the cheque is duly honoured, that is a payment in cash." So what he rested his judgment upon was the payment, not the cheque. And Blackburn, J. says: "Where the person to whom the money is paid stands in the relation of a clerk or servant, the payment to him, whether in cash or by a cheque which is afterwards paid, is a good payment to the principal." So that the learned judge also rests his opinion on the fact of the cheque being paid. If this is so, there was not in fact payment of any kind for the plaintiff, unless and until the cheque was cashed, and if the cheque was never cashed the defendant never received anything which the landlord was entitled to have handed over. On the question of damages I have nothing to add to what has been said by the other members of the court.

Solicitors: *Haynes and Claremont; Barraud, Regge, and Jupp.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 10, 1893.

(Before CHITTY, J.)

ROSS v. WOODFORD. (a)

Practice—Evidence—Commission—Examination of defendants resident abroad—Order XXXVII., r. 5.

The principles applicable to the case of a plaintiff asking for a commission to examine himself are not applicable to the case of a defendant; and where defendants were resident in South Africa, an application by them to have their evidence

taken in that country, under the circumstances, allowed.

THIS was a motion by the defendants Mr. and Mrs. Woodford who were resident in the Transvaal, that their evidence and that of any of their witnesses resident in South Africa might be taken in that country by commission or special examiner.

By the statement of claim which was delivered on the 31st Dec. 1892, the plaintiff alleged an agreement made in Nov. 1890 and signed by Mrs. Woodford, by which she bound herself to assign eighty 100l. shares in the capital of the "S." Syndicate of Pretoria, a joint-stock company established in the Transvaal, to the plaintiff absolutely, and he claimed to have a legal transfer of the shares made to him. The defendants delivered their defence on the 21st March 1893, and thereby alleged that the shares were agreed to be transferred to the plaintiff by way of security, only for money advanced by him to them, and that Mrs. Woodford did not understand the effect and nature of the agreement when she signed it.

Notice of trial was given on the 4th May 1893, and the action was set down for trial as a witness action, and was likely to come on for trial in a short time. After the action was set down for trial, the plaintiff delivered an amended statement of claim alleging fraud and misrepresentation, and, on the 28th Oct. 1893, the defendants delivered an amended defence.

The defendants were at the date of the agreement and when the action was commenced temporarily resident in England, and had been served with the writ in England, but since the commencement of the action they, with their children, had returned to the Transvaal, and were now resident there—Mr. Woodford being employed as an engineer at Johannesburg—that being his permanent home, although he was an American citizen.

The defendants' solicitor made an affidavit, which was the only evidence in support of the motion, stating that neither of the defendants had any property within the jurisdiction of the court; that at the commencement of the action they were only temporarily resident in England, their permanent home being at Johannesburg; that all the evidence which was material to the defendants' case could be given only by persons resident in South Africa, whose attendance in this country at the trial the defendants could not procure; and that the defendants were in poor circumstances, and it was impossible for them to come to England to give evidence at the trial, as they could not afford to pay the expenses of the journey.

During the hearing of the motion a proposal was made by the plaintiff's counsel that the plaintiff should advance 200l. to pay the fares of the defendants to England, and back to the Transvaal, leaving it to the judge at the trial to determine who should ultimately bear the expense, but this was declined on behalf of the defendants on the ground that the amount was insufficient.

Byrne, Q.C. and Geare, in support of the motion, referred to

Coch v. Alcock, 21 Q. B. Div. 178;
Re Boyes: Crofton v. Crofton, 46 L. T. Rep. N. S. 522;
20 Ch. Div. 760.

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

Farwell, Q.C. and *J. E. C. Munro* for the plaintiff, contended that the practice was settled that where the plaintiff is abroad and applies for a commission, it will not be granted if the circumstances are such that he ought to be cross-examined in open court, and the defendant opposes it, and, as in this case, the defendants asked that the shares should be held as security only for the amount advanced by the plaintiff, they were in the position of plaintiffs. They referred to

Nadin v. Bassett, 49 L. T. Rep. N. S. 454; 25 Ch. Div. 21;

Arnour v. Walker, 50 L. T. Rep. N. S. 293; 25 Ch. Div. 673;

Berdan v. Greenwood, 46 L. T. Rep. N. S. 524, n.; 20 Ch. Div. 764, n.

Byrne, Q.C., in reply.

CHITTY, J.—This is a motion on behalf of defendants asking that their evidence may be taken abroad, and the motion is strenuously opposed by the plaintiff who is resident in England. The court before allowing evidence to be taken abroad requires to be satisfied that the application is made in good faith, and not for the purposes of delay and embarrassment. First of all, I must consider whether this application is an honest one. As to the law in an application of this kind, it is now settled that it is entirely a question for the discretion of the court to grant or withhold what is asked for. [His Lordship then stated the nature of the action and the defence and proceeded;] When the writ in this action was issued the defendants happened to be temporarily resident in this country, but it is a material fact in this case that the husband is an American citizen, who has never been domiciled in this country, and whose true home appears to be in the Transvaal, and I am satisfied on the evidence that the defendants did not leave this country for South Africa with a view to escape being examined or to avoid or delay the trial, and I have also come to the conclusion that this application is made in good faith. It was said by the plaintiff's counsel that the application was made too late, and at the last moment for the purposes of delay, but I do not think that this charge is made out, because one has only to look at the dates when the pleadings were delivered to see that the defendants were not in a position to come much earlier, as the plaintiff amended his statement of claim on the 30th Aug., and the defendants' amended defence was not delivered till the 28th Oct. last. It is, no doubt, a matter of great importance to see the demeanour of the witnesses in open court where there is likely to be, as in this case, a considerable conflict of testimony; but that is not the point I have to decide in this case—the point is whether, by refusing the defendants' application, I am to compel them either to give up their case or to come over here at great expense and inconvenience to attend the trial. There are many cases where the court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself; so, too, with regard to the case of a plaintiff asking for a commission to examine himself, the court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out; but the case is entirely different when it is the defendant's application, and particularly that of a defendant law-

fully resident out of the jurisdiction, according to the ordinary course of his life and business; and to compel these defendants to come over here at great expense to attend the trial or give up their case would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself. It was said by Mr. Farwell that the defendants in this case were practically in the position of plaintiffs, and, that as their application was opposed, no commission ought to be allowed to issue, but I do not think he has made good that proposition. Fully alive as I am to the advantage of seeing the witnesses in open court, the circumstances of this case are not such as to justify me in refusing the defendants' application. The result, therefore, is that on the balance of convenience and inconvenience, and in the exercise of my judicial discretion, I think it right to allow the defendants' application, but I must have an undertaking on their behalf to proceed with due diligence. It seems to me, if this point is attended to, the course proposed by the defendants will rather expedite than delay the trial.

Solicitors: *Day, Russell, and Co; Burn, and Berridge*

Dec. 20, 1893, and Jan. 11, 1894.

(Before ROMER, J.)

PAGE v. NORFOLK. (a)

Vendor and purchaser — Specific performance — Contract by letter — Subject to approval of detailed contract to be entered into—Negotiation.

The court will not enforce the specific performance of an agreement by letter in which the main heads of agreement are specified, but which contains a provision that the offer is made subject to the approval by the intending purchaser of "a detailed contract to be entered into."

By the following letter the plaintiffs, Nathaniel Page and James Lewis Wigan, sought to establish a concluded agreement for the purchase of the property therein stated:

Deptford Brewery, Kent, S.E., April 17th, 1893.—We hereby offer you 145,000l. for your business, such sum to include the freehold brewery and premises at Deptford, the forty-six freehold and six leasehold houses enumerated in the list given to us, the book debts amounting to 5000l., and the loans 7800l., and all consumable and rolling stock, fixed and loose, plant, horses, drays, carts, and other effects, now used in connection with the business. This offer is made subject to our approving a detailed contract to be entered into. The purchase money to be paid as to 95,000l. in cash, and as to 20,000l. in preference stock of the brewery company to be formed, and to 30,000l. in debenture stock of the brewery company to be formed, purchase to be completed on or before the 24th June next. —N. PAGE, J. LEWIS WIGAN.

We accept the above terms.—EDWARD NORFOLK, CHARLES NORFOLK.

The defendants had the letter stamped as an agreement.

On the 24th April 1893 the defendants gave notice to the plaintiffs that they withdrew from the negotiation, as they termed it. The company referred to in the letter was never formed. The plaintiffs waived any detailed contract, stated

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

CHAN. DIV.]

CHAFFERS v. GOLDSMID.

[Q.B. DIV.]

that they were willing to carry out the contract, and claimed a declaration for specific performance of the agreement contained in the letter.

By their statement of defence, the defendants denied the agreement, saying that the letter was negotiation only. They also pleaded that no agreement had been come to as to the capital or memorandum or articles of association of the company, or as to the amount of the stock to be issued; or as to the title which the defendants were to show to the property. There was evidence that the question of the amount of the deposit and other matters not appearing in the letter had been discussed, and left for future arrangement.

Neville, Q.C. and W. F. Hamilton for the plaintiffs.—The terms of the agreement are contained in the letter, and the reference to the further contract was merely to put such terms into legal form. The defendants clearly intended to bind themselves by the letter, which they stamped as an agreement.

Hopkinson, Q.C. and George Henderson for the defendants.—There is no case made out. The detailed contract was to contain other matters not mentioned in the letter. There is no reference to the title, the deposit to be paid, the current liabilities, or the name under which the business was to be carried on. These matters were all such as would naturally be included in the detailed contract. Further, there were no articles of association, or memorandum of the new company prepared. In no one of the cases on this subject, where the offer or acceptance has been conditional, has a contract similar to this been enforced:

Crossley v. Maycock, 18 Eq. 180;
Winn v. Bull, 7 Ch. Div. 29;
The Vale of Neath Colliery Company v. Furness,
 34 L. T. Rep. N. S. 231; 45 L. J. 276, Ch.;
*Harvey v. The Principal and Ancients of Barnards
 Inn*, 45 L. T. Rep. N. S. 280; 50 L. J. 750, Ch.;
Hawkesworth v. Chafey, 54 L. T. Rep. N. S. 72;
May v. Thomson, 47 L. T. Rep. N. S. 295; 20 Ch.
 Div. 705.

Neville, Q.C. in reply.—The question is whether the parties were of a contracting mind:

Lewis v. Brass, 37 L. T. Rep. N. S. 738; 3 Q. B. Div. 667.

If so, this contract can be enforced, as we have waived the provision as to the detailed agreement which was solely for our benefit.

ROMER, J.—In my judgment the action fails. I think there was no concluded agreement between the parties which can be enforced at law. No doubt they had agreed to the main heads of the contract, and, at the time when the letter of the 17th April 1893—which contained the heads of the contract—was signed, the parties thought that they had bound themselves to these heads, and probably thought that they had contracted in some shape or form; but I think they intended that further terms should be discussed and settled and approved before they should be finally bound. The terms of the letter which were accepted included a provision that the plaintiffs' offer was to be made "subject to our approving a detailed contract to be entered into." It is common ground that it was contemplated that the detailed contract would be prepared by the vendors' solicitors, and submitted to the purchasers. It is also common ground

that the contract would contain details going beyond the heads contained, or referred to, in the letter; and it is clear that if these further terms were to be inserted on behalf of the plaintiffs, until the detailed contract was approved by the plaintiffs they would not be bound, and there would be no contract. I think it is also, to my mind, clear, that if the plaintiffs were not bound, neither were the defendants. This is not a case where there is some reference to a formal contract to carry out the terms which have been agreed upon and mentioned. It is a different case. It is a case where there is a reference to a further document to contain other terms, and a case where that further document is to be a contract entered into and approved, and it is only subject to such reference that the parties have come to any arrangement at all. In the particular case before me, there were many details which were of necessity left to be arranged and discussed. I may mention the deposit: for with regard to that the plaintiffs own evidence was to the effect that they had arranged to give to the defendants a very substantial deposit. And there were also other terms in addition, which no doubt would have to be considered by the defendants if they had gone so far as to prepare a detailed contract, which would have been also considered by the plaintiffs when that detailed contract came before them. For example, the provision as to the title, as to the new company, as to its stock, its debentures, or its debenture stock. Many other points besides those which I have enumerated might be mentioned. On these grounds I have come to the conclusion that the parties have not finally bound themselves to the heads of agreement which the plaintiffs seek to enforce in this case, that is to say, the heads mentioned in the letter, disregarding altogether the provision as to the further contract. For these reasons, there being no concluded agreement, the action fails, and must be dismissed, but I dismiss it without costs.

Solicitors for the plaintiffs, *Baker, Blaker, and Hawes*.

Solicitors for the defendants, *Benwell and Norfolk*.

QUEEN'S BENCH DIVISION.

Thursday, Oct. 26, 1893.

(Before WILLS and GRANTHAM, JJ.)

CHAFFERS v. GOLDSMID. (a)

Parliament—Petition to—Refusal by member to present—Action against member of Parliament—Statement of claim—Fivolous and vexatious.

Plaintiff, a voter in defendant's constituency, had on two occasions sent petitions to defendant (a member of Parliament) to present to the House of Commons. A committee on public petitions had returned them to defendant. Plaintiff sent a third petition to defendant to present, contending it differed from the other two. Defendant refused to present the petition. Plaintiff brought an action against the defendant for having refused to present the petition, and claimed damages.

Held, that the action was frivolous and vexatious. The right to petition Parliament does not imply

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

Re THE PULBOROUGH SCHOOL BOARD ELECTION PETITION.

[Q.B. Div.]

a right of action for damages against a member for refusing to present the petition.

THIS was an appeal of the plaintiff from Collins, J., who had affirmed the order of the master, setting aside the statement of claim as frivolous and vexatious.

The defendant was a member of Parliament, representing the constituency in which the plaintiff was a voter. The plaintiff had on two previous occasions sent the defendant two petitions to be presented to the House of Commons, and the defendant did present them; but these petitions had been returned to the defendant, who had returned them to the plaintiff, because in the opinion of the Committee upon Public Petitions they were not petitions which should have been presented to the House of Commons. The plaintiff desired the defendant to present a third petition to the House of Commons, which he contended was different from the others presented, as it asked for a different remedy. The defendant having refused to present this petition, the plaintiff commenced this action for damages.

The Plaintiff in person in support of the appeal. —The law of Parliament forms a part of the common law of England. A man who has a right to vote at an election for members to the House of Commons can maintain an action against a returning officer for refusing to admit his vote: (*Ashby v. White and others*, 2 Lord Raym. Rep. 938). Damages were there recovered for the refusal by the returning officer to receive a vote; how much more so, for the refusal to present a petition to Parliament. Sir Erskine May, in his *Parliamentary Practice*, on p. 493, 10th ed., says: "The right to petition the Crown and Parliament for the redress of grievances is acknowledged as a fundamental principle of the Constitution, and has been uninterruptedly exercised from very early times. Before the constitution of Parliament had assumed its present form, and while its judicial and legislative functions were ill-defined, petitions were presented to the Crown and to the great councils of the realm for the redress of those grievances which were beyond the jurisdiction of the common law.

Channell, Q.C. and Cagney, in support of the order.—This order was properly made; the statement of claim should be struck out as frivolous and vexatious. There is no authority whatever that such an action as the one in question could be maintained. There is no duty upon any individual members to present a petition, and there is certainly no duty to present one which might violate the rules of the House of Commons. The suggestion of malice is absurd, as appears from the facts stated in the defendant's affidavit. In such a case the court will dismiss an action and not allow it to proceed merely because a charge of malice clearly unfounded is laid in the statement of claim: (*Dawkins v. Prince Edward of Saxe-Weimar*, 1 Q. B. Div. 499.)

WILLS, J.—This appeal must be dismissed. The plaintiff has cited to us the well-known case of *Ashby v. White*, which is a great landmark in our legal history, and decided that an action might be maintained for the infringement of a common law right. No case of the kind has happened since that case all these years, nearly 200 years ago. The plaintiff contends that the present case is identical with the case cited. There is, in my

opinion, no precedent for such an action as the present. The right to petition Parliament no doubt exists, but that right does not imply that an action will lie against an individual member of Parliament who refuses to present a petition sent to him. That there is no precedent for such an action as the present would have been sufficient ground upon which to dismiss this appeal. This court has the independent right to prevent what it considers the abuse of its process, and it has exercised that right. Even if the respondent had made a mistake in not presenting the third petition to the House of Commons, it could not possibly be said, after having presented two previous ones, that he had acted in any way maliciously. This appeal therefore must be dismissed.

GRANTHAM, J. agreed.

Appeal dismissed.

Solicitors for the respondent, *Waterhouse, Winterbotham, Harrison, and Harper.*

Tuesday, Nov. 21, 1893.

(Before LAWRENCE and WRIGHT, JJ.)

Re THE PULBOROUGH SCHOOL BOARD ELECTION PETITION; BOUKE AND OTHERS (pets.) AND NUTT (resp.). (a)

Bankruptcy—Disqualification—School board election—Retrospective operation of disqualification—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 32.

Sect. 32 of the Bankruptcy Act 1883 provides that where a debtor is adjudged bankrupt he shall, subject to the provisions of the Act, be disqualified for (amongst other things) being elected a member of a school board.

Held, that this section is retrospective, and applies to those who were adjudged bankrupt before the date of the Act, as well as to those who have been adjudged bankrupt after that date, and accordingly, that an undischarged bankrupt, who was adjudged bankrupt before the date of the Act, is disqualified for being elected a member of a school board.

CASE stated for the opinion of the court pursuant to the order of Wills, J., made under sect. 93, sub-sect. 7, of the Municipal Corporations Act 1882.

At the School Board election for the parish of Pulborough, which took place on the 19th April 1893, the respondent was a candidate for election, and was declared to be elected a member of the school board.

The respondent was at the time of such election, save as may appear upon the facts in the next paragraph mentioned, qualified to be elected a member of the board.

Proceedings in bankruptcy under the Bankruptcy Act 1869 were commenced against the respondent on the 23rd Feb. 1883, and he was adjudged bankrupt on the 19th March 1883, and has not obtained his discharge, nor has the adjudication been annulled.

An election petition was duly presented by the petitioners under the Municipal Corporations Act 1882 and the Bankruptcy Act 1883, on the 9th May 1893, alleging that the respondent was at the time of the said election disqualified on the

(a) Reported by W. W. OAR, Esq., Barrister-at-Law.

Q.B. Div.]

Re THE PULBOROUGH SCHOOL BOARD ELECTION PETITION.

[Q.B. Div.]

ground that he was an undischarged bankrupt, and praying that it might be determined that the respondent was not duly elected, and that his election was void.

The question for the opinion of the court was: Whether the respondent was at the time of the election disqualified for being elected a member of the board.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 32. (1.) Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for . . . (e) being elected to or holding or exercising the office of . . . member of a school board, &c.

(2.) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when—(a) the adjudication of bankruptcy against him is annulled; or (b) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.

G. J. Talbot for the petitioners.—Sect. 32 of the Bankruptcy Act 1883 is retrospective in its operation as to the disqualifications specified therein:

Reg. v. Vine, 31 L. T. Rep. N. S. 842; L. Rep. 10 Q. B. 195.

In that case, upon the words of a section in an Act that, "every person convicted of felony shall for ever be disqualified from selling spirits by retail," it was held that the section applied to a person convicted of felony either before or after the passing of the Act. So the case *Re Pratt*; *Ex parte Pratt* (50 L. T. Rep. N. S. 294; 12 Q. B. Div. 334), especially the judgment of Bowen, L.J., is strongly in favour of the petitioners, as showing that this section is retrospective:

Re Salaman; *Ex parte Salaman*, 52 L. T. Rep. N. S. 378; 14 Q. B. Div. 938.

The rule as to retrospective enactments is laid down in *Reg. v. The Inhabitants of Christchurch* (12 Q. B. at p. 156), and the observations there made are exactly in point here. This is not a penal enactment, so that reason does not apply to prevent its retrospective operation:

Edmonds v. Lawley, 6 M. & W. 285;
Cornill v. Hudson, 8 E. & B. 429.

[WRIGHT, J.—Those cases refer to procedure which is governed by different considerations altogether.] No doubt they refer to procedure, but the principle is the same. The rule against retrospective operation only applies when the statute is a penal statute, and this is not a penal statute. The Legislature has explicitly declared that bankrupts are not proper persons to be elected, and it can make no difference in this respect whether a candidate was bankrupt before or after the passing of the Act of 1883.

S. H. Day for the respondent.—On the wording of the Act of 1883 the Act is not retrospective, as we see more especially from sects. 20 to 23, which show that the provisions there apply only after the date of the Act. The opposite contention would lead to this absurd result, that a man once bankrupt before or at the passing of the Act of 1883 could never afterwards be elected for the school board; for, by sect. 169 of the Act of 1883, with respect to bankruptcies pending at the date of the Act, all steps in the proceedings were to be taken under the Bankruptcy Act of 1869, and the discharge would have to be under that Act,

and therefore there could be no certificate, as there was no certificate under the Act of 1869. But sect. 32 provides for the removal of the disqualification by getting a certificate under the Act. If therefore the disqualification in this section is retrospective, and applies to bankruptcies pending in 1883, the disqualification could not be removed, as the bankrupt could not get a certificate, the proceedings being under the Act of 1869, which did not provide for a certificate. The case of *Reg. v. Vine* (*ubi sup.*) is distinguishable from the present, as there the disqualification was for life, whereas here the disqualification is one which can be removed. The reasoning in *Re Pratt* (*ubi sup.*) does not apply here. This is a penal enactment, and therefore it is contrary to all principles of construction to hold that it should be retrospective, and there are indications in the Act itself which show that it is not retrospective, particularly sect. 169. (He also referred to sect. 2 of the Bankruptcy Act 1887, and sect. 8 of the Bankruptcy Act 1890, and to the judgment thereon of Cave, J., in the case of *Re Raison*; *Ex parte Raison*, 63 L. T. Rep. N. S. 709.)

Talbot in reply.

LAWRENCE, J.—The question we have to decide in this case arises under the 32nd section of the Bankruptcy Act 1883, which says that where a debtor is adjudged bankrupt he shall, subject to the provisions of the Act, be disqualified for (amongst other things) being a member of a school board. The case we have to deal with here is that of a person who was bankrupt in 1883, and who has since become a member of a school board, and the question is whether the disqualification imposed by the 32nd section applies to him or not. Upon the whole I have arrived at the conclusion, that that disqualification does exist, and that the words of the section are to be read in their retrospective character. "Where a debtor is adjudged bankrupt" does not mean "adjudged after the passing of this Act," so that the section would run thus: "A debtor who is a bankrupt or becomes a bankrupt shall . . . be disqualified for holding the offices mentioned in this Act." Our attention has been called to sub-sect. 2 of sect. 169 of the Act, but that means that where any disqualification exists under any previous Bankruptcy Act, such disqualification should not be affected by this Act, and that to my mind is made abundantly clear by sub-sect. (c), which goes on to deal with any fines or forfeitures, or punishments incurred or to be incurred, or any offences committed or to be committed. I think, therefore, that that section has nothing to do with the case. Our attention has been called to two cases which have an important bearing on the present question. With regard to the case of *Re Pratt* (*ubi sup.*), I do not stop to consider the facts of the case, but I simply observe that the language used by the Lords Justices, especially that used by Bowen, L.J., seems to be extremely wide, and perfectly capable of including such a case as the present. The case which has most effect upon me is the case of *Reg. v. Vine* (*ubi sup.*), which was decided upon the construction of sect. 14 of 33 & 34 Vict. c. 29, which provides that, "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to

Q.B. Div.]

Re A SOLICITOR; *Ex parte* THE INCORPORATED LAW SOCIETY.

[Q.B. Div.]

any person so convicted." The words there no doubt were different from the words in the present case, but the same question arose as to whether the words of that section were retrospective or not in their operation, and it was there held by three out of four judges that the section did apply to a person convicted of felony, whether so convicted before or after the passing of the Act, and that a licence held by a person convicted before the Act became void after the passing of the Act. That was as strong a case as it was possible to conceive, for it was a case where a person had suddenly sprung upon him a disqualification of which he had no idea before, and where the law entirely altered his position, the result being that a person who had been convicted of felony became, from that time forward, incapable of holding a licence. For these reasons I come to the conclusion that the respondent in this case was disqualified for being elected a member of the school board.

WRIGHT, J.—I am of the same opinion. I think there are two governing considerations which decide this case. The first is, that the intention of Parliament in passing the Act of 1883 plainly was this: They thought that it was not fit that public offices of trust of this kind should be filled by an undischarged bankrupt; and I see no reason whatever for cutting down or limiting the application of that principle to persons who were adjudged bankrupt on or after the 1st Jan. 1884. Those who were adjudged bankrupt before that date had no particular right to different treatment from persons who are adjudged bankrupts afterwards; and although it is quite true that the Act of 1883, so construed, attaches to their bankruptcy far wider and graver consequences of disqualification than attached to their bankruptcy at the time they were adjudicated, still that is nothing more in principle than was held by the Court of Queen's Bench in *Reg. v. Vine (ubi sup.)* to be proper in the case of a conviction for felony. There when the man committed the felony it did not subject him to the disqualification to hold a licence for the sale of beer and spirits, but it was held notwithstanding that the Legislature must be taken to have meant that that additional consequence of crime should be added in the public interest. Then it was said that the grammar of the section binds us. But I think the case of *Re Pratt (ubi sup.)* is an authority against that. But what weighs most with me is the language of the Bankruptcy Disqualification Act 1871, which is repealed by this Act of 1883, but re-enacted in this sect. 32. Now there it is extremely remarkable that similar language is used, "every peer who becomes a bankrupt shall be disqualified;" but when you come to look at the interpretation clause that includes "every person who before or after the passing of this Act becomes bankrupt, or any person who has become bankrupt before the time of the passing of this Act, and whose bankruptcy has not determined." So that in the very section re-enacted by the section now in question a retrospective disqualification is attached to adjudication, and attached without any qualification whatever, and it is inconceivable that, if Parliament had meant a different interpretation to be put upon the 32nd section of the Act of 1883, it should not in some manner have marked the intended difference between the two enact-

ments. There can be no reason why Parliament should be supposed—finding before it a statute which retrospectively disqualified peers for bankruptcy—in extending the law of disqualification for bankruptcy, to have cut away that retrospective operation, and left to those who had been bankrupt between 1871 and 1883 a totally new qualification. Therefore I concur in the judgment of my learned brother.

Judgment for the petitioners with costs. Leave to appeal.

Solicitors for the petitioners, *Parish and Hickson*, for *Blagden*, Littlehampton.

Solicitors for the respondent, *Palmer and Bull*, for *Mant and Mant*, Storrington.

Nov. 25 and 30, 1893.

(Before WILLS and WRIGHT, JJ.)

Re A SOLICITOR; *Ex parte* THE INCORPORATED LAW SOCIETY. (a)

Solicitor—Professional misconduct—Client just of age—Borrowing from client—Suspension from practice.

A solicitor borrowed the sum of 69,500*l.* from a client, who had, shortly before the first transaction between them, attained the age of twenty-one years. The client had no independent advice, and left the conduct of his affairs entirely to his solicitor.

Held, that, although the solicitor had not been guilty of actual dishonesty by misappropriating the money to his own use, he had been guilty of such professional misconduct as to require his suspension from practice for a period of two years.

THIS was a report of the Committee of the Incorporated Law Society, appointed under the Solicitors Act 1888 (51 & 52 Vict. c. 65).

An application was duly made that the respondent solicitor might be required to answer the allegations contained in an affidavit, and that his name might be struck off the roll, or that he might be suspended from practising as a solicitor.

The charge was, that the respondent received from a client, Mr. Leigh, who attained the age of twenty-one in the month of April 1887, several sums amounting to 69,500*l.*, the first sum being paid to him on the 16th May 1887, and the last sum on the 7th Nov. 1887, that such sums were paid to the respondent by his client for investment, that they were not invested, and that a large part of the money was misappropriated by the respondent to his own use.

It was proved that Mr. Leigh had previously known the respondent, and during his minority had borrowed money of him. Mr. Leigh went abroad in Oct. 1887 for a long tour. Mr. Leigh paid to the respondent, on the 16th May 1887, 5000*l.*; on the 12th June 1887, 10,000*l.*; on the 8th July 1887, 10,000*l.*; on the 13th Sept. 1887, 40,000*l.*; on the 7th Nov. 1887, 4500*l.*; total, 69,500*l.*

No letters or memoranda were produced to show the terms on which or the purposes for which these sums of money were received by the respondent from Mr. Leigh, and the respondent in his examination before the committee swore that

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. Div.]

Re A SOLICITOR; *Ex parte* THE INCORPORATED LAW SOCIETY.

[Q.B. Div.]

there was nothing in writing to show the terms. He said that it did not occur to him to make a written record, or to ask Mr. Leigh to do so. He further swore that he kept no diary, and that, although he kept a ledger his account in it with Mr. Leigh had only been written up within the last few weeks. The respondent swore that the arrangement between himself and Mr. Leigh was that the whole five sums were lent to him, the respondent, that he was to pay 5 per cent. interest for them, and to use the money as he liked, but he could not say when the arrangement was made.

Having regard to the correspondence and accounts, and to the evidence given before the committee by the respondent, the committee were of opinion: That the several sums amounting to 69,500*l.* were sent to the respondent by Mr. Leigh for investment and not as a loan, and that the respondent was guilty of professional misconduct in the way in which he dealt with them.

Further, if they were to believe the respondent's evidence that the moneys were sent to him as a "loan to himself, to be used as he liked on the terms of his paying Mr. Leigh interest at the rate of 5 per cent. per annum;" the committee were of opinion that the respondent was guilty of professional misconduct:

First, in accepting such large sums from a client immediately after he attained twenty-one, and whom he had placed under an obligation by making him an advance of 250*l.* during his minority.

Second, in keeping no proper account or record of the transaction.

Third, in neglecting to carry out the promise made to Mr. Leigh by him in his letter of the 18th May 1888, that the money, as repaid, should be invested in Mr. Leigh's name.

Mr. Leigh did not give evidence upon the inquiry before the committee.

T. T. Paine appeared for the Incorporated Law Society.

Channell, Q.C. and Wedderburn for the respondent.

Nov. 30.—WILLS, J.—This case is one of very unusual complexity, and very unusual difficulty, and is one which certainly I should have felt myself very great difficulty in dealing with in the course of three or four days which was all that elapsed between the hearing and the presentation of the report; it can hardly be expected under those circumstances that the report should not be open to more criticism than such documents usually are. Now the view which the court has always taken, first of the matter, and secondly of the jurisdiction of the Statutory Committee is that it is, just as the judgment of a judge in the High Court is when it is presented to the Court of Appeal, entitled to the greatest consideration and the greatest weight, but it ought not to be considered as conclusive, and never has been. That is more especially the case, of course, in a matter of this kind which is almost a criminal trial, and which in its result may be as fatal to the person who is the subject of it as any criminal trial that ever takes place. I think that we ought to apply very much the same principle to it as we should to a criminal investigation, and that where one sees that the facts are such that there would have been, under ordinary

circumstances, no chance of a conviction if the case had been tried, I think one ought not to follow a different standard of what is required in order to bring about a conviction. [His Lordship, having dealt with the other charges against the respondent, proceeded:] I cannot come to any other conclusion than that the committee were right. The respondent had for his client a young man, just turned twenty-one years of age; he was his professional adviser, under circumstances which created, if anything, in an unusual degree the confidential relations under which a solicitor is bound to supply to his client, certainly very likely to need them, all the advantages which knowledge, experience of the world, and an acquaintance with the necessarily strict rules of professional conducts, with regard to the exercise of professional relation, would call for. Now, under such circumstances, has a solicitor the right, without putting his client in the most distinct fashion at arms length with him, to allow himself to take from him enormous sums of money as loans to himself, to be used more or less in his own speculations. Is it not his duty to take care that at all events his client shall not be at a distinct disadvantage because he trusts to him for advice instead of going to some independent person? It is a principle which I should have thought was fundamental in guiding the relations not only of solicitors towards their clients, but of all persons who stand in confidential relations towards others. A trustee is not allowed to make out of his trusteeship any advantage to himself. The conduct of a medical man for instance who is about the sick bed of a patient is regarded with singular suspicion if he gets any special advantage for himself, and I should think that it must be patent and indisputable that personal advantages obtained by the solicitor from his client, whilst in the exercise of his professional relationship towards him, could not be maintained if they were impeached by the party entitled to complain of them. The solicitor, therefore, must have known, I should have thought, when he was dealing in this way with his client, that he was doing a thing which, as a matter of civil right, could not stand if it was challenged, and that he was doing a thing also which the whole tone of his profession was against. Upon the question whether or not matters of this kind amount to professional misconduct, I cannot help thinking that the committee of the Law Society ought to be very safe and sound guides. I believe that one reason why these investigations were committed to them instead of remaining in the hands of the masters of the High Court, as they used to be, was that complaints were sometimes made that masters, who had not been solicitors themselves, had not the professional touch in matters of this kind, and did not understand either the mechanical processes by which solicitors do their business, or the kind of feelings which constitute the general tone of the profession, and it was said that solicitors who were the subjects of charges of this kind suffered on occasions by reason of the master adopting a standard of what was right or wrong in particular matters too high, possibly even pedantic. I believe it was in great measure to meet that complaint that the transfer of jurisdiction took place from the masters to the committee, and it is difficult to suppose that the court can have a better guide as to what ought to be con-

Q.B. Div.]

MANN v. JOHNSON; HURCUM v. TOWN CLERK OF WEST HAM.

[Q.B. Div.]

sidered professional misconduct than the opinion of those holding the highest and most distinguished places in the ranks of the solicitors. I do not for a moment say that we are not entitled to, and that we may not occasionally be called upon to review a decision of the committee as well as to criticise any other part of their report, but I must say it would take a good deal to make me form a judgment upon what is professional misconduct, at variance with the decision of the statutory committee. I always thought myself that the chances were that the persons who were accused of matters of professional misconduct would find that they had not changed their tribunal in their own interests, and that the professional tribunal created by the Act of 1888 would act with quite as much rigour as the masters ever did in matters of this kind, because the members of the committee would feel that they had exactly that professional touch which is of such value in estimating matters of this kind. In the present instance it cannot be doubted that they have come to a right conclusion. Here is a solicitor, a man of ripe age, who has a client of twenty-one, a young man of extravagant habits, who, although perfectly competent to understand matters of business, yet still could hardly have been what is ordinarily called a business man, and who clearly was a good deal under the influence of his professional adviser. One cannot help feeling that the client has suffered grievously, from the fact of the solicitor combining the two inconsistent characters, which he never ought to have allowed himself for one moment to assume at the same moment, that of a borrower gaining a personal advantage from the use of these large sums, and that of professional adviser to the young man. I think that the client must have understood something of what was taking place, because there is a letter from the respondent to his client which clearly indicates that with regard to something like 64,000*l.*, he would guarantee 5 per cent. upon the money to his client. No man guarantees 5 per cent. unless he expects to get a higher percentage, and I think the client must have perfectly understood that. The client's letter in reply shows that he was not altogether satisfied, because he says, "I must give you twelve months' notice, and you must repay this money to me." Unfortunately portions of the money have never been repaid, because that happened which any independent adviser would have told this young man was bound to happen, namely, that a man who got money into his hands, and guaranteed 5 per cent. for the purpose of making 6, 7, or 8 per cent., was pretty certain to end by not being able to repay a considerable portion of it. In that respect it is impossible to defend the conduct of the respondent, and impossible to say that it was other than very grave and serious professional misconduct. Now it has been our very painful duty to consider under these circumstances to what extent our censure should go, and what degree of punishment we ought to inflict. I cannot think that the high character which has been given to the solicitor, and the good opinion of many friends in and out of the profession, can make any difference. It cannot be permitted that those who stand at the head of the profession should allow themselves looser moral notions upon such a subject than those who stand lower

down. Acquitting the respondent as we do of actual dishonesty in the shape of anything like misappropriation of money to his own use, we think we ought not to strike him off the rolls, but we think that he ought to undergo a suspension of two years, which, to a man in his position, must be a very heavy punishment.

WRIGHT, J. concurred.

Order accordingly.

Solicitor for the Incorporated Law Society,
E. W. Williamson.

Solicitor for the respondent, *J. C. Stogdon.*

Dec. 4 and 8, 1893.

(Before Lord COLERIDGE, C.J., LAWRENCE and COLLINS, JJ.)

MANN v. JOHNSON.

HURCUM v. TOWN CLERK OF WEST HAM. (a)

Parliament—Registration of voters—Nature of qualification—Dwelling-house—"Houses in succession"—Distinct qualification—Power to amend—41 & 42 Vict. c. 26, s. 28, sub-sects. (1) (13).

The nature of the qualification of a Parliamentary and municipal voter to be placed upon the occupiers list was described in the notice of claim to be "dwelling-houses in succession," and the description of the qualifying property in the fourth column of the list as "Oliver-terrace, and 11, Moorgate-street." The claimant had occupied 11, Moorgate-street, as an inhabitant householder during the whole of the qualifying period, and had not occupied Oliver-terrace during any part of that period.

Held, that, having regard to the dicta of the Court of Appeal in Foskett v. Kaufman (54 L. T. Rep. N. S. 64; 16 Q. B. Div. 279), it must be taken that the revising barrister had no power under sect. 28 of 41 & 42 Vict. c. 26 to amend the claim by substituting the word "dwelling-house" for "houses in succession," and by striking out Oliver-terrace from the fourth column.

The Court intimated, however, that they dissented from the dicta in the Court of Appeal in Foskett v. Kaufman, and adhered to the construction placed upon the statute by this court in Blosse v. Wheatley (53 L. T. Rep. N. S. 49; 14 Q. B. Div. 504).

Mann v. Johnson was a special case stated by the revising barrister for the borough of Nottingham.

The appellant claimed before the revising barrister to have his name inserted in Division 1 of the occupiers list of the parish of Radford, in the borough of Nottingham, as a Parliamentary and a municipal voter.

The particulars of the appellant's claim were set out as follows:

Name of claimant in full, surname first—Mann, Arthur Joseph. Place of abode—125, Morton-street. Nature of qualification—dwelling houses in succession. Description of qualifying property—Oliver-terrace, Oliver-street, and 11, Moorgate-street.

As a matter of fact the appellant had occupied 11, Moorgate-street, as an inhabitant householder during the whole of the qualifying period, and had not occupied Oliver-terrace during any portion

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

MANN v. JOHNSON; HURCUM v. TOWN CLERK OF WEST HAM.

[Q.B. Div.]

of that period. The revising barrister was asked to amend the claim by altering "dwelling-houses in succession" to "dwelling-house" in the third column, and by striking out Oliver-terrace, Oliver-street, from the fourth column. The revising barrister, although desirous of making the amendment, held that he had no power under 41 & 42 Vict. c. 26, s. 28, to do so, and ordered the appellant's name to be expunged from the list, but stated a case.

This case and *Hurcum v. Town Clerk of West Ham* were heard together as one case, the point raised in each being identical.

Minton-Senhousie for the appellant in the first case, and *C. E. Jones* for the appellant in the second case.—This case is governed by *Blosse v. Wheatley* (53 L. T. Rep. N. S. 49; 14 Q. B. Div. 504). It is only the striking out of a superfluity, which was allowed in that case. They cited also

Ford v. Hoar, 53 L. T. Rep. N. S. 44; 14 Q. B. Div. 508;

Reg. v. McKellar, 67 L. T. Rep. N. S. 527; (1893) 1 Q. B. 121.

W. Appleton for the respondent in the first case, and *Roskill* for the respondent in the second case.—"House" and "houses in succession" are separate and distinct qualifications, and there is no jurisdiction to alter one into the other. [COLLINS, J. cited *Hitchins v. Brown*, 2 C. B. 25.] The case of *Blosse v. Wheatley* was wrongly decided. This appears from the judgments delivered in the Court of Appeal in *Foskett v. Kaufman* (54 L. T. Rep. N. S. 64; 16 Q. B. Div. 279). They also cited

Bartlett v. Gibbs, 5 M. & G. 81;

Plant v. Potts, 63 L. T. Rep. N. S. 585, 730; (1891) 1 Q. B. 256.

LORD COLERIDGE, C.J.—This case has been argued at great length, and I feel the force of the argument addressed to us by both sides. The matter before us has formed the subject of several decisions by this court, the earliest being *Hitchins v. Brown* (2 C. B. 25), and *Bartlett v. Gibbs* (5 M. & G. 81). The short substance of those decisions is that the word "house" in the third column sufficiently indicates the nature of the voter's qualification, although in reality his actual qualification consists in houses occupied in succession, provided the fourth column shows more than one house, so that the words "houses in succession," if inserted, are a kind of rider, the effect of which is not to alter the nature of the qualification—which remains a house qualification—but only to explain it. That being so, there are two later cases which are apparently, but not really, in conflict with the earlier decisions. In the first, *Ford v. Hoar* (*ubi sup.*), in which I disagreed with the majority of the court, it was held that an amendment might be made in the list by adding another house to the qualifying properties in the fourth column. In the other, *Blosse v. Wheatley* (*ubi sup.*) the amendment sought to be made was not by adding anything but by striking out a superfluity in the qualification. In that case I held that that could be done. In *Foskett v. Kaufman* (*ubi sup.*) the Court of Appeal have affirmed the view for which I was contending in *Ford v. Hoar*, and have held that no addition can be made to the qualifying properties so as to change a "house" qualification into one of "houses in succession." But the Court of Appeal have gone further, and have proceeded,

as the court of ultimate appeal in these cases, to expound the law, and it cannot be denied that, in the judgment of the Master of the Rolls and the Lords Justices, there are expressions which justify the conclusion that "house" and "houses in succession" are separate and distinct qualifications altogether. If that is so, it follows that one cannot be changed to the other. It is said that it was not necessary to the decision in *Foskett v. Kaufman* to go so far as that, and indeed the court do not in terms so decide, but they intimate strongly that that is their view. I propose to adhere to the construction placed upon the statute by this court, and I think, therefore, that the revising barrister had jurisdiction to make the amendment asked for in this case, but in deference to the strong intimation of the Court of Appeal, I content myself with expressing my own opinion, and think that judgment must be given against the amendment, and that this appeal must be dismissed.

LAWRENCE, J.—I am of the same opinion. The only question is, whether "house" and "houses in succession" are distinct qualifications. In 1843, as I understand the cases, they were decided not to be so, but the Court of Appeal appear to have held that they are distinct. Whether that point was decided or no, the question is, could the revising barrister make the alteration in this case. In my opinion he could not. I think it is as much an alteration of the qualification to subtract words which form part of the claim as to add those which are not there.

COLLINS, J.—In this case, if it were not for the *obiter dicta* of the Court of Appeal in *Foskett v. Kaufman*, my judgment would have been in favour of the amendment. Here we have a person who is fully entitled to a vote in respect of the occupation of one house. But the objection is taken against him that he cannot properly be entered on the list unless his name appears there as claiming in respect of one house only. This would involve amendments in the third and fourth columns of the claim, which it is said there is no power to make. Now it is quite clear to my mind that, if no objection had been taken to the amendment of the third column, the alteration in the fourth column could have been made. Suppose in the third column the qualification had been set down as a dwelling-house, and in the fourth there had been entered the descriptions of ten houses, the revising barrister would have had power to strike out of the fourth column all the superfluous houses. The inconvenience to objectors would have been no bar to his doing so. But here the qualification in the third column is stated to be houses in succession. Now, is a single dwelling-house a distinct qualification from houses occupied in succession? But for the language of the Court of Appeal in *Foskett v. Kaufman* I should have held that it was not. It was so held in *Hitchins v. Brown* (2 C. B. 25), where the objection was that the qualification was wrongly stated in the third column as house, whereas the fourth column showed the nature of the qualification to be houses in succession. But the Court says there that of the two "house" is the higher qualification, and held that it was a sufficient description where the fourth column showed the qualification to be houses in succession. That decision has

stood unimpeached for forty or fifty years, and it was followed in *Blosse v. Wheatley* (*ubi sup.*), a case which is on all-fours with the present case. There the qualification was stated to be "offices, successive occupation," and the fourth column contained the description of two offices. The Court allowed amendment by striking out the words "successive occupation" in the third column, and the name of one of the properties in the fourth column. That case has never been overruled. But it is said *Foskett v. Kaufman* must overrule it. I do not think so. I entirely agree with the decision in *Foskett v. Kaufman*. That case only decided that, where the qualification as stated is not complete, it is not competent to add an essential part which would make it complete. That is quite a different thing from saying that a qualification, consisting of successive occupation may not also constitute a house qualification. It appears to me that this is the proper inference from the Reform Act of 1832, sect. 28, and *a fortiori* from sect. 26 of the Representation of the People Act 1867. Those sections give to occupants of successive houses the same qualification as if they had continuously occupied the same house. Therefore, it appears to me that principle and authority are both in favour of this amendment. But I cannot conceal from myself that it appears from the dicta of the judges in the Court of Appeal in *Foskett v. Kaufman* that they regard the two qualifications as separate and distinct, and if that is so there is no jurisdiction to alter one into the other. I feel constrained, therefore, to decide this case contrary to my own opinion of the law, and I think this appeal must be dismissed.

Solicitor for the appellant in the first case, S. G. Warner, for Johnstone, Nottingham.

Solicitors for the respondent, Sharpe, Parker, and Co., for Sir P. Johnson, Nottingham.

Solicitors for the appellant in the second case, Sedgwick and Sharman.

Solicitors for the respondent, Hillearys.

Thursday, Jan. 11.

(Before Lord COLERIDGE, C.J. and DAY, J.)

BLAKER v. TILLSTONE. (a)

Public health—Diseased meat—Guilty knowledge of defendant need not be proved—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 116, 117.

In a summary prosecution under sect. 117 of the Public Health Act 1875 against the owner of unsound meat, exposed for sale, and intended for the food of man:

Held, that the absence of positive proof that the defendant was aware of the condition of the meat, was no bar to a conviction.

CASE stated by the stipendiary and other justices for the borough of Brighton, pursuant to an order of the Divisional Court.

At a Petty Sessional Court holden at Brighton on the 30th May 1893, an information was preferred by the respondent against the appellant, under sects. 116 and 117 of the Public Health Act 1875, and sect. 28 of the Public Health Amendment Act 1890.

The appellant was a manufacturer and seller

of German sausages, carrying on business at 28, Duke-street, and 51, West-street, Brighton, which communicate with each other by a private yard. The sausage manufactory was at 28, Duke-street, and the shop at 51, West-street.

On the 1st May the machineman in the appellant's employment went to the shop of one Cambridge, a butcher, from whom the appellant was in the habit of buying meat for his sausages, and bought certain meat from Cambridge at the usual price of 2s. 3d. per stone of eight pounds.

On the following day, when the meat was in process of conversion into sausages at 28, Duke-street, the sanitary inspector seized it as unsound and unfit for the food of man, and it was afterwards found to be so by a justice of the peace for the said borough, and condemned, and ordered to be destroyed.

There was no evidence that the appellant had seen the meat, or knew of his own knowledge what was its condition, but he was on his premises in West-street from time to time, while it was on his adjoining factory in Duke-street until it was seized. The justices found that the appellant's machineman who cut up the meat and another of his servants who received and weighed it must have known its condition, and if the appellant had not personal knowledge of it he might and would have had if he had exercised reasonable care. Upon these facts the justices convicted the appellant, but stated a case, the question for the court being whether, by reason of the absence of positive proof that the appellant had actual personal knowledge of the condition of the meat, he ought to have been convicted.

Francis Gore for the appellant.—The conviction is bad in the absence of proof of *mens rea*.

[Lord COLERIDGE.—The object of these statutes is to preserve life by preventing certain things from being done. The authorities show that in such cases guilty knowledge is not necessary.] Those decisions are all under the Sale of Food and Drugs Act 1875: (see *Betts v. Armstead*, 58 L. T. Rep. N. S. 811; 20 Q. B. Div. 771.) [DAY, J.—If the justices had power to condemn the meat without guilty knowledge of the defendant, why not also to convict the man?] The meat is condemned before the man is summoned, and the summons may be heard before a different justice: (see *White v. Redfern*, 41 L. T. Rep. N. S. 524; 5 Q. B. Div. 15.) In *Reg. v. Sleep* (4 L. T. Rep. N. S. 525; 30 L. J. 170, M. C.) it was held in a prosecution under 9 & 10 Will. 3, c. 41, for being in possession of naval stores marked with the broad arrow, that a conviction could not be sustained without proof that the defendant knew them to be so marked. That case governs the present, because guilty knowledge is not dispensed with in this statute any more than in that. The decisions under the Sale of Food and Drugs Act are not against the defendant, because in that Act it is shown that guilty knowledge is to be inferred by the section which enables the defendant to exonerate himself by showing that he had no such knowledge. The only authority against me is a dictum of Stephen, J. in *Mallinson v. Carr* (63 L. T. Rep. N. S. 459; (1891) 1 Q. B. 48). He also referred to *Reg. v. Tolson* (60 L. T. Rep. N. S. 899; 23 Q. B. Div. 168). [DAY, J.—There the defendant's innocence was proved and found as a fact.]

No counsel appeared for the respondent.

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

Re SIMONSEN; *Ex parte* BALL.

[IN BANK.]

LORD COLERIDGE, C.J.—It cannot be denied that in the judgment delivered in the case of *Reg. v. Sleep*, which was a prosecution under a statute of Will. 3 for being in possession of naval stores, there are expressions used which show that the court were of opinion that it was essential to a conviction to show that the defendant knew they were marked with the broad arrow. Certainly no higher authority could be found than the late Cockburn, L.C.J., and he seems to say that such knowledge is essential, and there are other cases to the like effect. All I can say, is that we have in this case to deal with a different statute, and it is different at least in this respect, that it is plain that under this statute the magistrate may destroy the property of another person without any inquiry as to whether that person knew that the property so seized was bad meat. That is unquestionable. Then the section goes on to say that after the justice has acted upon his judgment and destroyed the meat—"and (not or)—the person to whom the same belongs shall be liable to a penalty." Those are the terms of the Act, and its object is that people shall not be exposed to eating things that are injurious, and that such things shall not be sold. In the present case such a thing was sold, and the question is whether it must be proved by the prosecution that the defendant knew the article to be unsound. Perhaps it would be a good enough answer to the question to say that it is obvious that such a view would render the enactment nugatory, because a man might easily avoid personal knowledge of the state of the article and so go on habitually selling bad meat with impunity, and we ought not, if we can help it, to construe the section in a way which would render the enactment useless. The question put to us in this case is, whether we think the defendant ought not to have been convicted without positive proof that he knew of the condition of the meat which he offered for sale. Now, without going into the cases decided upon another statute, which I agree do raise considerable doubt about guilty knowledge, it is sufficient for me now to say that this is not that statute. No doubt the decisions under the Act of 9 & 10 Will. 3 are strong, because in that statute there is a way provided in the section by which a person found in possession of naval stores may free himself from penalty; and notwithstanding that provision, I agree that proof of guilty knowledge was still held to be necessary. If this conviction had been under that statute, I should have been bound by those decisions. But I am dealing with a statute the whole object of which is to afford protection to the lives and health of the public, and that object would be defeated if it were necessary to prove guilty knowledge in a case of this kind. I think the cases cited upon other statutes are not applicable to the present case. Under these circumstances I answer the question put to us in the negative, and hold that it is not necessary to prove that the defendant in this case had personal knowledge of the condition of the meat.

DAY, J.—I am of the same opinion.

Conviction affirmed.

Solicitors for the appellant, *Prince and Plumbridge*.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Thursday, Nov. 2, 1893.

(Before WILLIAMS, J.)

Re SIMONSEN; *Ex parte* BALL. (a)

Bankruptcy—Notice of suspension of payment—Circular—Costs of solicitors and accountants.

On the 15th Aug. debtors after consulting their solicitors, issued a circular to their creditors "We regret to inform you that the recent fall in the ivory market and other matters have placed us in financial difficulty, which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by [our] . . . accountants, and as soon as this is complete, we propose inviting you to a meeting of our creditors." On the 30th Aug. the meeting of creditors was held, and on the 12th Sept. a receiving order was made against the debtor.

Between the 17th Aug. and 14th Sept. the accountants received or collected a sum of money for the debtors, and out of it paid the solicitors their costs, and retained a portion for themselves for preparing the statement of affairs.

Held, that the circular was an act of bankruptcy, and that the sums paid to the solicitors and retained by the accountants must be returned to the trustee.

Though a trustee may under certain circumstances adopt and pay for work done by solicitors and accountants at the debtor's request before receiving order, still he ought to act very strictly in the matter and only pay for such services as he is satisfied after going through the items of charge, have resulted in a benefit to the creditors to the extent of the charge.

THESE were two motions by the trustee in bankruptcy of the debtor that certain sums of money "retained by or transferred to the credit of the firm" of Irvine, Hodges, and Co. or to the firm of Ford, Rhodes, and Ford by the bank by the direction of the debtor, might be repaid to the trustee.

On the 15th Aug. 1892 the following notice was issued by the debtors after consultation with their solicitors:

Sir,—We regret to inform you that the recent fall in the ivory market and other matters have placed us in financial difficulty, which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by Messrs. Ford, Rhodes, and Ford, of College-hill-chambers, Cannon-street, London, E.C., chartered accountants, and as soon as this is complete, we propose inviting you to a meeting of our creditors at a place and time of which due notice will be given to you. In the meantime, it will much assist if you will kindly furnish to the accountants a statement of your account with us, including any goods or other securities you may hold.—Yours obediently, SIMONSEN, PUDDFOOT, and JESSEL.

On the 24th Aug. 1892 the following circular was issued by the debtors:

We have to request your attendance at the London Tavern, Fenchurch-street, London, E.C., on Tuesday, the 30th Aug. at twelve o'clock noon, when we propose to submit to you a statement of our position prepared by Messrs. Ford, Rhodes, and Ford . . . and to consider what steps are necessary or desirable for protecting the interests of all concerned.—We are yours obediently, SIMONSEN, PUDDFOOT, and JESSEL.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re SIMONSEN; *Ex parte* BALL.

[IN BANK.]

On the 30th Aug. 1892 the meeting of creditors was held, but no arrangement was come to.

On the 7th Sept. the debtors issued a further circular to their creditors, which it was admitted constituted an act of bankruptcy.

On the 17th Sept. a receiving order was made against the debtors.

Between the 17th Aug. and the 14th Sept. the respondents Ford, Rhodes, and Ford received and collected 494l. 10s. 11d. for the debtors. Out of this they paid to the respondents Irvine, Hodges, and Co. for costs the sum of 30l. on the 1st Sept., 100l. on the 10th Sept., and retained on the 12th Sept. in their own hands 100l. 7s. 6d. for their costs incurred in the preparation of the statement of affairs.

The trustee in bankruptcy claimed the repayment of these three sums from the solicitors and accountants as part of the bankrupts' estate divisible amongst the creditors, but was ready if the court approved to make some allowance for their services.

Herbert Reed, Q.C. and *B. A. Cohen* for the trustee.

Pyke, Q.C. for the respondents.

WILLIAMS, J.—These motions raise a question as to whether the respondents, Messrs. Ford, Rhodes, and Ford, and Messrs. Irvine, Hodges, and Co., who are respectively accountants and solicitors, are entitled to retain out of moneys received by them on account of the bankrupts the respective sums of 100l. 7s. 6d., 30l., and 100l. on account of services rendered by them to the bankrupts immediately before the making of the receiving order. The first point I have to determine is the date of the act of bankruptcy of which the respondents had notice; this I have no doubt was Aug. 15. It was laid down in the House of Lords, in the case of *Crook v. Morley* (65 L. T. Rep. N. S. 389; (1891) A. C. 316), that a circular letter of this kind must be construed in the way in which it would be understood by commercial men who received it. The circular was issued to creditors and must have conveyed to every one of them who received it, the intention of these debtors to suspend payment, and it would have been very dishonest and improper for these debtors to have made payments after issuing that circular. The circular in so many words means that the debtors hope, since they cannot pay everyone, that the creditors will hold their hands; I think the case comes within the rule laid down by Lord Selborne in *Crook v. Morley*. I am quite aware that in that case the words of the circular were: "Being unable to meet my engagements," but the words of the letter of Aug. 15, in my opinion, mean the same thing. Any creditor receiving that circular would understand that these gentlemen were unable to meet their engagements, just as if the same thing had been expressed in the identical words in the circular in *Crook v. Morley*. The question now arises whether the respondents are entitled to retain these moneys on account of their charges. In my opinion clearly not; *Re Sinclair; Ex parte Payne* (53 L. T. Rep. N. S. 767; 15 Q. B. Div. 616), decided that where a man came with ready money in his hand and asked for legal assistance with regard to his financial affairs or his financial position, the lawyer, or it might be the accountant, was not bound to ask him

where such ready money came from; but, as pointed out by Cave, J. in *Re Spackman; Ex parte May* (62 L. T. Rep. N. S. 266; 24 Q. B. Div. 728), there was nothing in the decision in *Re Sinclair; Ex parte Payne*, which enabled a solicitor or an accountant to take from a debtor a charge upon the debtor's property to secure payment for services to be rendered, because in such a case the debtor informs the solicitor or accountant, as the case may be, that the money he is looking to for payment is the money of the debtor and potentially the money of his creditors, and it seems to me that just the same consideration arises with regard to moneys which the solicitor or accountant may be collecting for the debtor which were due to them in the course of their trade. Under these circumstances this case, in my opinion, is clearly outside *Re Sinclair; Ex parte Payne*, and falls within the rule laid down by Lord Esher in *Re Pollitt; Ex parte Minor* (68 L. T. Rep. N. S. 366; (1893) 1 Q. B. 455). The only possible conclusion I can come to on this motion is that the trustee must succeed. So far, therefore, I have nothing to do but decide in his favour, with costs. I am, however, asked to say whether the trustee can properly make any allowance to either the solicitor or accountant for the work they did; and, as to that, I understand the rule is that, if the trustee, in the exercise of his discretion, thinks that the creditors have derived benefit from the work done at the direction of the debtor, he may adopt these services and pay for them. Although this is the rule, I by no means think it is a rule which would justify the trustee in at all liberally or freely spending the creditors' money in paying the expenses of the meetings of creditors which the debtor or debtors may have thought fit to call before their bankruptcy. On the other hand, I think the trustee ought to be very slow indeed to adopt any such services. It is well known that, in hope of avoiding bankruptcy, debtors in difficulties will catch at a straw, and hope that something may avoid that disagreeable result. They will always call their creditors together, not from any sense that it is really the best thing for the creditors, but because they hope that somehow or another if there be a meeting of creditors they may avoid bankruptcy. That being so, and speaking generally, I should say that a trustee ought to decline to adopt the services of the solicitor or accountant with regard to these meetings of creditors which debtors, in expectation of a probable bankruptcy, call together, but I am unwilling to say that there may not be a case in which the trustee may properly adopt a portion of the services. It was said here that the accountants prepared a statement of affairs which was very useful to the creditors at the time of this meeting, and enabled them to determine with full information the best course to adopt. That particular item of charge is a charge for a service which I can quite understand the trustee might say was a very useful service and pay for it. The solicitors may, for aught I know, necessarily have been employed to get the statement prepared, but I should have said that *prima facie* the employment of a solicitor for that purpose was quite unnecessary, and I should have thought that the debtors might have given their instructions directly to the accountants. At the present moment, not having the bill before me, I cannot

IN BANK.]

Re WHITLOCK; *Ex parte* THE OFFICIAL RECEIVER.

[IN BANK.]

say whether there are any services of the solicitors which the trustee may properly adopt and pay for, as having been useful to the creditors. He must exercise his own discretion, and when he has done so, then, if anyone feels aggrieved, the matter may be brought before the court, but the rule that I lay down and intend the trustee to act upon is that he should be very strict in the matter of adopting services of this sort and paying for them, and he must go through the bills of costs and pay only for such items as he is clearly satisfied are items of costs which have been incurred in such a way that a benefit to the extent of the charge has resulted to the creditors.

Application allowed.

Solicitors for the appellant, *Druce and Atlee*.

Solicitors for the respondents, *Irvine, Hodges and Borrowman*.

Monday, Nov. 6, 1893.

(Before WILLIAMS, J.)

Re WHITLOCK; *Ex parte* THE OFFICIAL RECEIVER. (a)

Bankruptcy—Solicitors' costs—Employment of solicitors by debtors before petition.

A firm of distillers employed solicitors to investigate the affairs of the firm, and placed in the solicitors hands 50l. to cover costs. The solicitors engaged the services of accountants to go through the books, and paid them their charges. The services of the accountants were retained before the solicitors had notice of the presentation of a petition against the debtor, but the charges were paid after such notice; the solicitor afterwards incurred costs in resisting the petition against the debtors, and also in rendering other services to the debtors after receiving order.

Held, that the solicitors could retain out of the 50l. the accountants' charges, because they had pledged their own credit to the accountants before notice of the petition though the charges were actually paid after such notice:

Held also, that the solicitors could not retain out of the 50l. their own costs of resisting the petition, or for services rendered after receiving order, even though incurred by the debtors' authority, because they must have known that the money in their hands was part of the debtors' estate which the trustee was entitled to have handed over to him unburdened by any authority given by the debtors as to how it was to be disposed of, such authority not having been executed before notice of the petition.

THIS was a motion by the Official Receiver as trustee of the debtors' estate for a declaration that certain money retained by the respondents was the property of the trustee for the benefit of the creditors.

Whitlock and Jackson carried on business as distillers under the name of R. Chapman and Co. and on the 7th Oct. 1891 they instructed their solicitors, Messrs. Morse and Simpson, to investigate the affairs of their business.

On the 24th Oct. Jackson paid the solicitors 50l. to meet the expenses incurred by them.

On the 5th Nov. a bankruptcy notice was served on Whitlock and Jackson, and a petition was subsequently presented, the act of bankruptcy

alleged being the failure to comply with the bankruptcy notice.

On the 1st Feb. 1892 a receiving order was made against the debtors, and at the request of the assistant official receiver, the solicitors furnished an account of their charges. From this account it appeared that, on the 2nd Dec. 1891 the solicitors received notice of the presentation of a petition in bankruptcy against the debtors, that their charges for services rendered prior to the 2nd Dec. amounted to 15l. 14s. 10d., that prior to that date they had instructed a firm of accountants to examine the books of Chapman and Co. (the debtors' firm) and that on the 17th Dec. they had paid the accountants 4l. 1s. 3d. the amount of their charges, that between the 2nd Dec. 1891 and the 1st Feb. 1892, the date of the receiving order, they had rendered further professional services to the debtors partly in defending the action of *Prince v. Jackson*, and partly in opposing the petition: that from the 1st Feb. 1892 up to the date of the bankrupts' discharge they rendered further services which related solely to the bankruptcy proceedings; that the whole amount of the charges came to 52l. 0s. 9d., and that 6l. had been repaid to the bankrupts.

The Official Receiver, as trustee, asked for a declaration that the 50l. paid to the solicitors (after deducting therefrom the 6l. repaid to the bankrupts, and the 15l. 14s. 10d. the solicitors' charges up to the 2nd Dec. 1891, the day on which they received notice of the presentation of a petition against the debtors) was part of the bankrupts' estate divisible amongst the creditors.

Muir Mackenzie for the official receiver.—The official receiver is upon the authority of *Re Pollitt; Ex parte Minor* (68 L. T. Rep. N. S. 366; (1893) 1 Q. B. 455), entitled to the declaration asked for. [He was stopped.]

J. F. P. Rawlinson for the solicitors.—First of all as to the accountants' charges. The accountants examined the firm's books. The solicitors were instructed by the bankrupts to retain the services of these accountants to the 22nd Dec. 1891, and they pledged their personal credit for the accountants' charges; they are therefore entitled to retain the 4l. 1s. 3d.; which they paid the accountants. Next, as to the 15l. 14s. 10d., the solicitors' own charges prior to the 2nd Dec.; these are not claimed by the official receiver. Next as to the charges of the solicitors between the 2nd Dec. 1891 and the 1st Feb. 1892, the date of the receiving order; these were for work done in assisting the debtors to avoid bankruptcy, so *Re Pollitt; Ex parte Minor*, which was the case of work done by solicitors for the purpose of assisting a debtor to become bankrupt, does not apply, but *Re Sinclair; Ex parte Payne* (53 L. T. Rep. N. S. 767; 15 Q. B. Div. 616), does apply. In that case *Cave, J.* said: "It seems to me impossible to hold that whenever a solicitor has received instructions to oppose proceedings in bankruptcy, does his work and is paid for his services, if the petition is ultimately successful, the money that has been paid to him by the bankrupt may be recovered from him by the trustee in bankruptcy," and this doctrine was subsequently recognised by the Court of Appeal in *Re Spackman; Ex parte Foley* (62 L. T. Rep. N. S. 849; 24 Q. B. Div. 728). In short it is absolutely necessary that a debtor should have legal assist-

(a) Reported by W. B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re G. S. HEAD; *Ex parte* EXECUTORS OF G. HEAD.

[IN BANK.]

ance to help him to avoid bankruptcy, and the solicitor who has been paid for rendering such assistance ought to be allowed to retain what has been paid to him. As to the services rendered after receiving order the official receiver has by acquiescence sanctioned these services, and cannot now object to paying reasonable remuneration for them. In any event the solicitors can retain the 5*l.* 5*s.* court fees paid by them on the bankrupt's application for his discharge.

Muir Mackenzie in reply.

WILLIAMS, J.—This was a motion for a declaration that the sum of 28*l.* 5*s.* 2*d.*, the balance of a sum of 50*l.* received by the respondents on the 24th Oct. 1891, was the property of the official receiver as trustee of the bankrupt's estate. The first question I have to consider is, as to the costs incurred subsequently to the 2nd Dec. 1891, the day on which the respondents received notice of the act of bankruptcy; for the official receiver admits he has no claim to the money expended in costs prior to that date, and therefore gives credit for 15*l.* 14*s.* 10*d.* in respect thereof. Now these costs incurred since the 2nd Dec. may be divided into several heads; first there is the item of 4*l.* 1*s.* 3*d.* paid to the accountants, and as to this, although the date of payment was after the 2nd Dec., still I think the claim ought to be dealt with in the same way as services rendered prior to that date. The respondents are clearly entitled to retain the 15*l.* 14*s.* 10*d.* for services rendered before the 2nd Dec., because they had, at the date they had notice of the act of bankruptcy, in their hands moneys paid to them to cover their charges. They had a right to take a portion of those moneys because the bankrupts had given them authority to pay themselves out of those moneys, and in pursuance of that authority they did so. Now it does not seem to me to make the slightest difference whether the money was retained for services rendered prior to notice of the act of bankruptcy or for liabilities incurred prior thereto by the direction of the bankrupts. Therefore the only question which I have to decide is, with regard to the 4*l.* 1*s.* 3*d.* paid to the accountants, and this is a question of fact, *i.e.* whether or not the respondents had incurred a liability to the accountants prior to Dec. 2. I think they had and had pledged the personal credit of the firm with the accountants, and therefore I must decide with regard to this payment of 4*l.* 1*s.* 3*d.* the same way as if it were a payment for services rendered prior to notice of the act of bankruptcy: the moment that the liability was incurred the right to withdraw the authority given to the respondents ceased and determined, and the trustee in bankruptcy took the estate subject to that authority. There remains then to be considered the respondents' charges for services rendered prior to the receiving order and subsequent thereto. As to the services rendered subsequent, there can be no pretence for saying that the respondents are entitled to retain their charges for these out of moneys in their hands. As to the charges incurred between the 2nd Dec. and the receiving order, *prima facie* the whole estate of the bankrupts passed to the trustee on the act of bankruptcy being committed, and the trustee would take the estate free from any authority given by the bankrupt which had not been already executed: that being so, the respondents would have no right to retain

any of the money in their hands by reason of the authority given them by the bankrupts. It was said that there was an exception to the rule, and that that exception applied here because a petition had been presented against the bankrupts, and they had wished to resist it, and humanity required that the person attacked should be allowed to pay ready money which he has, for the purpose of defending himself, and reliance for this proposition was placed on the case of *Re Sinclair* (*ubi sup.*). Here I should just like to point out that a large portion of the costs incurred between the 2nd Dec. and the receiving order were not incurred for the purpose of resisting the petition, but to defend the action, and though the petition stood over pending the result, yet the costs incurred in resisting the action must be distinguished from the costs of resisting the petition, and are clearly not within *Re Sinclair*. Part, however, of the costs were incurred in resisting the petition, and the question is, whether the respondents may retain these costs out of the money in their hands. Having regard to the remarks of Cave, J. in *Re Spackman* (*ubi sup.*), I fear that I must decide that the solicitors have no right to retain this amount. Cave, J. there said that if a debtor, after committing an act of bankruptcy, comes to a person with ready money to buy necessities, the person from whom he buys the necessities, in return for the ready money, is not bound to inquire where the money comes from. Here it was not suggested that the respondents had any reason to suppose that the money was not part of the bankrupt's estate, and I am of opinion that a debtor cannot come, after committing an act of bankruptcy, and ask a person who has money in his hands, which is confessedly a part of his estate, to apply that money for him. The case of *Re Sinclair* only applies to ready money which is paid over, and has no application to moneys which happen to be in the hands of a solicitor. I know of no reason why any distinction should be drawn between this 50*l.* and any other 50*l.* which a solicitor might have received, for instance, from the trustees of the bankrupt's marriage settlement. Under these circumstances the only money which the respondents are entitled to retain is the sum of 4*l.* 1*s.* 3*d.*, and the amount mentioned in the motion less that sum must be paid over to the trustee.

Order accordingly.

Solicitors for the official receiver, *Adams and Adams*.

Solicitors for the respondents, *Morse and Simpson*.

Nov. 13, 17, 18, and 25, 1893.

(Before WILLIAMS, J.)

Re G. S. HEAD; *Ex parte* EXECUTORS OF G. HEAD. (a)

Bankruptcy—Proof—Joint and separate estates.

The executors of a deceased partner whose separate estate was solvent and of which there was a surplus over for the joint creditors, though not sufficient with the joint estate to pay the joint creditors in full, sought to prove against the separate estate of the copartner which was insolvent for money had and received.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

[IN BANK.]

Re G. S. HEAD; *Ex parte* EXECUTORS OF G. HEAD.

[IN BANK.]

Held (allowing the proof), that, although the dividend received by the solvent estate would go to the joint creditors, this was no violation of the rule which prohibits joint creditors from proving against separate estate until the separate creditors have been paid in full, as it was only equitable that such dividend should be appropriated amongst the joint creditors of the insolvent partner and his copartner.

THIS was a special case stated pursuant to sect. 97. sub-sect. 3 of the Bankruptcy Act 1883.

George Searle Head and George Head carried on business as bankers at East Grinstead under articles of partnership, dated the 21st Feb. 1871.

George Head died the 10th Dec. 1890, and by his will, proved the 12th Jan. 1891, appointed George Searle Head, William Alston Head, and Emma Taylor his executors.

George Searle Head continued to carry on the business after George Head's death under the firm name until the 20th Feb. 1892, when he suspended payment, and on the 21st March 1892 a receiving order was made against him on his own petition in the Kent County Court, and on the 14th May 1892 he was adjudicated bankrupt, and two trustees in bankruptcy were appointed.

At the commencement of the bankruptcy there remained in specie certain partnership assets which the court decided on the 2nd Feb. 1893 had not been converted into separate property of the bankrupt at the commencement of the bankruptcy. There were also a number of joint creditors of the partnership.

The separate estate of the bankrupt and the joint estate of the partnership were each insolvent, but the estate of George Head was sufficient to pay his separate creditors in full, and to provide a considerable surplus for the joint creditors, though not sufficient with the joint estate to pay the joint creditors in full. The only joint creditors of George Head, deceased, were the unpaid creditors of the partnership.

The partnership assets were at the death of George Head insufficient to satisfy the liabilities thereof; and during the period between the death of George Head and the commencement of the bankruptcy, during which the bankrupt carried on the business, the joint debts were largely reduced, but the bankrupt incurred very large separate debts.

At George Head's death the accounts of many customers were largely overdrawn, and, although some overdrafts were reduced or extinguished by payments in by the customers, others were increased and such customers since the bankruptcy proved to be insolvent, and the trustees in bankruptcy alleged them to have been insolvent before George Head's death. On the 6th March 1893 the executors of George Head tendered a proof for 3706l. 12s. 3d. for money had and received against the separate estate of the bankrupt. This proof was rejected by the trustees in bankruptcy. The question for the opinion of the court was, whether the proof ought to be admitted, and, if so, for what amount.

On the 25th April the following further objection was by agreement made part of the case. The whole claim will be objected to on the ground that no proof can be made until all the joint creditors of the late firm have been paid in full.

Muir for the applicant.—The trustees were wrong in rejecting this proof, and the further objection raised now cannot be supported. The separate estate of the bankrupt and the joint estate of the partnership are both insolvent, but George Head's estate is solvent so far as his separate creditors are concerned, and there is a surplus for the joint creditors, though not enough to pay the joint creditors in full. The rule laid down by Lord Loughborough to the effect that separate assets belong to separate creditors will not be in the least disregarded by allowing this proof, as it is only fair that the dividend derived from this bankrupt's separate estate by the separate estate of the copartner should go after all the separate creditors of that partner have been paid to the joint creditors of the bankrupt and his copartner.

Wace for the respondent.—A partner cannot prove in competition with his own creditors, and therefore it is only (1) when the joint creditors have been paid in full, or (2) when it is plain that there can be no surplus of the separate estate to go to the joint creditors that one partner can prove against the separate estate of his copartner. The first condition has not been fulfilled here, as the joint creditors have not been paid in full, and this last condition, which was laid down in *Ex parte Topping*; *Re Levy* (12 L. T. Rep. N. S. 3), does not apply to the case where there is, as here, a surplus of the estate that is proving; because this really amounts to proof by the joint creditors against the insolvent separate estate, and by this means the separate creditors are injured, and Lord Loughborough's rule of joint assets for joint estates and separate assets for separate estates is violated.

Muir in reply.—The question of competition does not arise here.

The following cases were referred to:

Lacey v. Hill, 28 L. T. Rep. N. S. 86; 8 Ch. 441;
Clayton's case, 1 Mer. 572;
West v. Skip, 1 Ves. sen. 239;
Re Hepburn; *Ex parte Smith*, 14 Q. B. Div. 394;
Nanson v. Gordon, 34 L. T. Rep. N. S. 401; 1 App. Cas. 195;
Ex parte Sheen; *Re Wright*, 37 L. T. Rep. N. S. 451; 6 Ch. Div. 235;
Ex parte Silktos, 1 Gl. & J. 374;
Ex parte Collings, 4 De G. J. & Sm. 533;
Ex parte Westcott, 30 L. T. Rep. N. S. 739;
 9 Ch. 626.

Cur. adv. vult.

WILLIAMS, J.—This was a special case stated under sect. 97 of the Bankruptcy Act 1883. The facts appear in the case itself, but the question raised was whether a proof tendered by W. A. Head, one of the executors of the will of G. Head, deceased, against the separate estate of George Searle Head, the bankrupt, formerly in partnership with G. Head, ought to be admitted. The trustees in the bankruptcy of George Searle Head have rejected the proof, and this special case was stated with a view to ascertain whether that rejection of the proof by the trustees in bankruptcy was right or not. One objection raised goes to the whole proof, and that is, that the separate estate of George Head, deceased, is solvent, and there is a surplus for the joint creditors, and if this proof is allowed against the separate estate of George Searle Head, the dividend which would be received from the separate estate of George

IN BANK.]

In the Goods of GARNETT (deceased).

[PROB.]

Searle Head would be received for the benefit of and distribution amongst the joint creditors of George Head and George Searle Head. It is a rule in the administration of the estates of partners that, although one partner may prove against the estate of his co-partner, he must not do so in competition with his own creditors. He therefore could so prove when all the joint creditors have been paid in full, and it was held in *Ex parte Topping; Re Levey*, that he might so prove against the separate estate of his copartner, when it was plain that there could be no surplus of such separate estate to distribute amongst the joint creditors. For as by Lord Loughborough's rule of administration of partnership estates the joint and separate estates are respectively appropriated in the first instance to the joint and separate creditors respectively, it follows that joint creditors can only prove on the separate estates of the partners, where there is a surplus of such estates respectively, and therefore that a partner seeking to prove against the estate of his copartner, will only come in competition with the joint creditors who are, of course, his own creditors, in cases where the separate estate will yield a surplus; such proof was no breach of the rule against a partner proving in competition with his own creditors. It was suggested in *Lacey v. Hill* that this principle laid down in *Ex parte Topping* had no application in a case where there was a surplus of the estate of the partner on whose behalf the proof was tendered because it was said that in such a case to allow the proof would be really to allow the joint creditors to come upon the insolvent separate estate of the partner, against whose estate the proof was tendered to the detriment of the separate creditors of that partner, and in violation of Lord Loughborough's rule. This contention has nothing to do with the rule about a man not competing with his own creditors. It is merely a contention that one partner ought not to be allowed to prove against another, where the result of the proof will be to benefit the joint creditors at the expense of the separate creditors, because to allow such a proof in such a case would be to disregard the branch of Lord Loughborough's rule which appropriates separate assets to separate creditors, but the answer to this seems to me to be that Lord Loughborough's rule was satisfied, when proof was made by one partner as a separate creditor on the separate assets of the other partner, *pari passu*, with the other separate creditors to the exclusion of the joint creditors. The equity between the partners on which Lord Loughborough's rule is based is satisfied, when the joint assets are appropriated primarily to the joint liabilities and the separate assets to the separate liabilities. The partner whose estate is insolvent cannot say that it is inequitable that the dividend derived from his separate estate which is paid on the debt which he owes his partner should be appropriated after payment in full of the separate creditors of the partner whose estate is solvent amongst the joint creditors of himself and such partner. The fact is, that by the time the dividend has reached the joint-creditors it has ceased to be separate estate of the partners out of whose estate it is paid, and his separate creditors have no longer any interest in it, and cannot be said to be robbed of it. The confusion arises from treating the separate creditors of the two partners as one constituency, who have a right to

the separate assets of the two partners in priority to the joint creditors, whereas, in truth, the separate creditors of each partner are a separate constituency and the separate creditors of one partner have no interest in the separate estate of the other partner. *Proof admitted for a reduced amount.*

Solicitor for the applicant, *Morrison*.

Solicitors for the respondent, *Linklater and Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Sept. 13 and Dec. 4, 1893.

(Before BARNES, J.)

In the Goods of GARNETT (deceased). (a)

Testamentary papers—Validity—Incorporation—Refusal of probate.

The testator called two witnesses into his room, informed them that he had made certain alterations in his will which he said was in a drawer of the writing-table, at which he was sitting, and he asked them to witness his signature. The document lying before him, written by himself upon blue paper, was then duly executed and attested as a will. The witnesses never saw and never attested any other document for the deceased. The document appointed no executor, and contained no bequest, but referred to "papers No. 1, 2, 3, 4, 5, and 6," as having been signed by the deceased in the presence of the witnesses. After the death, certain holograph papers, bearing those respective numbers, and with various dates antecedent to the blue paper, were found along with the latter in an envelope, outside of which was written, "My last will, 1890," also in the testator's handwriting.

Upon application by the executors for probate of all the documents:

Held, that as the numbered papers were not identified with the description given in the attested paper, in such a way as to exclude the possibility of mistake, they were not incorporated with that paper;

Held also, that as the attested paper, by itself, was inoperative, probate of it, as well as of all the other documents, should be refused.

MOTION by an executor for probate of certain documents.

Robert Garnett, late of Valley Field, King's Lynn, in the county of Norfolk, died on the 12th July 1893, at Anningdon Hall, near Tamworth, in the county of Stafford, a widower, leaving sons and daughters of full age, and grandchildren, the children of a deceased son, also of full age.

After the death of the said Robert Garnett, a blue paper and six documents, numbered 1, 2, 3, 4, 5, and 6, respectively, were found by Herbert Garnett, one of the sons, in the deceased's strong box. They were, when found, in an envelope, on which was written, "My last will, 1890," and which was fastened down with adhesive stamp paper. Herbert Garnett handed the envelope, unopened, to his brother, Colonel Albert Peel Garnett, who opened it in the presence of several members of the family, when it was found that

(a) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law

[PROB.]

In the Goods of GARNETT (deceased).

[PROB.]

the seven documents were all separate the one from the other.

The seven documents in question, which were all holograph, were as follows:

No. 1.—Memorandum for my executors.—Valley Field, King's Lynn, Jan. 5, 1883.—In consideration of my having already given the following sums to the following members of my family, viz.: To Albert Peel Garnett 6000*l.*, Emily Bedford 1000*l.*, Robert John Garnett 7000*l.*, Frederick Willcock Garnett 5000*l.*, and nothing to my youngest son Henry Percy Garnett, I hereby require and authorise you to retain in your hands and hold as trustees for the benefit of my said son Henry Percy Garnett, the sum of 1000*l.* (one thousand pounds), being a first charge upon my estate after payment of what may remain due by me to the trustees of Mrs. Frances Fisher, and the discharge of all my legal debts and funeral expenses. Further, that the annual sum to be paid to my son Edward Peel Garnett, be 50*l.* (fifty pounds). This is very small, and nobody can describe my feelings in thus reducing the annuity to so good a son. But poverty alone is the cause, and however mistaken I may think his religious creed to be, I shall always regard him as truly good and estimable. He is well worthy of his hire, as a faithful labourer in the vineyard, and will not suffer because my bequest is a mere pittance. Herbert must not think I have forgotten him because I do not name him specially. No father could have a better son. He is in a comfortable position, and not dependent like Henry Percy. I wish him to accept from me whatever there may be at Valley Field, belonging to me in furniture, linen, wine, or pictures. The plate I wish to go to the estate, but the clock in my smoking-room to go to Herbert.—ROBERT GARNETT.—Oct. 18, 1884.—I wish all my plate to be divided equally between my sons Albert Peel Garnett and Herbert Garnett.—ROBERT GARNETT.

No. 2.—Valley Field, Lynn, Jan. 3, 1886.—I hereby give for their sole use and profits to my sons, Albert Peel Garnett and Herbert Garnett, to be divided in equal parts, the whole of the plate and plated property belonging and now at Valley Field, with the full understanding that the whole of it is to remain at Valley Field during my lifetime.—ROBERT GARNETT.

No. 3.—Memorandum, Nov. 17, 1887.—I am in debt to Mr. Wm. Hayes, of Ashton Hayes, Chester, to the value of 6000*l.* (six thousand pounds). For this debt he holds as security my 100 shares of 100*l.* each in G. Skey and Co., and also a policy of insurance on the life of William Muir. On the decease of this William Muir, Mr. Hayes, or his executors, will receive from the insurance company what may be due, probably quite 5000*l.* As I am joint owner of this policy with my brother Charles Garnett, my debt to Mr. Hayes would be reduced to 3500*l.* In that case an arrangement might be made to pay off the whole remaining debt by sale of a portion of the 100 shares. This would depend upon the prosperity or otherwise of G. Skey and Co. Should such a sale be possible I wish my executors to effect it, if what they consider a fair price is offered. Any shares (of these 100 in G. Skey and Co.), which may remain after paying Mr. Hayes in full, I wish to be divided equally between my daughter Emily Bedford, and my son Henry Percy Garnett. In consideration of this act I revoke my bequest of 1000*l.* to Henry Percy Garnett, contained in a memorandum dated Jan. 5, 1883.—ROBERT GARNETT, Valley Field.

No. 4.—I hereby bequeath to my son Herbert Garnett my gold Geneva watch. Also my violoncello, by Foster, and all my music books.—ROBERT GARNETT.—Aug. 14, 1889.—Valley Field.—The watch to go to Albert Peel Garnett, Jan. 8, 1890.

No. 5.—Further memorandum, Jan. 8, 1890.—It is my desire that in the event of my decease prior to the termination of the existing deed of partnership of William Muir and Co., my executors should not be entitled to more than 10 (ten) p. cent. of the profits instead of 15 (fifteen) p. cent., and that the five p. cent. thus withdrawn be added to Herbert Garnett's share, which will then be 20 p. cent.—ROBERT GARNETT, Valley Field.

No. 6.—I hereby bequeath to my son Edmund Peel Garnett 100*l.* (one hundred pounds), to my daughter Frances Fisher 100*l.* (one hundred pounds), to my

daughter-in-law Annie Garnett 50*l.* (fifty pounds). All profits due to my estate from the business of William Muir and Co., to be equally divided amongst my three children. Albert Peel Garnett, Emily Bedford, and Henry Percy Garnett. I appoint my sons Albert Peel Garnett and Herbert Garnett my residuary legatees.—ROBERT GARNETT, Valley Field, Jan. 8, 1890.

The inclosed papers No. 1, 2, 3, 4, 5, 6, were signed by Robert Garnett, the testator, in the joint presence of us who thereupon signed our names in his and each other's presence.—ROBERT GARNETT, Valley Field, Feb. 5, 1890. FREDERICK DAWES, gardener, Valley Field, King's Lynn. ZEBEDEE RUST, coachman, Valley Field, King's Lynn.

The attesting witnesses, in their joint affidavit, stated:

The deceased called us into his room and said: "I have made certain alterations in my will, and I want you both to witness my signature." He further said: "The will is in this drawer," pointing to the drawer of the library table at which he was sitting. We are quite clear that no papers, except the one bearing our signatures, were shown to us; nor did the deceased sign any paper, except the one, in our presence. No one else was present.

Searle now moved the court to decree probate of the attested paper and of the documents numbered 1 to 6, therein mentioned, as together constituting the last will of the deceased. A correct summary of the authorities applicable to this case is to be found in Williams on Executors, 9th edit., 86.

E. A. Jennings appeared for Mrs. Emily Bedford, the remaining party interested, and stated that she would submit to any order that the court might think fit to make on this motion.

Dec. 4.—BARNES, J.—Having regard to the passage to which Mr. Searle has been good enough to call my attention from Williams on Executors, 9th edit., p. 86: "But the reference must be distinct, so as, with the assistance of parole evidence when necessary and properly admissible, to exclude the possibility of mistake; and the paper referred to must be already written;" also, the note to that paragraph, which is, "Where a will refers to a paper, such paper cannot be incorporated with the will unless it be clearly identified with the description of it given in the will, and be shown to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved, there can be no incorporation of the paper with the will." I have come to the conclusion, having regard to the verbiage of the attested document, that the six papers, Nos. 1 to 6, are not shown to be incorporated, so as to exclude the possibility of mistake, and are not shown to be clearly identified with the description given of them in the blue paper. The latter describes them as having been signed by the testator in the joint presence of the attesting witnesses; but, according to the affidavit of those witnesses, no papers were signed by the testator in their presence, and, if I recollect rightly, no one of the papers was produced to them, except the blue paper which they did attest, and which they saw him sign. All the testator seems to have said to them was substantially: I have made certain alterations in my will, and they are in this drawer, and I want you both to witness my signature. The will which he said was in the drawer is not shown necessarily to have been the six papers which it is now sought to incorporate. It may, perhaps, be that they

Div.]

EDWARDS v. EDWARDS AND FRANCIS.

[Div.]

were in existence at the time, and that they were then in the drawer which the testator indicated to the witnesses. But, in my opinion, in order that a document, which does not itself contain the terms of the will, should be allowed to incorporate other documents, the two propositions mentioned in *Williams on Executors (ubi sup.)* must be satisfied; and they cannot in this case be shown to have been really complied with. For that reason, coupled with what I have already said about the description in the executed document, the conclusion to which I have come is, that these documents ought not to be admitted to probate. The executed paper is inoperative, and none of the documents ought, in my judgment, to be admitted to probate.

Probate refused.

Solicitors: for the applicants, *G. Thatcher*; for Mrs. Bedford, one of the children of the deceased, *C. A. Jennings*, agent for *J. and C. Robinson and Wilkins*.

DIVORCE BUSINESS.

Dec. 6 and 9, 1893.

(Before BARNES, J.)

EDWARDS v. EDWARDS AND FRANCIS. (a)

Divorce—Verdict of adultery against respondent and co-respondent, and of cruelty against petitioner—Discretionary bar—Divorce Act 1857 (20 & 21 Vict. c. 85), s. 31—Decree nisi—Petitioner ordered to secure maintenance for respondent dum sola et casta vixerit.

In a suit by a husband for divorce the jury found that the respondent and co-respondent had committed adultery, and that the petitioner had been guilty of cruelty towards his wife, but they were not asked to give and did not give any verdict as to whether the cruelty of the petitioner had conduced to the adultery of the wife.

The Court, being satisfied that the adultery of the respondent had not been brought about by the cruelty of the petitioner, pronounced a decree nisi, in virtue of the discretion conferred by the Divorce Act 1857 (20 & 21 Vict. c. 85), s. 31, but directed that the decree should not be made absolute unless and until the petitioner executed a deed, securing to his wife, for her maintenance, a sum of 36l. per annum—the deed to contain a clause that the said allowance should only be payable dum sola et casta vixerit.

Badham v. Badham and Gorst (62 L. T. Rep. N. S. 663) followed.

Lander v. Lander (64 L. T. Rep. N. S. 120; (1891) P. 161) distinguished.

This was a case upon further consideration as to the verdict of a jury finding the respondent and co-respondent guilty of adultery, and the petitioner guilty of cruelty.

Leopold Alexander Edwards, the petitioner, was married to the respondent, Eliza Edwards, on the 26th July 1873, and one child was born in 1887 issue of the marriage. Another child was born after the date of the petition, but its paternity was denied by the petitioner, who was a farmer, possessed of small private means. The respondent was a farmer's daughter.

The petition was filed early in 1893, and alleged that the respondent and co-respondent had

committed adultery in the months of May, June, and September 1892.

The respondent, in her answer, denied the adultery, and alleged that on frequent occasions in the years 1885 and 1886 the petitioner committed adultery with a certain woman, and that in the year 1892 he committed adultery with another woman. The answer also contained allegations of cruelty and violent conduct towards the respondent.

The chief of these allegations, shortly stated, were the following: Nov. 12, 1885, blow in the face; Aug. 25, 1886, blow and threw carving knife at respondent; Sept. 5, 1886, petitioner bound over to keep the peace for six months; Sept. 1891, violent assault, blow in the face, threats; on other occasions turned her and infant child out of doors at night; blows and threatening language; Dec. 17, 1892, threatened to murder the respondent, and behaved violently towards her, under circumstances hereinafter mentioned.

The respondent left her husband on the 2nd Nov. 1892, and on the 12th Nov. he summoned her for stealing some clothes, which she stated that she had taken for herself and her child. This summons was withdrawn.

On the 10th Dec. 1892 the petitioner summoned his wife for stealing a pony which he alleged to be his property. The summons was adjourned for a week, and on the 17th Dec. 1892 it was dismissed, the magistrate ordering that the pony should be restored to her. That same night, the petitioner, accompanied by several men went to the house where the respondent was staying, threatened her, broke open the stable and took the pony away again. In consequence of this the petitioner was summoned by his wife, and on the 19th Dec. he was bound over in a sum of 50l., with one surety of 50l. to keep the peace for twelve months.

The case came on before Barnes, J. and a jury, and on the 18th Nov. 1893 the jury found that the respondent and co-respondent had committed adultery; that the petitioner had not committed adultery, but that he had been guilty of cruelty towards the respondent. The jury were then discharged, and on the 9th Dec. the case came before the court for further consideration.

Deane for the petitioner.—The court should exercise its discretion by pronouncing a decree nisi. If it sees fit to order the petitioner to make the respondent an allowance, he would be willing to do so. The petitioner states that his income is only 126l. 14s. 5d. per annum, and that the costs of the trial, which he will have to bear, amount to over 300l.

*Barnard for the respondent.—The figures given by the petitioner cannot be accepted, but it is not necessary for present purposes to determine the exact amount of the petitioner's income. Since the registrar dealt with that matter upon the petition for alimony *pendente lite*, the only deduction to be made from capital is the sum of about 300l., which the petitioner says he will have to pay for costs. The registrar allotted alimony pending suit at the rate of 15s. per week. That is a bare maintenance, and the court, if it pronounces a decree nisi, should order that the petitioner secure that amount to the respondent. If the petitioner will not consent to do that, the court ought to dismiss the petition. In a great*

(a) Reported by H. DURLEY GRAZESBROOK, Esq., Barrister-at-Law.

Div.]

EDWARDS v. EDWARDS AND FRANCIS.

[Div.]

number of cases where a husband has been the petitioner, and where cruelty has been proved against him, the court has granted him a decree nisi, but always upon condition that the decree should not be made absolute until a proper provision should have been made by him for the future maintenance of the respondent. Every case must, however, depend on its own facts. The cruelty proved in this case was of a very serious character, and the words of 20 & 21 Vict. c. 85, s. 31 make it immaterial that some of the acts of cruelty were condoned. In *Stoker v. Stoker* (60 L. T. Rep. N. S. 400; 14 P. Div. 60) where both the petitioner and respondent were found guilty of adultery, the court dismissed the petition. [BARNES, J.—The language of Butt, J. in that case is also applicable to cruelty.] Even if all the cruelty had been condoned that would not be material to the present application: (*Story v. Story and O'Connor*, 57 L. T. Rep. N. S. 536; 12 P. Div. 196.) The petitioner in the present case was summoned on three separate occasions for cruelty to his wife; in 1885 he was bound over to keep the peace; in 1888 the summons was withdrawn upon an agreement for a separation being entered into; and in 1892 he was again bound over. The last act of cruelty was committed after the final separation. It is no doubt better in the wife's interests that an allowance should be made for her maintenance, and if that is done she does not oppose the granting of a decree. The jury were judges of the facts, and the respondent feels bound to accept the verdict of adultery which has been given against her. But if the petitioner refuses to make her an allowance, the Court ought to dismiss the petition. [BARNES, J.—Is there any reported case which indicates the class of cruelty or the lines upon which the discretion conferred by sect. 31 has been exercised in such cases as this?] If the court is of opinion that the cruelty of the petitioner has actually brought about the adultery of the respondent it ought to dismiss the petition. If the court is not satisfied upon that point, then the discretion may be exercised in favour of the petitioner. The jury did not find as a fact that the cruelty conducted to the adultery. Cruelty by a petitioner does not stand on the same footing as adultery:

Boreham v. Boreham, L. Rep. 1 P. & D. 77;

Lempriere v. Lempriere and Roebel, L. Rep. 1 P. & D. 569.

[BARNES, J.—But in each of those cases something more than cruelty was established against the petitioner. Is there no reported case showing how the court has exercised its discretion where cruelty only has been established against a petitioner?]

Durley Grazebrook (*amicus curiæ*) referred to *Badham v. Badham and Gorst* (62 L. T. Rep. N. S. 663).

Barnard.—If the court decides to exercise its discretion by granting a decree and ordering an allowance, the deed by which the allowance is secured should not contain a *dum sola et casta* clause. The late President repeatedly expressed disapproval of the *dum casta* clause, and the former President (Lord Hannen) in *Lander v. Lander* (64 L. T. Rep. N. S. 120; (1891) P. 161), directed an allowance to be made by the petitioner to his guilty wife without any restriction as to her future condition or mode of life.

Deane in reply.—If a *dum casta* clause were not to be inserted it would be tantamount to saying that the respondent and co-respondent might go and live together, and that the petitioner must contribute to their maintenance. As to the cruelty, the wife continued to live in the same house with her husband until the final separation in Nov. 1892, and she was not, therefore, in fear of her life. Her condonation of all previous acts of cruelty was an absolute blotting out of those offences:

Bernstein v. Bernstein, 69 L. T. Rep. N. S. 513; (1893) P. 292.

Cur. adv. vult.

Dec. 9.—BARNES, J., after stating the facts, said:—The question then comes to be one for decision under sect. 31 of the Divorce Act 1857 (20 & 21 Vict. c. 85), and I am asked to exercise my discretion in favour of the petitioner, under the proviso of that section. A number of authorities were cited in the course of the arguments, but for the purposes of this judgment I need only refer to one or two of the cases. In *Pearman v. Pearman and Burgess* (1 Sw. & Tr. 601) the Judge Ordinary said: "As the jury have found that the petitioner has proved his charge of adultery, and also that he has been guilty of cruelty, the court has now to exercise the discretion given it by the thirty-first section. If there were reasons to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage." In *Lempriere v. Lempriere and Roebel* (L. Rep. 1 P. & D. 569) I find that Lord Penzance says this: "I am aware that in the Ecclesiastical Court there is more than one decision that, by way of *compensatio criminis*, cruelty is no answer to adultery. At the same time there are passages to be found in one judgment at least which tend to make it doubtful whether such a rule would be applied where the cruelty preceded and brought about the adultery." That was a suit by the husband for dissolution of marriage, and it was established that the wife was guilty of adultery and the husband of cruelty, and of misconduct conducing to her adultery. The court refused to amend the husband's petition by allowing a prayer for judicial separation to be substituted, and it was dismissed. But in *Badham v. Badham and Gorst* (62 L. T. Rep. N. S. 663), to which Mr. Grazebrook, as *amicus curiæ*, referred me, where the wife had obtained a decree of judicial separation on the ground of her husband's cruelty, and the husband subsequently petitioned the court to dissolve the marriage on the ground of adultery committed by his wife after the decree for judicial separation, Lord Hannen exercised his discretion in favour of the husband, and granted him a decree. There is, therefore, no doubt that there have been cases in which, notwithstanding that cruelty on the part of the petitioner has been proved, the court has pronounced a decree nisi. This, as was pointed out in *Pearman v. Pearman* (1 Sw. & Tr. 601), has been done more particularly in cases where the cruelty established against a petitioner has not been of such a nature as to have brought about the misconduct of the respondent. When one considers the last sentence of sect. 31 of the Divorce Act 1857, it rather favours the view that there are cases in which, although cruelty has been found, yet the court would in some instances

exercise the discretion conferred upon it by the Act in favour of the petitioner. Looking at all the circumstances of this case, and taking into account the fact that there was, here, no finding that the husband's cruelty in any way conduced to his wife's adultery, I have come to the conclusion that I may properly exercise my discretion by pronouncing a decree *nisi*, especially in view of the fact that it is not resisted by the wife. I have, however, been asked, and I think rightly asked, by her counsel to impose upon the husband terms in connection with the decree. Then comes the question, what terms ought I, under sect. 32 of the Divorce Act 1857 to impose upon him? I have been asked to suspend the decree until the husband shall have secured to his wife, by deed, to the satisfaction of the court a proper maintenance for her future support; and I have also been asked to direct that the deed should not contain a clause *dum sola et casta vixerit*. On the other hand, the husband asks me to insert that clause in the deed. Exercising my best judgment on these two points, I have come to the conclusion that the amount of the allowance which the husband ought to secure to his wife, under sect. 32 of the Act, should be the same as the registrar ordered as alimony *pendente lite*, namely, 36l. a year; and I think that, having regard to the general features of this case, the *dum sola et casta* clause ought to be inserted. I pronounce a decree *nisi*, but direct that it shall not be made absolute unless and until the petitioner has secured to the respondent, by a proper deed, the sum of 36l. per annum, *dum sola et casta vixerit*.

Solicitors for the petitioner, J. T. Rossiter, agent for E. B. Titley, Bath.

Solicitors for the respondent, Meredith, Roberts, and Mills, agents for Basil A. Dyer, Bath.

CROWN CASES RESERVED.

Saturday, Dec. 16, 1893.

(Before Lord COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ.)

REG. v. TYRELL. (a)

Criminal law—Aiding and abetting—Soliciting and inciting—Offence against Criminal Law Amendment Act 1885—Criminality of girl under sixteen—48 & 49 Vict. c. 69, s. 5.

A girl under the age of sixteen cannot be convicted of aiding and abetting the commission upon herself of an offence against the Criminal Law Amendment Act 1885, nor can she be convicted of soliciting and inciting a male person to commit such an offence upon her.

CASE stated by Robert Malcolm Kerr, Esq., one of the Commissioners of the Central Criminal Court, for the consideration of the Court for Crown Cases Reserved, as follows:—

Jane Tyrell was, on the 15th Sept. 1893, arraigned before me, and pleaded not guilty to the following indictment:

Central Criminal Court to wit. The jurors for our lady the Queen, upon their oath, present that Jane Tyrell, on the thirteenth day of Aug., in the year of our Lord one thousand eight hundred and ninety-three,

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

at the parish of St. Pancras, in the county of London, and within the jurisdiction of the said court, unlawfully did aid, abet, counsel, and procure the commission by one Thomas Froud, of a certain misdemeanour, by him the said Thomas Froud, then committed, that is to say, for that he the said Thomas Froud, on the day and year aforesaid, at the parish, in the county, and within the jurisdiction aforesaid, in and upon the said Jane Tyrell, a girl above the age of thirteen years, and under the age of sixteen years, to wit, of the age of thirteen years and eight months or thereabouts, unlawfully did make an assault, and her the said Jane Tyrell did then unlawfully and carnally know, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Jane Tyrell, on the day and year aforesaid, at the parish, in the county, and within the jurisdiction aforesaid, falsely, wickedly, and unlawfully did solicit and incite the said Thomas Froud to have unlawful carnal connection with her, the said Jane Tyrell, she the said Jane Tyrell then being a girl above the age of thirteen years, and under the age of sixteen years, to wit, of the age of thirteen years and eight months, or thereabouts, to the great damage of the said Thomas Froud, to the evil example of all others in the like case offending, against the peace of our lady the Queen, her Crown and dignity.

The evidence for the prosecution proved conclusively that the defendant, who was under the age of sixteen, aided and abetted and solicited and incited Thomas Froud to have unlawful carnal connection with her, and the defendant was accordingly convicted.

Counsel for the defence, in arrest of judgment, submitted that the indictment disclosed no offence in law. This objection I overruled, but allowed the prisoner to go upon her entering into her own recognisance to come up for judgment when called upon.

I reserved, at the request of defendant's counsel, for the opinion of this Court the question,

Whether it is an offence for a girl between thirteen years and sixteen years of age, to aid and abet a male person in the commission of the misdemeanour of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanour.

By sect. 5 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), it is enacted (*inter alia*) that:

Any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years, and under the age of sixteen years . . . shall be guilty of a misdemeanour.

Clarke Hall (with him Campbell), on behalf of the prisoner, submitted that the Criminal Law Amendment Act was merely a consolidating Act, and created no new offence; that at common law no one could commit a crime against himself except it were the crime of mayme; the reason why that was a crime being that the life and members of every subject are under the safeguard and protection of the Crown, to the end that they may serve their Crown and country when occasion offers. Coke on Littleton (s. 127, note b) says: "On my circuit in anno 1, Jacobi regis, in the county of Leicester, one Wright, a young strong and lustie rogue to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefore, and that by the opinion of the rest of

CR. CAS. RES.]

REG. v. TANKARD.

[CR. CAS. RES.]

the justices, for the cause aforesaid. And in Hawkins, P. C. p. 176, vol. 1, edit. 1778, it is laid down that, 'By the common law, if a person maim himself, in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted, and on conviction fined and imprisoned.' This, however, was the only crime that could be committed by a person upon himself. In the second place, that common law principle has been recognised by modern legislation in sect. 7 of the Offences against the Person Act 1861 (24 & 25 Vict. c. 100). So too, in the case of abortion, a woman is only indictable under that section if she is with child, the gist of the offence being the taking of life. In drafting the indictment in *Reg. v. Whitchurch* (24 Q. B. Div. 420) for conspiring to procure abortion against a woman who believed herself contrary to the fact to be with child, if the woman could have been indicted for aiding and abetting, it is obvious that she would have been so indicted. The law of conspiracy is quite different from the law of aiding and abetting, and the principles which govern the one class of crime are inapplicable to the other. Though, therefore, the girl might have been convicted of conspiracy, it did not follow that she could be convicted of aiding and abetting. The second count he submitted was based upon the common law, it having been held in *Reg. v. Higgins* (2 East, 5) that to solicit a servant to steal his master's goods is a misdemeanour, and in Stephen's History of the Criminal Law, vol. 2, p. 230, it being stated that, "A person who counsels, procures, or commands another to commit either a felony or a misdemeanour is guilty of the misdemeanour of incitement if the offence suggested is not committed, and if it is committed he is an accessory before the fact if the offence is felony, and a principal if the offence is either treason or misdemeanour." There must, however, be an offence; and it follows that, if the first count failed, the second count being based upon the fact of the commission of such an offence as is alleged in the first count, must of necessity fail also. There being no such crime as that alleged in the first count created by the indictment, the prisoner could not be convicted of soliciting or inciting the commission of that which was not criminal. One of the consequences of upholding the conviction would be, that a girl who had been seduced could be convicted of aiding or abetting, or soliciting or procuring her seduction. The sole object of the enactment was to prevent its being considered that a girl of immature mind had consented to the act committed upon her. The 4th section shows that, if the contention of the prosecution were to be held to be correct, the prisoner had she been under the age of thirteen years would have been liable to penal servitude for life. Were the construction put upon the Act which the prosecution sought to place upon it, it would be rendered practically inoperative, as it was not likely that parents would allow their children to run the risk of prosecution by giving information of offences committed upon them. Lastly, the Act having been passed expressly to prevent its being said when prosecuting the man that a girl under the age of sixteen could consent, it could not be construed as meaning that she could be considered

to have consented for the purpose of herself being prosecuted.

Dutton, in support of the conviction, submitted that there was nothing in the Act to prevent a girl being convicted of the offence with which she was charged; and that the jury having found upon the clearest evidence that she did incite the boy to commit the act, the conviction should stand.

LORD COLERIDGE, C.J.—I believe that I am expressing the opinion of my learned brothers when I say that this conviction must be quashed. This Act of Parliament was passed, and enacted after a great deal of disputing and fighting in the House of Commons, and a great deal of controversy took place as to the point at which the age of consent was to be fixed. It ended in a compromise; and it is not for us to dispute whether it was wisely or unwisely fixed at the age of sixteen. What was intended by the Legislature was to protect girls against themselves, and it cannot be said that an Act which says nothing at all about the girl inciting or anything of that kind, and the whole object of which is to protect women against men, is to be construed so as to render a girl against whom an offence is committed equally liable with the man by whom the offence is committed. In my opinion this conviction cannot be sustained, and must therefore be quashed.

MATHEW, J.—I am of the same opinion. I fail to see how this argument on the construction of the statute can be supported. The consequences of upholding this conviction would, as has been pointed out in the course of the argument, be most serious, there being scarcely a section in the Act which would not, upon the construction sought to be put upon the Act, support a criminal prosecution against a girl. There is no trace anywhere in the Act of any intention on the part of the Legislature to deal with the woman as a criminal, and I am of opinion that the Act does not create the offence alleged in the indictment.

GRANTHAM, LAWRENCE, and COLLINS, JJ. concurred.

Conviction quashed.

Solicitor, Morton Phillips.

Saturday, Dec. 16, 1893.

(Before Lord COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ.)

REG. v. TANKARD. (a)

Criminal law—Indictment—Property—Illegal association—Embezzlement of moneys received on behalf of illegal club—Beneficial ownership of members—24 & 25 Vict. c. 89, s. 4—31 & 32 Vict. c. 116, s. 1.

The members of an unregistered club, having for its object the acquisition of gain by such members, which is illegal owing to non-compliance with the requirements of sect. 4 of the Companies Act 1862, are the beneficial owners of the property of such club. It is therefore right, in an indictment for stealing or embezzling moneys paid to the treasurer on behalf of such a club, to lay the property in the moneys in the individual members of the club as beneficial owners.

(a) Reported by E. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

CR. CAS. RES.]

REG. v. TANKARD.

[CR. CAS. RES.]

CASE stated for the consideration of this Court by the Recorder of Bradford, as follows:—

At the Court of Quarter Sessions of the Peace, held at Bradford on the 20th Oct. 1893, the prisoner was arraigned upon and pleaded not guilty to an indictment of which the material parts are as follows:—

1. That Michael Naylor Tankard, being on the 28th July 1893 then one of a number of beneficial owners, called the Bowling Feast Club, consisting of the said Michael Naylor Tankard, William King Jackson, and others, did then, and whilst he was one of the said beneficial owners as aforesaid, receive and take into his possession certain money to the amount of five shillings, for and in the name of and on account of the said beneficial owners as aforesaid, and the said money then fraudulently and feloniously did embezzle, and the jurors on their oath aforesaid do say that the said Michael Naylor Tankard, then in manner and form aforesaid, the said money the property of the said beneficial owners as aforesaid, from the said beneficial owners as aforesaid feloniously did steal, take, and carry away, against the form of the statute, &c.

2. There were other similar counts alleging embezzlement of other amounts.

3. It was proved that the prisoner, Michael Naylor Tankard, William King Jackson, and some twenty-eight other persons were the members of and constituted the Bowling Feast Club mentioned in the indictment.

4. It was proved that the club traded with its members in coal and cloth, from which trading profits were made, and that profits were also derived by it from fines paid by the members, and from interest paid by the members on loans from the club to them at varying rates, and that the whole of the proceeds of the club, consisting of such profits and the subscriptions, were divided equally amongst all the members at a fixed period in each year.

5. The prisoner was treasurer of the Bowling Feast Club.

6. It was proved that on the 28th July 1893 the prisoner was unable to produce or account for the money which he had received on account of the club, and for which he was accountable under the rules of the club, that he could not account for amounts, as laid in the indictment, that there was a general deficiency of over 150*l.*, and that he absconded.

7. At the close of the case for the Crown it was submitted by counsel for the prisoner that the prosecution had failed to prove any offence under the indictment, on the ground that the Bowling Feast Club in which the property was laid was illegal, owing to the provisions of sect. 4 of the Companies Act 1862 (25 & 26 Vict. c. 69), and incapable of holding any property, and that the said club had no existence in law, and that the members of it could have no legal beneficial ownership as the Bowling Feast Club.

8. The case was left to the jury and the prisoner was convicted, and was sentenced to six months imprisonment with hard labour, which sentence, in the absence of approved bail, he is now undergoing.

9. The question reserved at the desire of the prisoners' counsel for the opinion of this Court is, whether the prisoner was properly convicted on the indictment.

By sect. 1 of 31 & 32 Vict. c. 116, it is enacted that,

If any person, being a member of any copartnership, or being one or two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership, or one of such beneficial owners.

By sect. 4 of the Companies Act 1862 (25 & 26 Vict. c. 89), it is enacted that,

No company, association, or partnership, consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership, consisting of more than twenty persons, shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

R. D. Wright, on behalf of the prisoner, submitted that, inasmuch as the association, the money of which the prisoner was charged with embezzling was an association for the acquisition of gain of more than twenty persons, which was prohibited by the Companies Act, and therefore illegal, the prisoner could not be convicted of embezzling its money; that such an association being prohibited by law could have no legal existence, and could not therefore own money. [Lord COLERIDGE, C.J.—The Court held, in *Reg. v. Stainer*, that a society, the rules of which were void as being in restraint of trade, was not prevented from prosecuting a servant for embezzlement.] But, then, it is submitted the society was not prohibited by law as here, and could, had its rules not been void, have had a legal existence. Such an association as the present would have no civil remedy for the recovery of its money. [GRANTHAM, J.—The case of *Tennant v. Elliot* (1 B. & P. 3) shows that a person who has received money to the use of another upon an illegal contract cannot set up the illegality of the contract in an action by such other person for the recovery of the money.] That might be so here if the association could sue, but it has no legal existence, and cannot therefore bring an action. In *Re Padstow Total Loss and Collision Assurance Association* (45 L. T. Rep. N. S. 774; 20 Ch. Div. 137) the Court of Appeal held that such an association could not for this reason be wound-up by the court. In *Reg. v. Hunt* (8 C. & P. 642) it was held that a person charged with embezzlement as a clerk and servant to a society which, in consequence of the administering to its members an unlawful oath, was an unlawful combination and confederacy under 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, s. 25, could not be convicted. Here the effect of the prohibition of this society was the same as if it had been rendered a criminal offence to take part in such a combination, and no indictment could be supported which laid property in such a society. [Lord COLERIDGE, C.J.—I see that, in *Reg. v. Boulton*

CR. CAS. RES.]

REG. v. STEWARD.

[CR. CAS. RES.]

(5 C. & P. 537), the court held that the property in a Bible had been rightly laid in a dissenting minister and others, they being the trustees of a society of Wesleyans.] But there was no law which rendered it illegal for such a society to possess Bibles, whereas here this association could not exist at all. He also cited

Reg. v. Robson, 53 L. T. Rep. N. S. 823; 16 Q. B. Div. 137; 55 L. J. 55, M. C.

W. Beverley, on behalf of the prosecution, was not called upon.

LORD COLERIDGE, C.J.—This is an indictment which is laid under 31 & 32 Vict. c. 116, s. 1, which is in these terms: [His Lordship read the section, *vide sup.*]. Now I must say that I agree with my brother Grantham that it would seem almost as if this Act had been passed to sweep away any objection of this kind. Here are a number of people who join together, not for a criminal purpose, but for a purpose which is not legalised. Their joining together is not legalised; that is to say, they are not a company. But the members are nevertheless beneficial owners, and in one of the paragraphs of the case stated for our opinion it is stated that the prisoner was one of a number of beneficial owners, and that the property was laid in the indictment in the members of the club as beneficial owners. It is true that they are not incorporated, and that apart from the actual physical existence of the members they have no legal existence as a company. But it does not follow that because they do not exist as a legal company they have no legal existence as individuals. It has been decided with regard to friendly societies that it did not follow that, because they did not in all respects comply with the law as to such societies at the time, they were not to be treated as if they did not exist at all, and it was put on the ground that they were not criminal associations, and that therefore they could possess property. The moment it was admitted that the argument involved the necessity of admitting that this money belonged to nobody, and that anybody might scramble for it, counsel for the prisoner put himself out of court, and as that is the only objection taken to the conviction, I am of opinion that the conviction was right, and must be affirmed.

MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ. were of the same opinion.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury*.

Solicitor for the prisoner, *M. Banks Newell*, Bradford.

Saturday, Dec. 16, 1893.

(Before LORD COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ.)

REG. v. STEWARD. (a)

Criminal law—Embezzlement—Clerk or servant—Director of company employed to collect moneys on behalf of company—24 & 25 Vict. c. 96, s. 68.

The fact that a person employed to collect moneys on behalf of a company of which he is a shareholder, is also a director of such company does not prevent such person from being convicted

of embezzling moneys collected by him on behalf of the company, as a servant of the company, within the meaning of 24 & 25 Vict. c. 96, s. 68.

CASE stated by the Deputy Chairman of the North London Court of Quarter Sessions, from which it appeared that on the 23rd June 1893 Charles Edward Steward was arraigned before him at the North London Sessions, sitting at Clerkenwell, on an indictment for embezzling 5l., the moneys of Scott and Company Limited, his employers; and that the prisoner had entered into the following agreement with the prosecutors, which was put in evidence, viz.:

Memorandum of agreement made the 1st Nov. 1890 between Messrs. Scott and Company Limited (late Glover and Company Limited), incorporated under the Companies Acts 1862 to 1893 (hereinafter called the company) of the one part, and Charles Edward Steward, of 61, Choumert-road, Peckham, in the county of London, advertisement manager, of the other part. Whereas it has been agreed by and between the company and the said Charles Edward Steward, that the said Charles Edward Steward shall be reappointed, and engaged as manager of the company (whose business is that of advertisement contractors, subject to the conditions and agreements hereinafter contained. Now, therefore, it is hereby agreed as follows:

1. The company hereby agrees to take the said Charles Edward Steward in their employ as manager for a period of twelve months from the eleventh day of November last, and so on from year to year, determinable (subject to the provisions and stipulations hereinafter contained) by either party giving to the other three calendar months notice of such his or their intention to determine the same, at a weekly salary of three pounds ten shillings.

2. The said Charles Edward Steward hereby agrees to continue the post of manager to the said company, at the said salary of three pounds ten shillings per week, and hereby further agrees to devote the whole of his time to the business of the company, and will report daily if required the progress and work done by him, and leave the said report in writing at the offices of the company, No. 36, Southampton-street, Strand, for the secretary or his nominee.

3. That the said Charles Edward Steward shall have at any time within twelve calendar months from the eleventh day of November 1890 the option of purchasing the business of the said company at such a price as may be agreed upon by the directors and shareholders of the company and the said Charles Edward Steward; but should the said company at any time during the said twelve months receive an offer (which the directors and shareholders consider sufficient) from any person or persons, company or companies, to purchase the business of the said company, whether by taking over the business of the said company, or by winding-up the same, and registering another company, or any like matter, the said Charles Edward Steward shall be called upon to exercise his option of purchasing the said business at the same price as that which has been offered; such option to be exercised within one calendar month from the date of the notice to him of the receipt by the company of the offer to purchase the said business, and the amount of the purchase money shall be stated therein. But if the said Charles Edward Steward shall decline or neglect to become the purchaser within the period of one month, he shall notwithstanding be entitled to the three months notice hereinbefore provided for determining his engagement.

4. And lastly it is hereby mutually agreed that, if the said Charles Edward Steward shall devote or employ any of his time for any purpose or business detrimental to the company, or receive or take orders for advertising on behalf of any other advertising contractor or contractors without the consent of the directors of the said company, then the company shall be at liberty to determine or put an end to this agreement by giving one month's written notice to the said Charles Edward Steward, and without any compensation or salary in lieu of the three months notice, and the said Charles Edward Steward shall cease to have any connection with the said company whatsoever.

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

CR. CAS. RES.]

Ex parte EVANS.

[H. OF L.]

As witness the hand of the said Charles Edward Steward and the common seal of the company, the day and year first above written.

CHARLES E. STEWARD, Nov. 25, 1890.

Witness, LYDIA C. GOULD, Book-keeper.

The common seal of the company was duly affixed in the presence of JOHN D. FIGOTT, E. G. DULCKEN, Directors.

The case then stated as follows:

1. It was proved that the prisoner's duties were to canvass for orders for advertising, and superintend the bill-posting, and collect the moneys due to Scott and Co. Limited, and to pay them over to the cashier of the company, as and when he collected them. It was also proved that the prisoner was a director and shareholder of Scott and Co. Limited, and as such director had power to vote on the questions of his own salary and duties, and that he attended the meetings of the board, and took part as a director in the management of the business of the company, and that the prisoner was allowed one guinea a week for travelling expenses by a resolution of the company.

2. It was further proved that at an extraordinary general meeting of the company, held on the 4th June 1892, the prisoner attended as a shareholder, and took part in the discussion as to his own dismissal, and in the other subjects before the meeting, and at the said meeting the prisoner was dismissed by the vote of the shareholders present.

3. At the close of the case for the prosecution the counsel for the prisoner submitted that the prisoner's position and powers, as a director of Scott and Co. Limited, as explained by the above evidence, including the agreement in question, were inconsistent with his being a person employed in the capacity of a servant to the company, within the meaning of sect. 68 of 24 & 25 Vict. c. 96, and asked me to withdraw the case from the jury.

4. I however left the case to the jury, and directed them that, if they were of opinion that the prisoner was in fact employed in the capacity of a clerk or servant by Scott and Co. Limited, the fact that he was a director of that company, as explained by the evidence, including the above agreement, did not in law prevent his being amenable to the above indictment because I held that his appointment as a servant was a distinct and separate office apart from his duties as a director, as evidenced by the above agreement, but reserved the point for the consideration of the Court.

5. The jury found the prisoner guilty, and I admitted him to bail pending the decision of the Court of Crown Cases Reserved.

6. The question for the opinion of the Court is whether, on the facts above stated, the prisoner was rightly convicted.

By 24 & 25 Vict. c. 96, s. 68, it is enacted that,

Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him, for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed.

Vol. LXX., N. S., 1791.

Warburton, on behalf of the defendant, submitted that, inasmuch as the defendant at the time he entered into the agreement with the company was a director of the company, he could not be convicted of embezzlement as a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68; that as a director he represented the shareholders, and was therefore practically the company, and could not employ himself as a servant. In *Reg. v. Waite* (2 Cox C. C. 245) it was held that a clerk of a friendly society who was also a member of the society, being a part owner of the moneys of the society, could not be convicted of embezzlement of the moneys of the society. A clerk or servant within the section must be someone who is under contract to give his whole time to the orders of some other person. He must therefore be a subordinate, and cannot be his own master. There was another section of the Act of Parliament, namely, sect. 81, under which the prisoner could certainly have been indicted for misdemeanour. In *Reg. v. Taffs* (4 Cox C. C. 169) it was argued that a member of a society could still be a clerk or servant to it, if employed in that capacity; but Maule, J. held that the prisoner, being in the position rather of partner than of servant of the society of which he was a member, could not be convicted of embezzlement of the moneys of the society.

R. D. Muir, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—It appears to me that in this case the proper question was left to the jury, and that they have answered it very properly. It is true that the prisoner acted in two capacities, as a director and as a servant of the company. He was a servant, not of himself, however, but of the company. Mr. Warburton was obliged to admit that his argument told equally against every shareholder of the company as against a director, which is a *reductio ad absurdum* of the argument. Here the prisoner was employed outside his functions as a director, and appropriated the money of the company while so employed; the conviction must therefore, in my opinion, be upheld.

MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ. concurred. Conviction affirmed.

Solicitor for the prosecution, W. H. Armstrong.
Solicitors for the prisoner, Wilson and Wallace.

House of Lords.

Thursday, Nov. 30, 1893.

(Before the LORD CHANCELLOR (Herschell),
Lords ASHBOURNE and MORRIS.)

Ex parte EVANS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Quarter sessions—Practice—Court equally divided
—Alehouse Act 1828 (stat. 9 Geo. 4, c. 61), s. 9.

Where, on an appeal from licensing justices, the magistrates composing the Court of Quarter Sessions are equally divided, the decision

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.]

Ex parte GORMAN.

[H. OF L.]

appealed against must be affirmed, for sect. 9 of the Alehouse Act 1828, which provides that questions respecting licences shall be determined by a majority of the justices present, only applies to licensing meetings, not to proceedings at quarter sessions.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from a decision of the Court of Appeal affirming a judgment of the Divisional Court (Mathew and Wright, JJ.) refusing to grant an order *nisi* calling upon the justices of Glamorganshire Quarter Sessions to hear and determine an appeal brought by the appellant against the refusal by the licensing justices of Cardiff to renew his licence. The case is reported in 56 J. P. 488.

The appellant had, up to 1891, been the holder of a publican's licence for a house known by the name of the Princess Royal, situated at Grange-town, Cardiff, and in October of that year the licensing justices of Cardiff refused to renew his licence. The appellant thereupon gave notice of appeal to the Quarter Sessions of Glamorganshire, but only gave notice of his intention to appeal to four out of the twelve licensing justices who had refused his licence. The Court of Quarter Sessions held that the appellant's notice of appeal was bad on that ground, but their decision was overruled by the Queen's Bench Division (affirmed on appeal), who held that it would have been sufficient had the notice been served on the clerk of the licensing justices (*Reg. v. Justices of Glamorganshire*, 66 L. T. Rep. N. S. 444; (1892) 1 Q. B. 621). In consequence of the decision of the Court of Appeal the Court of Quarter Sessions sat to hear the appellant's appeal. The appeal was heard before four justices, and after half an hour's consideration the chairman announced that the court was equally divided. Eventually one of the justices who was favourable to the appellant withdrew, with the result that the appeal was dismissed. The appellant then applied to the Queen's Bench Division for a rule *nisi* calling upon the justices of the Glamorganshire Quarter Sessions to show cause why a writ of *mandamus* should not issue directing them to hear and determine the appellant's appeal, on the ground that where the justices were equally divided in opinion, they were bound to adjourn the case until the court could be differently constituted. The Queen's Bench Division refused the order, and their decision was affirmed by the Court of Appeal. The applicant appealed.

Lawson Walton, Q.C. and Paterson, for the appellant, argued that the case ought to have been reheard before a court differently constituted, and relied upon the provisions of the Act, 9 Geo. 4, c. 61, s. 9, which enacts that licensing questions shall be decided by a majority of the justices present.

At the conclusion of their arguments their Lordships gave judgment as follows:

The LORD CHANCELLOR (Herschell).—My Lords: I agree with the decision of the court below, that the justices in quarter sessions have duly heard and determined the appellant's appeal. In my opinion sect. 9 of the Alehouse Act 1828 (9 Geo. 4, c. 61), requiring questions to be determined by the majority of justices not disqualified who shall be present applies only to general annual licensing meetings, and does not apply to

proceedings at quarter sessions on appeal from licensing justices. That being the case, there is no statutory restriction on the mode in which the Court of Quarter Sessions may give their judgment, and, inasmuch as in this case they have entered judgment affirming the decision of the licensing justices, your Lordships cannot go behind it and inquire how the four justices came to their decision. The practical result of the authorities is, that when justices at quarter sessions are equally divided the judgment appealed from remains in force; for the fact that the justices are equally divided in opinion is equivalent to affirming the decision of the licensing justices; and the withdrawal, in this case, of one of the justices who was in favour of the appeal, made the decision against the appeal all the stronger. Such being the case, I move your Lordships that this appeal be dismissed with costs.

Lords ASHBOURNE and MORRIS concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Riddell, Vaizey, and Smith.*

Nov. 30 and Dec. 1, 1893.

(Before the LORD CHANCELLOR (Herschell),
Lords ASHBOURNE and MORRIS.)

Ex parte GORMAN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Quarter sessions—Practice in licensing appeal—Beerhouse licence—Grounds of refusal—32 & 33 Vict. c. 27, s. 8.

Where licensing justices refused a beerhouse licence without specifying upon which of the grounds mentioned in 32 & 33 Vict. c. 27, s. 8 (which were the only grounds upon which they could act), they did refuse it, as required by the section, and the applicant appealed to the quarter sessions:

Held (affirming the judgment of the court below), that he was not entitled to a renewal of his licence as of course, but that the Court of Quarter Sessions were entitled to go into the merits of the case on the appeal, without further adjournment.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R. Bowen and Kay, L.JJ.) affirming a decision of the Divisional Court (Mathew and Wright, JJ.) refusing to grant an order *nisi* for a writ of *mandamus* addressed to the Glamorganshire Justices of Quarter Sessions to hear and determine an appeal brought by the appellant against the decision of the licensing justices of Cardiff refusing to renew the licence of his beerhouse. The case is reported in 56 J. P. 487.

The case of the appellant was, that his beerhouse was proved and admitted to be one of those houses for the sale by retail of beer to be consumed upon the premises which had been licensed on the 1st May 1869, and had been licensed ever since. By reason of this circumstance the justices had no right to refuse the renewal of the licence except upon one of the four grounds set forth in the 32 & 33 Vict. c. 27, s. 8. The justices refused to renew his licence without stating upon which

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

of the four grounds they did so, and the Court of Quarter Sessions dismissed his appeal on the ground that he had not given due notice of appeal. The Divisional Court, however, thought that the notice of appeal was sufficient, and ordered a writ of *mandamus* to issue to the Court of Quarter Sessions directing them to hear and determine the applicant's appeal. When the appeal came on to be heard before the quarter sessions the appellant showed that the licensing justices had not stated in respect of which of the four grounds they had refused to renew his licence, and contended that the decision of the licensing justices was null and void, and that he was therefore entitled to a renewal of his licence. The quarter sessions overruled his contention and proceeded to hear grounds of objection to the appellant's application. The appellant thereupon took no further part in the proceedings, and the quarter sessions refused to renew the licence on certain grounds. The applicant thereupon applied to the Divisional Court for a *ru'è nisi* for a *mandamus* to the quarter sessions to hear and determine his appeal, but the Divisional Court refused the rule on the ground that the appellant was bound to have taken part in the remainder of the proceedings before the quarter sessions and should have applied for a *mandamus* against the licensing justices. The decision of the Divisional Court was affirmed by the Court of Appeal. The applicant appealed.

Lawson Walton, Q.C. and *Paterson*, for the appellant, argued that the appeal had virtually not been heard by the quarter sessions. The proceedings of the licensing justices were informal (*Ex parte Sykes*, 33 L. T. Rep. N. S. 566; 1 Q. B. Div. 52; *Ex parte Smith*, 3 Q. B. Div. 374), and the licence was improperly refused; but, if the Court of Quarter Sessions chose to rehear the whole case *de novo*, they were bound to give the appellant notice of the legal grounds of objection, and to adjourn the case to give him time to answer them.

At the conclusion of their arguments their Lordships gave judgment as follows:

The LORD CHANCELLOR (Herschell).—My Lords: I am of opinion that this appeal must be dismissed. This is a case in which the appellant was refused a renewal of his licence, but it was not stated that it was on one of the four grounds on which alone licensing justices are entitled to refuse licences. He appealed to the quarter sessions, and there took the objection that inasmuch as no legal ground had been stated for the refusal, the justices were bound to grant his licence as of course. The Court of Quarter Sessions refused to do this and said that, as there had been notice of objections to the licence before the licensing justices on several grounds, they would hear evidence on those objections. But at that point the appellant withdrew from the court, and took no further part in the proceedings, and he now says that he is entitled to a *mandamus* on the ground that all that went on up to the point when the justices gave judgment must go for nothing, and that the proceedings must begin *de novo* at the quarter sessions, and that he must have notice of the objections taken before the court in order that he may have an opportunity of answering them, before they can entertain his appeal. This course the Court of Quarter

Sessions refused to adopt, and, after hearing evidence, they refused the renewal. That, in my opinion, they were quite justified in doing, and I think that they have adopted the proper course. Upon these grounds, therefore, I move your Lordships that the appeal be dismissed with costs.

Lords ASHBOURNE and MORRIS concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Riddell, Vaisey, and Smith*.

Judicial Committee of the Privy Council.

Saturday, June 24, 1893.

(Present: The Right Hons. Lord WATSON, Sir RICHARD COUCH, Sir FRANCIS JEUNE, and GEORGE DENMAN.)

THE UTOPIA. (a)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR

Collision — Sunken wreck — Lights — Harbour authority — Maritime lien — Wrecks Removal Act 1877.

Where the harbour authority of the port of G. undertook and paid for the lighting of a sunken wreck, of which her owners continued in possession and eventually raised, and in consequence of the lighting being inefficient another vessel collided with the wreck, her owners were held not liable for the collision, the control and management of the lighting of the wreck having been undertaken by the harbour authority, and the owners having been guilty of no negligence:

Held further, that in the circumstances no maritime lien attached to the wreck so as to render it liable to make good the damage done to the other ship.

The Bywell Castle (41 L. T. Rep. N. S. 747; 4 P. Div. 219; 4 Asp. Mar. Law Cas. 207) approved.

THESE were cross-appeals from the decision of the Vice-Admiralty Court of Gibraltar in two consolidated collision actions by which the Chief Justice held both ships to blame.

The collision occurred in Gibraltar Bay on the 31st March 1891 between the s.s. *Primula* and the wreck of the s.s. *Utopia*.

At the time of the collision the screw-steamship *Primula* was entering Gibraltar Bay at about 8 p.m. when the look-out suddenly saw and reported the mast and funnel of a sunken wreck on the starboard bow and about fifty yards away. The *Primula* was at this time drifting, but her engines were at once put full speed ahead and her helm was hard-a-starboarded, but before she had time to answer she struck the wreck, which proved to be the s.s. *Utopia* sunk on the 17th March.

The witnesses on behalf of the *Primula* alleged that the wreck was not lighted, that there were no lights in the vicinity to indicate the position of the wreck. They also alleged that they executed the best manœuvre by putting their engines ahead, and that they could not go astern, as there was a steamer close behind following them in.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

PRIV. CO.]

THE UTOPIA.

[PRIV. CO.]

It appeared that after the *Utopia* was wrecked on the 17th March her owners continued to light and watch her until the 21st, when the captain of the port, thinking that she was not properly lighted, assumed the task and hired a hulk and the necessary lights for this purpose. On the 23rd March the hulk was moored in position on the port side of the wreck, and men were placed in charge of her to see that the necessary lights were duly exhibited. The port authorities paid for the hulk and the lighting.

Evidence was called at the trial on behalf of the *Utopia* to prove that the lights required by the Board of Trade Regulations were exhibited and burning on the hulk at the time of and before the collision, and that proper indications were given to the *Primula* of the position of the wreck. The owners of the *Utopia* continued in possession of her while she was lying sunk, and eventually raised her.

The Chief Justice tried the case with the assistance of assessors, and found both ships to blame; the *Utopia* because her lighting was deficient and improper, and that her owners were responsible therefor; the *Primula* because on seeing the wreck she had set her engines ahead and not reversed them.

By Order in Council dated the 2nd Feb. 1884:

Except in respect of matters which now are or hereafter may be provided for by any Order in Council or local ordinance for the time being in force in Gibraltar, or by any Act of Parliament expressly or by necessary inference extending to Gibraltar, or by any proclamation, or by any instrument issued under the authority of such Order in Council, local ordinance, or Act of Parliament, the law of England as it existed on the 31st day of Dec. 1883 shall be hereafter in force in Gibraltar so far as it may be applicable to the circumstances thereof.

By the Port Order in Council, Gibraltar, the 3rd April 1886:

12. It shall be lawful for the captain of the port from time to time to make, and when made to alter and revoke, all such regulations in writing as he may deem expedient for the government and use of the port and harbour of Gibraltar, and of all ships, hulks, and boats being therein.

23. If any ship, hulk, or boat shall from any cause be sunk in the port or harbour of Gibraltar, and the owner or master thereof shall fail to remove the same within fourteen days or within such further notice as the captain of the port may fix after such owner or master shall have been required in writing by the captain of the port so to do, it shall be lawful for the captain of the port to remove such ship, hulk, or boat, and the expense of such removal shall be repaid to the owner or master thereof, and in default of payment the captain of the port may recover the same as a penalty under this order; or the captain of the port may sell such ship, hulk, or boat, and out of the proceeds of the sale pay such expenses, rendering the overplus, if any, to the owner or master on demand.

The Wrecks Removal Act 1877 (40 & 41 Vict. c. 16):

Sect. 4. Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such position as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove, or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal, or destruction thereof, and may sell in such manner as they think fit any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may out of the proceeds of such sale reimburse themselves for the expenses incurred by

them under this Act, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto.

Finlay, Q.C. and *Aspinall, Q.C.* (with them *Butler Aspinall*), for the owners of the *Utopia*, in support of their appeal.—The judge in the court below was wrong in holding the owners of the *Utopia* in fault. After the port authority had taken the lighting out of their hands, their responsibility was at an end. The lighting was in fact efficient; but, even assuming it to be otherwise, the owners of the wreck could not interfere with the manner in which the port authority discharged its duties:

Brown v. Mallett, 5 C.B. 599;

White v. Cresp, 10 Ex. 312;

The Douglas, 47 L. T. Rep. N. S. 502; 7 P. D. 151;

5 Asp. Mar. Law Cas. 15.

The captain of the port had authority to undertake the lighting of the wreck. The fact of a collision does not necessarily give rise to a maritime lien, and as in the present case the owners of the wreck were guilty of no negligence, the ship is not liable to answer the claim of the owners of the *Primula*:

The Castlegate, (1883) App. Cas. 52; 7 Asp. Mar.

Law Cas. 284; 68 L. T. Rep. N. S. 99.

The *Primula* was alone to blame. A cardinal rule of navigation is, that where there is risk of collision a vessel should stop her way. The *Primula* in fact increased her speed and so caused the collision.

Cohen, Q.C. and *Raikes*, for the owners of the *Primula, contri.*—The *Utopia* is alone to blame. At the time of the collision the *Utopia* had not been abandoned by her owners. She was still their property, and was under their control. It was their duty to see that the persons who were lighting her did so efficiently. A maritime lien attached to the *Utopia* in respect of this collision, and if so, she is answerable to make good the damage done to the *Primula*:

The Ticonderoga, Swa. 215;

Fletcher v. Braddick, 2 B. & P. 182;

Hoagkinson v. Fernie, 2 C. B. N. S. 415.

The judge was wrong in holding the *Primula* to blame for her action with her engines. In fact she did the best and only thing she could, having regard to the fact there was a vessel close astern of her. Even assuming the court should think her action was wrong, the fault was excusable. Her master had not sufficient time to determine on the best course, and had to act on the spur of the moment:

The Byrcell Castle, 41 L. T. Rep. N. S. 747;

4 P. D. 219;

Aspinall, Q.C. in reply.

Cur. adv. vult.

June 24.—Judgment was delivered by Sir FRANCIS JEUNE.—These are appeals from the decisions of the Chief Justice of Gibraltar, in two consolidated actions, the first being brought by the owners of the steamship *Utopia*, against the owners of the steamship *Primula* and freight; the second being brought by the master of the *Primula*, against the *Utopia*. The case arose out of a collision occurring between the *Utopia*, which was lying sunk in Gibraltar Bay, and the *Primula* entering that bay at about 8 p.m. on the 31st March 1891. The *Utopia* had been sunk by the collision with Her Majesty's ship *Anson*, on the 17th March, at a spot about a quarter of a mile

PRIV. CO.]

THE UTOPIA.

[PRIV. CO.]

N.-by-E. of the extremity of the New Mole, and thereafter lay with her hull submerged, but her two masts, her yards, and her funnel above water, the masts being immersed only to the extent of about fifteen feet, and the funnel proper not at all. From the 17th to the 23rd March the wreck was lighted by her owners, a light being hoisted at each masthead. The acting captain of the port of Gibraltar then complained to the managers for the owners of the *Utopia* that the lights were not sufficient and were not properly looked after, and gave an order to William Adair, a boarding officer, to have a hulk moored in the vicinity of the wreck, in order to warn vessels in accordance with the Board of Trade Regulations. These instructions are in No. 28 of the Board of Trade Regulations, and are as follows: "In England and Ireland, wherever a light vessel or other craft is anchored, to mark the position of a wreck, the top sides will be coloured green, and she will be further distinguished by day by three balls placed on a yard twenty feet above the sea, two balls (vertically) on the side on which navigating vessels may safely pass, and one on the other by night by three fixed white lights similarly arranged and with the same meaning. These marking vessels, when so employed and fitted, will not show the ordinary siding light." Mr. Adair, in pursuance of this order, agreed with the owner of a hulk that she should be placed near the wreck, in position, and exhibiting the lights, described in these instructions. On the 23rd March the hulk was accordingly anchored on the port side of the wreck, with four shackles to S.W., and four to N.E., by the bows on a swivel. In this position the hulk swung with the tide, and when swung stern on was about thirty fathoms from the wreck. It was the duty of those employed to see that, when the vessel swung, the yard was braced round, so as to preserve the position of the lights relatively to the wreck. The expense of this hulk was defrayed by the port authorities. It is not necessary to refer at any length to the mode of lighting the wreck, or to the way in which the instructions to the owners of the hulk were carried out by the men employed by them for the purpose. Evidence was given on behalf of the *Primula*, that only two lights were visible on board of the hulk before the collision, for which some time afterwards three lights were seen to be substituted, and that in consequence those on board of the *Primula* were ignorant that they were approaching the *Utopia* till they saw her masts and funnel, and so came into collision with her. On the other side was called Manuel Cruz, one of the men on board the hulk, who said that the lamps were of the proper number, and in the proper position. It is clear, however, that the evidence of this witness was not accepted by the learned judge in the court below, for he has found that it probably was the case that on the night of the collision the duties of the light-keepers on board of the hulk were very inefficiently performed. Their Lordships see no reason to doubt the correctness of this opinion, and they think it must be taken to be the case that, owing to the neglect on the part of those employed by the acting captain of the port, that is to say, the port authority, the position of the wreck was insufficiently indicated, and that in consequence those in charge of the *Primula* were misled, and had no notice from lights of the position or

existence of the wreck. The first question which is raised in this appeal is, whether the owners of the *Utopia* are liable to the owners of the *Primula* for the damage sustained by the *Primula* in the collision, by reason of this insufficient lighting of the *Utopia*. The learned judge in the court below has held that the owners of the *Utopia* are liable, because they remained in possession of the wreck, and on them alone rested the responsibility of taking every means in their power to secure ships entering the harbour from the danger of collision with her. Their Lordships think that the law applicable to this case may be gathered from three authorities, which their Lordships do not regard as being in conflict. The first of these cases is that of *Brown v. Mallett (ubi sup.)*, which was decided on demurrer, and in which the question being whether in the absence of an allegation that the possession and control of a vessel, after she had foundered, was in the defendants, an obligation to protect other vessels against injury was imposed on them. That question was answered in the negative. It is to be observed that what was laid down was, and was only, that "this duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel." The case does not define exactly what is meant by possession and control, nor does it throw light on what constitutes reasonable skill and care in circumstances such as those of this case. In the case of *White v. Crisp (ubi sup.)*, also decided on demurrer, the pleader alleged a transfer of the vessel, and that the transferees had and exercised, at the time of the happening of the injury, possession, control, management, and direction of the vessel. It was held that they were liable. But the Court, in giving judgment, defined their understanding of the allegation that the defendants had and exercised possession, control, management, and direction of the vessel, to be that "the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury," and added that, "if these words do not mean this, we think there was no liability on the part of the defendants." It is clear, therefore, from this case that, to the extent to which the owners have properly parted with the control and management of their vessel, their liability ceases. The case of the *Douglas (ubi sup.)*, decided in the Court of Appeal, is very similar to the present. There the steamship *Douglas* was by the fault of those on board of her sunk in the Thames. The vessel was never abandoned, but the master and mate took steps to inform the harbour master, and the mate was told that the harbour master undertook to light the wreck. The steamship *Mary Nixon* collided with the *Douglas* six hours after she sank, and it appears to have been assumed, and indeed would seem clear (although it was suggested before their Lordships that there was no negligence in anyone), that the harbour master might have taken, but did not take, steps to light the wreck. It was held by Sir Robert Phillimore, on the authority of *White v. Crisp (ubi sup.)* and *Brown v. Mallett (ubi sup.)*, that the "possession, management, and control of the *Douglas* was not abandoned by her master and crew," and that the owners were therefore liable. On appeal this decision was reversed, on the ground that, inas-

Priv. Co.]

THE UTOPIA.

[Priv. Co.]

much as notice was given to the harbour master, the defendants were not guilty of negligence. It may be observed also that, in the opinion of Cotton, L.J., the defendants had in fact for the time abandoned the control of the wreck. The result of these authorities may be thus expressed: The owner of a ship, sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her, or to protect other vessels from coming into collision with her. It is equally true that, so long as, and so far as, possession, management, and control of the wreck be not abandoned, or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But, in order to fix the owners of a wreck with liability, two things must be shown: first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned or legitimately transferred; and secondly, that they have, in the discharge of their legal duty, been guilty of wilful misconduct or neglect. In the present case the *Utopia* was certainly not abandoned by her owners, in the sense that they gave up all rights of property and possession in her. On the contrary, they no doubt always intended to raise her if they could, and in fact, either before or soon after the collision with the *Primula*, they commenced the construction of a coffer dam, and by its means eventually recovered the vessel. It is clear, however, that before the collision with the *Primula* the port authority of Gibraltar, represented by the acting captain of the port, took from the owners, and itself assumed the task, of protecting other vessels from the wreck, by means of the signals which it directed to be employed for the purpose. The owners of the *Utopia* yielded to the action of the port authority, and thenceforward stood aloof from the operation of lighting the wreck. In these circumstances it appears to their Lordships that the control and management of the wreck so far as related to the protection of other vessels from her, and of her from them, was properly transferred to the port authority. Further, their Lordships are unable to see how any part of the conduct of the owners of the *Utopia* can lay them open to a charge of negligence. Neither in allowing the port authority to take on itself the control of the lighting, nor in abstaining from interfering with the subsequent action of the port authority in the matter, do their Lordships think that any default can be imputed to them. It would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority, constituted for such purposes, to ensure the safety of other vessels navigating those waters. Their Lordships do not desire to indicate any doubt whether the port authority of Gibraltar had legally power to deal with the protection of sunken vessels; but they do not think it necessary to inquire into the precise legal foundation of such power. The action taken by the port authority was certainly within the apparent scope of its powers, and it would be impossible to hold that the captain or owners of a vessel entering port were bound, under pain of being held liable for the acts of the port authority, to inquire into the sources

of its legal power before rendering obedience or deference to it. It was suggested in argument that, as the action against the *Utopia* is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law, now well recognised. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners or their servants causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved, no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed. In the recent case of *The Castlegate* (*ubi sup.*), in the House of Lords, language used by the present Master of the Rolls, in the case of *The Parlement Belge* (5 P. D. 197; 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. N. S. 273), which expresses the above view, was quoted with an approval which their Lordships desire to repeat. The second question in this case relates to the conduct of the *Primula*. The learned judge in the court below, guided in part by the expert evidence called before him, has held that the captain of the *Primula*, by putting his engines full speed ahead, and his helm hard-a-starboard, contributed to the collision. The account given by the master of the *Primula* of the circumstances, and of his action, is as follows: "Passing New Mole Head, saw vessel with two lights on our port bow, nearly ahead; took them for ship's anchor lights; took it to be one on each masthead; came on, sometimes stopped, and sometimes moving engines to steer; nothing reported to me passing New Mole Head; look-out man hailed there was something on starboard bow about five minutes before collision; engines not moving then; ship drifting; I observed funnel, mast, and yard above water on starboard bow about fifty yards away; no lights on them, two points on starboard bow (funnel); put engines full speed ahead for five or six turns, and put helm hard-a-starboard; if I had ported, I should have gone amidships; should not have cleared her; after the turns I stopped engines; if I had gone astern, I should have struck steamer amidships just the same; could not go astern, as there was another steamer astern of me also coming in; I think stem of the *Utopia* was visible above water, but that night could see nothing but masts, and funnel; there was nothing whatever to indicate her position." The accuracy of this statement appears to have been doubted by the learned Chief Justice on one point only, that relating to the ship alleged to be following the *Primula*. Having regard to the fact that the express statement of the master of the *Primula* on this point is corroborated by his crew, is contradicted only by the occupant of the hulk, whose statement as to the lights cannot be accepted, and was not challenged in cross-examination at a time when it would have been possible to have sought for further corroborative evidence, their Lordships are not prepared to reject the assertion of the master of the *Primula* that there was a vessel close astern of him which impeded

CT. OF APP.]

Re THE BOROUGH COMMERCIAL AND BUILDING SOCIETY.

[CT. OF APP.]

his going astern. It may be added, that the learned judge has found, in their Lordships' opinion correctly, that the tide was half ebb and the wind northerly. The question is one of seamanship, and it is in their Lordships' opinion a question of seamanship in circumstances of instant peril. They think that the master of the *Primula* is entitled to pray in aid this latter circumstance in the consideration of his conduct, on the principles approved by the Court of Appeal in the case of *The Bywell Castle* (*ubi sup.*). Their Lordships do not think it necessary to examine the expert evidence in the court below, inasmuch as they have the assistance of skill assessors. Taking the facts and circumstances to be as above stated, they have requested their assessors to advise them whether the captain of the *Primula*, in pursuing the course he adopted, acted with that care and skill which might reasonably be expected of a competent navigator, and they are advised without hesitation that he did so act. This advice their Lordships think it right to adopt. Their Lordships therefore think that the appeal of both parties should be allowed, that the decree of the court below should be reversed, and both actions dismissed, and that each party should bear their own costs of this appeal and in the court below. They will humbly advise Her Majesty accordingly.

Solicitors for the appellants, *Clarkson, Greenwells, and Co.*

Solicitors for the respondents, *Clarkson, Damant, and Toovey.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Dec. 6, 1893.

Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re THE BOROUGH COMMERCIAL AND BUILDING SOCIETY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Costs—Taxation—Agency charges—London agents of country firm—London firm having common partners with country firm—Rules of Court 1883, App. N., Costs, r. 119.

In taxing a bill of costs, certain agency charges for work done by a London firm of solicitors, as agents for a country firm, were disallowed. Two of the partners in the country firm were also partners in the London firm, and held certificates for practising in London as well as in the country.

Held, that, it having been the long-settled practice of the taxing masters not to treat cases of two firms having certain partners in common as agency cases at all, the court could not disturb that practice; and that the charges were properly disallowed.

Decision of Williams, J. affirmed.

A SUMMONS was taken out by the voluntary liquidator in the winding-up of the above-named society, against S. Wood, an alleged contributory

of the society, for payment by him of a call of 5l. per share.

The summons was refused, with costs, to be paid by the liquidator personally.

The order having been completed, Wood's costs were duly carried in for taxation by Ramsden, Radcliffe, and Co. (a London firm of solicitors) as agents for Ramsden, Sykes, and Ramsden, a firm of solicitors practising at Huddersfield, who were acting for Wood there.

The firms of Ramsden, Radcliffe, and Co. and Ramsden, Sykes, and Ramsden, each consisted of three partners. The two Messrs. Ramsden were partners in both firms, and held certificates for practising in London as well as in the country.

In taxing the bill of Wood's costs, the taxing officer declined to allow certain items, viz., charges for close copies and a term fee, on the ground that, though these charges were proper agency charges in a case in which agency charges ought to be allowed, yet Ramsden, Radcliffe, and Co. were not entitled to agency charges, having regard to the long-settled practice in the Chancery Division not to allow agency charges in a case in which a London firm had a common partner or common partners with a country firm; and that they were to be treated as being themselves "properly concerned" as principals, inasmuch as the London firm and country firm had each two common members.

The registrar upheld his taxing clerk's decision and issued his certificate accordingly.

A summons to review the taxation was taken out, but was dismissed by the judge in chambers, and subsequently, on the 22nd Nov. 1893, by Williams, J., in court. His Lordship expressed a strong opinion that these costs ought to be allowed, but did not feel himself at liberty, being comparatively new to Chancery practice, to disregard what was represented to him as being, and having long been, the practice of the Chancery taxing masters, viz., not to treat cases of two firms having a common member as agency cases at all. From that decision Wood now appealed.

The liquidator did not appear on the hearing of the appeal.

R. W. Harper for the appellant.—The charges objected to by the registrar are proper agency charges, and ought to have been allowed. The practice of refusing to consider cases of this kind as agency cases may exist among the taxing masters, but it is one which has not a sound and proper foundation, and Charles, J. in a case which came before him in Dec. 1891 declined to follow it. [The case is unreported, but the papers relative thereto were handed to the court.] He also referred to Rules of Court 1883, Appendix N., Costs, r. 119.

LINDLEY, L.J.—We have seen Mr. Ryland, who knows as much about these things as anyone, and he tells us that the practice of the taxing masters is, that cases of two firms of solicitors with a common partner are not regarded as agency cases at all. That being so, it is a serious matter to ask us to interfere—to upset a practice which has been established fifty years. And the practice is not a whim of the taxing masters, but is one which has sprung up from the common law doctrine which prevents one firm from suing another where there are common partners; the same person cannot be both principal and agent. I do not

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

think it is possible for us to run counter to the practice. The charges in question are acknowledged as being proper agency charges if the court should hold that the relation of agency existed, but this class of case has never for forty or fifty years been considered as one of agency at all. A person cannot be principal and agent at the same time. That has been recognised by the law up to recent times—until recently it has been made allowable that one firm should sue another, although consisting partially of the same members. Rule 119, which has been referred to, was intended to apply to cases which are agency cases, and was not intended to mean that costs of close copies should be allowed in non-agency cases, and does not apply to the present case. If a change in the practice is to be made, the proper way for it to be done is, not through us sitting here judicially, but by means of the Rule Committee. The appeal must be dismissed.

SMITH, L.J.—That the charges in question are properly agency charges, if an agency exists, no one disputes. The question, then, is, did an agency exist? For half a century it has been the practice that where there are common partners in two firms one firm cannot be considered the other's agents. That answers and settles the question to my mind. But then it is said that rule 119 comes in. But I reply that that rule only means close copies in cases where agency does exist, and not where agency does not exist. The decision of Charles, J., which has been brought to our notice, does seem to run counter to the established practice, and I do not think he was right. If the practice is to be changed at all, it must be by the Rule Committee.

DAVEY, L.J.—It is impossible for us to overrule the practice which has so long existed, even though one may dislike being bound by that which does not commend itself to one's mind. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ramsden, Radcliffe, and Co.*, agents for *Ramsden, Sykes, and Ramsden*, Huddersfield.

Tuesday, Dec. 12, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

HOLE v. THE CHARD UNION. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Action to restrain nuisance—Continuing cause of action—Injunction—Inquiry as to damages—Assessment of damages down to date of chief clerk's certificate—Order XXXVI., r. 58.

A continuing cause of action, in respect of which damages can be assessed down to the time of the assessment, within the meaning of Order XXXVI., r. 58, is a cause of action which arises from the repetition of a series of acts of the same kind as that for which the action was brought; the object of the rule being to prevent the necessity of bringing repeated actions in respect of repeated acts of the same nature.

Decision of Chitty, J. affirmed.

THIS action was brought by T. T. Hole, the owner of a house and lands at Moorlands, in the county

of Somerset, against the guardians of the poor of the Union of Chard, who were the sanitary authority of the district, to restrain them from polluting a stream which ran through the plaintiff's land and past his house, by allowing sewage and refuse to flow into the stream so as to be a nuisance to the plaintiff.

The writ was issued on the 23rd Nov. 1888. In May 1889 the plaintiff died, and the action was afterwards revived and continued by the devisees under his will.

On the 25th Feb. 1890 Chitty, J., before whom the action was tried, gave judgment in favour of the plaintiffs, granting a perpetual injunction to restrain the defendants from permitting the sewage and refuse to pass into the stream so as to cause a nuisance to the plaintiffs; and he further ordered an inquiry what damages the plaintiffs had sustained from the date of the death of the original plaintiff T. T. Hole by reason of the nuisance committed by the defendants; the costs of the inquiry to be reserved, with liberty to all parties to apply. But the operation of the injunction was suspended for six months, namely, till the 25th Aug. 1890.

The defendants made some alterations in their works in order to purify the sewage and refuse before the same passed into the stream, but did not succeed in abating the nuisance in a manner satisfactory to the plaintiffs. The consequence was, that the plaintiffs were unable to let or sell the house and land, and sustained thereby considerable loss.

They accordingly moved for a writ of sequestration against the defendants after the six months had expired.

The motion stood over from time to time, and eventually, on the 22nd Jan. 1892, the Court, with the plaintiffs' consent, dismissed the motion, but ordered the defendants to pay the costs of it.

On the 24th July 1893 the chief clerk made his certificate, by which he assessed the damages sustained by the plaintiffs down to the date of the certificate at 2000*l.*

The defendants took out a summons to vary the certificate, which came on to be heard before Chitty, J. on the 1st Nov. 1893, when the following judgment was delivered:

CHITTY, J.—This is a summons to vary the chief clerk's certificate in answer to an inquiry as to what damages the plaintiffs have sustained from the date of the death of their testator by reason of the nuisance committed by the defendants, and in respect of which a certain injunction was granted. The first question is, during what period the damages ought to run. The commencement is limited by the order from the date of the testator's death; but the order does not go on to say when it is to terminate. The general practice is, that where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment. That is under the 58th rule of the 36th order. No doubt some time has elapsed since this judgment was made; but still, if there has been any delay, either party might have forced the other on, and the rule, it appears to me, is to apply. There is a continuing cause of action, and consequently the chief clerk would be right in assessing damages down to the date of his certificate. Unquestionably, however, it is neces-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

sary to show that the cause of action—that is, in this case, the nuisance of polluting a stream by sewage—was going on. And the point has been raised by the defendants as to whether there was any evidence at all that it was going on after a particular date; that is to say, after the date up to which Mr. Farwell admitted that the defendants were liable, namely, six months after the date of the judgment, which was the time allowed by way of indulgence to the defendants to put their works in order, and to so abate the nuisance. I am of opinion that I cannot take that date as the date at which the nuisance ceased. That is a question of fact, and it appears to me, on the evidence, that the nuisance did continue down to the time when the chief clerk made his certificate. I do not mean that the nuisance was going on hour by hour and day by day, or even week by week, or that it was as bad as it was during some of the periods that are covered by the evidence at the trial. Nuisances of this kind are not nuisances, as I have said during the argument, that are occurring at all times. In a sense they are continuing, and the nuisance amounts to a discomfort to the inhabitants of the house—not perhaps in cold weather, not in weather when floods are coming down and when the sewage is carried off without any perceptible smell or the like, but at certain seasons of the year, generally during hot weather, discomfort is caused. Now, I do not pretend to go minutely into the question as to what extent this nuisance was continuing during this time, nor exactly how many days are covered by it. But I think a reasonable conclusion upon the evidence is that the nuisance was continued down to the time of the certificate. Now, that will give, speaking roundly, a period of four years, and the damages, therefore, would be in respect of the loss sustained by the plaintiffs during that period of time. Now, in this case the defendants did not commit this nuisance maliciously. There is no ground for imputing anything of the kind. There is no ground for giving vindictive damages; the measure of damages in this case is certainly the ordinary one, compensation for the loss that “naturally and reasonably arises from the defendants’ wrongful acts.” That is the way in which it has been stated, and I do not know that any attempt to improve upon that method of stating the law would be of any avail. The difficulty in this case is to apply the rule fairly, and it is, of course, of great importance, on the one hand, not to give by way of damages losses that might be of a sentimental nature, or such as flow too indirectly or remotely from the acts of the wrong-doer. Within some limits the line has to be drawn as to what damages directly flow from the act. Now, of course, I need hardly say that there is no distinction in assessing damages in the Chancery Division and in the Queen’s Bench Division, and I really regret in this case that formal particulars of damages were not asked for and given. Particulars of damages tend to limit the course of the inquiry and bring matters to a point. But in this case there have been affidavits, and I have expressed my dissatisfaction that they are rambling as it were over the case, not specifying the heads of damages in the way it is done in the ordinary common law action so that the attention of parties and of their advisers may be directed to those points. Now, in this case Mrs. Hole, who is

one of the plaintiffs and who happens to be the tenant for life under the will of her husband, has made an affidavit, and she certainly in one paragraph has set out what appear to be particulars of damage. Of course, particulars of damage may be given not in the ordinary form, but may be given in an affidavit. But I must say that these particulars are not well framed. I am not desirous of throwing any unnecessary blame on either party, but the advisers were certainly not sufficiently alert in framing particulars on the one side in this loose way, while on the other side they might have asked for better particulars than these. They are not called by the plaintiff herself “particulars,” but in the affidavit of her solicitor they are referred to as particulars. I am not going, however, to send this case back again on any technical grounds; nor am I asked to do that. The plaintiffs and the defendants are desirous of making an end of this case. And I am asked, therefore, now to do what I intend to do, namely, assess the damages myself, having regard to the evidence generally, not holding the plaintiffs too strictly bound by these particulars, for I need not say with regard to some heads that they are altogether idle, and that no evidence has been put forward in support of them. Now, having said thus much, I will descend into such details as I think it necessary to mention. [His Lordship then stated the facts of the case, and discussed the evidence as to the damages caused to the plaintiffs, ultimately coming to the conclusion that the amount of such damages ought to be reduced to 1150*l.*, which sum his Lordship ordered the defendants to pay to the plaintiffs, together with the costs of the inquiry. The chief clerk’s certificate was varied accordingly.]

From that decision the defendants now appealed.

Cozens-Hardy, Q.C. and *Farwell*, Q.C. (*R. Cunningham Glen* with them) for the appellants. —We submit that the damages were assessed by the chief clerk on an erroneous principle, and that his certificate should be varied. The rule on which he proceeded was Order XXXVI., r. 58, which provides that where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the date of assessment. But there was no continuing cause of action in this case. Every day that the nuisance complained of continued after the time that the injunction came into operation there was a fresh cause of action. The nuisance was caused by fresh acts of the defendants, not by the acts done before the writ was issued. Therefore the damages should have been assessed only down to the date of the judgment, or, at all events, to the end of the six months during which the injunction was suspended:

Whitehouse v. Fellows, 10 C. B. N. S. 765, 779.

If the plaintiffs really suffered damage after that date, their proper remedy was either by bringing a fresh action, or by sequestration for breach of the injunction. We also contend that the damages have been calculated on a false system, and are extravagant in amount.

Byrne, Q.C. and *Bunting*, for the respondents, contended that the cause of action was a continuing one, and that the damages were properly estimated. [They were stopped by the Court.]

Cozens-Hardy, Q.C. replied.

CT. OF APP.]

Re ELCOM; Re HAMILTON; LAYBORN v. GROVES-WRIGHT.

[CT. OF APP.]

LINDLEY, L.J.—The principal question raised by this appeal is whether the damage sustained by the plaintiffs since the judgment for an injunction came into operation is to be taken into account in assessing the damages in the action. The nuisance complained of is the pollution of a stream flowing through the plaintiffs' land by the discharge into it of sewage and refuse by the defendants. Chitty, J. has granted an injunction restraining the defendants from permitting sewage and refuse to pass into the stream so as to cause a nuisance to the plaintiffs, and he further ordered an inquiry what damages the plaintiffs had sustained from the date of the death of the original plaintiff by reason of the nuisance committed by the defendants; and he suspended the injunction for six months, that is, till the 25th Aug. 1890. The question raised on this appeal is, what are the damages since the death of the original plaintiff to which the plaintiffs are entitled? That depends upon the construction of Order XXXVI., r. 58. Chitty, J. having directed an inquiry as to damages, the chief clerk has assessed the damages down to the time of his certificate. The question is, whether he was justified in taking account of damage sustained by the plaintiffs since the date of the grant of the injunction, or rather since the 25th Aug. 1890, the date when it came into operation. It is contended on behalf of the defendants that it was not right in principle to do this, because any nuisance committed after the date when the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action in respect of which the damages could be assessed down to the date of assessment under Order XXXVI., r. 58. What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of a series of acts of the same kind as that for which the action was brought. In my opinion that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated acts of the same nature. To adopt the argument of the defendants would be to render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of the acts of the same kind as had been investigated at the trial, and had been decided to be a nuisance. The judge was therefore right in treating it as a continuing cause of action and in assessing the damages down to the date of the chief clerk's certificate. [His Lordship then considered the question of the amount of damages, and gave his opinion that they were correctly calculated. The appeal was therefore dismissed with costs.]

SMITH, L.J.—The principal question in this appeal turns upon the construction of Order XXXVI., r. 58. It is contended by the appellants that, when the act on which an action is brought is established, the cause of action has reference to that one act and no other. In my opinion that is not so. If once a cause of action arises, and the acts complained of are repeated, the cause of action continues and goes on *de die in diem*. It seems to me that the plaintiffs in the present case have not

exhausted their cause of action. There was a connection between the two series of acts before and after the action was brought. They were repeated in succession and became a continuing cause of action. They were an assertion of the same claim, namely, a claim to continue to pour sewage into the stream. Therefore, in my opinion, there was a continuing cause of action within the meaning of the rule.

DAVEY, L.J. concurred.

Appeal dismissed.

Solicitors for the appellants, *Vandercom, Hardy, Oatway, and Doulton.*

Solicitors for the respondents, *Walker and Battiscombe*, agents for *Partridge and Cockram*, Tiverton.

Dec. 12 and 13, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re ELCOM; Re HAMILTON; LAYBORN v. GROVES-WRIGHT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Married woman—Reversionary interest in personality—Will executed before and codicil executed after Act—Disposition by deed acknowledged—Malins' Act (20 & 21 Vict. c. 57).

A testatrix, by her will made before the 31st Dec. 1857, the date of the coming into operation of Malins' Act (20 & 21 Vict. c. 57), bequeathed her residuary personal estate, after payment of the legacies thereinbefore bequeathed, or which she might bequeath by any codicil, upon certain trusts under which H., a married woman, took a reversionary interest therein. After the 31st Dec. 1857 the testatrix made a codicil, which was expressed to be a codicil to her last will and testament, and by such codicil she bequeathed additional pecuniary legacies to other persons. H., by a deed, duly acknowledged in accordance with the Act, purported to assign her reversionary interest under the will to a purchaser.

Held, that H. did not become entitled to the reversionary interest "under any instrument made after the 31st Dec. 1857," within the meaning of the Act; and that consequently the deed of assignment executed by her was not effectual to pass the property.

Decision of Chitty, J. affirmed.

LOUISA ELCOM, by her will, dated the 13th March 1856, after bequeathing certain legacies as therein mentioned, devised and bequeathed all the residue of her real and personal estate to William Lloyd Birkbeck and Edward Basil Jupp, her executors and trustees therein named, upon trust to sell, call in, and convert the same into money, and to stand possessed thereof, upon trust to pay her debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed, or which she might bequeath by any codicil to that her will; and, after directing the payment of certain further legacies, the testatrix directed her trustees to invest the residue of her estate in the manner therein mentioned, and to pay the annual produce thereof unto Harriet Wright for her life; and from and immediately after the decease of Harriet Wright the testatrix declared that the trust funds and annual produce thereof should be in trust for

(a) Reported by G. W. KING and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

all or any the children and child of Harriet Wright who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, and be divided between or among them, if more than one, in equal shares. And the testatrix thereby directed and declared that the several pecuniary legacies thereinbefore bequeathed to such person or persons as was, were, or should be a married woman or married women should be for their respective separate use, and free from the debts, control, or interference of their respective husbands, and that their receipts respectively, or the receipts of any person or persons to whom they should respectively by writing under their respective hands direct their respective legacies to be paid, should, and notwithstanding coverture, be sufficient discharges for such legacies respectively.

The testatrix made a codicil to her will, dated the 28th April 1864, whereby she bequeathed to Frances Eleanor Gadsby, Caroline Gadsby, and Clara Gadsby, children of her late niece Frances Ann Gadsby, the sum of 100*l.* each, in addition to the legacies bequeathed to them respectively by her will; and she bequeathed to Emma Gadsby, Elizabeth Gadsby, and Emily Gadsby, children of her late niece Elizabeth Gadsby, the sum of 200*l.* each; and she bequeathed to Caroline Louisa Davison, Frederick Davison, and Jane Stables, the three surviving children of her late sister Ann Davison, the sum of 80*l.* each, in addition to what they would take under her will.

On the 19th April 1866 the testatrix died, and her will and codicil were duly proved on the 6th June following.

Harriet Wright was married once only, to John Wright, and there was issue of their marriage nine children, three of whom died in early infancy, and of the remaining six children one was Louisa Wright, who married John Edmund Hamilton.

On the 20th Dec. 1867 John Edmund Hamilton and Louisa Hamilton caused the absolute reversion of Louisa Hamilton, on the death of Harriet Wright, to one-sixth part or share in 6967*l.* 6*s.* 10*d.* New Three per Cent. Consols and 537*l.* 2*s.* New Three per Cent. Consols, being the residuary estate of the testatrix Louisa Elcom, deceased, to be put up for sale by auction, Harriet Wright being in the particulars stated to be in her fifty-fourth year; and at such auction Thomas Layborn purchased the same for 350*l.*

By an indenture, dated the 2nd March 1868, John Edmund Hamilton and Louisa Hamilton assigned unto Thomas Layborn, his executors, administrators, and assigns, all and singular the share and interests, as well vested as contingent and as well original as accruing, expectant on the decease of Harriet Wright, to which Louisa Hamilton or John Edmund Hamilton in her right then was or should or might thereafter be entitled under the will of the testatrix Louisa Elcom, deceased, of and in the sum of 6967*l.* 6*s.* 10*d.* and 537*l.* 2*s.* New Three per Cent. Consols.

The indenture was duly acknowledged by Louisa Hamilton on the 7th March 1868, in pursuance of the provisions of Malins' Act (20 & 21 Vict. c. 57).

By an indenture dated the 19th March 1877, and made between Thomas Layborn of the one part, and his son Thomas Richard Layborn of the other part, Thomas Layborn assigned unto

Thomas Richard Layborn the said reversionary interest.

On the 19th March 1890 Henry Groves-Wright and William Joseph Fraser were appointed new trustees of the will of the testatrix Louisa Elcom, deceased.

An action was brought by Thomas Richard Layborn against Henry Groves-Wright, William Joseph Fraser, and Louisa Hamilton, claiming (*inter alia*) a declaration that the plaintiff was, under and by virtue of the indenture of the 2nd March 1868, entitled, as the assignee of Thomas Layborn, to the one-sixth share of the proceeds of the residuary estate of the testatrix comprised in that indenture; and a direction that the defendants, the trustees of the will, should ascertain and pay the same to him accordingly; and also an injunction to restrain the defendants, the trustees, from distributing the estate of the testatrix without paying or making due provision for the payment to the plaintiff of his one-sixth share as aforesaid.

The action came on for trial before Chitty, J.

Byrne, Q.C. and Hull, for the plaintiff, contended that the testatrix's will and codicil together constituted her "will" within the meaning of that word in the first section of the Act 20 & 21 Vict. c. 27, a "will" being the aggregate of a person's testamentary dispositions, and that her will was therefore made after the 31st Dec. 1857:

Re Earl's Trust, 4 K. & J. 673;

Winter v. Winter, 5 Hare, 306;

Re Blackburn; *Smiles v. Blackburn*, 43 Ch. Div.

75;

Re Smith; *Bilke v. Roper*, 63 L. T. Rep. N. S. 448; 45 Ch. Div. 632;

Sidney v. Sidney, 29 L. T. Rep. N. S. 569; L. Rep. 17 Eq. 65;

Lemage v. Goodban, 13 L. T. Rep. N. S. 508; L. Rep. 1 P. & M. 57.

Vaughan Hawkins, for the defendants, argued that the will and codicil were two distinct creative instruments, and that Mrs. Hamilton was entitled under the will as a separate instrument which was made before the Act:

Re Butler's Trusts, 3 Ir. Rep. Eq. 138;

Gurney v. Gurney, 3 Dr. 208;

Willet v. Sandford, 1 Ves. sen. 178;

Fuller v. Hooper, 2 Ves. sen. 242;

Pigott v. Waller, 7 Ves. 98;

Farrer v. St. Catherine's College, 28 L. T. Rep.

N. S. 800; L. Rep. 16 Eq. 19;

Tempest v. Tempest, 2 K. & J. 635;

Sherer v. Bishop, 4 B. C. C. 54;

Wilson v. O'Leary, 26 L. T. Rep. N. S. 463; L. Rep.

7 Ch. App. 448;

Rolfe v. Perry, 8 L. T. Rep. N. S. 441; 3 De G.

J. & S. 481;

Bixey v. Flight, 3 Ch. Div. 269;

Drinkwater v. Falconer, 2 Ves. sen. 623;

Re Taylor; *Whitby v. Highton*, 58 L. T. Rep. N. S.

842.

Byrne, Q.C. in reply, referred to

Green v. Tribe, 38 L. T. Rep. N. S. 914; 9 Ch. Div. 231.

Cur. adv. vult.

Nov. 22, 1893.—CHITTY, J.—The question is whether the deed executed after the 31st Dec. 1857, by Mrs. Hamilton, then a married woman, and duly acknowledged by her in the manner required by the Act commonly called Malins' Act (20 & 21 Vict. c. 57), was effectual to pass her reversionary interest in personal estate, the principal point being whether she was entitled to the reversionary interest under an instrument made after the

[CT. OF APP.]

Re ELCOM; Re HAMILTON; LAYBORN v. GROVES-WRIGHT.

[CT. OF APP.]

31st Dec. 1857, within the meaning of the Act. She acquired the reversionary interest under the testamentary dispositions of Louisa Elcom. By her will, made before the 31st Dec. 1857, the testatrix bequeathed her residuary personal estate, after payment of the legacies thereinbefore bequeathed or which she might bequeath by any codicil, upon trusts under which Mrs. Hamilton took the reversionary interest in question. After the 31st Dec. 1857 the testatrix made a codicil, whereby she bequeathed additional pecuniary legacies. The codicil is expressed to be a codicil to her last will and testament. It does not in terms confirm the will, but, as was admitted on both sides in the argument, nothing turns on that circumstance. In support of the deed an argument was founded on the general object of the Act. Before it was passed a married woman could not effectually dispose of her reversionary interest in personalty except where it was limited to her for her separate use or where a special power of disposition was conferred on her. The object of the Act, as appears on the face of it, was to enable her by acknowledged deed to dispose of her reversionary interest in personalty except where she is restrained from alienation, and where the interest is acquired under her marriage settlement. The Act is not retrospective; it is confined to dispositions made by her after the 31st Dec. 1857, and the interests to which she shall be entitled under any instruments made after that date. A consideration of the general object of the Act does not throw any material light on the meaning of the particular words used. All that can be justly said is, that the Act enlarges the capacity of a married woman in the manner and to the extent prescribed by the Act, and subject to the provisions and restrictions therein contained. In support of the deed it was pointed out that the words in the proviso at the end of the first section, "shall become entitled by virtue of any deed, will, or instrument," show that "any instrument" in the previous enacting part of the same section include a will. This is clear and would be so without the proviso. Then it was said that the word "will" means the aggregate of a man's testamentary intentions, so far as they are manifested in writing duly executed according to the statutes relating to wills; and in support of this proposition the judgment of Lord Penzance in *Lemage v. Goodban* (*ubi sup.*) was cited. Thereupon it was urged that no man could be properly said to have made his will until he had finished his last codicil; and, applying this reasoning to the present case, the conclusion arrived at was that the testatrix's will and codicil, taken together, constituted her will, and that her will was therefore made after the 31st Dec. 1857. But the question is, whether this reasoning has any application to the statute under consideration. By using the term "instrument" the Legislature appears to have directed its attention to the particular instrument under which the married woman is entitled, and not to the set of instruments which together make up the will. Mrs. Hamilton is entitled under the will to the reversionary interest thereby bequeathed, subject only to the diminution contemplated by the will itself of the amount of the residue by legacies left by the codicil; and the will itself, regarded as a separate document, was actually made before the date mentioned in the

Act. The Act treats the date at which a testator's testamentary dispositions come into operation by his death as immaterial. Persons still living at the passing of the Act (the 25th Aug. 1857) who had already made their wills, and persons who afterwards made their wills before or on the 31st Dec. 1857, were in effect told that their wills would be left to operate in regard to married women under the law as it stood at the passing of the Act; that it was not necessary for them to insert any restraint upon alienation in order to prevent the married woman from disposing of her interest. In dealing with the Act I am bound to take the words as I find them, and to construe them in their ordinary and natural sense. I think the words refer to the particular instrument containing the gift, which in this case is the will, and that this instrument was made within the meaning of the Act at the time when it was duly executed and attested as required by law. In his able and learned argument against the deed, Mr. Vaughan Hawkins referred to various expressions which have been used in reference to the effect of a codicil on a will—such as "a codicil is part of the will"; "a codicil republished the will"; "it incorporates or reiterates the will"; or "draws down the date of the will to its own date," and the like; and he contended, and as I think rightly, that all such expressions must be considered in reference to the particular case which was under discussion. They have no direct bearing on this case. Reference was made to the 34th section of the Wills Act (1 Vict. c. 26), which enacts that the Act shall not extend to any will made before the 1st Jan. 1838, and that every will re-executed or republished or revived by any codicil shall, for the purposes of that Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. The operation of the section is therefore confined to the purposes of that particular Act, and there is no such enactment in Malins' Act. The section, so far as it goes, supports the conclusion at which I have arrived. Of the numerous authorities cited at the bar, I think it necessary to refer only to *Rolfe v. Perry* (*ubi sup.*). The question there was the meaning of the words, "will, deed, or document already made or to be made before the 1st Jan. 1855," in Locke King's Act (17 & 18 Vict. c. 113). In that case there were two wills, both duly executed and attested, one before and the other after the date mentioned. Lord Westbury held that the words "already made" referred to the actual making of the first will, and declined to apply any doctrine of republication by the second will. The decision, no doubt, was on a different Act, in which the words were somewhat different; but it has a close application to the present case, and it at least shows that the word "will" in an Act of Parliament may be properly construed as referring to a particular instrument. For these reasons I hold that the acknowledged deed was not within the Act, and therefore that Mrs. Hamilton is not bound by it.

From that decision the plaintiff now appealed.

Byrne, Q.C. and Hull for the appellant.

Vaughan Hawkins, for the respondents, was not called upon to argue.

LINDLEY, L.J.—I think that it is unnecessary for us to hear Mr. Vaughan Hawkins, for the language of Malins' Act is too strong for the

appellant, although we have certainly no disposition to assist the respondents, and only do so if we are obliged. The facts are shortly these: In 1856 Louisa Elcom made a will giving her residuary estate to the mother of Mrs. Hamilton for life with remainder to her children who should attain twenty-one or marry. In 1864 the testatrix made a codicil giving certain additional legacies. In 1866 the testatrix died. In 1868 Mrs. Hamilton purported to assign her share of the residuary estate of the testatrix to Thomas Layborn. Malins' Act was passed in Aug. 1857, the first section of which provides that after the 31st Dec. 1857 it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st Dec. 1857 (except such a settlement as after-mentioned), and so on. The short point which we have to decide is, whether Mrs. Hamilton became entitled to this reversionary interest "under any instrument made after the 31st Dec. 1857." If she did, then the assignment by her by the indenture of the 2nd March 1868 is good, and she is bound by it; if she did not, that assignment is inoperative. It is argued for the appellant that the will and codicil together constitute the "instrument," under which she is entitled, for that a "will" means the aggregate of a person's testamentary dispositions. No doubt for some purposes a "will" does mean that. But the question is, what does the Act mean when it speaks of being "entitled under any instrument made after the said 31st Dec."? When was this will made so as to confer a title for the purposes of the Act? My answer is, that it was made when it was first executed. As to authority, cases do not throw much light upon the matter; but, if we are to have any, the one that seems to be nearest in point is *Rolfe v. Perry* (*ubi sup.*). I think the appeal therefore fails.

SMITH, L.J.—I think so too. The question is, under what instrument did Mrs. Hamilton become entitled to this interest? I think, without doubt, under the will which was made on the 13th March 1856. It was said that because the testatrix made a codicil to that will in 1864, Mrs. Hamilton became entitled under the aggregate of the testamentary dispositions. But I ask, did she become entitled under the codicil? If anything, she rather became disentitled under the codicil. I agree that the appeal fails.

DAVEY, L.J.—I am of the same opinion. I do not think that "instrument" in Malins' Act is to be construed as being equivalent to "will" in the sense of an aggregate of testamentary dispositions. The will here made in 1856 is only one of the testamentary dispositions, and so far as it is not revoked, remains in force, and I do not hesitate to say that Mrs. Hamilton is entitled under it.

Appeal dismissed.

Solicitors for the appellant, *George Brown, Son, and Vardy*.

Solicitor for the respondent, *W. J. Fraser*.

Nov. 1, 15, and 27, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re LOW; BLAND v. LOW. (a)

APPEAL FROM THE CHANCERY DIVISION.

Administration—Scotch judgment—Registration in England—Certificate of debts—Res judicata—Statute of Limitations—(21 Jac. 1, c. 16)—Judgments Extension Act 1868 (31 & 32 Vict. c. 54), s. 3.

An action having been commenced in Scotland against an administratrix to recover a debt which was barred by the Statute of Limitations in England, an action for the administration of the intestate's estate was commenced in England, and an order for administration made. Judgment for the plaintiff by default was afterwards given in the Scotch action. The Scotch creditor then sought to prove his debt in the administration action, but the chief clerk disallowed the claim, as being barred by the Statute of Limitations. The administratrix afterwards obtained an order from the Scotch court recalling the judgment by default, and giving her leave to defend.

The action was then heard, and judgment given against her, which was then registered in England under the Judgments Extension Act 1868.

Held, that the Scotch creditor was entitled to prove in the administration action as a creditor for the amount of the judgment and costs; and that it was not necessary that the chief clerk's certificate should be varied, as the Scotch judgment when registered under the Act created a new cause of action which had not been adjudicated upon.

Decision of North, J. reversed.

THE question raised by this appeal was, whether John Low, who had obtained judgment in Scotland against the defendant, as administratrix of her deceased husband J. H. Low, was entitled to be paid the amount of the judgment out of his assets, which were being administered in the Chancery Division of the High Court in this country.

John Low, the father of the deceased, lent him money on some IO U's, which had not been repaid at his death. John Low lived in Scotland. The deceased lived in England, and died domiciled in England, having property both in England and in Scotland, but principally in England. The defendant was his administratrix in England. John Low could not enforce payment of his debt in England, it being barred by the Statute of Limitations. But he could enforce payment in Scotland, his debt not being barred by lapse of time according to the law of that country. Accordingly, on the 13th Dec. 1892 John Low brought an action in Scotland against the defendant, as administratrix of her husband, and claimed over 400*l.*, and on the 1st Feb. 1893 judgment was signed against her in her absence for this amount. She afterwards applied to the Scotch court to set aside this judgment, and for leave to defend the Scotch action, and on the 14th Feb. 1893 this application was granted. She then defended the action. By her pleadings she denied the debt, asserted that it was barred by lapse of time, denied assets sufficient to pay it, and relied on the fact that a judgment had been obtained in

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

[CT. OF APP.]

Re LOW; BLAND v. LOW.

[CT. OF APP.]

England for the administration of the estate of the deceased. John Low then reduced his claim to 270*l.*, and on the 30th May 1893 he recovered judgment against the defendant for this amount with costs. This judgment was in form for payment by her personally of 270*l.*, and as administratrix, of the costs. But during the hearing of the appeal it was ascertained that the judgment was only against the defendant as administratrix, both as regards the principal sum and the costs. Immediately after the proceedings had been thus commenced in Scotland, viz., on the 17th Jan. 1893, one Bland, a creditor of the deceased, brought an action in this country against the defendant for the administration of the estate of J. H. Low, and on the 20th Jan. 1893 the usual administration judgment was pronounced. In March 1893 John Low sought to prove his debt in the administration action, but, the debt being barred, the chief clerk disallowed the claim, and he declined to allow the claim to stand over until the result of the Scotch proceedings should be known. He gave John Low further time to support his claim, but, being unable to take his case out of the statute, he filed no further evidence, and on the 1st May 1893 the chief clerk made a certificate disallowing the claim, and finding that the only debt due from the intestate's estate was that of Bland for 11*l.* 7*s.* 6*d.* No application had been made to vary this certificate.

On the 22nd July 1893 John Low registered a certificate of his Scotch judgment in the Queen's Bench Division, under sect. 3 of the Judgments Extension Act 1868, and gave notice to the administratrix that unless the amount was paid in three days execution would be issued.

The administratrix then obtained *ex parte* an order transferring the proceedings in the Queen's Bench Division to North, J., to whose court the administration action was attached, and an interim injunction restraining John Low from proceeding to issue execution. On the 4th Aug. a motion to continue the injunction was heard by North, J.

Coxens-Hardy, Q.C. and *Gatey* for the administratrix.

Swinfen Eady, Q.C. and *F. Thompson* for John Low.

NORTH, J. (after stating some of the facts, continued:—) When the matter came before the chief clerk he was asked to allow it to stand over till the question in the Scotch action had been tried. The answer to the claim set up by the claimant was the Statute of Limitations, and it is admitted here to be quite clear now that the question is to be tried in the administration action. The advances were made under such circumstances that the Statute of Limitations is a clear defence which cannot possibly be got over. That being so, that defence was set up by the administratrix, and the question was, whether the claim should stand over to find out what the Scotch law on the subject was. I cannot imagine why it should have stood over for any such purpose. The chief clerk declined to allow it to stand over till judgment was recovered. But he did not dispose of the matter summarily; he gave three weeks to the applicant to file any further evidence beyond the formal affidavit. The formal affidavit was displaced by the defence as to the statute, and it was necessary to have further evidence before the

chief clerk could adjudicate upon the claim. But the applicant chose not to do anything further. He was content to let matters rest as they were so far as the administration action was concerned, and on the 1st May the chief clerk made a certificate as to creditors, in which the claim of the present claimant was disallowed. That certificate was allowed to stand; there has never been any application to vary it. Then, in May, the action came on in Scotland. I may say I know nothing about the way in which the jurisdiction arose, or whether it could be disputed or not; it is sufficient to say that the administratrix did not put in any plea as to jurisdiction, and therefore the court had jurisdiction to go on and decide the action. Judgment was given, not for 441*l.*, but for 270*l.* and 39*l.* for costs. Thereupon the claimant, who recovered judgment in Scotland, proceeded to register the judgment in England, and having done so—ignoring the administration action altogether—threatened to issue execution against the proceeds of the intestate's estate, which were in the hands of the administratrix in this country. I give him credit for this, that before doing so he gave notice stating that if they did not pay within three days he should issue execution. Thereupon he was asked to give an undertaking not to do so, or an *ex parte* application would have to be made to the court. He declined to give that undertaking owing to circumstances which he is not to be blamed for. Then an application was made to me to restrain him from continuing proceedings in this country founded on registration in England of the Scotch judgment. Now the question is, whether this gentleman, having recovered a judgment in Scotland, is to be permitted, after the certificate in the administration action in which this claim was disallowed, to come in and prove in respect of that sum. In the first place, it is to be observed that that is not what he sought to do at first, though it is what he says now he is willing to do. At first he claimed to sweep away the assets, ignoring altogether the proceedings in the action in England. Now it is said that he is willing to come in and prove, though he has not applied to do so by making formal application—but that is his highest right, namely, to come in and prove. Is he entitled to do so? In my opinion he is not. The matter has been dealt with here and decided. Although no doubt the court would allow him to prove if there was an equitable reason for allowing him to do so, I see no reason whatever why he should be allowed to reopen the proceedings which have been finished in this country, by which it has been adjudicated that he is not a creditor. What is the ground for saying he should be permitted to do so? Is it because he has, since the claim has been adjudicated upon in England, by proceedings which he took in Scotland obtained a better case than he could have had in the proceedings in England; that is to say, can he insist upon an adjudication in his favour by Scotch law where the very point to be decided in this case, and which was adjudicated upon here, namely, the Statute of Limitations, cannot be raised? In my opinion, he cannot be entitled to any such right, and I think the chief clerk was right in not postponing the proceedings until the Scotch action was tried. There was no dispute as to the facts. If there was a dispute as to the amount of the debt it might be different. It is

conceded that the claimant has no case here, as the Statute of Limitations applies. There is no equity shown for letting him in to prove, and the judgment obtained since cannot do him any good. For these reasons I think the proceeding under the judgment registered here is one that cannot have any effect given to it, and therefore the order which I made upon the *ex parte* application must be continued, but that is subject to this point: There was a proceeding in the action in Scotland which the administratrix defended, and the result was that a claim was established in Scotland, and 39*l.* awarded for costs. That was the result of a proceeding by this claimant against the administratrix, both parties leaving it to Scotch law to decide that point; and, as regards the costs of that proceeding which was taken by the common consent of the parties in that way, it seems to me it is only fair to say that he has a good claim against the administratrix in respect of that sum, but it is a claim against the administratrix personally. I could not allow the assets in the hands of the administratrix to be seized for the purpose of paying those costs. I am prepared to do this: to direct that those costs should be paid in this proceeding to the claimant out of the estate in the hands of the administratrix, after satisfying the costs of the creditor who has proved and the costs of the administration action.

From this decision J. Low appealed.

The appeal came on for hearing on the 1st Nov. 1893, when a question arose whether on the form of the Scotch judgment it was against the respondent personally, or in her character of administratrix; and the hearing was adjourned in order that the point might be inquired into. It was ascertained that the judgment was against her as administratrix only.

Swinfen Eady, Q.C. and *F. Thompson* for the appellant.—The appellant's claim has not been adjudicated upon on its merits. The appellant's affidavit which was before the chief clerk showed that there was a pending action in Scotland, and that it depended on the decision in that action whether or not he was a creditor.

Cozens-Hardy, Q.C. and *Gatey* for the respondent.—J. H. Low was a domiciled Englishman, and the question as to who are his creditors must be decided by English law, including the Statute of Limitations. The case was properly before the English court, which was not bound to await the decision of the Scotch court:

Phosphate Sewage Company v. Molleson, 1 App. Cas. 780; 4 App. Cas. 801.

The case is *res judicata*, and no application has been made to vary the chief clerk's certificate. The court will not enlarge the time for such an application in this case, which is an attempt to avoid the effect of the Statute of Limitations by taking advantage of the fact that a few pounds of the deceased's property happened to be in Scotland. It was never intended that the Judgments Extension Act 1868 should have that effect.

Swinfen Eady, Q.C. in reply.—Sect. 8 of the Judgments Extension Act 1868 prevents that Act having the effect suggested. The case was heard on its merits in Scotland, and the administratrix appeared and contested the claim. The position of the appellant is not affected by the decision in *Phosphate Sewage Company v. Molleson* (*ubi sup.*). The court ought only to exercise its juris-

diction to restrain the proceedings on the judgment in England on the terms that the appellant should be allowed to prove on his judgment as a creditor in the administration proceedings. But although a legal personal representative is entitled to an injunction in order that there may be an equal distribution of the assets among the creditors, such an injunction has never been granted where after the commencement of an administration action he has defended an action and it has been decided against him.

Cur. adv. vult.

Nov. 27.—*LINDLEY*, L.J., after referring to the facts, continued:—The parties to the English action might have applied to restrain John Low, the plaintiff in the Scotch action, as in *Graham v. Maxwell* (1 Mac. & G. 71), from proceeding with his Scotch action, or they might have applied to restrain him from registering his judgment under 31 & 32 Vict. c. 54, s. 3; but no such application was made, and on the 22nd July 1893 he duly registered a proper certificate of his Scotch judgment under that Act. There was nothing wrong in this, and, whether he could or could not have been restrained from obtaining or from registering his Scotch judgment, whatever advantages the registration gives the judgment creditor he is entitled to. Having, however, threatened to issue execution against the assets of the deceased, the administratrix very properly applied for and obtained an injunction to restrain him (*i.e.*, John Low) from carrying out his threats. But the injunction is so worded that it may prevent him from proving against the estate of the deceased in the administration action, and the judgment of North, J., who granted the injunction, is in effect a decision that, although John Low has obtained and registered his Scotch judgment for 270*l.* and costs, he is not entitled to prove in respect of this judgment in the administration action. Practically, therefore, it has been decided that John Low is not entitled to be paid his judgment debt out of the deceased's assets in England. No order on further consideration has yet been made. Those assets have not yet been distributed, and it is admitted that there are no unpaid creditors except John Low and the plaintiff Bland, and that the English assets will probably be enough to pay John Low in full, or nearly so. Under these circumstances, the mere fact that the time for carrying in claims has expired is of no consequence. The assets being undistributed, and available for the payment of John Low's debt, it would be a matter of course to pay it, and, if necessary, to extend the time for proving it before the chief clerk, and for including it in his certificate, if the debt ought really to be paid out of the assets in this country. The question we have to determine is, whether John Low is entitled to prove his judgment debt in the administration action. North, J. decided against him, upon the ground that his claim was barred by the Statute of Limitations, and was *res judicata*. I cannot concur in this view. John Low's present claim is not based on his original cause of action, but on the Scotch judgment, which is a very different thing. The original cause of action is no doubt barred, and has been adjudicated upon in the English action; and the decision upon it was, moreover, quite correct. Nothing, therefore, would be gained by extending the time for a motion to vary the certificate of the chief clerk disallowing John Low's claim as pre-

sented to him. But the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, gives a new cause of action, which is not barred by the Statute of Limitations, and which has not yet been adjudicated upon. Whether the chief clerk's certificate could have been pleaded in the Scotch action as *res judicata* I do not stop to inquire. It is quite plain that it could not be so pleaded to an action in this country on the Scotch judgment now that it has been registered. The effect of the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, is the same as that of an English judgment. The language of sect. 3 is very clear upon this point. It provides that the certificate of the Scotch judgment, when registered, "shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decree of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered." The judgment, therefore, must now be regarded as an English judgment. But the registration cannot wholly alter the nature and character of the judgment registered; and, if the Scotch judgment is only for a particular mode of applying Scotch assets, registration under the statute would not change its character and convert it into a judgment for the application of English assets in the same way. The object of the statute is simply to prevent the necessity of bringing several actions in England, Scotland, and Ireland, instead of one, in order to establish a right to be enforced anywhere within Great Britain and Ireland. The Scotch judgment orders the defendant to pay the plaintiff 270*l.* and costs out of the assets of the deceased. The Scotch court cannot reach assets out of Scotland; but it can investigate and adjudicate upon claims against the estate of a deceased person whose legal personal representative is properly before the court. This is what the Scotch court has done. The Scotch judgment has established John Low's claim to the extent of 270*l.*, and has adjudicated him to be a creditor for that amount against the defendant, as the legal personal representative of the deceased. The registration of this judgment under the statute converts the plaintiff into an English judgment creditor for the same amount, to be paid by the defendant as the legal personal representative, or, in other words, out of the personal assets of the deceased. If John Low had obtained an English judgment to this effect, he would clearly be entitled to prove in respect of it in the administration action. The judgment could not be disregarded on the ground that the action in which it had been obtained might have been restrained by injunction, and ought not to have been brought; nor would it be any answer to the judgment creditor, seeking to prove his debt, to say that the original cause of action was statute-barred, or had been disallowed by the chief clerk, whose certificate had not been varied. The judgment would give a new cause of action, a new ground of claim, to the judgment creditor, and the judgment debtor could not dispute it, except by taking proceedings to impeach the judgment itself. So in the present case, unless the registration of the Scotch judgment can be set aside, and until it is set aside, John Low is entitled

to the benefit of it. If the defendant had allowed the first Scotch judgment of the 1st Feb. 1893, obtained against her in her absence, to stand, that judgment could not have been registered in this country (31 & 32 Vict. c. 54, s. 8), and it would have been of very little use here (see *Re Boyse*, 15 Ch. Div. 591). But, as already stated, the defendant fought the case in Scotland, and omitted to apply for an injunction to restrain the Scotch action or the registration in this country of the judgment ultimately recovered against her there. I am not aware of any principle on which John Low can now be deprived of the benefit of this registration. He is in the same position as if he had sued the defendant in this country, and had not been stopped by injunction, and had obtained judgment against her in her representative capacity. In such a case, although execution would be stayed, the judgment creditor would be admitted to prove his debt in the administration action as a matter of course, so long as there were assets still undistributed and under the control of the court in that action. This decision is in no way opposed to *Phosphate Sewage Company v. Molleson* (*ubi sup.*), for the decree in Chancery to which the Scotch courts refused to give effect, in preference to a prior decision of their own, was not relied upon or treated as equivalent to a subsequent Scotch judgment. The case did not turn on the statute to which I have alluded and which governs the present case. The order appealed from must be varied by adding, "but the appellant John Low is to be admitted in the administration action as a creditor for the amount of his judgment debt and the costs of registering the Scotch certificate." The rest of the order appealed from will stand, as the appellant had no right to enforce his judgment, as he threatened to do. He ought, however, to have the costs of the appeal, for he has succeeded in establishing his right to be paid his judgment debt, which the defendant denied, and which the order appealed from prevented.

SMITH, L.J.—I agree.

DAVEY, L.J.—I agree with the judgment read, and should not add anything, were it not that we are differing from the judgment below. In this case the real and substantial question which we have to decide is whether the appellant is entitled to have a judgment which he has obtained in the Court of Session in Scotland, and which has been duly registered in accordance with the Judgments Extension Act 1868, satisfied out of the assets of John Houston Low, deceased, in the hands of the respondent, his administratrix. The deceased was resident in England at the time of his death, and is stated to have been domiciled in England, but I do not understand that there has been any judicial determination on his domicile, nor do I think it in the least material. He died in 1892. The respondent is his legal personal representative. On the 13th Dec. 1892 the appellant, who resides in Scotland, took out an arrestment in the Scotch court *jurisdictionis fundandæ causâ*, and on the 15th Dec. commenced an action in that court against the present respondent, as such legal personal representative, to recover a debt alleged to be due to him from the deceased. This was a proceeding which he was fully entitled by law to take. On the 1st Feb. 1893 the appellant obtained judgment against the respondent *in absentia*. Now

the respondent might if she had chosen have left the Scotch proceedings severely alone. The judgment *in absentia* would of course have been effective against the Scotch assets, which are, however, stated to have been very small, but it could not have been registered under the Judgments Extension Act 1868 (see sect. 8) and thereby acquired the force and effect of an English judgment, and it would at most have been *prima facie* evidence of debt in an English court (*Re Boyse (ubi sup.)*). But what did she do? She moved to discharge the judgment *in absentia*, and on the 14th Feb. an order was made by the Lord Ordinary recalling the interlocutor of the 1st Feb. and admitting the respondent to lodge defences. That was an obviously right order if the defendant desired to contest the claim on the merits, and suggested that she had a defence, but it was a course inconsistent, as it seems to me, with her present pretension to treat the Scotch action as a nullity. The respondent put in answers to the condescendence and pleas in law, and in due course the parties went to trial on the pleadings, and the court, after hearing counsel for the parties, repelled the pleas in law for the defender and, apparently on some mutual admissions, gave judgment for the present appellant for 270*l.* with expenses. I assume, in accordance with an opinion of the learned Lord Advocate which has been obtained, that this is a judgment for payment by the respondent as administratrix only, notwithstanding it is not so expressed. The appellant registered this judgment on the 22nd July 1893, and thereby it has, by the statute, acquired the force and effect of a judgment obtained in an English court. In order to understand the reasons why it is alleged the appellant should not have the benefit of it, it is necessary to state the nature of the question between the parties and the proceedings taken by the respondent in England. It does not seem to be denied, on the one hand, that the deceased was at his death indebted to the appellant on certain I O U's, nor, on the other hand, that any remedy for that debt in an English court would be barred by the Statute of Limitations. In Scotland it has been held that there is no Statute of Limitations which bars the remedy in a Scotch court. This really constitutes the singularity and difficulty of the case, which has been aggravated by the course taken by the parties. The respondent, after the commencement of the Scotch action, got a small creditor for 11*l.* (who appears to be the only other creditor of the estate) to commence an administration action in the Chancery Division, and on the 20th Jan. 1893 an administration order was made, and I think it was stated that the same solicitor appeared for plaintiff and defendant. There is no censure to be cast on the administratrix for taking this course. It is a recognised mode of placing the assets under the protection of the High Court. I only observe that this is not a case between the appellant and the other creditors of the deceased, but it has been presented to us as exclusively a question between the appellant and the administratrix. On the 24th March 1893 the appellant filed an affidavit of debt in the English action, in which the pendency of the Scotch action was mentioned. The chief clerk, however, refused to let it stand over to abide the result of the Scotch action, but gave leave to file further evidence. No further affidavits were filed, and the chief clerk

disallowed the claim, it being admitted that it was barred in an English court by the Statute of Limitations. I pause here to observe that this was a submission by the appellant to the jurisdiction of the English court, and the administratrix might, if she had been so minded, thereupon have moved to restrain the appellant from proceeding with his Scotch action: (see *Graham v. Maxwell (ubi sup.)*). But I do not intend to express my opinion that she would have necessarily obtained an injunction for that purpose, even in a qualified form. However, she did not take that course. Nor did she make any application to restrain the appellant, when he had recovered his judgment in the Scotch court, from converting it into an English judgment by registration. She has permitted the judgment to be obtained and registered without objection. Has she any equity to deprive the appellant of the fruits of it? On the 1st May a certificate of debts was made, disallowing the appellant's claim, and finding that Bland was the only creditor. The English action has not been heard on further consideration, and the estate remains undistributed in the hands of the administratrix, but subject to the control of the court. In these circumstances the appellant threatened to issue execution on his judgment. Now this was, in my opinion, wrong, and the order of the 4th Aug. 1893 appealed from was therefore right, so far as it restrained him from issuing execution. I think, however, it is too widely expressed; but the question is, whether the learned judge ought to have made the order without giving the respondent liberty to carry in a proof on his registered judgment against the assets, notwithstanding the certificate. I am of opinion that such liberty should have been given. The respondent's contention is, that the matter is *res judicata*, and the appellant is concluded by the certificate. Now, in the first place, I am of opinion that the certificate was quite right, but that all that was determined by it was that the defendant was barred of his remedy in an English court. There was no decision on the merits or existence of his claim. It is familiar law that a statute which bars the remedy without extinguishing the debt is part of the *lex fori* only and mere matter of procedure in that particular court: (see *Harris v. Quine*, 20 L. T. Rep. N. S. 947; L. Rep. 4 Q. B. 653.) In the next place, this is not in fact the same claim as was disallowed by the chief clerk. This is a claim founded on a judgment which is a new cause of action. We are bound by the statute to give the judgment the same force and effect as if it had been obtained in an English court. No attempt has been made, or so far as I can see can be made, to set aside the registration, and while the certificate exists effect ought to be given to it, and I can see no equity that the administratrix has to deprive the appellant of his legal rights. This is not a case in which there is any competition between creditors, or in which the appellant is seeking to obtain any priority by reason of his judgment over other creditors, or to interfere with the equal distribution of the estate between creditors; but the question is exclusively between him and the administratrix, and but for the administration action there could be no question of his right to have his registered judgment satisfied out of the assets. In the course of the argument a case of *Phosphate Sewage Company v. Molleson (ubi sup.)* was referred to. The facts in that case have a

CT. OF APP.]

Re FISHER.

[CT. OF APP.]

superficial resemblance to the present case, but when closely examined are, in my opinion, substantially different. In the *Phosphate Sewage* case the House of Lords held that the Scotch court, exercising an exclusive statutory jurisdiction in bankruptcy, had a discretion whether they would adjudicate on a claim against the bankrupt's estate at once, or would wait to inform themselves by the result of an English suit in which the claim against the bankrupt's estate was mixed up with that against several other defendants, and that the Scotch court had rightly exercised such discretion in investigating and deciding the claim for themselves on its merits. This judgment of the Scotch court on the merits in the Scotch bankruptcy was the one relied on and upheld by the House of Lords as *res judicata* in the second case, and there was not, and could not be, in that case any judgment of the English court capable of registration and acquiring the force and effect of an English judgment, for the simple reason that the English court had no jurisdiction to decide a question of proof in a Scotch bankruptcy. I do not therefore think the *Phosphate Sewage* case is a binding or guiding authority in the case now before us. I think that the injunction is too broad. It would restrain the appellant from issuing execution against the defendant personally, and I think that if he is entitled to do so he cannot be restrained from so doing. I also think that it could not extend to any assets there may be in Scotland, and, for the reasons I have stated, I think it should be pre-faced by liberty being given to the appellant notwithstanding the certificate, and without disturbing any payment or any order which may have been already made for payment out of the estate (if any such has been made) to prove upon the certificate of registration of his judgment granted on the 22nd July 1893. I much regret the waste of this small estate in the costs of these double proceedings, for which the respondent and administratrix is responsible. As the appellant was wrong and the injunction was rightly granted, I think the order upon the appellant for payment of the costs in the court below should stand, but he should have his costs of the appeal from the respondent, because I think that the injunction should only have been granted upon terms.

Solicitor for the appellant, *W. T. Wilkinson*.

Solicitors for the respondent, *Harrison and Powell*, agents for *C. H. Moordaff*, Kingston.

Thursday, Jan. 18.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re FISHER. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Costs—Money paid in under special Act—Costs of petition for payment out—Jurisdiction—Rules of Supreme Court 1883—Order LXV., r. 1—Supreme Court of Judicature Act 1890 (53 & 54 Vict. c. 44), s. 5.

The Commissioners of Sewers, acting under the powers of a private Act, compulsorily purchased certain trust hereditaments, and paid the purchase money into court. The trustees now applied for payment out to them of this sum, and

asked that the commissioners should pay the costs of the petition. The private Act made no provision for the payment out of court of money paid in under the Act.

Held, that, under sect. 5 of the Supreme Court of Judicature Act 1890, jurisdiction has been conferred on the court to exercise its discretion with regard to these costs, and to order the commissioners to pay them.

Decision of Chitty, J. affirmed.

THIS was a petition by the trustees of the will of R. Fisher for payment out to them of a sum of Consols now in court, under the following circumstances:—

Under the powers conferred on them by a private Act of Parliament (57 Geo. 3, c. xxix.) the Commissioners of Sewers compulsorily purchased for the sum of 1475*l.* certain leasehold hereditaments vested in these trustees upon trust for accumulation during the life of F. Fisher, and at his death upon trust for sale and distribution.

The purchase money was paid into court, and invested in consols; and F. Fisher having died in 1892, the trustees now applied for payment out to them of the sum in court, and also for an order that the commissioners should pay the costs of the petition.

The private Act made no provision for the payment out of court of money paid in under the Act.

By sect. 5 of the Supreme Court of Judicature Act 1890 (53 & 54 Vict. c. 44), it is provided that.

Subject to the Supreme Court of Judicature Act and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

Turnour Murray for the petitioners.—Sect. 5 of the Judicature Act 1890 confers a jurisdiction on the court to order these costs to be paid, though it previously had no such jurisdiction, as was held by the Court of Appeal in

Re Mills' Estate, 55 L. T. Rep. N. S. 465; 34 Ch. Div. 24.

John Henderson for the commissioners.—The decision in *Re Mills' Estate* (*ubi sup.*) is still binding. Sect. 5 of the Judicature Act 1890 only gives jurisdiction in cases where before the Act the court had jurisdiction; and on the true construction of the section the jurisdiction is limited to cases coming within Order LXV., r. 1, which is simply re-enacted by this Act. See

London County Council v. Churchwardens and Overseers of West Ham, 67 L. T. Rep. N. S. 363, 366; (1892) 2 Q. B. 173.

CHITTY, J.—Before the passing of the Judicature Act 1890 it was decided by the Court of Appeal in *Re Mills' Estate* (*ubi sup.*) that the court had no jurisdiction in a case like this to give the petitioners' costs against the commissioners. In *Ex parte Mercers' Company* (10 Ch. Div. 481) the late Master of the Rolls (Sir G. Jessel) had decided the contrary, but the Court of Appeal declined to follow his decision, and came to the conclusion that Order LXV., r. 1, did not confer any jurisdiction as to costs in cases where none existed, but only regulated the existing jurisdiction. Then the Judicature Act 1890 was passed, and it is contended on behalf of the

(a) Reported by H. M. CHARTERS MACPHERSON and W. C. BISS, Esqrs., Barristers-at-Law.

commissioners that sect. 5 of that Act has not the effect of conferring any jurisdiction as to costs. But, in my opinion, it has conferred such jurisdiction, and that in cases where jurisdiction did not previously exist. It is argued that the limitation of jurisdiction, if any there be, is to be found both in the express words of the section and by holding it to apply only to cases where, before the Act, the court had jurisdiction to award costs to or against either party. The latter view is not, I think, maintainable, for the enactment would then come to this: that where, before the Act, a discretion existed as to costs, it was still to exist. Nor can I follow the contention that on the true construction of sect. 5 the jurisdiction is limited to cases coming within Order LXV., r. 1. It is plain that the Legislature was not simply re-enacting that rule, for it adds the proviso as to "the express provisions of any statute" which was not to be found in the rule, and if the intention was merely to give jurisdiction when it already existed, there was no reason for adding the concluding words of the section, "and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Here is a clear conferring of jurisdiction. It is said that "such costs" means not costs "of and incidental to all proceedings," but costs which are in the discretion of the court under Order LXV., r. 1. But I cannot get this meaning out of the words used, and, taking the proviso—"subject to the express provisions of any statute"—I find that the Act under which the land was compulsorily taken contains no express provision, and, "express" only being mentioned, none is to be implied. The result is, that I hold that the court has jurisdiction to exercise its discretion with regard to these costs. Reference has been made to observations in the judgments in *London County Council v. Churchwardens and Overseers of West Ham* (*ubi sup.*), but they do not touch the point, unless it be the suggestion thrown out by Fry, L.J. I conceive myself, therefore, to be at liberty to decide this question on what I hold to be the true meaning of sect. 5. I therefore give the petitioners their costs of and incidental to this application, to be paid by the commissioners.

From this decision the Commissioners appealed.

John Henderson for the appellants.—All that was done by sect. 5 of the Judicature Act 1890 was to express in an Act the state of the law as decided in *Re Mills' Estate* (*ubi sup.*) and *London County Council v. Churchwardens and Overseers of West Ham* (*ubi sup.*). It was passed in order to get rid of the decision in *Garnett v. Bradley* (39 L. T. Rep. N. S. 261; 3 App. Cas. 944), and as there were doubts about Order LXV., r. 1, of the Rules of Court 1883:

Rockett v. Chippingdale, 64 L. T. Rep. N. S. 641; (1891) 2 Q. B. 293.

Turnour Murray, for the respondents, was not called on.

LINDLEY, L.J.—I have no doubt about this case. Money has been paid into court under the provisions of an Act of Parliament passed in the reign of George III. (57 Geo. 3, c. xxix.), which, like a great many Acts of that period, contained no provisions as to the payment of the costs of getting the money out of court. The old Court of Exchequer held that, where land had been pur-

chased by a company, and the money had been paid into court under the provisions of an Act of Parliament, it had an inherent jurisdiction to make the company pay the costs of payment out. The Court of Chancery took a different view, and held that there was no jurisdiction to order payment of such costs, and whichever may have been the better view, at the time of the Judicature Act 1873 it had been the settled practice of the Court of Chancery not to award such costs. That state of things was very unjust, and in *Ex parte Mercers' Company* (*ubi sup.*) the late Master of the Rolls thought that the difficulty was got over by the rules framed under the Judicature Act. However, in *Re Mills' Estate* (*ubi sup.*) that case was not followed, as the Court of Appeal considered that the Judicature Acts conferred no jurisdiction to repeal by the rules of court a practice existing under previous Acts of Parliament. It was felt that that difficulty ought to be got rid of, and sect. 5 of the Judicature Act 1890 was passed for the purpose, amongst other things, of removing what was admitted to be an unjust anomaly, and now, when money is paid in under an Act of Parliament which contains no express provisions as to the costs of payment out and an application is made for payment out, that section enables the court to award such costs. The appeal must be dismissed.

KAY, L.J.—I agree. The decision in *Re Mills' Estate* (*ubi sup.*) was that Order LXV., r. 1, of the Rules of 1883 (a good deal of which is in language very similar to the later statute) did not increase the jurisdiction of the court. It was an order made by the Rule Committee, which had no authority to increase the jurisdiction of the court, and therefore it was necessary to construe it in that restricted manner to prevent it from being *ultra vires*. Cotton, L.J. put the case thus: "What was the object of these rules and orders? Was it to give to the court a jurisdiction which did not previously exist; or was it not rather to regulate the manner in which the jurisdiction given to the court, and which the court had independently of this rule, was to be exercised?" and he adopts the latter of these two views. The words of Order LXV., r. 1, were large enough to increase the jurisdiction of the court, but seeing that that would be *ultra vires*, the court adopted the other construction which I have just read. That was in 1886, and with that decision before them the Legislature passed the Judicature Act 1890, which to some extent is in the words of the rule, but to some extent goes beyond it. Sect. 5 runs thus: "Subject to the Supreme Court of Judicature Acts and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act"—these last words are not in the rule—"the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge." Then follow these words which are not in the rule: "And the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Taking these last words alone, to what costs do they apply? Clearly to the costs of and incidental to all proceedings in the Supreme Court. The object of words so plainly expressed must be to give the court full power to do that which it had not power to do before. In my

[CT. OF APP.]

MIGHELL v. THE SULTAN OF JOHORE.

[CT. OF APP.]

opinion it is impossible to read this sect. 5 in any way but this. It is an enabling section enlarging the jurisdiction of the court, and giving it jurisdiction where it had not jurisdiction before in respect of costs. What is the limitation to that jurisdiction? The limitation is contained in a former part of the section: "Subject to the Supreme Court of Judicature Acts and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act." That meant, if there be a provision in the Judicature Acts or in the rules of court, or an express provision in any statute which limits the discretion of the court, the Act is to be taken subject to that limitation; but it also means that the court is to have a discretion where the former Acts were silent as to costs. It was for that very reason that the Act was passed. It was passed in consequence of the decision of this court in *Re Mills' Estate* (*ubi sup.*), and was intended to give to the court a jurisdiction which, according to that decision, the rule did not give, inasmuch as the rule was not intended to have the same effect as an enabling statute. In this case we have a certain statute which enabled the Commissioners of Sewers to take land compulsorily, and it did not provide, when the money in respect of such land was ordered to be paid out of court, for the payment of the costs of that proceeding; but there is no expression to the contrary, therefore it does not come within the words "subject to the express provisions of any statute" in the Act of 1890. It was this omission to give the court power to deal with those costs to which this Act was intended to apply. Look at the reason of the thing. It is very hard upon a man that his land should be taken away from him compulsorily and the money paid into court, and that when the money is paid out he should have to pay the costs of that proceeding himself. It is one of the very cases which this Act was intended to meet.

SMITH, L.J.—I am of opinion that the judgment of Chitty, J. was right. We are asked to put a restricted construction on the Judicature Act of 1890, because in 1886 the court, when asked to put a construction on Order LXV., r. 1, put a restricted construction upon that rule. But Kay, L.J. has explained that it was necessary to put that restricted construction upon that rule, because otherwise the rule would have been *ultra vires*. The language of sect. 5 is very like the language of the rule. In my judgment this section is not to be restricted in the way in which the rule was restricted in *Re Mills' Estate* (*ubi sup.*), but it confers a jurisdiction on the court to give costs which it had not before.

Solicitors: Paddison, Fullilove, Cummins, and De la Chapelle; E. A. Baylis.

Nov. 27, 28, and 29, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

MIGHELL v. THE SULTAN OF JOHORE. (a)
APPEAL FROM THE QUEEN'S BENCH DIVISION.
International law—Foreign sovereign—Immunity from jurisdiction—Evidence of submission to jurisdiction—Proof of independent sovereignty—Statement by the Secretary of State.

(a) Reported by W. W. ORR and E. MANLEY SMITH, ESQTS., Barristers-at-Law.

The Court will not entertain an action against an independent foreign Sovereign unless he voluntarily submits himself in that particular action to the jurisdiction of the court.

Such a submission cannot be made until the court is asked to exercise its jurisdiction, and the court will therefore, in considering whether any such submission has been made, refuse to take into consideration his conduct before that time.

A certificate from a responsible Minister of the Queen as to the relations between Her Majesty and a foreign sovereign is conclusive in Her Majesty's courts.

THIS was an appeal from a judgment of the Queen's Bench Division (Wills and Lawrance, JJ.) setting aside an order for substituted service.

The writ was issued against "His Highness the Sultan of the State and Territory of Johore, otherwise known as Albert Baker," and was for damages for breach of promise of marriage, and for the return of a pair of diamond buckles or their value, and damages for their detention.

A master made an order for substituted service of this writ upon the defendant, and on appeal the learned judge referred the case to the court, the question being whether the defendant was subject to the jurisdiction of the courts of this country.

In an affidavit filed by the plaintiff she stated that she was introduced to the defendant in Aug. 1885 as Mr. Albert Baker, and that she has known him ever since under that name, being the name under which he always passed; that he proposed and promised marriage with her in that year when she knew him as Mr. Albert Baker, and that he was known by that name in the neighbourhood in which he lived; that in Oct. 1885 she accidentally discovered his real name and position, but he made her promise never to reveal it or call him by any other name than the one she had previously known; that at the defendant's request she assumed the name of Mrs. Baker in her communications with him; that in Oct. 1885 the defendant took a furnished private house in London as and in the name of Mr. Albert Baker: that he afterwards left England for some years, but that upon his return in 1891 he again represented himself as Mr. Baker and as a private individual and subject to the Queen, and that on his visits to the plaintiff he always so represented himself.

To ascertain the position of the defendant, a communication was addressed by the learned judge at chambers to the Colonial Office, and in answer thereto a letter, dated the 9th Sept. 1893, was received from the Colonial Secretary, in which it was stated that

Johore is an independent state and territory in the Malay Peninsula, and that his Highness Abubakar is the present Sovereign ruler thereof; that the relations between himself and Her Majesty the Queen, which are relations of alliance and not suzerainty, are now regulated by treaty, wherein he is called the Maharajah of Johore; that the Sultan has raised and maintains armed forces by sea and land, has organised a postal system, dispenses justice through regularly constituted courts of justice, and generally speaking exercises, without question, the usual attributes of a Sovereign ruler.

The treaty referred to—dated the 11th Dec. 1885—was headed:

Agreement on certain points touching the relations of Her Majesty's Government of the Straits Settlements with the Government of the independent State of Johore

made between Her Majesty's Secretary of State for the Colonies on behalf of the Queen . . . and his Highness the Maharajah of Johore.

Articles 5 and 6 of this agreement were relied on by the plaintiff as showing that the defendant was not sovereign ruler, but merely the ruler of a "protected" state.

Article 5 provided:

The Governor of the Straits Settlements, in the spirit of former treaties, will at all times to the utmost of his power take whatever steps may be necessary to protect the Government and territory of Johore from any external hostile attacks, and for these or for similar purposes Her Majesty's officers shall at all times have free access to the waters of the State of Johore. . . .

Article 6:

The Maharajah of Johore, in the spirit of former treaties, undertakes on his part that he will not, without the knowledge and consent of Her Majesty's Government, negotiate any treaty, or enter into any engagement with any foreign state, or interfere in the politics or administration of any native state, or make any grant or concession to other than British subjects or British companies, or persons of the Chinese, Malay, and other Oriental race, or enter into any political correspondence with any foreign state.

It is further agreed that, if occasion should arise for political correspondence between his Highness the Maharajah and any foreign state, such correspondence shall be conducted through Her Majesty's Government, to whom his Highness makes over the guidance and control of his foreign relations.

By article 7, the Maharajah was henceforth to be called "His Highness the Sultan of the State and Territory of Johore."

Finlay, Q.C. and George Wallace, for the defendant, were stopped.

George White for the plaintiff.—The order for substituted service here was right. In the first place, under the terms of the treaty, Johore is not an independent sovereign state, and therefore the Sultan is not an independent reigning sovereign. This is clear from articles 5 and 6 of the treaty, upon which I rely. Article 5 shows that Johore is a protected state, under the protection of this country; and article 6 shows that the Sultan of Johore cannot enter into treaties with foreign countries without the consent of Her Majesty's Government, and cannot send ambassadors to foreign countries, and therefore he has none of the attributes of sovereignty. The Sultan is, therefore, not an independent sovereign, and cannot claim immunity, as such, from the jurisdiction of the courts of this country. But, in the next place, assuming him to be a sovereign, the facts in this case show that he has waived his position as sovereign by coming into this country and living here as a private individual. [WILLS, J.—The whole point was considered by the Court of Appeal in the year 1880 in the case of *The Parlement Belge* (42 L. T. Rep. N. S. 273; 5 P. Div. 197), which is an authority against you.] That case is easily distinguishable. The whole point there was whether the ship then in question was a public or a private ship, by reason of its carrying on private trading in addition to carrying mails. I admit that an action cannot be brought against a sovereign in his character as a sovereign; but, if he is here as a private individual, he can be sued as such. There are many cases to show that the courts of this country have no jurisdiction over the public property of foreign states, but if the property be impressed with the character of private property, as for instance, if it

be in the hands of an agent, then our courts have jurisdiction. By analogy, there is the same distinction as to sovereigns being in this country in their public or private capacity, and if they are here in a private capacity merely, then they are amenable to the jurisdiction of our courts:

Munden v. The Duke of Brunswick, 10 Q. B. 656;
The Duke of Brunswick v. The King of Hanover, 2 H. of L. Cas. 1;
Wadsworth v. The Queen of Spain, 17 Q. B. 171;
The Charkieh, 28 L. T. Rep. N. S. 513; L. Rep. 4 A. & E. 59;
Marten's Law of Nations, pp. 183-4;
Wheaton's International Law, pp. 156 *et seq.* (1889);
Hall's International Law, p. 167 (3rd edit. 1890).

WILLS, J.—I entertain no doubt at all what my judgment ought to be in this case. In the first place, I have not the smallest doubt that the proper mode of obtaining information as to the status of the defendant has been adopted by my brother Wright, who wrote to the Colonial Office and got the answer which has been read. The Sultan of Johore, we are told in that answer, exercises, generally speaking, without question the usual attributes of a sovereign ruler. It appears that by treaty he has bound himself not to exercise certain of those rights except in certain particular ways. But that does not deprive him of the character of an independent sovereign ruler, and this case must be decided upon exactly the same principles as if it had arisen with regard to an attempt to bring into the courts of this country the sovereign of a powerful and neighbouring country, for instance, the King of Italy or the President of the French Republic. There is no precedent for any such action as this, which is a strong fact in itself, and it seems to me to be entirely contrary to every principle of international law as applied to the persons of sovereigns or of those who represent them. The ground upon which immunity from process by our courts is recognised by our law with regard to a foreign sovereign is that it is absolutely inconsistent with his status as an independent sovereign that he should be subject to the jurisdiction of a foreign country. That has been admitted in various cases—in the case of *The Charkieh* (*ubi sup.*), for instance. It is said that, because in that case the sovereign indulged in trading transactions, he lost the status of a foreign sovereign, and certain dicta of Sir R. Phillimore have been called to our attention. But in the case of *The Parlement Belge* (*ubi sup.*), which was many years after, and which was a considered judgment of very great lawyers, the court entirely dissented from those dicta, and they laid down in the final part of their judgment, which deals with the very question of the amenability of a foreign sovereign to the process of our courts, that one objection which was fatal to the attempt to bring the sovereign into the Admiralty Court by means of seizing a vessel was that, quite independently of the right of the foreign sovereign to have the public property of the State respected, it was contrary to international law and the comity of nations that a foreign sovereign should be directly impleaded in the courts of this country. It is there said that the process of attachment in the Court of Admiralty by seizing a vessel is an indirect mode of impleading the sovereign, although the sovereign was not personally made a defendant in the action, and it was said that that which cannot be done directly

CT. OF APP.]

MIGHELL v. THE SULTAN OF JOHORE.

[CT. OF APP.]

cannot be done indirectly, and that, therefore, such a process could not be allowed on the broad general principle that a reigning sovereign is not subject to the jurisdiction of a foreign country. No authority has been produced to qualify that broad principle so laid down by the Court of Appeal. A dictum in Hall's *International Law* has been cited. This dictum, which does not seem ever to have been acted upon, suggests that, if a sovereign comes into this country *incognito*, he is amenable to the jurisdiction of this country, although he chooses to claim his immunity. There is no authority for such a proposition, and it seems to me to be contrary to principle, and has probably arisen from some expressions in the case of *The Duke of Brunswick v. The King of Hanover* (*ubi sup.*). That was a very peculiar case from this circumstance, which can but very seldom happen, that the King of Hanover was not only King of Hanover, but was also a British peer, and it was held that he could be sued here because the transaction, in respect of which the right of action arose, had nothing to do with his character of King of Hanover, and that, inasmuch as he had two distinct personalities, in respect of one of which he was a British subject, and in respect of the other he was a foreign prince, in a matter which did not touch any attribute of his foreign royalty he was still a British subject, and might be treated as such. The Sultan of Johore is in no sense a British subject. It is said he came to this country *incognito*. I do not know that he did. The affidavit says that in the year 1891 he was using the name of Mr. Baker, but unquestionably the plaintiff was under no misapprehension as to what he was. She knew ever since Oct. 1885 who and what he was. If anything turned on the question of fact, I should say that it is not shown that in Aug. 1893, when this writ was issued, there was any *incognito*, or that he was here otherwise than as a sovereign prince. But it seems to me to be immaterial, for, if he was at the time when he was sought to be sued a sovereign prince, he was not subject to the jurisdiction of the courts of this country. There is authority for that proposition in the case of *Munden v. The Duke of Brunswick* (*ubi sup.*), a case which was cited as an authority in favour of the plaintiff, but it is a very strong authority against the plaintiff. It is one thing to say that a sovereign prince is capable of making an effectual contract in this country; it is another thing to say that when he is a sovereign prince he can be sued in the courts of this country. In *Munden v. The Duke of Brunswick* (*ubi sup.*) the question directly arose, because the Duke of Brunswick was sued for a debt, and he pleaded that at the time of the making of the deed under which the liability arose he was the reigning sovereign of Brunswick, and he goes on to say, "and that from the time of the making thereof until action brought he had been, and still was jointly entitled to all the rights, prerogatives, and privileges appertaining to him as the Duke of Brunswick." The courts said, "that does not allege that at the time when he was sued he was Duke of Brunswick or a reigning sovereign; it carefully avoids saying that;" and they point out that it is quite consistent with that plea that he may have been, when he was sued in the Court of Queen's Bench, deposed from his sovereignty or may have abdicated it. They held the plea to be

bad because it did not state that he was a reigning sovereign duke at the time when the action was brought. It is perfectly clear, therefore, that had that allegation been made in the plea it would have been a good plea, and that seems to me to be entirely consonant with every authority upon the subject. I have no hesitation whatever in coming to the conclusion that this writ must be set aside, and the order asked made.

LAWRANCE, J.—I am entirely of the same opinion on the grounds which have been given. The very year in which the judgment was given in *The Parlement Belge* (*ubi sup.*) judgment was also given by one of the judges who decided that case, that is, James, L.J., in a case of *Strousberg v. The Republic of Costa Rica* (44 L. T. Rep. N. S. 199), and there he points out exactly the only two exceptions which in his judgment exist with regard to actions against foreign sovereigns, and those are where a foreign sovereign or state has come into our court to seek redress against a defendant, in which case the defendant may assert any claim he has by way of counter-claim or cross action, in order that complete justice may be done; or, secondly, where both the plaintiff and the foreign sovereign or state claim funds in the hands of a third party under the jurisdiction of the English courts, in which case the foreign sovereign or state may be joined as a defendant in order to be able to assert any claim to the funds in question.

Order for substituted service of writ set aside and action stayed.

The plaintiff appealed.

Nov. 27, 28, and 29.—George White, for the plaintiff, used the same arguments as in the court below, referring also to Calvo, *Droit International*, 2nd edit., vol. 1, ss. 508 and 513; and to the following dictum of Lord Campbell, C.J., in *Wadsworth v. The Queen of Spain*, reported only in 20 L. J., at p. 492, Q. B., "No doubt a foreign sovereign may be sued here for money borrowed for his private purposes," and to *Strousberg v. The Republic of Costa Rica* (44 L. T. Rep. N. S. 199).

Finlay, Q.C. and George Wallace for the defendant.

LORD ESHER, M.R.—For the purposes of this case we must assume that the defendant, the Sultan of Johore, lived in this country under the name of Albert Baker, that he looked as if that might be his real name, and that the plaintiff believed that it was his real name. We must also assume that under this name he promised to marry the plaintiff, and that he broke his promise. Then, upon being sued for a breach of this promise, he says that he is a sovereign prince, and that therefore no civil action can be maintained against him in this country. An elaborate argument on this point has been presented to us, which was much the same as that which was put forward in the case of *The Parlement Belge* (*ubi sup.*). One good point in that argument was, that the House of Lords had formerly declined to determine this point. However, the point now raised was argued and determined and all the authorities upon it inquired into with the utmost care in *The Parlement Belge*. That case was decided by the Court of Appeal, and the judgment in it would therefore be binding on us in deciding the present case, even if we did not altogether agree with it. The first point argued

was, that there was no sufficient evidence that the defendant is an independent sovereign prince. The evidence is a letter written from the Colonial Office and signed by someone on behalf of the Secretary of State for the Colonies. The Secretary of State is the adviser of the Queen, and upon such a matter as this a letter from the Colonial Secretary has the same effect in courts of justice as if the letter had been written by the Queen herself. It was argued that the court ought not to remain satisfied with the letter, but ought to make further inquiries, and reference was made to what was said by Sir Robert Phillimore in *The Charkieh* (*ubi sup.*). I know what he did say in that case, but the judgment of the court in *The Parlement Belge* (*ubi sup.*) shows that Sir Robert Phillimore's opinion was not right. I think that a certificate from the Queen, given through her responsible Minister upon the question of the position of a foreign sovereign with regard to herself, is decisive in her courts of law. It is therefore clear that the defendant is an independent sovereign. All independent sovereigns are, so far as this question is concerned, equal to one another. That being the defendant's position, the question arises whether he can be sued in the courts of this country. It is suggested that in this case he can be sued, because, by coming to this country and living here under a false name and so deceiving the plaintiff, he has lost his privilege as an independent sovereign and made himself subject to the jurisdiction of the courts in this country. Now the whole of this subject was carefully considered in *The Parlement Belge* (*ubi sup.*). It was then pointed out that great judges had formerly declined to give decisive opinions on the matter, but I think that in that case the court was called upon to decide the point and did decide it. In delivering the judgment of the court I used these words (5 P. Div. at p. 206): "The first question therefore is—what is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised? 'Our king,' says Blackstone (bk. 1, c. 7), 'owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a court would be contemptible unless the court had power to command the execution of it; but who shall command the king?' " In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. "The world," says Wheaton, adopting the words of the judgment in the case of *The Exchange* (7 Cranch. 116), "being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." "This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attri-

bute of every nation." "One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why have the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation." Then again further on (at p. 214) I used these words: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." The Court of Appeal seems to me to have there laid down an absolute rule, without any exception or qualification whatever. No mention was made there of the case of a sovereign voluntarily submitting himself to the authority of a foreign court. Everyone knows that a sovereign can do so, if he wishes. What is the time when a sovereign must decide whether he submits or not? It must be when the court is about to exercise authority over him. He elects whether he will submit or not when the court cites him to appear, and if at that time he proves that he is an independent sovereign, then the court has no jurisdiction over him. The court cannot inquire into what he has previously been doing, and if he at that time elects not to submit to the jurisdiction of the court, then the court has no jurisdiction over him. The court cannot inquire whether he has been acting *incognito* or deceitfully, nor make any inquiries into the nature of his conduct. That seems to me to be the law as laid down in *The Parlement Belge* (*ubi sup.*), which is a decision binding upon this court. I think that this appeal fails, and must be dismissed.

LOPES, L.J.—It was contended that the defendant's position as an independent sovereign prince was not satisfactorily established. It seems to me to have been fully established that the defendant is as much an independent sovereign prince as any in Europe, and like all independent sovereign princes he is entitled, upon coming into this country, to immunity from the jurisdiction of English courts. That such is the law seems to me to have been clearly established in *The Parlement Belge* (*ubi sup.*). Vattel, too, in a passage that was cited in the judgment in the case of *The Parlement Belge*, says (bk. 4, c. 7, s. 108) that a sovereign prince who may come as a traveller into a foreign country is exempted from all jurisdiction. There is no doubt that a foreign sovereign may submit, if he chooses to do so, to the jurisdiction of the courts of this country. It is argued that the defendant has done so in this case, because he has lived and acted in this country as a private individual and under an assumed name. We are therefore asked to infer that he has submitted to the jurisdiction of the courts of this country. I am clearly of

CT. OF APP.] SMITH AND SERVICE v. ROSARIO NITRATE COMPANY LIMITED. [CT. OF APP.]

opinion that we cannot draw any such inference. The only mode in which a foreign sovereign can submit to the jurisdiction of our courts is by a submission in the face of the court. He does not waive his rights by taking an assumed name or doing anything of that kind. Vattel again says that a sovereign, on making himself known, cannot be treated as subject to the common laws, for it is not to be presumed that he has consented to such a subjection. It is clear, to my mind, that there has been no submission by the defendant to the jurisdiction of English courts, and I agree that the appeal should be dismissed.

KAY, L.J.—The status of a foreign sovereign is one of which the courts will take judicial cognisance; that is to say, neither party to the action is required to prove to the court whether or not a person is in the position of an independent sovereign. Of course, if there is any doubt upon the matter the court will take means to inform itself. Here the defendant is the Sultan of Johore, and the means which Wright, J. took to inform himself was an inquiry at the Colonial Office. A letter was sent to him from that office signed by an official, who stated that he was directed by the Secretary of State for the Colonies to give the information which the letter contained. For the plaintiff it was argued that that was not enough. I confess that I cannot conceive a more satisfactory mode of obtaining information of this kind than a letter from one of the Queen's Secretaries of State, which, for this purpose, is entirely the same as a letter from the Queen herself, and if Her Majesty condescends to state to one of her own courts that a certain person is an independent sovereign, such a statement must be conclusive. That this letter contains such a statement seems to me to be perfectly clear. A treaty is referred to in it, under which the Sultan is entitled to British protection, and by which he undertakes not to enter into any negotiations or treaty with any foreign state without the consent of Her Majesty. From this it was argued that he had ceased to be an independent sovereign; but clearly he is not dependent on any one. The Queen has given him her protection as a condition of his not entering into relations with foreign countries, and if he should do so, contrary to his agreement, he would lose his right of protection, and possibly other consequences might follow. But there seems to me to be nothing in this treaty to disprove or to qualify the statement contained in the letter that the Sultan of Johore is an independent sovereign. The next point in the argument was this: An independent sovereign, who is sued in a foreign court, may waive his rights of immunity and become subject to the jurisdiction of the court. I agree that that is so; but how is it to be done? Supposing some great European potentate were to be sued in an English court but were to take no notice of the proceedings, then the court would take judicial notice of the fact that he was a foreign sovereign, and therefore not subject to English jurisdiction. This shows that it is not necessary for a foreign sovereign to assert his rights of immunity, but that the court is bound to take notice of the fact, and to say that it has no jurisdiction. Then it was said that the defendant in this case had waived his rights. It is said that he came to England as a private person; he passed under the name of Albert Baker, and as such entered

into the relations with the plaintiff upon which this action is founded, and that by doing this he showed that he intended and wished to be treated in this country as a private individual, and therefore as subject to the jurisdiction of the courts of this country in the same way as any other private individual would be. Then the question arises, whether a foreign sovereign who has lived in this country perfectly *incognito*, no one knowing that he is an independent sovereign, thereby waives his rights of immunity as an independent sovereign. The only authority cited in support of that is a dictum of Lord Campbell, C.J., reported in *Wadsworth v. The Queen of Spain* (20 L. J., at p. 492 Q. B.). The case is also reported in the authorised reports (17 Q. B. 171); but the dictum relied on is not reported there, and it appears nowhere but in the *Law Journal* report. Under these circumstances the dictum seems to me not to be one of very great authority. Probably when the authorised report came, as it may have done, to Lord Campbell for revision, he would not allow it to remain in the report. Besides that dictum certain textbooks were cited; but in the books by writers of great authority, such as Vattel, nothing of the kind appears. On the contrary, there are the passages from Vattel which Lopes, L.J. has referred to, which show that the moment at which a defendant should claim immunity as a foreign sovereign is the moment when he is cited to appear before the court. The true proposition of law seems to me to be this: that a foreign sovereign is entitled to immunity from an action brought in the courts of this country, unless in any particular action he chooses to waive his immunity and submit to the jurisdiction of the court. Here the defendant has not consented to submit to the court; but has acted just to the contrary. Having done nothing to waive the immunity which he now claims, I think that, upon principles which are well settled upon abundant authority, he is entitled to immunity, and that this appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Colyer and Colyer*.
Solicitor for the defendant, *Edward F. Turner*.

Wednesday, Nov. 29, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

SMITH AND SERVICE v. THE ROSARIO NITRATE COMPANY LIMITED. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Restraints of princes and rulers—Demurrage—Customary mode of loading.

The defendants chartered the plaintiffs' vessel to proceed to Iquique, in Chili, and there to load for the United Kingdom a cargo of 3000 tons of nitrate of soda at the rate of 200 tons per working lay day, and after provisions as to the lay days came the usual clause mutually excepting restraints of princes and rulers, political disturbances or impediments during the said voyage.

At the trial of the action the learned judge found as a fact that the ordinary and recognised mode of

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.] SMITH AND SERVICE v. ROSARIO NITRATE COMPANY LIMITED. [CT. OF APP.]

loading nitrate at Iquique was to send the required amount of nitrate down by railway from the mines direct to the ship at the quay when she was ready for loading.

When the ship arrived at Iquique considerable delay was caused in the loading by reason of a civil war having broken out and the mines and the railway being for a time in possession of the troops, so that no nitrate could be sent down by railway to the ship. In an action for demurrage : Held, that the delay was within the exception in the charter-party.

THIS was an appeal from the judgment of Pollock, B. at the trial of the action without a jury at the Guildhall.

The action was for demurrage, and was brought by the owners of the steamship *Mount Tabor* against the charterers.

The *Mount Tabor* was chartered to proceed to Iquique in Chili, and there to load a cargo of 3000 tons of nitrate of soda in bags, and thence to proceed to ports in the United Kingdom or on the Continent as ordered.

The charter-party provided for the loading of the cargo at the rate of 200 tons per working lay day from the day when the ship was ready to receive cargo, demurrage at an agreed rate per day, restraint of princes and rulers, political disturbances, or impediments during the said voyage always mutually excepted.

When the ship arrived at Iquique a civil war had broken out, and the nitrate mines and the railway from the mines to the port being in the hands of troops, the ship's loading was delayed for a considerable time until it became possible to send down nitrate by railway from the mines to the ship.

At the trial of the action the learned judge found that the customary mode of loading nitrate at Iquique is by sending the nitrate down direct by rail from the mines to the port and the quay and putting it on board the vessel as it is acquired at the mine.

The plaintiffs then brought this action for demurrage in respect of the delay at Iquique, and also in respect of a subsequent delay at another port in Chili.

At the trial of the action, before Pollock, B. without a jury, the learned judge held that both the delays came within the exception clause in the charter-party, the case as to the delay at Iquique being governed by the decision in *Hudson v. Ede* (18 L. T. Rep. N. S. 764; L. Rep. 3 Q. B. 412); and he gave judgment for the defendants.

The plaintiffs appealed.

Joseph Walton, Q.C. and Philipson for the plaintiffs.—The loading of the ship was not delayed by any restraints or impediments within the exception clause, and the defendants are not protected by that clause. The question here is, at what moment did the loading of the ship commence? There was nothing at the port of Iquique which delayed the loading. The loading of a ship consists in putting the goods into the vessel, or transferring them from the land to the vessel. The loading of the ship cannot be said to commence with putting the goods into trucks on a railway many miles away from the sea or the ship. It is the duty of a charterer to have the goods ready for loading at the port when the ship arrives. *Hudson v. Ede* (*ubi sup.*) is a strong

decision, and the decision of Pollock, B. goes even further. They cited

Grant v. Coverdale, Todd, and Co., 51 L. T. Rep.

N. S. 472; 9 App. Cas. 470;

The Aine Holme, 68 L. T. Rep. N. S. 962; (1893 P. 173.

R. T. Reid, Q.C. and J. W. Mansfield, for the defendants, were not called upon.

LORD ESHER, M.R.—It seems to me that, upon the facts as found by the learned judge at the trial, his decision was right. His finding was that the ordinary mode of loading nitrate at Iquique was, that the nitrate was not taken away from the mines until it was wanted to put on board ship. When the ship was ready a message was sent to the mines to send the required nitrate down in trucks. The nitrate was then sent down and unloaded, not for the purpose of being stored in warehouses, but for putting on to the ship. The whole matter was a single transaction, and was treated by everyone at Iquique as the ordinary, proper, and usual mode of loading nitrate. When the contract now sued upon was made, it must be taken to have been made with reference to the recognised custom of the port as to what is there considered to be loading. Then the case comes exactly within the decision of *Hudson v. Ede* (*ubi sup.*). Then, if the ship could not be loaded in the recognised manner by reason of "restraints of princes and rulers, political disturbances or impediments," the charterers are not liable. The decision of the learned judge was right, and this appeal must be dismissed. The case is governed by *Hudson v. Ede* (*ubi sup.*), which is a well recognised decision and is binding on this court.

LOPES, L.J.—Having regard to the finding of fact by the learned judge at the trial, I can only say that this case is governed by the decision in *Hudson v. Ede* (*ubi sup.*).

KAY, L.J.—I agree. The question raised in *Hudson v. Ede* (*ubi sup.*) seems to me to be a very arguable one, but it has now been decided in the Exchequer Chamber, and that decision has been recognised in *Postlethwaite v. Freeland* (42 L. T. Rep. N. S. 845; 5 App. Cas. 599) in the House of Lords, where Lord Blackburn cited it approvingly, and also in *Grant v. Coverdale, Todd, and Co.* (51 L. T. Rep. N. S. 472; 9 App. Cas. 470) by Lord Selborne. The only question now, therefore, is whether this case is within the decision of *Hudson v. Ede* (*ubi sup.*). An attempt was made on behalf of the plaintiffs to distinguish the two cases, on the ground that in *Hudson v. Ede* (*ubi sup.*) the goods were brought down the river to the ship in lighters, and the loading began when the goods were put into the lighters, whereas in this case the nitrate was brought down by rail to the port. But here the learned judge has found as a fact that the nitrate was brought directly from the mines to the ship, without being kept at all stored up in warehouses, and that this was the ordinary and recognised mode of loading at the port in question. The case is, therefore, undistinguishable from *Hudson v. Ede* (*ubi sup.*), and I agree that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, and Hawkesley*.

Solicitors for the defendants, *Norton, Rose, Norton, and Co.*

CT. OF APP.]

GORDON v. EVANS.

[CT. OF APP.]

Monday, Dec 11, 1893.

(Before Lord HALSBURY, LOPES and
DAVEY, L.JJ.)

GORDON v. EVANS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*County Court—Practice—Default summons issued out of the jurisdiction—Affidavit—Claim exceeding 5l.—County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 74 and 86—County Court Rules 1889, Order V., rr. 9a, 10, and Appendix, Form 14a.**Where the claim in a County Court action exceeds 5l. and the plaintiff asks for leave for the issue of a default summons out of the jurisdiction, it is not required of him that in his affidavit he should swear that the defendant is not of any of the occupations or descriptions mentioned in Order V., r. 10, of the County Court Rules 1889.*

This was an appeal from an order of the Queen's Bench Division (Wills and Wright, JJ.) setting aside an order made by Kennedy, J. at chambers for the issue of a writ of prohibition against the judge of the County Court of Birmingham.

The action was commenced in the Birmingham County Court to recover a sum of 19l. due upon a promissory note, which was payable at Birmingham, made by the defendant who resided at Ludlow.

By the County Courts Act 1888 (51 & 52 Vict. c. 43) it is enacted as follows:

Sect. 74. Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced by leave of the judge or registrar in the court within the district of which the defendant or one of the defendants dwell or carried on business at any time within six calendar months next before the time of commencement, or, with the like leave, in the court in the district of which the cause of action or claim wholly or in part arose.

Sect. 86. (1.) Subject to any rules and orders under this Act, in any action in a court for a debt or liquidated money demand, the plaintiff may at his option cause to be issued a summons in the ordinary form, or (upon filing an affidavit to the effect set forth in the prescribed form) a default summons in the prescribed form or to the prescribed effect. . . . (6.) Provided always that no other summons than a summons in the ordinary form shall, without leave of the judge or registrar, be issued when the amount claimed shall not exceed five pounds, unless the action is for the price, value, or hire of goods which, or some part of which, were sold and delivered or let on hire to the defendant to be used or dealt with in the way of his trade, profession, or calling, and such leave shall be given in the manner prescribed.

By the County Court Rules 1889 it is provided by Order V., r. 9a, as follows:

Where leave to enter a plaint under sect. 74 of the Act is required, an application shall be made upon the affidavit of the plaintiff, or of some person on his behalf who has knowledge of the facts, according to the form in the appendix.

By rule 10:

Where pursuant to the proviso in sect. 86 of the Act, the leave of the judge or registrar is required for the issue of a default summons, no such leave shall be given unless the occupation and description of the defendant shall be fully set out in the affidavit given in the appendix, and no such leave shall be given in cases where in the affidavit it appears that the defendant is a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or any person engaged in manual labour.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

In the Appendix to the Rules Form 14a is headed, "Affidavit for leave to issue ordinary or default summons out of the jurisdiction."

Paragraphs 4 and 5 of this form are as follows:

4. And I further say that the said C. D. is not a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or a person engaged in manual labour.

5. And I further say that my (or the plaintiff's) claim is for the price (or value or hire) of goods which, or some part of which, were sold and delivered (or let on hire) to the said C. D. to be used or dealt with in the way of trade (or profession or calling) of (state the trade, profession, or calling).

By the side of these two paragraphs respectively are two marginal notes as follows:

To be added where a default summons is proposed to be issued.

To be added where a default summons is proposed to be issued, and the claim does not exceed 5l.

The plaintiff proceeded against the defendant under Keating's Act (the Summary Procedure on Bills of Exchange Act 1855, 18 & 19 Vict. c. 67), and Ludlow being out of the jurisdiction of the Birmingham County Court, he obtained leave from the registrar to issue a plaint note and default summons.

This leave was granted upon an affidavit which followed the Form 14a in the Appendix to the County Court Rules, except that it did not contain any such allegation as is contained in paragraph 4 of the form.

On the ground, therefore, that the affidavit being insufficient, the registrar had no jurisdiction to grant leave, the defendant applied at chambers for a writ of prohibition to the County Court.

Kennedy, J., at chambers, granted the application.

Upon the plaintiff's appeal, the Queen's Bench Division (Wills and Wright, JJ.) set aside the order made at chambers, holding that the prohibition was asked too broadly against the entering of the plaint, and that the omission in the affidavit of paragraph 4 of the form was a mere irregularity.

The defendant appealed.

Spearman for the defendant.—The plaintiff's summons in this case was a default summons, within the definition of "default summons" in Order LII. of the County Court Rules. Therefore, under sect. 86, sub-sect. 1, of the County Courts Act, the plaintiff was obliged to file an affidavit in the prescribed form, and under Order V., r. 10, he is bound to insert in his affidavit paragraph 4 of Form 14a.

H. Tindal Atkinson for the plaintiff.—The case is governed by the proviso, sub-sect. 6 of sect. 86, of the County Courts Act. Order V., r. 10, which in terms refers to this proviso only, is to be applied only to cases where the claim does not exceed 5l. The plaintiff's claim here is for 19l., and therefore his case is not within Order V., r. 10, and consequently he rightly omitted from his affidavit paragraph 4 of form 14a. The marginal note, which in the form appears opposite paragraph 5, really applies to paragraph 4; it has no meaning as applied to paragraph 5.

Spearman replied.

Lord HALSBURY.—I confess I do not feel any doubt on this question. The County Courts Act

CT. OF APP.]

Re BROOKE; BROOKE v. BROOKE.

[CHAN. DIV.]

1888 gives power, with certain restrictions, to issue a default summons out of the jurisdiction. The two important sections of the Act on this point are sects. 74 and 86. There is a proviso at the end of sect. 86 by which it is enacted that no other summons than a summons in the ordinary form shall, without leave of the judge or registrar, be issued where the amount claimed shall not exceed 5*l.*, unless the action is for the price, value, or hire of goods which, or some part of which, were sold and delivered or let on hire to the defendant, to be used or dealt with in the way of his trade, profession, or calling, and such leave shall be given in the manner prescribed. That proviso applies to a default summons, because that is not a summons in the ordinary form. Then further provisions are made by the County Court Rules 1889. Order V., r. 10, provides that, where, pursuant to sect. 86 of the Act, the leave of the judge or registrar is required for the issue of a default summons, no such leave shall be given unless the occupation and description of the defendant shall be fully set out in the affidavit given in the appendix, and no such leave shall be given in cases where in the affidavit it appears that the defendant is a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or any person engaged in manual labour. Then in the appendix is a form of affidavit, No. 14*a*, paragraph 4 of which is in accordance with the latter part of Order V., r. 10. The course of legislation upon this point seems to me clear enough. When an application is made for a default summons, and when the sum claimed is under 5*l.*, the affidavit, which is required before leave will be given, shall set forth the occupation and description of the defendant, and if he is of an occupation mentioned in paragraph 4 of the form of affidavit No. 14*a*, then no default summons will be granted. That is very intelligible. Now, the form of affidavit is applicable to more cases than one, and it must be admitted that in some cases in which it may be used certain parts of it are to be omitted to suit the occasion. But it has been contended in this case that paragraph 4 of the form ought necessarily to have been included, and that its inclusion in the affidavit made by the plaintiff was a condition precedent to the exercise by the registrar of his jurisdiction to give leave for the issue of the default summons. I am not disposed to consider the question whether what happened after the plaint note had been entered was a mere irregularity, or was something which went to the jurisdiction, because it seems to me that the Act and the rules, and the marginal notes to the form of affidavit in the rules, are all clear enough. The marginal note to the form, which refers to the claim not exceeding 5*l.*, is perfectly intelligible when applied to paragraph 4 of the form, but I see no object in applying it to paragraph 5. The form of the note is a blunder, and should not be applied to paragraph 5, but it should have been put opposite paragraph 4. I think that this affidavit was drawn up in the proper form, and that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. It is unnecessary that I should give any opinion as to the question whether that which happened after the plaint note had been issued was merely an irregularity, or whether it was something more than that. I will only say that I think that the

conjoint effect of the proviso in sect. 86 and the rules made under the Act is to confer a privilege on the persons named in Order V., r. 10. when sued upon a claim not exceeding 5*l.* The Divisional Court were right in refusing the prohibition asked for, and this appeal should be dismissed.

DAVEY, L.J.—I am of the same opinion. The affidavit need only be in the form 14*a*, so far as it is applicable to the circumstances of the case. The marginal note which refers to the claim being under 5*l.* has been inadvertently put in the wrong place. I agree that the judgment of the Divisional Court should be affirmed.

Appeal dismissed.

Solicitors for the plaintiff, *Robbins, Billing, and Co.*, for *Rollason*, Birmingham.

Solicitors for the defendant, *Edward Ricketts*, for *C. B. Cottam*, Ludlow.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 7, 8, and 14, 1893.

(Before CHITTY, J.)

Re BROOKE; BROOKE v. BROOKE. (a)

Will—Construction—Contingent remainder—Devise to trustees—Direction to pay debts—Legal estate in trustees.

By her will, E. B., who died in 1875, after directing her just debts, and funeral and testamentary expenses, and legacies, to be paid by her executors thereafter named, specifically devised a freehold messuage to her sons, H. B. and W. J. B., and their heirs, upon trust to allow the said H. B. to use and enjoy the same for life, and after his decease to stand possessed thereof upon trust for all and every one or more of the children of the said H. B., as he should by deed or will appoint, and, in default of appointment, in trust for all and every one or more of the children of the said H. B., who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares as tenants in common. The will contained a residuary devise and bequest unto and to the use of her said son H. B. and to E. W. R., thereafter called her said trustees, upon trust for sale and conversion. After declaring the beneficial trusts of the sale and conversion, the testatrix appointed her said son H. B. and the said E. W. R. trustees of her will, and her said sons, H. B. and W. J. B., her executors.

H. B. died in Nov. 1892, without having exercised his power of appointment, and leaving two children, both infants and unmarried.

*The question arose whether, on the true construction of the will, H. B. and W. J. B. took the legal estate in the specifically devised freehold messuage, in which case only the contingent remainder to the children would be valid as an equitable remainder supported by a freehold; otherwise the children's estate would fail to take effect according to the rule established in *Festing v. Allen* (2 L. T. Rep. N. S. 150; 12 M. & W. 279).*

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re BROOKE; BROOKE v. BROOKE.

[CHAN. DIV.]

Held, that the direction to pay debts was sufficient to show that, in the specific devise to her two sons and their heirs in trust for her son H. and his children, the testatrix did not mean to avail herself of the machinery of the Statute of Uses, or to make them mere conduit-pipes of the legal estate, but that, on the contrary, she intended that the legal estate should pass to and not through them, in trust, according to the modern signification of the term "trust," and that the estates given to the infants were equitable and did not fail.

ORIGINATING SUMMONS.

Elizabeth Brooke, by her will dated the 21st April 1875, after directing her just debts and funeral and testamentary expenses, and the legacies bequeathed by her will, to be paid by her executors thereafter named, as soon as conveniently might be after her decease; and after bequeathing divers general pecuniary legacies, devised and bequeathed a freehold messuage, No. 4, Royal-crescent, Bath, together with the furniture, plate, plated articles, linen, china, glass, books, pictures, prints, and other household effects therein at the time of her decease, unto her sons, Henry Brooke and William John Brooke, their heirs, executors, and administrators respectively, upon trust that they and the survivors or survivor of them should permit the said Henry Brooke and his assigns to use, occupy, and enjoy the same during the term of his natural life, he keeping the same in tenantable repair, and insured against fire, and from and after his decease should stand possessed thereof upon trust for all and every one or more of the child and children of the said Henry Brooke, as he should by deed or will appoint, and in default of such appointment, then in trust for all and every his children and child, who being sons or a son should live to attain the age of twenty-one years, or being daughters or a daughter should attain that age or previously marry, in equal shares and proportions as tenants in common, and if there should be only one such child, then in trust for such child, and if there should be no such child then upon precisely similar trust for the said William John Brooke during his life; and after his death for his children, with remainder over. The testatrix declared that it should be lawful for the person for the time being entitled under the trusts of that her will to the use, occupation, and enjoyment of the said messuage with the appurtenances, to lease the same for any term not exceeding seven years, and after giving some further legacies and annuities, the testatrix demised her residuary real and personal estate unto and to the use of her said son Henry Brooke and to Ernest Wallace Rooke thereafter called her said trustees, their heirs, executors, administrators, and assigns respectively, upon trust for sale and conversion as therein mentioned, and she appointed her said son Henry Brooke and the said Ernest Wallace Rooke trustees of that her will, and her said sons Henry Brooke and William John Brooke executors.

The testatrix died on the 28th April 1875, and her will was proved by both the executors.

Her son, the said Henry Brooke, died on the 11th Nov. 1892, without having exercised the power of appointment, leaving two children, both infants and unmarried.

The infants, by their next friend, took out an originating summons to determine the question

whether the contingent remainder limited to them by the will was valid, which depended upon whether the executors took the legal estate in fee simple in the messuage, No. 4, Royal-crescent, specifically devised.

C. E. Jenkins for the infant plaintiffs.—The direction to pay debts imposes a duty on the executors and vests the legal estate in them; and the equitable remainder to the children has not failed:

Spence v. Spence, 6 L. T. Rep. N. S. 538; 12 C. B. N. S. 199;

Creaton v. Creaton, 3 Sm. & Giff. 386;

Marshall v. Gingsell, 47 L. T. Rep. N. S. 159; 21 Ch. Div. 790.

It has already been decided in *Re Brooke* (35 L. T. Rep. N. S. 301; 3 Ch. Div. 630) that the legacies were charged on the residuary real estate. Another argument in favour of the contention that these are equitable interests may be founded upon the bequest of the chattels in the house being combined with the gift of the messuage itself.

B. B. Rogers for the trustees.—The effect of the authorities cited is limited by the fact that in each of them the devisees took some legal estate in the realty devised. Here they take nothing under the devise apart from the direction to pay debts. The will must be construed as it stands, and there being no freehold to support it, the remainder to the children fails:

Cunliffe v. Branker, 35 L. T. Rep. N. S. 578; 3 Ch. Div. 393.

The argument founded on the bequest of the chattels being combined with that of the house fails, for that does not prevent the law applicable to each kind of property being applied:

Forth v. Chapman, 1 P. Wms. 683;

Houston v. Hughes, 6 B. & Cr. 403;

Baker v. White, 33 L. T. Rep. N. S. 347; L. Rep. 20 Eq. 166;

Rhodes v. Whitehead, 2 Dr. & Sm. 532.

He referred also to

Re Tanqueray-Williame and Landau, 46 L. T. Rep. N. S. 542, 545; 20 Ch. Div. 465, 476.

Jenkins in reply.—The fact that the devisees in the three cases first cited took some legal estate in the realty devised did not form the ground of the decisions; which turned on the direction to pay debts.

Nov. 14.—*CHITTY, J.*—The question is, whether on the true construction of the will, Henry Brooke and William John Brooke took the legal estate in fee simple in the messuage, No. 4, Royal-crescent, specifically devised. If they did, the contingent remainders to the children of John Brooke are valid; if they did not, the estates of the children, being limited by way of legal contingent remainders, have failed to take effect according to the rule established by *Festing v. Allen* (2 L. T. Rep. N. S. 150; 12 Mees. & Wel. 279). In determining the question, I am bound, according to the judgment of James, L.J. in *Cunliffe v. Branker* (*ubi sup.*) to construe the will as it stands, without regard to this feudal rule, notwithstanding that it is not adopted in equity when the legal fee is vested in trustees; notwithstanding that it defeats the testator's intention and ought, in the opinion of eminent judges, to have been abolished long ago (see the judgment of Sir George Jessel, M.R., in the same case), and has been at last abolished by statute; which, however, does not reach back to the will of this testatrix (see the

CHAN. DIV.]

Re BROOKE; BROOKE v. BROOKE.

[CHAN. DIV.]

statute 40 & 41 Vict. c. 33). On this will one point is quite clear; the devisees, H. Brooke and W. J. Brooke, take in the specifically devised messuage, either the entire legal estate in fee simple as joint tenants, or they take nothing at all, being merely conduit-pipes to carry the legal estate to Henry Brooke and his children. There is no intermediate position admissible; they do not take a partial interest in the legal fee. For the sake of clearness I may treat the will as consisting of three parts; first, the direction to the executors at the beginning of the will; secondly, the specific devise and bequest of furniture and chattels; and thirdly, the residuary devise and bequest. The residuary devise and bequest is made "unto and to the use of my said son Henry Brooke and to Ernest Wallace Rooke, hereinafter called my said trustees, their heirs, executors, administrators, and assigns respectively upon trust" for sale and conversion. After declaring the beneficial trusts of the proceeds of sale and conversion, the testatrix expressly appoints these two persons trustees of her will, and appoints her sons H. Brooke and W. J. Brooke her executors. On this third part of the will it is unquestionable that the legal estate in fee was devised to the trustees named upon duly constituted "trusts" in the modern sense of the term. There was, however, a question whether the legacies previously given by the will were charged on the residuary realty. This question was decided in the affirmative in *Re Brooke (ubi sup.)*. The decision turned on the rule established by *Greville v. Browne* (7 H. L. Cas. 689), which was held to apply, notwithstanding the direction to the executors at the beginning of the will. I turn now to the specific devise, dealing with it for the moment without reference to the direction to the executors. The testatrix thereby devised and bequeathed the messuage and the appurtenances, with the furniture and other specified chattels therein, unto her sons H. Brooke and W. J. Brooke, their heirs, executors, and administrators respectively, upon trust (in effect) to permit H. Brooke to occupy and use the same during his life, and from and after his decease to stand possessed thereof for his children as he should appoint—he made no appointment—and in default in trust for his children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or previously marry, with limitations over, all of which are expressed in the same form—viz., "upon trust" or "in trust." No active duties in regard to the messuage are in express terms imposed upon the devisees, the two sons. It is clear that to this specific devise, still treated as standing alone, the rule laid down in *Doe v. Biggs* (2 Taunt. 109) and established by subsequent authorities would apply, and that, notwithstanding the employment of the term "trust," the devisees, the sons, would be mere conduit-pipes, and the legal estate would pass to H. Brooke for life, with a contingent remainder to his children. The term "trust" would be read, not in its modern sense, but in the old sense in which it was understood before and in the Statute of Uses (27 Hen. 8, c. 10), which admitted of no difference between "uses" and "trusts." The statute itself, as has often been observed, does not of its own force apply to wills, the Statute of Wills having been subsequently passed (see, for instance, *Re Tanqueray-Willame and Landau (ubi sup.)*), but testators are at liberty

to employ the machinery of the statute for the purpose of manifesting their intention. To take familiar illustrations—a devise to the use of A. and his heirs in trust for B. and his heirs passes the legal estate to A. in fee; a devise to A. and his heirs to the use of B. and his heirs, or in trust for B. and his heirs, passes the legal estate in fee to B., there being no duties to be performed by A. requiring that the legal fee should remain in him; but when there are such duties, as where the devise is to A. and his heirs in trust for a married woman and her heirs for her separate use, the legal estate remains vested in A. for the protection of the married woman. The will before me affords a further illustration; the devise of the residuary real estate is to the "use" of the persons named and their heirs upon trust to sell. This clearly shows that the legal estate was intended to be taken by them, and for two reasons—first, the employment of the word "use;" and secondly, the execution of the duties imposed; either of the reasons is sufficient. On the other hand, the specific devise, taken apart from the rest of the will, carries the legal estate to the apparent *cestuis que trust*. At the end of the specific devise the testatrix confers a power to lease the messuage with the appurtenances, which, however, is not given to the two sons, but to the persons for the time being entitled "under the trusts of this my will" to the use and enjoyment of the messuage. This power does not throw much light, one way or the other, on the testatrix's intention. I have seen, in regularly-drawn wills, where it was clear that the legal estate passed to the trustees, a similar power conferred upon the equitable tenants for life. The term "trusts" in the clause is capable of being taken in either of the senses above indicated. It is, however, not inconsistent with the view that the tenants for life are intended to take merely equitable interests. An argument in support of the contention that the son Henry and his children take merely equitable interests, was founded upon the bequest of the chattels in the house being combined with the gift of the house itself. But this argument was disposed of by *Baker v. White (ubi sup.)* and *Firth v. Chapman (ubi sup.)*. It was part of the same argument that the leasing power extended to the chattels by reason of the word "appurtenances;" but the same word occurs in the devise itself in reference to the messuage; and, if it is necessary to express an opinion on the point, my opinion is that the chattels are not included in the power. I am now brought to consider the effect of the direction at the beginning of the will. It is a direction that the testatrix's debts and general and testamentary expenses, and the legacies bequeathed by the will shall be paid "by my executors hereinafter named," and the critical question is, what effect this direction has upon the specific devise made to the persons afterwards appointed executors? It is admitted that this direction is sufficient to charge the specifically-devised realty with the debts, expenses, and legacies directed to be paid. For the trustees of the residuary estate, who claim that the specifically-devised messuage has fallen into the residue, it is contended that the direction has no further operation. For the children it is contended that the direction is sufficient to show that the testatrix intended the legal estate in the messuage should remain with the devisees, the executors, for the performance of

CHAN. DIV.] Re PRINTING, &C., CO. OF AGENCE HAVAS; Ex parte CAMMELL. [CHAN. DIV.]

the duty imposed on them of making the payments. For the children three authorities were principally relied on: *Creaton v. Creaton* (*ubi sup.*), *Spence v. Spence* (*ubi sup.*), and *Marshall v. Gingell* (*ubi sup.*). For the trustees of the residue it was pointed out that in all these cases there was no question that the devisees took at least some legal estate in the realty devised, and it was contended that the effect of the authorities was limited by that circumstance. It is necessary to consider these authorities shortly with a view to extract from them the principle upon which they are founded. In *Creaton v. Creaton* the subject of the devise was copyhold, to which, of course, the machinery of the Statute of Uses could not possibly be applied: (see *Baker v. White* (*ubi sup.*)). The will, made in 1818, contained a direction that the testator's debts and funeral and testamentary expenses should be paid, but without stating in terms by whom the payments were to be made. The will then proceeded to devise the copyholds to three persons named (also his executors) and the survivors and survivor of them and the heirs of the survivor upon trusts (in effect) for the heirs of certain beneficiaries and the survivor, and from and after the decease of such survivor, the will contained direct devises over, the form employed being, "I give and devise." The real difficulties in the case arose from this partial declaration of trust, which did not exhaust the customary estate of inheritance in the copyholds, and from the form of the gift over, but the Vice-Chancellor found in the direction for payment of the debts sufficient ground for surmounting these difficulties, and held that the three executors and devisees took the legal estate in the whole of the customary estate of inheritance. His decision was followed by the Court of Common Pleas in *Spence v. Spence* (*ubi sup.*). In that case the testator, by his will, made after Jan. 1838, directed payment of his debts and funeral and testamentary expenses by his executors, and devised to the persons afterwards appointed his executors, all his real estate, in trust to pay the rent to his son Jonathan for life, and "from and immediately after" his death "in trust for the right heirs" of his said son. It was held that, by reason of the direction to pay debts, the executors and devisees took the legal estate, and that the son took merely an equitable estate in fee. In his judgment Willes, J. stated that he was far from saying that the words "in trust" would alone have the effect of giving the legal estate to the trustees (meaning the devisees also executors), but he went on to say that those words were, at all events, consistent with the legal estate, being entirely vested in them. He then observed that there certainly was nothing by implication showing that they were to take any less estate; and that the direction to pay the debts by implication showed the contrary. The consequence was, as he said, that they took power over all the property for the purpose of enabling them to pay the debts, and they could only have that power by allowing them to take the legal fee. These observations are very pertinent to the will before me. In *Marshall v. Gingell* (*ubi sup.*) the testator, by his will, made in 1838, after directing his debts to be paid, without saying by whom, devised a freehold farm to four persons, afterwards appointed executors, their heirs and assigns, upon trust (in effect) for his daughter

during her life for her separate use, and from and after her decease upon trust, and he gave and devised the farm to her children. Kay, J. followed *Creaton v. Creaton* (*ubi sup.*) and *Spence v. Spence* (*ubi sup.*), although he observed that the latter was the strongest case on the subject. Although, then, in these three cases, the devisees clearly took the legal estate for the purposes of the partial express trusts, which were not commensurate with the fee or customary estate of inheritance, I think that this circumstance did not form the ground of the decisions; and that the principle to be extracted from them is to be found in the direction to pay debts. Applying, then, these authorities to the will before me, I hold that the direction to pay debts is sufficient to show that in the specific devise to her two sons and their heirs in trust for her son Henry and his children, the testatrix did not mean to avail herself of the machinery of the Statute of Uses, or to make them mere conduit pipes of the legal estate; but that, on the contrary, she intended that the legal estate should pass to, and not through, them in trust according to the modern signification of the term "trust." The result, then, is that the estates of the children are equitable, and have not failed.

Solicitors: Robinson, Preston, and Stow, agents for Rooke and Coker, Bath.

Dec. 15, 1893, and Jan. 16, 1894.

(Before STIRLING, J.)

Re THE PRINTING, TELEGRAPH, AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS LIMITED; Ex parte CAMMELL. (a)

Company — Director — Qualification — Entry of name on register — Rectification.

The mere prescription of a qualification for directors and an allowance of one month to first directors in which to acquire their qualification, with a provision that the office of director shall be vacated if he ceases to hold the requisite number of shares, or, in the case of a first director, if he fails to get them within the prescribed time, or on sending in a written resignation not withdrawn for seven days or previously accepted, does not prevent a first director who has acted as a director before but not after the expiration of the month, and who is unaware till after such expiration that his name has been put on the register in respect of shares allotted to him in accordance with resolutions passed at a board meeting at which he was not present, and on hearing of the allotment immediately resigns, from having his name removed from the register, the resignation under the circumstances not being an act done in respect of a qualification or such as to estop him from denying that he agreed to take the shares.

THIS was a motion by Charles Cammell that the register of shareholders of the above-mentioned company might be rectified by removing his name therefrom in respect of all the shares in his name, except one for which he signed the memorandum of association.

The memorandum and articles of association were dated the 16th March 1893. It was provided by art. 62 that the first directors should be

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

CHAN. DIV.] *Re* PRINTING, &C., CO. OF AGENCE HAVAS; *Ex parte* CAMMELL. [CHAN. DIV.]

appointed by a majority of subscribers of the memorandum of association. Cammell signed the memorandum of association for one 5*l.* share, and was appointed a director. By art. 64 the qualification of a director was to be the holding of 200*l.* of share capital in respect of which all calls for the time being due should have been paid, the qualification to apply to the first as well as to all future directors, but such first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification. By art. 70 the office of director was to be vacated (c) if he ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed time; (d) if he should send in a written resignation to the board, and the same should not be withdrawn for seven days, or be previously accepted. C. was present at the first meeting of directors on the 19th March 1893, and at one held on the 14th April of the same year, but he was not present at meetings held on the 29th March and the 7th April 1893. At the meeting of the 29th March 1893 resolutions were passed for an allotment of shares, and forty shares were allotted to him, and his name placed on the register in respect of them. He had not made any application for the shares. The period of a month prescribed by art. 64 expired on the 29th April 1893. On the 1st May 1893 the secretary of the company wrote to Cammell inclosing a form of application for shares, and asking him to forward it with a cheque for the amount due on application. On the 5th May the secretary again wrote, calling attention to the letter of the 1st May, and informing him that a board meeting would be held on the 9th May. By letter of the 7th May Cammell explained that he could not attend the meeting, and resigned his position as director, returning the form of application for shares unsigned. Some correspondence then ensued between Cammell and the chairman of the company as to whether Cammell was a director, and on the 31st May 1893 Cammell wrote to the chairman:

I have seen my solicitor on the subject and shown him the articles of association, and he says that by the articles I am certainly not a director, but that if I qualify I should be one, so that under the circumstances I am advised not to do so.

In the September following Cammell received notice to pay 85*l.* in respect of the shares. On the 1st Nov. he gave notice of the present motion.

Hastings, Q.C. and *George Lawrence* for the motion.—Not having qualified as a director Cammell could not act as one. He ceased to be a director when the month allowed for acquiring the qualification expired.

Buckley, Q.C. and *Edward Ford* for the company.—If a director does not get the qualification prescribed in art. 64 he ceases to be a director; Here Cammell did get them. We do not dispute that from the 29th March to the 29th April he might have got them elsewhere. Directly a reasonable time has elapsed it is his duty to get them:

Re Australian Direct Steam Navigation Company; Miller's case, 3 Ch. Div. 661, 665; 5 Ch. Div. 70;
Re The Portuguese Consolidated Copper Mines; Ex parte Lord Inchiquin, 64 L. T. Rep. N. S. 841; (1891) 3 Ch. 28;
Re Colombia Chemical Factory, Manure, and Phosphate Works; Brett and Hewitt's case, 49 L. T. Rep. N. S. 479; 25 Ch. Div. 283.

On the 30th April Cammell had not taken any step to declare he would not be a director. The company may say, "You are the holder of an office, and you are estopped from saying you are not the holder of forty shares."

Re Metropolitan Carriage and Repository Company; Brown's case, 29 L. T. Rep. N. S. 562; 9 Ch. App. 102, 106, 109.

We have the right to put him on the list in respect of the qualification. He was registered in respect of this. If, on the 29th April the directors had said to him, "We have now shares, and you must take them," he might have resigned, or must have taken the shares. He is estopped from saying that the thing he ought to have done was not done. Art. 70 (c) does not touch this. Although the shares were not allotted to him upon a written application, he was a director under articles which compelled him to have them:

Re The Wheel Buller Consols Limited; Ex parte Jobling, 58 L. T. Rep. N. S. 823, 826; 38 Ch. Div. 42;

Re Wincham Shipbuilding and Boiler Company; Hallmark's case, 38 L. T. Rep. N. S. 413, 660; 9 Ch. Div. 329.

Down to the 7th May he says that he is a director by writing to resign on that day. The correspondence shows that he would, if he could, have attended the board meeting on the 9th May. We submit that there is no difference between this and actual attendance.

Lawrence in reply.—Cammell has not acted in the sense in which a director must act. The cases cited are where a man has been acting as a director and has no right to do so, cases where a man ought not to fill the office of director without qualification. See per Lord Selborne, in *Brown's case* (29 L. T. Rep. N. S. at p. 564; 9 Ch. App. at p. 106). He ought not to have facts imputed to him which it was not his duty to find out. The effect of the articles is, that if he does not take shares within a month, which he is not bound to do, he merely ceases to be a director.

Jan. 16.—*STIRLING, J.*, after stating the facts, proceeded as follows:—I think that upon the evidence it must be taken that until the 15th May the applicant was unaware that any shares had been allotted to him. The first question to be considered is, whether the applicant has agreed with the company to take the thirty-nine shares in question from it. Express agreement there is none. Can any be implied? The applicant no doubt acted as director, but the case of *Re Wheel Buller Consols (ubi sup.)* appears to me to show that that circumstance alone is no sufficient ground for holding that he has contracted to take shares. I apply (with the necessary modifications to this case) the language of *Bowen, L.J.* (58 L. T. Rep. N. S. 827; 38 Ch. Div. 50). The applicant "bound himself to conform to the regulations contained in the articles, including of course those as to the qualification of directors. There is no provision in the articles that the directors shall take the shares required for qualification, or be liable as if they had taken them. There is only a provision that, if a director does not acquire the requisite number of shares within three months, he shall cease to be a director. That regulation makes it his duty not to act after the three months; but that is quite different from a regulation that if he continues to act he shall be

CHAN. DIV.] *Re* PRINTING, &C., CO. OF AGENCE HAVAS; *Ex parte* CAMMELL. [CHAN. DIV.]

deemed to have contracted to take them." In the present case there is found an ingredient which did not occur in *Re Wheal Buller Consols*, namely, that the name of the applicant had been entered on the register as the holder of the shares allotted to him on the 29th March. If the applicant had been aware of this, I should readily infer an assent on his part to take the shares; but I think he did not actually know it until the middle of May, and I also think that he cannot be fixed with constructive notice of the fact. See *Re Wincham Shipbuilding Company; Hallmark's case* (38 L. T. Rep. N. S. 413, 660: 9 Ch. Div. 329). This, however, does not conclude the case. Although the applicant may not actually have agreed to take the shares from the company, either expressly or by implication, he may have so acted as to preclude himself from denying that he has entered into such an agreement, and the main contention on the part of the company has been that he did in fact so act. On this subject a leading authority is *Brown's case* (29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. App. 102). In that case the articles provided simply that the qualification of a director should be the holding of fifty shares, and the observations that I am about to read must be taken in conjunction with that fact. Lord Selborne, L.C. says (L. Rep. 9 Ch. App. at p. 106): "The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification, that that act was done by his authority, and he could not be allowed to repudiate it." And again (L. Rep. 9 Ch. App. 107) he says: "The true result to be drawn from those authorities appears to be that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorised by himself, the registration of shares which, in the ordinary business of the company, have actually been placed in his name, and which were needful for his qualification." The Lord Chancellor, therefore, speaks of accepting the office of director, "which a man ought not to fill without qualification," or again, "for which the possession of a certain number of shares is a necessary qualification," language which appears to indicate that in his view the obligation which lay on a director to possess qualification shares was a material element in arriving at the decision. Again, in *Lord Inchiquin's case* (*ubi sup.*), the articles of association, according to the construction put upon them by the Court of Appeal, rendered it obligatory on a director to acquire the proper

qualification within a reasonable time. Lord Inchiquin was appointed a director, and immediately afterwards shares were allotted to him, but (as was assumed in the Court of Appeal) without his knowledge. After the expiration of a period, within which the court held that he might reasonably have acquired his qualification, he acted as a director, and it was held that he was estopped from denying that he was the holder of the shares allotted to him, and registered in his name. Lindley, L.J. says (1891) 3 Ch. at p. 35: "Suppose he is not bound to qualify before he acts, still, if a reasonable time for qualification has elapsed before he acts, must he not, when he does act, be taken to have acted in respect of some qualification?" These cases appear to show it to be essential to the application of the law there laid down that the director should be found acting as such at a time when he could not properly so act without possessing the qualification. In the present case, as I have already pointed out, the articles of association (construed by the light of *Re Wheal Buller's Consols*) do not impose an absolute obligation on the part of a person accepting the office of first director to acquire qualification shares before acting; they only provide that, if a first director does not acquire the requisite number of shares within a prescribed time he shall cease to be a director. The prescribed time expired on the 29th April 1893; at that date, according to art. 70, his office was vacated; did he act afterwards? He appears to have been ignorant of the terms of the articles of association; he supposed that he continued to be a director, and for a short time was willing and intended to act. Mere intention, however, will not estop him; and he soon came to the conclusion that he ought not to remain a member of the board. After the 29th April he attended no board meeting, and did not act as a director unless, as is contended, his resignation of office be such. A man cannot of course resign an office which he does not hold, but in judging of the effect of this resignation for the purpose now under consideration, regard must be had to the surrounding circumstances. The board did not treat him as having acquired his qualification, and the secretary, by the instruction of the board requested him to sign and send in a formal application for the proper number of shares. That he declined to do, and if he had known his true position his answer would have been to the effect that his office was vacated, and that it was unnecessary for him to take any shares. Instead of that he sends in his resignation, with the object of avoiding compliance with the request of the board founded on the absence of qualification. In so acting I think he cannot (to use the language of Lindley, L.J.) be taken to have acted in respect of a qualification, or be held to have estopped himself from denying that he agreed to take the shares in question. In my opinion, therefore, the name of the applicant was entered on the register without sufficient cause, and he does not appear to be precluded by anything which has happened from having his name removed. There must, therefore, be an order in accordance with the notice of motion.

Solicitors for the motion, *Slaughter and May*.
Solicitors for the respondents, *Beyfus and Beyfus*.

[Priv. Co.]

BLACK v. CHRISTCHURCH FINANCE COMPANY.

[Priv. Co.]

Judicial Committee of the Privy Council.

Nov. 29, 30, and Dec. 16, 1893.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, and Sir R. COUCH.)

BLACK v. CHRISTCHURCH FINANCE COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

*Negligence—Dangerous operation—Liability for act of contractor—Contract to fell timber in November and burn underwood “about February.”**A person who authorises another to perform an operation on his land, which is necessarily attended with danger to his neighbours, is bound not only to stipulate that all reasonable precautions should be taken to prevent damage, but to see that they are observed.**The respondents agreed with a contractor in July 1890 to clear some forest land belonging to them by felling the timber and burning the underwood. The contractor undertook to “complete the felling by the 30th Nov. 1890, and burn in a favourable time about February next.” The contractor was to take all responsibility, and make good all damage. He sublet the contract, and the sub-contractor completed the felling in November, but burnt the underwood on the 23rd Dec., when the fire spread to adjacent land of the appellant, and damaged his crops and fences.**Held (reversing the judgment of the court below), that, even assuming that the contractor had broken the terms of the contract by burning as early as December, the respondents were liable.**This was an appeal from the judgment of the Court of Appeal of New Zealand (Prendergast, C.J., Williams and Connolly, J.J.), delivered on the 14th Nov. 1891, reversing the judgment of the court below (Denniston, J.).**The action was for damages for the destruction of the appellant's crops by a fire which spread from respondents' land to the appellant's property.**The appellant and the respondents were owners of contiguous lands—the appellant's property being under crop, while that of the respondents was covered with native forest. With a view to clearing this the respondents entered into a contract, on the 15th July 1890, with one Joseph Wright. This contract was as follows:—**I hereby contract with you for the felling and burning of bush on sect. No. 31,438 in the following manner:—
I will fell bush, scrub, saplings, and briars on the land, up to the size of 18 inches in diameter, about one foot from the ground, with the exception of “Kounini,” “Broadleaf,” and “Eno,” which I will strip off all limbs, and agree to burn everything up to the size of 6 inches in diameter, and I will start felling within three days from this date, and complete the felling by the 30th Nov. 1890, and burn in a favourable time about February next. I to take all the responsibility connected with burning off the bush, and all damages arising therefrom are to be made good and borne by me alone. The boundary being about two chains south of creek and joining Mr. Black's fences on other boundaries, and that you should pay me 30s. per acre for felling and burning in the aforesaid manner, and the payments to be as follows:—23 payable on bush being felled and the balance of contract paid on**Mr. Belmer's certificate of completion. I to have the firewood at a royalty of 3s. per cord, and right to make road through the reserve to enable me to haul my timber to the main road.**Wright employed a bushman of the name of Nyman, and his mate Jacob Neilson, to do this work, and to clear the bush off an additional piece of land belonging to the respondents, which they wished to have cleared also.**The felling of the bush was duly completed about the end of November, and Nyman and his mate received the money for this as provided by the contract. On the 23rd Dec. following Nyman set fire to the fallen bush, in order that the work might be completed. A strong north-westerly wind was blowing at the time, and the fire spread to the adjoining property of the appellant and destroyed more than 200 acres of cocksfoot grass, which he was saving for seed.**On the 19th Dec. the appellant wrote to the respondents:**I wish you would be so good as to instruct your men who have felled the bush joining my ground, not to set fire to it until after I get my crop of cocksfoot off it. Also to look out and burn it when the wind is down the valley, otherwise it may sweep my property, and if so, I will have to hold your company responsible for any damages that may occur.**To this the respondents replied on the very day of the fire:**With regard to your request, to ask the men who felled the bush on our land not to burn off just now, we beg to inform you that their contract agreement in writing with us clearly states that the bush is not to be burnt off until February. This ought to meet what you require regarding your cocksfoot. We may also state for your information that the contractor is responsible for all damages arising from the burning off the bush, and we therefore are not liable for whatsoever kind of damage may be done in connection therewith.**The appellant claimed damages for the destruction of his property. The trial took place in the Supreme Court, before Denniston, J. and a special jury, on the 16th June 1891. The only question put to the jury was whether the fire had been lighted by one Nyman, as alleged by the appellant. The jury found that it had been so lighted. On cross-motion by the parties, the learned judge gave judgment for the appellant, for 1600l., the agreed amount of the damages.**On appeal to the Court of Appeal of New Zealand, the judgment for 1600l. recovered by the now appellant was set aside and judgment ordered to be entered for the respondents.**Ollivier (of the New Zealand Bar), for the appellant, argued that lighting the fire was part of the work to be done by the contractor, and the respondents neglected to make any provision in the contract or to take any precaution to prevent damage to neighbouring properties. The contract was a single contract to clear the land by felling and burning, not a contract to fell at one time and a separate contract to burn at another. No definite time was fixed for the burning as long as it was “a favourable time,” having reference to the condition of the wood. “About February” was only a suggestion, and in fact the fire may be said to have been lighted “about February,” within the meaning of the contract. *Bower v. Peate* (35 L. T. Rep. N. S. 321; 1 Q. B. Div. 321) and *Dalton v. Angus* (44 L. T. Rep. N. S. 844; 6 App. Cas. 740), which were cited below, are not much in point; but *Hughes v. Percival* (49 L. T.*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

BLACK v. CHRISTCHURCH FINANCE COMPANY.

[PRIV. CO.]

Rep. N. S. 189; 8 App. Cas. 443) is a strong case in the appellant's favour. He also cited

Reg. v. St. Paul, Covent Garden, 74 L. J. 109, M. C.;
Hole v. Sittingbourne Railway Company, 3 L. T.

Rep. N. S. 750; 6 H. & N. 488;
Limpus v. London General Omnibus Company,
7 L. T. Rep. N. S. 641; 32 L. J. 34, Ex.

Jelf, Q.C., Danckwerts, and E. A. Jelf, for the respondents, contended that the principal is only liable for the act of the sub-contractor where knowledge or reasonable anticipation of the risk is brought home to him, having reference to the nature of the work. These were two separate contracts, to fell by November, and to burn about February. The words are not "say February" but "about February." A "favourable time" refers to the direction of the wind which would make the operation safe, not to the state of the wood, or the time of year. All that the respondents could reasonably anticipate was that he would keep strictly to his contract. No reasonable man could expect that when he had contracted to burn about February he would do it in December, and there was no duty on the respondents to guard against the possibility of his doing so:

Pearson v. Coz, 36 L. T. Rep. N. S. 495; 2 C. P. Div. 369.

Ollivier was not called on to reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 16 — Their Lordships' judgment was delivered by

LORD SHAND.—On the 23rd Dec. 1890 a fire was lighted on certain uncleared land, the property of the respondents, and extended to the adjoining land of the appellant, and there destroyed property of the admitted value of 1600*l*. This action was brought by the appellant against the respondents for the recovery of the damage thus sustained, and the appellant obtained a judgment for the sum of 1600*l*. from Denniston, J. before whom the case was tried, but this judgment was reversed by the Court of Appeal. The ground of the plaintiff's claim is that the defendants lighted or caused or procured the fire to be lighted on their own land in a negligent and improper manner, and wrongfully and negligently permitted the fire to spread to the lands of the plaintiff, with the result that the injury complained of was done to the plaintiff's growing crops of grass-seed, and fences and firewood. The defence was a denial of the plaintiff's allegations, and it was further alleged that the defendants did not authorise or empower any person to light or cause or procure to be lighted the fire which did damage to the plaintiff. The trial took place before Denniston, J. on the 16th June 1891. Unfortunately the only question which was left to the jury was whether the fire which caused the damage had been lighted by a man named Nyman. This they answered in the affirmative, and the learned judge reserved further consideration of the case. Afterwards on the hearing of a motion by the plaintiff that judgment should be entered for him for the damages found due upon "the finding of the jury, the admissions of the parties, and the judge's notes of evidence," and a counter motion by the defendants for a new trial on the ground "that the finding of the jury is so defective that the judge cannot give judgment upon it," his Honour on the 15th July 1891 delivered decree in

the plaintiff's favour. His judgment explains the course which the trial took, and the reasons which induced him to ask the jury the limited question already mentioned, and it seems to be essential in the determination of the present appeal to keep in view the account thus given of what occurred at the trial. His Honour said that: "At the trial it was proved by written agreement, produced and put in evidence, that the defendant company had contracted with one Wright to clear and burn the bush on land belonging to the defendant company. Wright swore that, at the request of the defendants, and on its behalf, he had let the felling and burning of an additional piece of bush to one Nyman. This was not disputed at the trial. Neither of these questions could be said to have been in issue in the sense of being in doubt or dispute. The real and only dispute at the trial was, as to whether or no Nyman was the man who was seen on the evening of the 23rd Dec. lighting the fire in the company's bush, which undoubtedly spread into the plaintiff's land and did the injuries complained of. The defendant called no evidence, and in charging the jury I told them that there was only one question in dispute so far as the facts were concerned, and I proposed to submit only one to them; and that, as there were questions of law involved, I would leave them to answer a specific issue, and reserve the law points for after discussion. No objection was made to my charge. The jury found, as they could not avoid finding, that Nyman had lit the fire. No other issue was asked to be put to the jury by the defendants' counsel. There was never any doubt that, in lighting the fire, Nyman did so in his capacity of contractor or sub-contractor. It is not suggested that he did it for amusement or maliciously. Indeed, in the present argument, Mr. Joynt himself suggested that no one would dispute that his real object was to get the work done as early as possible, so as to get the contract money. The legal consequence of his having so lit the fire is another matter, but it is clear that, after the finding of the jury, no disputes as to the facts can exist, and the only question left is one purely of law." In the view which the learned judge took of the law the question really turned on the meaning and effect of the contract by which the defendants devolved the operations of clearing and burning the bush on Wright, the contractor, which was in these terms: [His Lordship read the contract as set out above, and continued:] The defendants appealed against Denniston, J.'s judgment, and by their notice of appeal they intimated that they would move the Court of Appeal "to set aside the judgment given for the respondent, by the Supreme Court at Christchurch, on the 15th July 1891, and to enter judgment for the defendants, with costs, on the grounds shown by the statements of claim and defence, and by the admissions, evidence, and finding at the hearing in the said Supreme Court." This notice of appeal, it will be observed, did not again ask for a new trial, but invited the court to dispose of the case on the record, and the admissions, evidence, and finding at the hearing of the case by Denniston, J., as that learned judge had himself done. Although the verdict given at the trial was an answer to one question only, and that a question the answer to which taken alone could not afford a solution of the legal point of the defendants' liability, the Court of Appeal has

PRIV. CO.]

BLACK v. CHRISTCHURCH FINANCE COMPANY.

[PRIV. CO.]

entertained and disposed of the case on the view that the judgment of Denniston, J. fully explains the course which the trial took, and that judgment should accordingly be given on the evidence and the admissions, as the defendants asked by their notice of motion. Taking this view, the Court of Appeal have concurred with Denniston, J. in holding that the decision of the case depends on the terms of the contract entered into between the company and Wright, as to the legal effect of which however they have arrived at a different result. The defendants' counsel proposed in the event of their Lordships differing from the judgment of the appellate court that the case should still be remitted back to have a new trial on certain points on which they maintained the proof was not clear, but their Lordships are clearly of opinion, having regard to the course taken before the courts below, that the appeal should be now disposed of as depending on the contract already referred to, in the light of the facts as these have been found or accepted as proved in the judgments of the courts below. In this view it appears to their Lordships that the act of Nyman in setting fire to the bush on the defendants' land must be regarded as the act of the contractor. Denniston, J. expressly says, with reference to what occurred at the trial: "No other issue was asked to be put to the jury by the defendants' counsel. There was never any doubt that, in lighting the fire, Nyman did so in his capacity of contractor or sub-contractor," and the learned judges in the Court of Appeal have proceeded on substantially the same view of the result of the evidence and of what occurred at the trial on this point. The case seems to involve the question whether the defendant company under the special terms of their contract are responsible for the act of Nyman in setting fire to the bush at a time when admittedly, with a north west wind blowing, his act was attended with great risk of damage to the plaintiff's property. It has not been disputed that if Nyman in what he did was acting under the defendants' contract, by which the burning off the bush had been let or contracted for, the defendants must be responsible for the consequences. The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (*sic utere tuo ut alienum non lædas*). And if he authorises another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences: (see *Hughes v. Percival*, 49 L. T. Rep. N. S. 189; 8 App. Cas. 443, and authorities there cited). Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favourable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred. In any view no preventive means of any kind were adopted, and there can be no doubt as to the liability of the defendants if they are responsible

for Nyman's act. Conflicting views have been taken by Denniston, J. on the one hand, and the Court of Appeal on the other, as to the effect of the contract with Wright which was entered into on the 15th July 1890. The fire took place on the 23rd Dec. following. The Court of Appeal has held that a fire on that date, or on any date earlier than would be fairly covered by the words "about February next," could not be regarded as under the contract, and accordingly reversed the judgment of Denniston, J. in the plaintiff's favour. The contract was made expressly for the "felling and burning" of the bush on the defendants' land. It proceeds in its second sentence to specify what the contractor is to fell, and what he is to burn. "I will fell bush, scrub, saplings, and briars on the land" &c., "and agree to burn everything up to the size of six inches in diameter." It then proceeds "and I will start felling within three days from this date and complete the felling by the 30th Nov. 1890, and burn in a favourable time, about 'February next.'" Thus in three instances in the earlier part of the document the felling and burning of the bush are treated together as parts of one general operation for the clearance of the ground. There follows a clause by which the contractor agrees to take all responsibility connected with burning off the bush, and all damages arising from this. The price is then fixed at a lump sum of 30s. per acre "for felling and burning," two-thirds to be paid on bush being "felled," and the balance paid on certificate of completion. The contract contains a further term that the contractor is to have the firewood at a royalty of 3s. per cord, and right to make a road through the reserve to enable him to haul his timber to the main road. The contract taken as a whole is one for the clearance of the ground of all growing bush and timber, to be effected by the consecutive operations of felling and burning. It is stipulated that the first of these operations shall be begun at once, and concluded by the end of November following. Then follow the words on which the judgment of the Court of Appeal proceeds, "and burn in a favourable time, about February next." It is said that the specification of time to burn "about February next" has the practical effect of separating the operations of felling and burning so completely as really to create two contracts, though for a lump payment, and that the contractor, if he went on the land sooner than "about February" to light the bush, was to be regarded in the present question in the same way as an intruder or a stranger for whose act the defendant company would have no responsibility. Their Lordships are unable to agree with this view of the contractor's position. The contract bound the contractor "to burn in a favourable time." It cannot be suggested that, if he had violated this condition only of his contract, the defendants would have escaped responsibility. Having authorised and intrusted the operation of burning to another they must answer for his proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. Their Lordships agree in the observation of Denniston, J. when he says with reference to the act of Nyman: "I cannot distinguish between the legal consequences of lighting a fire at an improper time and of lighting it in an improper manner." In the present case the clearing of the land was authorised by a

PRIV. CO.] WEST INDIA IMPROVEMENT CO. v. ATTORNEY-GENERAL OF JAMAICA. [PRIV. CO.]

contract for felling and burning. It no doubt contained a stipulation that an interval should elapse between the two operations, presumably in order that the bush cut should be thoroughly dried so that the burning should be as complete as possible. It is not easy to say why "about February" should have been specified as the time of burning, for there is some evidence that the cocksfoot harvest which would be endangered is usually going on throughout that month. It may have been in order to secure a sufficient interval after the felling, which was to be completed not later than by the end of November, or because it was desired to have the ground fully cleared about February. But assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December, this cannot in their Lordships' opinion affect the defendants' liability to third parties injured by the act of their contractor. It is clear that the contractor had the right under his contract to be on the ground from time to time as he thought fit, until the whole operations were completed for felling, for clearing away the timber he was entitled to remove, for making a road to enable him to do so, and for the burning of the bush. Their Lordships cannot adopt the view that the contracts for felling and for burning the bush are to be regarded as in any proper sense separate or independent, and that the separate contract to burn the bush did not come into operation until about February. There was but one contract, to fell and to burn, that is to clear the land, and though the contractor disregarded the stipulation which the defendants made with him as to the time of burning, this cannot relieve them from responsibility. The defendants might have stipulated that an interval of two months should elapse after the time of felling and before the burning should take place. If the contractor having leave under his contract to be on the land had allowed a shorter interval only, it could not be said he was a trespasser when he lighted the fire, so that the defendants would not be liable for his act. So also if the contractor disregarded or violated stipulations as to the manner of lighting, or the place at which the fire should be lit. Their Lordships are unable to draw any distinction in legal principle between such cases and the present in which the condition related to the time at which the fire was to be lighted. Their Lordships will humbly advise Her Majesty to reverse the judgment of the Court of Appeal, and to restore the judgment of Denniston, J. The defendants will pay the costs of the appeal to the appellate court and of the present appeal.

Solicitors for the appellant, A. R. and H. Steele.

Solicitors for the respondents, H. Kimber and Co.

Nov. 28 and Dec. 16, 1893.

(Present: The Right Hons. Lords WATSON, MACNAGHTEN, and SHAND, and Sir R. COUCH.)

WEST INDIA IMPROVEMENT COMPANY v. ATTORNEY-GENERAL OF JAMAICA. (a)

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA.

Railway—Construction—Compensation—Accommodation works.

Where the Legislature imposes upon the promoters of an undertaking an obligation to construct and maintain works, they must bear the cost of construction and maintenance, in absence of provision to the contrary.

By a colonial Act, confirming a provisional agreement for the making of a railway, power to take lands for the purposes of the undertaking was vested in the promoters, but the obligation to pay compensation was imposed on the Government, who were to conduct the proceedings for ascertaining the amount of compensation payable. The promoters were to construct and maintain such accommodation works as might be fixed by agreement with the owners of lands at the time that the amount of compensation payable was settled.

Held (affirming the judgment of the court below), that the person appointed under the Act to conduct the proceedings for ascertaining the compensation to be paid had power to bind the promoters without their consent, and contrary to their express instructions, to construct such accommodation works as were reasonably necessary.

THIS was an appeal from a judgment of the Supreme Court of Jamaica (Ellis, C.J., Northcote, and Lumb, J.J.) in favour of the respondents, who were plaintiffs below, upon a special case.

The facts appear sufficiently in the judgment of their Lordships.

Finlay, Q.C. and Swinfen Eady, Q.C. appeared for the appellants.

The Solicitor-General (Sir J. Rigby, Q.C.) and Jenkins for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 16.—Their Lordships' judgment was delivered by

LORD WATSON.—An Act was passed in June 1889 by the Governor and Legislative Council of Jamaica, confirming a provisional agreement for the purchase of the Jamaica Railway, which was the property of the Government, by a company to be incorporated for that purpose, and also for the construction of certain extensions of the railway by persons described as "the promoters." Sect. 10 authorises the promoters to construct these extensions, in accordance with plans and sections to be approved by the Director of Public Works: and subject to the provisions of sects. 20 and 23, to take and use the land requisite for that purpose, upon making full compensation for its value, and for all damage sustained by reason of the exercise of the powers vested in them. The same clause enacts that the amount of compensation is to be ascertained in the manner provided by the Land Clauses Law 1872, which, with the exception of eight sections, is incorporated with the Act. By

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

the 37th article of the agreement it is stipulated that "the Government shall provide the track for the said extensions, except through the limits of Kingston, Montego Bay, and Port Antonio." Outside of these limits, whilst the power to take lands for the purposes of their undertaking is by the Act vested in the promoters, the obligation to pay full compensation is made incumbent, not upon them, but upon the Government. But the Act does not authorise the promoters themselves to conduct the proceedings for ascertainment of the amount of compensation payable; and that circumstance has led to the present litigation. Sect. 20 enacts that "the Director of Public Works, or some other person appointed by the Governor in that behalf, shall, on behalf and in the name of the promoters, acquire for the promoters such lands, not less in width than thirty feet in excess of what is actually required for any cutting or embankment, as may be required for laying the track of, and building the stations, sidings, and workshops necessary for, the said railway." It also enacts that the cost of such lands, and of acquiring the same, shall be paid, on the warrant of the Governor, out of the general revenues of the Island. Sect. 29 enacts (*inter alia*) that "the promoters shall cause fences to be erected and maintained on each side of the railway, with such accommodation bridges, level crossings, and other works, as may be fixed by agreement with the owners of lands at the time when the amount of compensation to which they may be entitled is being settled under the Lands Clauses Law 1872." It is plain that the Legislature did not contemplate that the extent of the accommodation works to which an owner was entitled should be fixed at any other time or in any other way; because the clause proceeds to enact that, if an owner of land adjoining the railway shall at any time require accommodation works, "beyond those fixed by agreement as aforesaid" he can only obtain them upon complying with certain conditions, one of which is "his entering into good and sufficient agreement to pay the entire cost of such work and of its maintenance." The appellant company are "the promoters" within the meaning of the Act. The respondents are the Attorney-General, as representing the Government of Jamaica, and Philip Affleck Fraser, who is the person appointed by the Governor, in terms of sect. 20, to acquire lands on behalf of the promoters. The parties having differed as to the extent of Mr. Fraser's statutory powers, and other matters, the respondents brought this suit before the Supreme Court of the colony, for a declaration to the effect that it is the duty of the appellant company, at their own expense, to execute and maintain such reasonable accommodation bridges, level crossings, and other works as may be fixed by agreement between Philip Affleck Fraser, as the person appointed as aforesaid, and the several owners of the lands acquired by him for the company, at the time when the compensation to which they may be entitled is being settled under the Lands Clauses Law 1872. The parties adjured a special case for the opinion of the court, the questions submitted being these:—(1) Is the Director of Public Works, or the plaintiff Philip Affleck Fraser, or any other person appointed under sect. 20 of the Jamaica Railway Company Law 1889, entitled to bind the defendants by any such agreement as that mentioned in paragraph five of

this case? (a) (2) If the answer to the first question is in the affirmative, is the Director of Public Works, or the plaintiff Philip Affleck Fraser, or any other person appointed under sect. 20 aforesaid, entitled so to bind the defendants if the said agreement is made either (a) without their consent or (b) contrary to their express orders? (3) If either of the preceding questions is answered in the affirmative, is the cost of constructing and maintaining such bridges, level crossings, and other accommodation works to be borne by the defendants?" It was agreed that, if these questions were answered in the affirmative, the present respondents should have judgment with costs, and that the appellants should have judgment with costs if any one or more of them was answered in the negative. The case was heard before Sir A. G. Ellis C.J., Northcote and Lumb, J.J., who answered all three questions in the affirmative, and entered judgment for the respondents accordingly. Their Lordships have come without difficulty to the same conclusion as the learned judges. The terms of sect. 20 appear to them to indicate that the person charged with the statutory duty of conducting the assessment of compensation to landowners on behalf of the promoters was to be an independent official, entitled and bound to exercise his own discretion in all matters committed to him, and not a mere agent acting under the orders of the promoters. It is not easy to understand what object could be gained by making such an appointment, if the appointee was to be subject, in all his proceedings, to the control of the promoters. The fact that the Government had a material interest, whereas the promoters had none, in reducing the amount of compensation awarded to the landowners, may account for the enactment of sect. 20. The appellant company did not in the argument stated for them in the special case, or in their argument upon this appeal, assert any right to interfere with Mr. Fraser in his conduct of the proceedings under the Lands Clauses Law. They maintained, however, that the making of agreements in regard to accommodation works with landowners was beyond the scope of these proceedings, and of his statutory authority. It is certainly true that such works do not constitute compensation within the meaning of the statutes, although they are an important factor in ascertaining the amount of compensation payable. But the enactments of sect. 29, taken in connection with the other provisions of the Act with reference to accommodation works, are in the opinion of their Lordships sufficient to show that the making of these agreements was intended to be a step in the proceedings towards assessment of compensation, and to form part of the duty committed to the official appointed under sect. 20. The main argument for the appellants upon this part of the case proceeded on the assumption that the official in question had power to treat with landowners for the execution of accommodation works, and their claim to control him in the exercise of that power was founded upon the fact that in settling the

(a) This paragraph referred to an agreement to provide such accommodation bridges, level crossings and other works, not calculated to interfere with the proper working of the railway, as should be reasonably necessary for the accommodation of the landowners whose lands had been severed by the construction of the railway.

PRIV. CO.]

THE NORTHEY STONE COMPANY LIMITED v. GIDNEY.

[CT. OF APP.]

extent of accommodation works their interest was directly opposed to that of the Government. The construction of suitable works would necessarily tend to obviate damage for which compensation would otherwise be payable; but that circumstance cannot justify a court of law in straining the language of the Act, so as to give the appellants a right of control contrary to its natural interpretation. Their Lordships see no reason to suppose that the Legislature doubted, or had occasion to doubt, that the statutory official would perform the duty intrusted to him fairly and reasonably towards the appellants as well as towards the Government. There is no need to discuss the precise limit of his power in this case, because the respondents admit that the appellants are only bound to execute such accommodation works as are not in excess of what may be reasonably necessary to enable land-owners whose lands are severed to continue working the property in manner accustomed, subject to no greater inconvenience than is necessarily occasioned by its severance; and the decree which they have obtained is limited to reasonable works. These observations exhaust the first and second questions submitted in the special case. The third question presents an alternative. If the statutory official shall be held to have power to enter into agreements for accommodation works without the consent and contrary to the express order of the appellants, they contend that the cost of constructing and maintaining such works must be borne by the Government. Their argument in support of that contention appeared to be based, not upon the construction of the Act of 1889, but upon a vague theory that the court ought to give them equitable relief against the prejudice which they may sustain in cases where an excessive amount of accommodation is conceded by agreement. By the seventh article of the agreement, the promoters undertook to construct the extended railway "in accordance with the specification" contained in Schedule I. thereto. Schedule I., which is also incorporated with the Act, specifies, as part of the railway works which they were thus bound to execute, "such accommodation gates and other works as shall be stipulated for in the conveyance of land, or may be required by law." It was conceded that there is no common law requiring the construction of such works, and that no provision is made with regard to them by the incorporated clauses of the Lands Clauses Law 1872. Sect. 29 of the Act of 1889 expressly provides that accommodation works, when fixed by agreement, shall be erected and maintained by the promoters. Their Lordships need hardly observe that, when the Legislature imposes upon the promoters of a railway or other undertaking an obligation to construct and maintain works, it necessarily follows that they must bear the cost of construction and maintenance, unless there be an express or plainly implied provision to the contrary. In this case no such provision is to be found. For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs of this appeal.

Solicitors for the appellants, *Freshfields and Williams*.

Solicitors for the respondents, *Shaen, Roscoe, Massey, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 13, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE NORTHEY STONE COMPANY LIMITED v. GIDNEY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Price—Nonpayment—Cause of action—County Court—Jurisdiction—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 74.

In an action for money payable for goods sold and delivered, nonpayment of the money is part of the cause of action.

Therefore, under sect. 74 of the County Courts Act 1888, such an action may be commenced by leave of the judge or registrar in the County Court in the district of which the price of the goods is to be paid.

THIS was an appeal from a decision of the Queen's Bench Division (Charles and Wright, J.J.) affirming a refusal by Collins, J. at chambers to issue a writ of prohibition to the judge of the Bath County Court, on the ground that that County Court had no jurisdiction to try this action.

The action was brought by the plaintiff company, who carried on business in Bath, to recover the balance of the price of goods sold and delivered.

The defendant resided in the county of Essex, the contract for the sale of the goods was made in Essex, and the goods were delivered to the defendant in Essex.

The Registrar of the County Court at Bath gave leave for the action to be brought in that County Court, upon which the defendant then applied for a prohibition to the judge in chambers, who refused the application.

The defendant appealed.

Sect. 74 of the County Courts Act 1888 (51 & 52 Vict. c. 43) enacts as follows:

Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell, or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six months next before the time of commencement, or, with the like leave, in the court in the district of which the cause of action or claim, wholly or in part, arose.

Bower for the defendant.—The defendant is right in appealing from the learned judge in chambers for refusing to issue this prohibition to the County Court judge at Bath. That court has no jurisdiction to hear this action, for no part of this action arose within the district of that County Court. It does not appear to be stipulated where payment of the price of the goods sold and delivered is to be made, but even if payment is to be made within the jurisdiction, nonpayment is no part of the cause of action. The Court of Appeal, in the case of *Read v. Brown* (59 L. T. Rep. N. S. 605, and 60 L. T. Rep. N. S. 250; 58 L. J. 14, Q. B.; 22 Q. B. Div. 128)

(a) Reported by E. MANLEY SMITH and T. E. BRIDGWATER, Esqrs., Barristers-at-Law.

CT. OF APP.] DANE v. THE MORTGAGE INSURANCE CORPORATION LIMITED. [CT. OF APP.]

approved the definition of "cause of action." Lord Esher, M.R. says, in 60 L. T. Rep. N. S. 251, that the expression "cause of action" was defined by himself in the case of *Cooke v. Gill* (28 L. T. Rep. N. S. 32; L. Rep. 8 C. P. 107), as follows:—"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse." Where the action is for the price of goods sold and delivered, as in the present action, the only facts necessary to be proved by the plaintiff are the contract and delivery of the goods; payment must be affirmatively alleged and proved as a defence by the defendant. [WRIGHT, J.—Is not the breach of the contract to pay a part of the cause of action?] No; because nonpayment is not a fact which would have to be proved by the plaintiff in order to entitle him to judgment. He further cited

Bell and Co. v. Antwerp, London, and Brazil Line, 64 L. T. Rep. N. S. 276; (1891) 1 Q. B. 103;

Haves v. Pavey, 34 L. T. Rep. N. S. 836; 1 C. P. Div. 418.

Edward Pollock, for the plaintiff company, was not called upon.

CHARLES, J.—In my opinion this is a very clear case indeed, and this appeal, by the defendant, should be dismissed. An action was brought by the plaintiff company to recover the balance of the price of goods sold and delivered to the defendant. According to the law applicable to contract, there being no special stipulation as to the place of payment, the defendant must pay at Bath, where his creditors, the plaintiff company, live. This action has been brought in the County Court at Bath, and the question is whether, under sect. 74 of the County Courts Act 1888, which provides (*inter alia*) that by the leave of the judge or registrar an action may be commenced in the court in the district of which the cause of action, wholly or in part, arose, leave was properly given. In the present case payment for the price of goods sold and delivered was to be made in Bath, and on behalf of the defendant it has been contended that the non-payment of the price of the goods sold and delivered is neither the cause of action nor part of the cause of action. The meaning of the expression "cause of action" was much discussed in cases arising under the Common Law Procedure Act 1852, although it is true that the decisions are not entirely applicable to the present case, for in the Common Law Procedure Act only the expression "cause of action" was used, while in the County Courts Act, now under discussion, the words "wholly or in part" are used when dealing with the place where the cause of action arose. The courts differed at one time as to whether the breach of a contract was the whole cause of action; but they were always of opinion that it was a part of the cause of action. The meaning of "cause of action" in sect. 18 of the Common Law Procedure Act 1852 was held in *Jackson v. Spittall* (22 L. T. Rep. N. S. 755; L. Rep. 5 C. P. 542) to be the act on the part of the defendant which gave the plaintiff his cause of complaint; and, although I do not say that nonpayment is the whole cause of action, it is, in my opinion, clearly part of it. A long argument has been addressed to us to-day, founded upon the rules of pleading, chiefly as to

what was necessary to prove under the old system in an action for goods sold and delivered. Payment, it is true, had at that time to be specially pleaded; but it does not follow that nonpayment for goods was not part of the cause of action.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed.

The defendant appealed.

Nov. 13.—*Bower* for the defendant.—His argument, and the cases which he cited, were the same as in the court below.

Edward Pollock, for the plaintiffs, was not called upon.

The COURT (Lord Esher, M.R., Lopes and Kay, L.JJ.) dismissed the appeal, holding that nonpayment for the goods was part of the plaintiffs' cause of action, and that, as according to the contract the goods were to be paid for at Bath, part of the plaintiffs' cause of action arose at Bath, and the action was rightly commenced in the Bath County Court.

Appeal dismissed.

Solicitors for the plaintiffs, Young, Jones, and Co.

Solicitor for the defendant, A. A. Timbrell.

Tuesday, Nov. 21, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

DANE v. THE MORTGAGE INSURANCE CORPORATION LIMITED. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance—Deposit in bank for term of years—Failure of bank—Reconstruction—Discharge of bank's liability to the depositor—Accord and satisfaction—Suretyship—Liability of insurers.

The plaintiff having deposited a sum of money for a term of years, repayable at a fixed date, in an Australian bank, entered into a contract with the defendants in London to secure to herself the repayment of the deposit.

By this contract, called therein a "policy of insurance," the "assured" agreed to pay certain premiums, and the defendants agreed to pay the plaintiff the sum deposited "if the debtors shall have made default in paying the same." The bank afterwards failed and made default in repaying the deposit on the agreed date. Afterwards a scheme for the reconstruction of the bank was made in Australia, and under an Australian Act the plaintiff was compelled to accept in satisfaction and discharge of her claim against the bank certain rights and claims against the new bank as reconstructed. The plaintiff sued the defendants upon their contract.

Held (affirming the judgment of the Queen's Bench Division), that, upon the bank making default in payment on the agreed date, a right of action against the defendants was vested in the plaintiff to be indemnified against her loss, and this right of action was not taken away by any of the events which happened afterwards.

THIS was an appeal from a judgment of the Queen's Bench Division (Pollock B. and Kennedy J.), setting aside an order of Wright, J. at chambers,

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.] DANE v. THE MORTGAGE INSURANCE CORPORATION LIMITED. [CT. OF APP.]

upon a summons under Order XIV., and giving leave to the plaintiff to sign judgment.

The action was brought to recover 1000*l.* and interest under the terms of a contract made between the plaintiff and the defendants under the following circumstances:—

The plaintiff deposited for a term of years with a bank at Victoria, Australia, called the Commercial Bank of Australia, a sum of 1000*l.* at 4½ per cent., which was repayable on the 19th April 1893.

She then entered into the following contract with the defendant company upon which the present action was brought:

This policy of insurance witnesseth that, whereas Mrs. Jessie Dane, who with her executors, administrators, and assigns is hereinafter called "the assured," is the holder of a deposit receipt for 1000*l.* of the Commercial Bank of Australia Limited, hereinafter called "the debtors," bearing interest at the rate of 4*l.* 5*s.* per cent. per annum and numbered 6400, and the said assured is desirous of being insured by the above-named corporation as hereinafter appearing, and there has been paid to the corporation the sum of 1*l.* 3*s.*, being the agreed premium for such assurance until the 25th March 1891, and the sum of 1*l.* 5*s.* is the agreed annual premium for the said assurance after the said March 25, 1891, and is to be payable on March 25 in each year; Now therefore these presents witness that the corporation do hereby guarantee to the assured the payment of the said principal sum of 1000*l.* and interest in manner following, namely: (1) The corporation will pay to the assured any interest on the said principal sum which the debtors shall not pay for sixty days after the day when the same shall become payable thereunder. (2) The corporation will pay to the assured the said principal sum if the debtors shall have made default in paying the same. (3) Any principal money payable under this policy will be paid within three calendar months after notice in writing from the assured to the corporation, requiring the corporation to pay the same, and any interest payable under the policy will be paid within one calendar month after notice in writing from the assured to the corporation requiring the corporation to pay the same. This policy is issued subject to the conditions indorsed hereon, which are to be deemed part of it.

Indorsed on the policy were the two following conditions:

1. This policy will be void (a) if the proposal, dated the 23rd April 1890, on the basis of which the policy is effected, contains any material statement untrue to the knowledge of the assured, or fails to disclose any material fact within her knowledge; (b) if the assured, without the consent in writing of the corporation, consents to any arrangement modifying the rights or remedies of the assured against the debtors.

2. If the debtors make default in paying any principal or interest for sixty days after the same ought to be paid, or if the corporation is called upon to pay any money under this policy, the assured shall, at the request and costs of the corporation, give to the corporation all such information as she may possess and the corporation may require as to the issue of the said deposit receipt, and the circumstances under which she took out the same, and the securities and rights available to the assured, and shall also, at the like request and costs, and upon payment by the corporation of the principal remaining due upon the deposit receipt and interest to date of payment, execute and do all such assurances and things as may be required by the corporation for vesting in them all rights of the assured against the debtors and any property or person whatsoever, and the corporation may enforce any such rights or remedies in the name of the assured, but at the costs of the corporation. If the assured shall refuse or neglect to execute or do any such assurance or thing for twenty-one days after being required by the corporation to execute or do the same, all the rights of the assured under this policy shall forthwith cease.

On the 4th April 1893 the bank stopped payment.

On the 19th April the repayment of the 1000*l.* deposited, with 18*l.* for interest, became due, but the bank made default in paying it to the plaintiff.

On the 24th April the plaintiff gave notice of the default to the defendants.

On the 26th July this action was commenced to recover from the defendants, under their contract, the amount which the bank had failed to pay to the plaintiff.

In the meantime, before the commencement of this action, proceedings had been taken, both in England and in Victoria, for the winding-up and reconstruction of the bank.

In Victoria, on the 26th April, an order had been made by the Supreme Court sanctioning a scheme of arrangement under a Victorian Act, the Companies Act Amendment Act 1892, and on the 28th April a winding-up order was made by the same court. The scheme of arrangement was finally sanctioned by an order of the court on the 19th June, and under sect. 3 of the Act of 1892 the scheme then became binding on all the creditors of the bank.

In England an order for the winding-up of the bank was made on the 18th May. The scheme of arrangement was agreed to at a meeting of creditors, and was sanctioned by an order of court on the 10th Aug.

Under this scheme a new company was formed to carry on the business of the old bank, and the creditors of the old bank accepted certain new rights against the new company as reconstituted in satisfaction and discharge of all their claims against the old company.

Moulton, Q.C. and Dankwerts for the defendants.—The defendants have a good arguable defence in this case. The contract between the plaintiff and the defendants was one of suretyship, the bank being the principal debtor. The rights taken by the plaintiff under the scheme for the reconstruction of the bank, were taken in accord and satisfaction of her debt, and her claim against the principal debtor being discharged, the defendants, as sureties, are discharged also. [*KAY, L.J.*—In *Slater v. Jones* (29 L. T. Rep. N. S. 56; L. Rep. 8 Ex. 186) a composition under the Bankruptcy Act 1869 was held not to be an accord and satisfaction, though pleadable in bar to an action for the original debt brought by the creditor before default by the debtor.] In that case the composition should be considered as taken, not in respect of the original debt, but in respect of the creditor's right to a dividend in the bankruptcy:

Re Fothergill; Ex parte Corry, 45 L. J. 153, Bank.

Secondly, as the plaintiff contracted with an Australian bank she must be taken to have known of the effect which Victorian law would have in the event, which has in fact happened, of the Australian bank being compulsorily wound-up, and a reconstruction of it being authorised. Therefore it must be taken to be a term in her contract with the defendants that in the event which has happened she would accept instead of her deposit the rights against the new bank which she has under the scheme of arrangement. They referred to

Megrath v. Gray, 30 L. T. Rep. N. S. 16; L. Rep. 9 C. P. 216.

Channell, Q.C. and Walter for the plaintiff.—There can be no arguable defence here. The

very state of things which the policy provides for, namely, default by the bank in repaying the plaintiff her deposit on the agreed date, is what has happened, and is the ground on which the action is brought. When that state of things occurred a right of action became vested in the plaintiff. No ground has been suggested which would take away from the plaintiff such a vested right of action. The defendants wish that a stipulation should be implied in the policy which is contrary to stipulations actually expressed in it. The reconstruction, under the scheme of arrangement, cannot affect the plaintiff's right of action, nor would it discharge sureties:

Re Jacobs; Ex parte Jacobs, 31 L. T. Rep. N. S. 745; L. Rep. 10 Ch. 111;
Re The London Chartered Bank of Australia, 69 L. T. Rep. N. S. 593; (1893), 3 Ch. 540.

Danckwerts replied.

LORD ESHER, M.R.—In this case attempts have been made on behalf of the defendants to lead us into a discussion upon bankruptcy law, and also upon the law of guarantees, neither of which branches of the law have anything to do with the present case. The contract which we have now to consider is not one of guarantee, it is a contract of insurance. The defendants are a limited company—an insurance company, not a guarantee company—and, in the course of their business, they issue policies. The contract in this case begins with the words, "This policy of insurance." It is a contract of insurance, and it is subject to insurance law. By this contract the defendants agreed to pay money to the plaintiff upon the happening of a certain event; they did not guarantee the payment of the money by someone else. That is the ordinary form of a policy of marine insurance. When a ship is insured, the underwriter pays if she is lost; his liability to pay does not depend on whether the owner is able to get something to indemnify himself out of, for instance, the owner of the ship which has caused the loss of the insured vessel. The contract in this case begins by reciting that whereas Mrs. Dane, thereafter called "the assured," is the holder of a deposit receipt for 1000*l.* of the Commercial Bank of Australia, and is "desirous of being insured" by the defendants, and that a premium has been agreed upon; and it is then witnessed that the defendants guarantee the payment of the principal and interest, if the bank make default in paying the money. The effect of that is, that the defendants insure payment of the deposit note according to the contract made between the plaintiff and the bank. The bank agreed to pay the plaintiff on a certain day, and the agreement of the defendants is therefore a direct and positive contract that, if the bank should not pay the plaintiff the due amount on the agreed day, then, without any question as to suretyship, the defendants would pay it to the plaintiff. In that event, if it were not for the law of insurance, the plaintiff, after compelling the defendants to pay her the amount left unpaid by the bank on the agreed day, would be allowed to get what she could out of the bank; but now, since the defendants are in the position of underwriters, the ordinary law of insurance must be applied. An underwriter pays money to the assured by way of indemnity, the contract of insurance is a contract of indemnity, not a

guarantee. Consequently, if the assured saves anything out of the loss, it goes to the underwriter, for, if this were not so, the assured would be more than indemnified. That is an incident of every contract of indemnity. But to such a contract the law also attaches a further incident, namely this, that, if the assured is able to obtain any salvage whereby the loss might be diminished, he cannot refuse to try and obtain it, and at the same time insist on his being paid in full by the underwriter. It follows from that, that if the assured does not choose to obtain the salvage himself, he is bound to help the underwriter to do so. In the present case, if the bank had not failed, but had simply refused to pay the plaintiff on the agreed date the amount that was due, she would not have been bound to bring an action against the bank to recover the money. The object of the policy of insurance was to save her that trouble. She would be entitled to require payment from the defendants, but then if, after they had paid her, the bank were also to pay her the amount due under the deposit note, she would in such a case be bound to account to the defendants for the money she had received from the bank. It is only bewildering to try and argue that there ought to be added to the contract some proviso to the effect that the defendants are to be relieved from liability under the policy by some law of Australia with regard to some scheme of arrangement. What happens in Australia is quite immaterial to the plaintiff, so far as her rights under this policy are concerned. All that is material to her is the question whether the bank has or has not paid her the due amount on the agreed date. If the bank does not pay her, then any salvage that can by any law be afterwards recovered must be recovered by the defendants, with the help of the plaintiff. The case is a simple case of insurance law, and I cannot see that any plausible defence has been made out. I may add moreover that all that I have said is implied by the terms of the second condition on the policy, though, even if there had been no such condition, the duty of the plaintiff, if she were paid by the defendants, to assist them in recovering salvage would still exist. I therefore think that this appeal must be dismissed.

LOPES, L.J.—I agree with every word that my Lord has said, and I have nothing to add.

KAY, L.J.—I agree. It seems to me immaterial whether this contract is one of insurance or of suretyship, because, in either case, the moment the bank made default in paying the plaintiff, she got an absolute right of action against the defendants, which has not been defeated by anything which took place afterwards. The facts are as follows: The plaintiff deposited money in the Commercial Bank of Australia, which was repayable at a certain agreed date. When the agreed date arrived the bank did not pay her. Nothing had then occurred to destroy the debt. Then the plaintiff brings this action against the defendants upon a policy, the terms of which are as clear as possible, that, if the bank made default in paying the money, the defendants would pay it within a certain limited time after notice of the bank's default. I can see no possible answer to the claim on this policy. Supposing that this contract with the defendants were a guarantee, then, the bank having made default, the right of

CT. OF APP.] GREAT WESTERN RAIL. CO. v. COMMISSIONERS OF INLAND REVENUE. [CT. OF APP.]

the plaintiff to recover from the surety would be clear. Now, after the default occurred a scheme was made for the reconstruction of the bank, and by reason of some Australian Act all the creditors, including the plaintiff, were bound by that scheme. Thereupon the learned counsel for the defendant argued that under this reconstruction there was an accord and satisfaction for the debt from the bank to the plaintiff, by which the sureties, the defendants, were discharged from their liability. That argument is answered by the case of *Slater v. Jones* (29 L. T. Rep. N. S. 56; L. Rep. 8 Ex. 186). That case shows that by English law the scheme for reconstituting the bank would not be such an accord and satisfaction as is contended. Then it was argued that there had been no default by the bank within the meaning of the contract, because the plaintiff, having deposited money in an Australian bank, must be taken to have known of the Australian law by which she might be compelled, in the reconstruction of the bank, to accept something instead of her debt. Therefore, it is argued, it is to be treated as a part of the contract that the plaintiff would accept, as payment of the debt by the bank, whatever a majority of creditors in the reconstruction might compel her to accept. But even if that were so, all those things happened after default had been made by the bank in paying the plaintiff on the agreed date, and therefore, after the debt now sued on had become due from the defendants. It is unnecessary, I think, to say more than that it is clear that the defendants have no defence whatever to the action, and I therefore agree that this appeal fails, and must be dismissed. *Appeal dismissed.*

Solicitors for the plaintiff, *Beaumont, Sons, and Rigden.*

Solicitors for the defendants, *Baker, Blaker, and Hawes.*

Friday, Dec. 1, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.J.J.)

THE GREAT WESTERN RAILWAY COMPANY v. COMMISSIONERS OF INLAND REVENUE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Revenue—Duty chargeable—“Conveyance or transfer on sale”—Dissolution of railway company and transfer of its undertaking to another by Act of Parliament—Duty chargeable on copy of Act—Stamp Act 1891 (54 & 55 Vict. c. 39), s. 54 and first schedule.

By the Stamp Act 1891 an ad valorem duty is payable on a conveyance or transfer on sale of any property, and by sect. 54 the expression “conveyance on sale” includes every instrument, and every decree or order of any court whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser. By a private Act of Parliament a railway company was dissolved and its undertaking transferred to the Great Western Railway Company, the Great Western Company paying and issuing to the shareholders of the dissolved company a certain amount of consolidated guaranteed stock in the

Great Western Company. Under the Act a Queen's printer's copy of the Act was to be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act had been effected by an executed instrument in writing, and the copy were the instrument.

Held (affirming the judgment of the Queen's Bench Division), that a Queen's printer's copy of the Act was chargeable with an ad valorem duty, as upon a conveyance on sale, upon the value of the stock in the Great Western Railway Company issued to the shareholders of the dissolved company.

APPEAL from a judgment of the Queen's Bench Division (Cave and Wright, J.J.), upon a special case stated by the Commissioners of Inland Revenue pursuant to sect. 13 of the Stamp Act 1891 (54 & 55 Vict. c. 39).

The special case, so far as it is necessary to set it out, was as follows:—

1. The Great Western Railway Act 1892 (55 & 56 Vict. c. xxxiii.) which was passed on the 28th June 1892, and intitled “An Act for conferring further powers upon the Great Western Railway Company in respect of their own undertaking, and upon that company and the London and North-Western Railway Company in respect of undertakings in which they are jointly interested, for amalgamating the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies with the Great Western Railway Company, for vesting in that company the powers of the East Usk Railway Company, for vesting the undertaking of the Ludlow and Cleve Hill Railway Company, in the Great Western and London and North-Western Railway Companies, and for other purposes,” contains recitals:

(A.) That the undertaking of the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies, are under the authority of Parliament leased to or worked by the Great Western Railway Company, (in that Act and hereinafter called “the company”) and that the third schedule to the Act contains in the first three columns thereof a statement of the particulars of the capitals issued by the said companies respectively. (B.) That the company have under the authority of Parliament subscribed for, and now hold by themselves or their nominees, the shares, debentures, and debenture stock of the said companies specified in the fourth column of the same schedule, and the company or their nominees have also subscribed for and now hold the shares and debentures of the said companies mentioned in the fifth column of the same schedule, and that it is expedient that the said companies should be amalgamated with the company in the manner provided by the Act. (C.) That the East Usk Railway Company (in the Act and hereinafter called “the East Usk Company”) were unable without the assistance of the company to raise the capital required for the construction of their railway, and it was agreed between the company and the East Usk Company that the traffic on the East Usk Railway should be worked by the company, and it is expedient that the powers of the East Usk Company should be transferred to the company. (D.) That the Ludlow and Cleve Hill Railway is worked, managed, and maintained by the company and the London and North-Western Railway Company (in the Act, and hereinafter called “the North-Western Company”), and it is expedient that the said railway should be transferred to and vested in the said companies;

and makes provision in reference to the amalgamation and transfers of the said railways and their powers.

2. By sect. 2 of the said Act, relating to the Incorporation of General Acts, Part V. (relating to amalgamation) of the Railways Clauses Act 1863

(26 & 27 Vict. c. 92) is, except where expressly varied by the said Act, incorporated with and forms part of the said Act.

3. By sect. 3 of the said Act relating to the interpretation of terms and expressions used in the Act, it is provided that the expression "the amalgamated companies" means and includes the Calne Railway Company, the Newent Railway Company, the Ross and Ledbury Railway Company, and the Wellington and Severn Junction Railway Company, and that the expression "the amalgamated undertakings" means and includes the undertakings of the amalgamated companies respectively. These expressions are similarly used in this case.

4. Sects. 32 to 42 of the said Act relate to the amalgamated companies. The material sections are as follows:

32. The several undertakings of the amalgamated companies shall, subject to the contracts, obligations, debts, and liabilities of those companies respectively, be amalgamated with and form part of the undertaking of the company, subject nevertheless to the provisions of this Act, and each such amalgamation shall take effect as on and from the first day of July 1892, and as on and from that date the said companies are respectively dissolved, except for the purpose of winding-up their affairs. A Queen's printer's copy of this Act shall be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction effected by an executed instrument in writing and the copy were the instrument, and that copy shall, within three months from the date of amalgamation, or from the passing of this Act, whichever shall last happen, be produced as such instrument to the Commissioners of Inland Revenue for their opinion as to the stamp duty chargeable thereon, under the provisions of the Stamp Act 1891, and all the provisions of that Act shall apply thereto accordingly, except that the company, if dissatisfied with the assessment of the commissioners, shall not be required to pay duty in conformity with such assessment as a condition of appeal to the High Court. Provided, that in case of delay of payment under the above exception the amount of duty assessed or determined by the court to be chargeable shall be a debt due to Her Majesty, and shall be paid with interest thereon at the rate of 5 $\frac{1}{2}$ per cent. per annum, from the expiration of the said three months until the day of payment.

33. The amalgamated companies shall be respectively entitled to all their revenues up to and inclusive of the 30th day of June 1892, and except as hereinafter mentioned the amalgamated companies shall discharge and relieve the company of all their contracts, obligations, debts, and liabilities not chargeable to capital account, which shall have accrued up to the time of amalgamation.

34. As from the time of amalgamation the shares, debentures and debenture stocks, mortgages, or bonds of the amalgamated companies, held by or on behalf of the company, and specified in the fourth and fifth columns of the third schedule to this Act, shall be, and the same are hereby cancelled.

35. All mortgages or bonds of the amalgamated companies existing at the time of amalgamation and not cancelled by this Act, shall, during the continuance of such mortgages or bonds respectively, be charges upon the undertaking upon which such mortgages or bonds are respectively secured, but the company shall be liable for all interest which shall accrue thereon after the time of amalgamation, and as such mortgages or bonds fall due they shall be paid off, or may be renewed by the company, or the company may issue new mortgages or bonds in respect thereof, and all such mortgages or bonds shall be charges upon the undertaking of the company, and the company may raise by mortgage of their undertaking, or by the creation of debenture stock, all such sums as they may require for paying off mortgages or bonds falling due as aforesaid. Provided that the aggregate borrowing powers of the

company and the amalgamated companies be in no case exceeded under the powers contained in this section.

36. As at and from the time of amalgamation the several holders of the shares in the capital of the Wellington and Severn Junction Railway Company shall, in lieu of and in exchange for the shares held by them respectively, become and be the holders of consolidated guaranteed stock of the company in the proportion of 100 $\frac{1}{2}$ of such stock for every ten shares of 10 $\frac{1}{2}$ each in the Wellington and Severn Junction Railway Company held by them.

37. As at and after the time of amalgamation the capital which immediately before the time of amalgamation was the capital of the Great Western Railway Company, shall be increased by addition thereto in the manner and to the extent necessary to give effect to the provisions of this Act with reference to the Wellington and Severn Junction Railway Company. Provided always, that any additions to the Great Western Railway Company's consolidated guaranteed stock, made under the authority or for the purposes of this Act, shall be deemed to be part of, and shall rank *pari passu* with, the other like stock of the company.

5. Sects. 43 to 48 of the said Act contain provisions for the dissolution of the East Usk Company, and the transfer of all the rights, powers, privileges, and authorities which are conferred on the East Usk Company, whose undertaking is to become after the transfer part of the undertaking of the company.

6. Sects. 49 and 55 have reference to the winding-up of the Ludlow and Cleve Hill Railway Company, and provide for the transfer of the undertaking upon a sale thereof to the company and the North-Western Company. The transfer is to be evidenced by a duly stamped deed of conveyance.

Paragraph 7 contained the third schedule to the Act, which shows that the company held the whole of the issued capital of the Newent and of the Ross and Ledbury Company, as well as of the Calne Railway Company, excepting an amount of 11,600 $\frac{1}{2}$., and of the Wellington and Severn Junction Company excepting 59,830 $\frac{1}{2}$ l.

Paragraph 9 stated that no agreement in writing was entered into in respect of the several amalgamations, but the company and each of the amalgamated companies passed resolutions approving the Bill.

The commissioners were of opinion that the copy of the Act was chargeable with duty as a conveyance or transfer on sale under the Stamp Act 1891: (1) in respect of the amalgamation of the Wellington and Severn Junction Railway Company, with an *ad valorem* duty in respect of the value on the 1st July 1892 of 59,830 $\frac{1}{2}$ l. consolidated guaranteed stock of the Great Western Company, to be issued to the shareholders of the Wellington and Severn Junction Railway Company; (2) in respect of the amalgamation of the Calne Railway, with an *ad valorem* duty in respect of the sum of 11,600 $\frac{1}{2}$.; and (3) in respect of the amalgamation of the other two companies, with a duty, in each case, of ten shillings.

The question for the consideration of the court was, whether the commissioners had rightly assessed the duty payable on the copy of the Act of Parliament.

The Queen's Bench Division (Cave and Wright, JJ.) were of opinion that the Act was chargeable with duty as assessed by the commissioners.

The Great Western Railway Company appealed.

CT. OF APP.] GREAT WESTERN RAIL. CO. v. COMMISSIONERS OF INLAND REVENUE. [CT. OF APP.]

Cripps, Q.C. and Haldane, Q.C. for the railway company.—The arrangement in this case was carried out by an Act of Parliament. It is not in the nature of a sale, but was an amalgamation of several companies. There is no "conveyance" here, and the duty under the Act is payable on "a conveyance." They referred to

The Furness Railway Company v. The Commissioners of Inland Revenue, 10 L. T. Rep. N. S. 161; 23 L. J. 173, Ex.

The Attorney-General (Sir Charles Russell, Q.C.) and *Danckwerts*, for the Commissioners of Inland Revenue, were not called upon.

Lord ESHER M.R.—I confess I share the opinion of Cave and Wright, J.J. that this is an extremely clear case. The smaller company, as it is called, had property which in railway language is called its "undertaking," and therefore was the owner, as Wright, J. has pointed out, of several railway lines and a great deal of other property. Then a transaction took place which is contained in a written instrument, namely, in a private Act of Parliament. That Act made a transfer—no other word describes the transaction—of all the property of the smaller company to the Great Western Railway Company. The Act does not in any way alter the Great Western Railway Company, which after the Act had been passed remained exactly the same entity, exactly the same corporation, as it had been before, neither greater nor less. So, by this instrument in writing, by this Act of Parliament, the property and powers of the smaller company are transferred to the Great Western Railway Company. Now, this Act of Parliament has sanctioned the consideration which is to be given by the Great Western Railway Company for the transfer to it of the property of the smaller company. The Great Western Railway Company is to give to the smaller company or to the shareholders of the smaller company—it does not signify which—a certain number of shares in the Great Western Railway. If such a transaction as that had taken place between private persons, or between private companies, who, we must suppose, would not require the authority of an Act of Parliament, it would be carried out by an instrument in writing. The effect of the instrument would be to transfer the property from one party to the other for a certain consideration, and, whether or not it were drawn up in virtue of a previous contract of purchase and sale, its effect would be the same as if it were a conveyance executed in pursuance of a contract of purchase and sale. The substance of that transaction would be the transfer or conveyance of property for a consideration as though upon a contract of sale. Now, turning to the Stamp Act 1891, we find that a duty is payable on a "conveyance on sale." Are those words used in the Stamp Act to mean only a conveyance carried out in pursuance of a definite contract of purchase and sale, or are they not used in this Act to mean a conveyance carried out as though upon a previous contract of sale? Used in the Stamp Act the words seem to me to bear the latter meaning. The transaction in this case being, in substance, of the nature which I have stated, it seems to me to come within the meaning of the phrase "conveyance on sale" in the Act. I therefore think that this transaction is directly within the

Stamp Act, and that the decision of the Divisional Court in favour of the Crown is perfectly right.

LOPES, L.J.—It is an established rule in considering cases of this kind, namely, whether any particular instrument is liable to duty under the Stamp Act, that the substance of the transaction is alone to be considered. It appears to me that, looking at the substance of this transaction, it is a clear case of a conveyance on sale. It was observed by Cave, J. that there is in this case everything that constitutes a sale. There are two parties, one of whom is parting with something and the other giving something for it. The arrangement ultimately come to is then carried out and embodied in an Act of Parliament. It was argued that the consideration, instead of passing to the smaller company, passed to the shareholders of that company. I fail to see that that can make any material difference, or make that which, on the face of it, is apparently a conveyance on sale anything else than a conveyance on sale. I think, therefore, that this appeal should be dismissed.

KAY, L.J.—The Stamp Act 1891 provides in the first schedule for certain *ad valorem* duties, payable on the "conveyance or transfer on sale of any property except" certain stock. Sect. 54 of the Act provides, that "for the purposes of this Act, the expression 'conveyance on sale' includes every instrument, and every decree or order of any court, or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser, or any other person on his behalf or by his direction." The Great Western Railway Company, under the powers of a special Act of Parliament, has obtained all the property and undertaking of certain other companies and clause 32 in the Act, which enabled them to do so, is as follows: [His Lordship read it; see paragraph 4 of the special case.] Now the special Act incorporates Part V., a group of sections headed "Amalgamation," of the Railways Clauses Act 1863 (26 & 27 Vict. c. 92). Sect. 37 of that Act provides that "for the purposes of this part of this Act, companies shall be deemed amalgamated by a special Act in either of the following cases . . . (2) where by the special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company." That is exactly what was done here by this special Act. The property and undertakings of the dissolved companies were transferred to and vested in the Great Western Railway Company without any change being made in its name. Now the argument, as I understand it, seemed to me to turn entirely upon the meaning and effect of the word "amalgamation." It was argued that in truth there was here a combination of two companies, but the difficulty that arises at once is, how can there be a combination of two companies one of which is dissolved? That is impossible. Then it was said that the Great Western Railway Company, as the consideration for this so-called amalgamation, issued stock in certain proportions to the shareholders of the dissolved company, and thereby took into itself the shareholders of

the dissolved company, and so an amalgamation was constituted between the two companies. Therefore, it was argued, there was no transfer as on a sale. The attempted analogy was this: that, if two partnerships carrying on the same kind of business were united, and all their business and property thrown into one, there would be no transfer as on a sale. To meet that argument let me put an instance. Supposing in this case that instead of shares the consideration for the transfer or so-called amalgamation had been cash, and that it had been handed directly to the company before it was dissolved, for the purpose of its being divided by the company amongst its shareholders. Would that be a sale or would it not? It seems to me impossible to say that it would not, though counsel would not admit it. I cannot understand what a sale means if that would not be a conveyance as on a sale. It is to be observed that the Stamp Act 1891 has nothing to do with contracts or negotiations. It requires a stamp upon a conveyance on a sale, and a conveyance on a sale is the instrument by which the property is transferred upon a sale. Now, in the case I have put, it seems to me impossible to doubt that the transfer would be a transfer upon a sale. Then take the case, instead of the roundabout proceeding, of the cash being paid direct to the shareholders of the dissolved company, and not paid to the dissolved company to distribute among its shareholders. What is the substantial difference? I can see none. Then take the case, which is this case a little altered, of handing to the dissolved company stock in the company which was taking over the property for the purpose of distribution amongst its shareholders. Would not that be a sale and purchase? Of course it is not admitted, but I cannot see the reason why. In the present case, instead of handing the stock to the dissolved company for distribution by it among its shareholders, the stock has been given straight to the shareholders of the dissolved company. Substantially that seems to me to be a purchase and sale of the property, business, powers, and everything else that is involved in the word "undertaking" of the company which was to be dissolved. The transfer was effected by this special Act of Parliament, and this Act is to receive the same stamp which an instrument in writing, carrying out the same arrangement, would have been subject to if the companies had had power to execute it without a special Act of Parliament. Supposing the companies had had that power, and the transfer had been made without an Act of Parliament, one company would, by the deed of conveyance, have conveyed over the whole of its property to the other company, the other company paying as a consideration the money's worth in stock, which it has practically handed over in the way I described to the smaller company. The reason why that has been treated as the consideration, and the only consideration, is that all the debenture stock and debts of the companies transferring belonged to the Great Western Railway Company already, so that all that the Great Western Company had to buy was practically an equity of redemption, something subject to that debt. The *ad valorem* duty has not been computed on the debt, but has been computed on the price which the company has

paid for what I, by way of analogy, call the equity of redemption which it had to buy. That seems to me perfectly right, and I think the appeal must be dismissed.

Lord ESHER, M.R.—I think that I ought to add that we cannot distinguish this case from the *Furness Railway Company v. The Commissioners of Inland Revenue* (*ubi sup.*). *Appeal dismissed.*

Solicitor for the appellants, *Nelson.*

Solicitor for the respondents, *Solicitor to the Inland Revenue.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 16 and Dec. 2, 1893.

(Before STIRLING, J.)

COXEN v. ROWLAND. (a)

Power of appointment—General power of appointment—Appointment by will—Death of appointee in lifetime of donee of power—Destination of appointed property.

A freehold house was conveyed to a trustee to such uses as E. J. should by deed or will appoint, and in default of appointment to the use of her husband R. J., his heirs and assigns. E. J. by her will devised the above house by the description "my message" to R. J. who predeceased her.

Held, that E. J. had shown an intention to make the property her own, and that it therefore passed to her heir-at-law.

SPECIAL CASE.

By an indenture, dated the 20th Dec. 1865, a freehold messuage house, formerly known as 18, now as 35, Stokes Croft, in the city of Bristol, was conveyed to William Rice and his heirs to such uses as Eliza Jones should, notwithstanding coverture by deed or will appoint, and in default thereof to the use of William Rice and his heirs during the life of Eliza Jones upon trust for her; and after the decease of Eliza Jones, and such default of appointment as aforesaid to the use of her husband, Richard Frederick Jones, his heirs and assigns.

R. F. Jones by his will, dated the 27th Jan. 1887, devised a yearly fee farm rent to which he was entitled out of the messuage No. 35, Stokes Croft, and certain furniture and articles therein unto his wife Eliza Jones for her separate use absolutely. And he devised and bequeathed the residue of his estate to the said William Rice upon trust for sale as therein mentioned, and appointed him sole executor of his will.

R. F. Jones died on the 1st March 1887.

Eliza Jones by her will, dated the 21st Dec. 1885, gave, devised, and bequeathed all the real chattel and personal effects whatsoever and wheresoever of which she might be possessed or entitled to, or of which by virtue of any power or authority by any deed or will, she was competent to dispose of as therein mentioned. Then, after making certain specific bequests and devises, in which she described the subjects of the gifts as "my cluster diamond ring," "my gold watch," "my gold watch chain with guinea attached,"

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

CHAN. DIV.]

COXEN v. ROWLAND.

[CHAN. DIV.]

"my messuage and premises, situate and being No. 11, Hillgrove-hill," "my five shares in the Bristol Waterworks Company," "my messuage and premises No. 6, Montague-street," she made the following gift: "I give and devise my messuage and premises, formerly known as No. 18, but now known as No. 35, Stokes Croft, Bristol, to my said husband, Richard Frederick Jones, absolutely;" and afterwards gave "my four several yearly fee farm rents," and her will concluded with a gift of the residue of her estate and effects after payment of all her just debts, funeral and testamentary expenses, to her husband absolutely.

Eliza Jones died on the 1st June 1888, and her will was proved on the 5th July 1888 by W. Rice and J. Carswell, who with her husband, R. F. Jones (who predeceased her), were the executors therein named.

The present trustees of the will of R. F. Jones now stated to the court a special case for the purpose of determining who, upon the death of Eliza Jones, became entitled to the property No. 35, Stokes Croft.

Vernon R. Smith for the plaintiffs.—Eliza Jones having survived her husband, the appointment by her will was ineffective. The limitation in the indenture of the 20th Dec. 1865 therefore took effect, and the property passed under the will of R. F. Jones:

Re Davies' Trusts, 25 L. T. Rep. N. S. 785; L. Rep. 13 Eq. 163;

Re Van Hagan; *Sperling v. Rochfort*, 44 L. T. Rep. N. S. 161; 16 Ch. Div. 18;

Re Ickeringill's Estate; *Hinsley v. Ickeringill*, 17 Ch. Div. 151;

Willoughby-Osborne v. Holyoake, 48 L. T. Rep. N. S. 152; 22 Ch. Div. 238.

Dunham for the defendants.—The will of Eliza Jones is a good appointment, and overrides the limitations in the indenture of the 20th Dec. 1865, as she survived her husband, R. F. Jones. The defendants, therefore, as her coheirs-at-law, are entitled:

Willoughby-Osborne v. Holyoake (*ubi sup.*); *Re Pinde's Settlement*, 41 L. T. Rep. N. S. 579; 12 Ch. Div. 667;

Brickenden v. Williams, L. Rep. 7 Eq. 310;

Re Thurston; *Thurston v. Evans*, 54 L. T. Rep. N. S. 833; 32 Ch. Div. 508.

Vernon R. Smith replied.

Cur. adv. vult.

Dec. 2.—*STIRLING, J.* stated the facts and continued:—The question is whether the real estate conveyed by the deed of the 20th Dec. 1865 passed by the will of Richard Frederick Jones or devolved upon the defendants as the co-heirs of Eliza Jones. Unless the will of Eliza Jones operates as an appointment in favour of the defendants, it seems to me that the title of the plaintiffs who claim under Richard Frederick Jones must prevail; and the real question is, whether the will of Eliza Jones does so operate. The rule applicable is thus stated by the Vice-Chancellor of Ireland in *Re De Lusi's Trusts* (3 L. Rep. Ir. 232, 237) in a passage cited with approbation by Jessel, M.R. in *Re Pinde's Settlement* (*ubi sup.*), and by Fry, J. in *Willoughby-Osborne v. Holyoake* (*ubi sup.*). The Vice-Chancellor says: "The question in all cases of the class now before me is one of intention—namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument con-

taining the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed." Where an appointment is made by will under a general power to a trustee in favour of a person in the lifetime of the testator, the case of *Re Van Hagan* (*ubi sup.*) shows that the question becomes one of resulting trust, whether the appointed property is real or personal. There, however, the executors were the persons named as trustees. Here, the appointment made by the will of Eliza Jones is made without the intervention of any trustee, and, consequently, that case affords but little guidance in the decision of the present. It is, however, established by the decisions in *Re Pinde's Settlement* (*ubi sup.*), *Re Ickeringill's Estate*, *Hinsley v. Ickeringill* (*ubi sup.*), and *Willoughby-Osborne v. Holyoake* (*ubi sup.*), that the rule laid down in *Re De Lusi's Trusts* (*ubi sup.*) may apply, although the appointment is not in the first instance to a trustee. The appointment may be valid, although not in terms made in favour of any individual. If a testator were to make a will in such words as these: "I hereby declare my intention to exercise all general powers of appointment vested in me, and my meaning is that all real and personal property subject to such powers shall go and devolve as if it were vested in me at the time of my death," I take it that this would be a sufficient exercise of the powers, and that the court would, as regards personalty, treat the will as an appointment to the testator's legal personal representatives, and as regards realty to his heir-at-law. Having regard to what was laid down by the Court of Appeal in *Re Van Hagan* (*ubi sup.*), I conceive that no distinction can be drawn in this respect between a will dealing with real estate and one dealing with personal estate, and this appears to have been the opinion of Hall, V.C. in *Re Ickeringill's Estate* (*ubi sup.*), and of Fry, J. in *Willoughby-Osborne v. Holyoake* (*ubi sup.*). It was suggested in argument that the latter case was one where an appointment was made to trustees; but there are four reports of the decision (*viz.*, 22 Ch. Div. 238; 52 L. J. N. S. Ch. 331; 48 L. T. Rep. N. S. 152; and 31 W. R. 236), and in one of them the will is set out verbatim. I cannot discover any ground for such a contention. It is not, of course, necessary that the testator should express himself in the precise terms which I have mentioned. It is enough if the court finds an intention that the power shall be exercised, and that the property shall be treated as if it belonged to the testator himself. This I understand to be expressly laid down by Fry, J. at the conclusion of his judgment in the case of *Willoughby-Osborne v. Holyoake* (*ubi sup.*), and I may add that the reasoning of the learned judge was independent of the decision in *Re Van Hagan* (*ubi sup.*). He was dealing with the case of *Hoare v. Osborne* (10 L. T. Rep. N. S. 258), in which Kindersley, V.C. held that a married woman could not make property her own by appointing it by her will in exercise of a power. He says this: "It appears to me that the sound conclusion from a will of that description is this: that the appointment shall operate, but it shall operate as if the property had been her own. In that manner I give effect to both the expressed intentions, *viz.*, the expression of intention that it shall be disposed of, and the expression of intention that it shall be treated as if it were her own. I therefore think

that where, as in the present will, I find a declaration that the property is to be deemed hers, and a declaration of intention to exercise her power of appointment there is nothing to prevent the property being appointed as if it were her own." That reduces it to a question of the intention of the testator, but what the intention is, is not always an easy matter to ascertain. [His Lordship then discussed the will and concluded:] I think that under these circumstances she has indicated (not less clearly than did the testator in the three cases of *Re Pinede's Settlement* (*ubi sup.*), *Re Ickeringill's Estate*; *Hinsley v. Ickeringill* (*ubi sup.*), and *Willoughby-Osborne v. Holyoake* (*ubi sup.*), her intention that the power should be exercised, and that the property which is subject to it should be deemed hers. In my opinion, therefore, the first question must be answered in favour of the defendants.

Solicitors: *Meredith, Roberts, and Mills*, for *Broad and Francis*, Bristol; *George Reader and Co.*, for *David Johnstone*, Bristol.

Dec. 14 and 15, 1893.

(Before KEKEWICH, J.)

Re LAWANCE; BOWKER v. AUSTIN. (a)

Solicitor—Marriage settlement—Costs—Trustee—Lien.

In 1889 A. B., in contemplation of marriage, instructed C. D. and E. F., a firm of solicitors, to prepare a settlement. In 1891 the solicitors sent in a bill of costs to A. B., the bill including stamp duty and other disbursements. In 1892 A. B. became bankrupt. The settlement and other deeds and documents remained in the hands of the solicitors.

On summons taken out by the trustees:

Held, that the solicitors had no lien on the settlement, deeds, and documents in respect of their costs.

Order for delivery up of the box containing the settlement, deeds, and documents, to the trustees to be placed in a bank.

In Aug. 1889 Edward George Lawrance was about to be married to Lilian Edith Lawrance (then Lilian Edith Seymour), and he instructed the defendants, Richard Freer Austin and Arnold Austin, solicitors, carrying on business under the style of Austin and Austin, to act for him as his solicitors in preparing a settlement on his marriage. The trustees of the settlement were the defendant Richard Freer Austin and the plaintiffs; and Edward George Lawrance transferred to them certain debentures and shares, and conveyed to them certain freeholds upon trust for sale. The settlement also contained certain policies, and Edward George Lawrance covenanted to pay a sum of 10,000*l.* The trusts of the settlement were in favour of the husband, wife, and issue in ordinary form.

The settlement was executed on the 3rd Sept. 1889, and the following day the marriage was solemnised in America.

After the marriage Messrs. Austin and Austin had the settlement and other documents in their custody.

In Jan. 1891 Messrs. Austin and Austin delivered a bill of costs, 89*l.* 4*s.* 1*d.*, to Mr. Lawrance,

this sum including the stamp duty and other disbursements.

In March 1892 Edward George Lawrance was adjudicated bankrupt. Richard Freer Austin now wished to retire from the trust, and the question arose as to whether Messrs. Austin and Austin were entitled to a lien for their costs, which remained unpaid.

This was a summons taken out by Frederick Bowker and Henry Austin Lee against Richard Freer Austin, Arnold Austin, and the official receiver of the estate of Edward George Lawrance and his wife, for the determination of the following questions: (1) Whether the trustees of the settlement ought to raise out of the funds subject to the trusts of the settlement, and pay the defendants, Richard Freer Austin and Arnold Austin, all or any and what part of the sum of 89*l.* 4*s.* 1*d.* and interest, claimed by them in respect of the bill of costs of Messrs. Austin and Austin in relation to the preparation and completion of the settlement and conveyance. (2) That if and so far as it might be necessary, it might be determined whether the defendants Austin and Austin had any lien on the settlement and the conveyance, and upon the title deeds relating to the property comprised in such conveyance, in respect of such costs and interest. (3) That all proper directions might be given for placing the box containing the settlement and other trust documents at Lloyd's Bank, in the joint names of the trustees of the settlement.

Renshaw, Q.C. and *A. F. Peterson* for the plaintiffs.—The solicitor has no lien as against the trustees. *Re Gregson* (26 Beav. 87) is not considered good law now. The cases of *Re Snell* (37 L. T. Rep. N. S. 350; 6 Ch. Div. 105); *Re Mason and Taylor* (10 Ch. Div. 729); *Macfarlane v. Lister* (58 L. T. Rep. N. S. 201; 37 Ch. Div. 88); and *Brunton v. Electrical Engineering Corporation* (65 L. T. Rep. N. S. 745; (1892) 1 Ch. 434) show that the solicitor has no lien.

Warmington, Q.C. and *G. P. Macdonell* for R. F. and A. Austin.—Until our right as against the settlor is satisfied, the trustees' rights do not begin. We claim a lien on the settlement and other documents (*Re Gregson* (*ubi sup.*), our case is different from the case of *Re Snell* (*ubi sup.*).

KEKEWICH, J.—The absence of any reported decision upon this point since *Re Gregson* was decided in 1858, shows that it is one that really is not found of much practical importance. Whether that arises from the generosity of solicitors or from another cause I do not know, but certainly there is no case. I do not think it arises from *Re Gregson* having been acquiesced in. My own unfamiliarity with the case counts for nothing, but it is strange that it was not cited in *Re Snell* or in *Re Mason and Taylor*, because it would certainly have been in point, and it is not referred to by the counsel or the learned judges who decided those cases. I say it certainly would have been in point, because if *Re Gregson* is a sound decision, and one which ought to be followed, it goes to this, that the lien of a solicitor, which of course arises out of his implied contract with his client, extends not only to the client but to every person claiming under the client whether with or without valuable consideration, and then if that is the law, *Re Mason and Taylor* and *Re Snell* ought to have been decided in a different way, unless, indeed,

you can infer another contract from the conduct of the parties. If you can do that, then of course *Gregson's* case may be held not to apply, though I am bound to say it seems to me that the materials for inferring another contract probably existed there as well as in the other cases. I have not searched all the books, but I think it will be found that, though *Re Gregson* is of course cited in the text books of the law of attorneys and solicitors (I use the word "attorneys" because some of the old books are on attorneys) as far as my knowledge goes, it is very likely cited as an authority without comment and without pushing it to the extent to which it is now desired to push it. On the other hand, I have those two cases of *Re Snell* and *Re Mason and Taylor* decided upon what seems to me a sound principle. Let us consider how a marriage settlement comes to be prepared, and when I say a marriage settlement of course I mean any document necessary for the completion of a marriage settlement, any muniments of title or documents of that kind without which the marriage settlement is not complete, as for instance, where real estate is conveyed to trustees in trust for sale and to hold the proceeds of sale upon the trusts of an indenture of even date. The two documents comprise one marriage settlement. How does that come to pass. The gentleman instructs his solicitor to prepare the necessary documents communicating of course with the solicitor of the lady. They are prepared according to the course of the profession by the lady's solicitor and the gentleman pays all the costs. That is the ordinary rule. The trustees, of course, have to be communicated with; the solicitor preparing the documents has to be put into communication with them. In one sense they are not the solicitor's clients, because in the absence of express retainer, which I never saw, they certainly would not be liable for any costs, but they are his clients in this sense that he recognises them as the persons who are to become entitled to the property, hold it upon the trusts of the settlement, and they must of course have the custody of the settlement itself. It seems to me that therefrom the conduct of the solicitor accepting that duty raises an entirely new contract—a contract that he will not enforce his lien; that he will prepare that document or assist in the preparation of it for the benefit of the trustees who are, in the modified sense I have mentioned, his clients. I believe it is the solicitor's bounden duty to tell his clients and to tell the trustees if he intends to insist upon his lien: "I will undertake this duty, I will see to the preparation of this document, to the stamping and so forth, but remember I shall not part with it unless I am paid my costs." I do not think that it can be assumed that either the instructing client, or the trustees know that any such lien exists. I think the lien is inconsistent with the position in which a solicitor is. It is a matter of regret to everybody that solicitors should not be paid their costs when unfortunately there is a bankrupt client. It is still more a matter of regret that they should not only not be paid their reasonable remuneration, but they should be out of pocket in respect of the stamp duty and other disbursements which on a marriage settlement sometimes are heavy. But I cannot go into that. Whether it is a few pounds or a very large sum as sometimes it is, the principle

must be the same. As I understand the decisions in *Re Snell* and *Re Mason and Taylor*, where a solicitor is acting for the gentleman and the trustees, and the marriage settlement is all being done in one office, there being no independent solicitor employed, then the solicitor has a duty to perform to two sets of persons, and he must act, and it must be assumed that he does act so as to perform his duty to both sets of persons. On behalf of the trustees he is bound to see that a perfect deed is completed and handed over to the trustees. Something was said about the time when the completion took place. It is not necessary for me to go into that. When the settlement passes into the property of the trustees as distinguished from the property of anyone else I need not now consider. It does certainly become the property of the trustees when it is thoroughly completed, so that they are entitled, and, in fact, bound to lock it up in the box and to deny access to it by any other person. If, therefore, *Re Gregson* interferes with that, I think I am not bound to follow it, but I am bound to follow the other two cases which were decided on a principle which is not enunciated in *Re Gregson*, and can only be picked out of it. I must follow the two cases to which I have referred. I have taken care in giving judgment to avoid resting upon the fact that one of the trustees is a member of the solicitors' firm—I am not saying that that is unimportant—but I had rather put my judgment on the broader ground, and therefore I give my judgment independently of that fact. The result is that there is no lien, and the rest follows. It has been suggested that the trustees of the settlement on the question asked in the summons might pay these costs out of the trust fund. It is quite impossible for me to accede to that. If there were a lien, probably I might on a proper application assent to the trustees paying the costs in order to discharge the lien. I am not sure I should do it without the trustees, or somebody to represent the *cestui que trust*. That I might or I might not do, but if they can get the deed for the benefit of their *cestui que trust* without paying the money, I cannot say that they ought to be generous to the solicitors with other people's money.

Solicitors: Surman and Quekett; Austin and Austin.

Tuesday, Jan. 16.

(Before KEKEWICH, J.)

TURNBULL v. THE WEST RIDING ATHLETIC CLUB LEEDS LIMITED. (a)

Company—Director—Fiduciary character—Contract—Declaration of interest—Penalty—Notice—Injunction.

Article 70 of the articles of association of a company, provided that the office of any director should be vacated, if among other things, he contracted with the company, or was concerned in or participated in the profits of any contract with, or work done for the company, without declaring his interest at a meeting of the directors and that no director so interested should vote on any question relating to such contract or work. The plaintiff was a director, and at a meeting of the board on the 14th April 1893, he

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.] TURNBULL v. WEST RIDING ATHLETIC CLUB LEEDS LIMITED. [CHAN. DIV.]

informed the chairman, prior to the commencement of the business, that he was "jointly interested" with M. in a contract, concerning which some question was on the agenda paper for discussion, but he did not specify the precise nature or extent of his interest. The plaintiff took no part in the business, and was recorded on the minutes as "neutral." At a meeting of the board on the 11th Aug. 1893, no notice of which was given to the plaintiff, a resolution was passed declaring that his seat as a director had been vacated under article 70.

On motion, treated by consent as the trial of the action :

Held, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that the plaintiff had an interest in the matter; but, Held, also, that notice should have been given to the plaintiff, and a board meeting summoned to give him an opportunity of justifying himself. Perpetual injunction granted, without costs.

THIS was a motion by the plaintiff, who claimed to be a director of the defendant company, for an injunction to restrain the defendants, the directors of the company, from excluding him from any meeting of the directors, and from holding any such meetings without notice to him, and from in any way interfering with him in the discharge of his duties as a director.

The company was registered in Feb. 1893, for the purpose of providing an athletic ground suitable for cycling, football, and other sports, and a club-house, with accommodation for spectators.

Article 70 of the articles of association provided that, "the office of any director shall be vacated," (a) if he became bankrupt or suspended payment; (b) if he was found lunatic; (c) if he ceased to hold the share qualification; (d) if he absented himself from board meetings for a period of three months; and

(e) If he contract with the company, or be concerned in, or participate in the profits of any contract with, or work done for the company, without declaring his interest at the meeting of the directors, at which such contract is determined on or work ordered, if his interest then exists, or in any other case at the first meeting of directors after the acquisition of his interest, and no director so interested shall vote on any question relating to such contract or work.

The plaintiff was one of the first directors of the company and was subsequently elected deputy chairman.

The company proceeded to advertise for tenders for laying out a football ground and cycling track, and ultimately the directors accepted the tender of a contractor named McQuone, of Leicester, and a contract with him was signed in March 1893.

McQuone was to have begun the work on Easter Monday, the 3rd April, but on the plaintiff going down to the ground that afternoon to see whether a start had been made, he found that McQuone had only a foreman and nine men with him and no tools.

It turned out that McQuone was a man of very limited means, and could not find even his first week's wages, so that the plaintiff himself paid them by way of loan to him.

Ultimately it appeared that the plaintiff and McQuone arranged to have a joint interest in the contract.

At a meeting of the board on the 14th April held after the work had been commenced, and the plaintiff's agreement with McQuone, the plaintiff, who was present, stated at the outset that, as he was "jointly interested" with McQuone, his intention was not to vote or take part in the business on the agenda paper, which was to pass a resolution for payment to McQuone of an instalment of the contract price on the certificate of the company's architect. Accordingly, though he remained at the meeting, he took no part in the business, and was recorded on the minutes as "neutral."

The plaintiff at the meeting did not specify the precise nature of his interest. It appeared that he and McQuone had taken out a patent for the materials used in carrying out the contract.

At board meetings held subsequently to the 11th April the plaintiff again took no part in any business relating to the contract.

The work was completed in Aug. 1893.

On the 11th Aug. a board meeting was held, at which all the directors were present except the plaintiff, who had received no notice of it, and a resolution was then passed declaring his seat as a director vacant under art. 70.

The next meeting was held on the 18th Aug. and the plaintiff being aware of it, attended, though he had received no formal summons to it. Before the business commenced, the chairman asked him why he was present; to which he replied that he was there to assert his legal rights. The chairman then said he had no right to be there, as he was no longer a director.

Warmington, Q.C. and Stewart Smith for the plaintiff.—The board gave no notice to the plaintiff. The plaintiff might have had a good explanation, and his office of director cannot be declared vacant without his first being afforded an opportunity of explanation.

Bardwell (Walton, Q.C. with him) for the company.—Under art. 70, the plaintiff's office became vacated, *ipso facto*, by his non-disclosure of the actual nature of his interest in the contract :

Liquidators of Imperial Mercantile Credit Association v. Coleman, 29 L. T. Rep. N. S. 1; L. Rep. 6 Eng. & Ir. App. Cas. 189.

The directors were not bound to give the plaintiff notice of a fact which he already knew. The court has jurisdiction :

Richardson v. Methley School Board, 69 L. T. Rep. N. S. 306; (1893) 3 Ch. 510.

KEKEWICH, J.—On the first point I am entirely in favour of the defendants. It was settled by *Liquidators of Imperial Mercantile Credit Association v. Coleman* (29 L. T. Rep. N. S. 1; 6 Eng. & Ir. App. Cas. 189) that a director under such a rule as this was bound, not only to declare that he had an interest, but to specify what his interest was. Lord Cairns, with his usual incisiveness, put the case as clearly as words could put it, at page 205 of 6 Eng. & Ir. App. Cas.: "Did he 'declare,' or, as that word implies, show clearly his interest? His interest might be anything, from the absolute ownership of the property sold, down to a right of a nominal charge on or payment out of it. Did he then 'declare' what his intention was? Certainly he did not. A man declares his opinion or his intentions when he states what his opinion is, or what his intentions are, not that he has an opinion

CHAN. DIV.]

WENDON v. THE LONDON COUNTY COUNCIL.

[Q.B. DIV.]

or that he has intentions; and so, in my opinion, a man declares his interest, not when he states that he has an interest, but when he states what his interest is." Mr. Turnbull has told the court, according to his own view and recollection (and there has been no contradiction of it), what took place. He did not state to the directors clearly what his interest was. Therefore, on that ground, I am of opinion Mr. Turnbull is out of court. But it does not follow that what has happened is right. It may be that, if the court grants Mr. Turnbull the relief he seeks, it will be of a futile character, and that it will be found that he has in fact vacated his seat, and there will be a resolution by the directors to that effect, from which there will be no appeal. But a man is entitled to have the penalties imposed by articles of association inflicted according to the letter of the law. He is entitled to have words and rules followed strictly. In my opinion it is not fair and proper, or within the meaning of these articles of association, that a man should be turned out of the board of directors of the company without an opportunity of justifying himself. Here justification may have been possible. Assuming Mr. Turnbull did honestly declare his interest, and that the directors probably knew what his interest was, he might have made a plausible speech, and might, if he were as clever an advocate as a cyclist, have won over the directors. Mr. Bardswell argued that the seat would be vacant without further steps being taken. Possibly that may be the literal meaning of the rule; but, in my opinion, the fair construction of it must be that something more must be done to render the seat vacant; and moreover natural justice requires that the director shall have an opportunity of saying what occurs to him on his own behalf. [His Lordship having read and commented on the clauses of art. 70 continued:] I am not aware of the point having been precisely decided, but, having regard to the clauses (a), (b), (c), and (d), I cannot say the seat was vacated as a fact when the director did not declare his interest. In my opinion the proper course is to give notice to the director, and to have a board meeting specially summoned for the purpose of considering his position—that is to say, the matter should be placed on the agenda, in order that the director may have the opportunity of explaining, if he can, and justifying his conduct. The defendants have taken the law into their own hands improperly, and accordingly I must grant an injunction. The case of *Richardson v. Methley School Board* (69 L. T. Rep. N. S. 308; (1893) 3 Ch. 510) was cited. It is not directly in point, but it shows that the court has jurisdiction in such cases. I will not declare that Mr. Turnbull is a director; but I will grant a perpetual injunction to restrain the defendants, the directors, from excluding him from any meeting of the board and from holding any meeting of the board without notice to him, and from in any way interfering with him in the discharge of his duties as director. Seeing that the plaintiff has entirely failed on one point of the case, I cannot give him any costs.

Solicitors: *Gibson, Weldon, and Bilbrough*, for *Millington and Compston*, Leeds; *Hamlin, Grammer, and Hamlin*, for *B. C. Pulleyne*, Leeds.

QUEEN'S BENCH DIVISION.

Tuesday, Nov. 28, 1893.

(Before WILLS and WRIGHT, JJ.)

WENDON v. THE LONDON COUNTY COUNCIL. (a)

Building line—Erecting—Completion by tenant after line laid down of building begun by owner before—Metropolis Management Act 1862 (25 & 26 Vict. c. 102), s. 75.

In 1890 the owner of a piece of land laid out a road on it for building, and laid down "the footings" of a house adjoining on the road, and built up one wall of it to a height of twelve feet. In 1892 he erected a row of houses ten feet further back, and in the same year granted a building lease of the piece of land with the unfinished building on it to the appellant, who without obtaining the consent in writing of the London County Council, built up the house to a height of two stories. In 1893 the superintending architect of the London County Council decided the general line of buildings to be the front of the row of buildings ten feet further back. Held, that an order of a metropolitan police magistrate for the demolition of that part of the house which was built by the appellant, and which was in front of the building line was right, and that the building up by the appellant from the already existing foundations was "erecting" within the meaning of sect. 75 of 25 & 26 Vict. c. 102.

THIS was an appeal from the decision of one of the metropolitan police magistrates by way of a special case stated in the following terms:—

This is a case stated by me the undersigned, one of the magistrates of the police-courts of the metropolis, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the opinion of the court, at the request of the appellant, who was dissatisfied with my determination in point of law upon the hearing of a summons wherein the respondents were complainants, and the appellant was defendant.

1. Upon the hearing of such summons the following facts were either admitted or proved in evidence: (a) Previously to the month of March 1890 the owner of a piece of land situate in the parish of Fulham, and bounded on the west by a road called Munster-road, and bounded on the east by a road called Filmer-road, laid out upon the piece of land a road for building as a new street forty feet in width, called Fernhurst-road, and communicating in a straight line directly between the Munster-road and the Filmer-road. (b) In or about the month of March 1890 the owner of the piece of land deposited with the vestry of the parish of Fulham, plans for the erection of twelve shops upon the piece of land fronting the Munster-road, and immediately to the north of the Fernhurst-road. At the time of such deposit there were no buildings erected on the piece of land in or fronting the Munster-road, or in or fronting the Fernhurst-road, on either side thereof. The site of the southernmost of the shops was shown upon the plan as being on the north side of the Fernhurst-road, and immediately at the junction of the road with the Munster-road, and such site is the same as the site of the building complained of in the summons, and is hereinafter referred to as the site. (c) In or about the month of Aug. 1890 the owner of the piece of land commenced to build upon the site in

(a) Reported by MERVYN LL. PHEL, Esq., Barrister-at-Law.

Q.B. Div.]

WENDON v. THE LONDON COUNTY COUNCIL.

[Q.B. Div.]

accordance with the plan, and constructed immediately between the site and the Munster-road, and immediately between the site and the Fernhurst-road the footings for the front and flank external walls respectively of the southernmost shop, and erected upon such footings and immediately adjoining and abutting upon the Fernhurst-road, the flank wall of the shop to a distance of thirty feet from the Munster-road to a height of twelve feet from the level of the Fernhurst-road. (d) The owner discontinued any building operations at the corner of the Munster-road and Fernhurst-road, and portions of the work he had done there as above mentioned became covered with rubbish. Subsequently to the construction of the footings and erection of the flank wall, namely, in or about the year 1892, the owner erected upon the north side of the Fernhurst-road a number of dwelling-houses, the fronts of which were erected at a distance of thirty feet from the centre of the roadway of the road which fronts were about ten feet back from the front of the wall mentioned in sub-paragraph (c) of paragraph 1. (e) In the month of July 1892 the owner of the piece of land granted a building lease of the site to the appellant who purchased from the owner the footings and the flank wall, and in or about the month of Jan. 1893 commenced building operations, utilising for that purpose the portion of the work which about two and a half years before had been erected by the owner as before described. In the course of these operations a chimney breast which had been built in the old wall was cut away. At the date of the summons the shop had been carried to the height of two storeys, or about twenty-three or twenty-four feet from the level of the ground, and projected about ten feet in advance of the general line of buildings herein-after mentioned. The work so executed by the defendant has been added to the old work, that is to say, it has been erected upon the footings hereinbefore mentioned, and upon and by the side of the flank wall hereinbefore mentioned. No portion of the work is erected or built in advance of the flank wall, or further in advance of the general line of buildings herein-after mentioned than the flank wall is in advance of such line. And on the date of the summons the footings and the flank wall formed part of the building complained of in the summons. (f) The consent in writing of the London County Council had not been obtained to the completion by the defendant of the building, and on the 21st March 1893 the superintending architect of the council decided the general line of buildings on the north side of the Fernhurst-road to be the main fronts of the dwelling-houses erected thereon as hereinbefore stated.

2. In support of the summons reliance was placed upon the decision of the Queen's Bench Division in *Nathan (app.) v. Metropolitan Board of Works* (resps.); a copy of the case stated therein for the opinion of the court, and a copy of the shorthand notes of the judgment delivered by the court was supplied to me, and it was contended upon such decision that any work executed by the appellant on the site which was in advance of the general line of buildings in Fernhurst-road, was prohibited by sect. 75 of 25 & 26 Vict. c. 102, such general line of buildings having come into existence before the execution of such work.

3. On behalf of the appellant it was contended that sect. 75 of 25 & 26 Vict. c. 102, in no way prohibited the appellant from continuing and completing the erection of a building commenced before the existence of any general line of buildings at all in Fernhurst-road, and that the decision of the Queen's Bench Division in the case relied upon by the respondents was therefore not in point, it being a decision merely that the Metropolitan Board of Works was not prevented from enforcing the prohibition contained in sect. 75 of the 25 & 26 Vict. c. 102, in that particular case by reason of the limitation contained in sect. 11 of 11 & 12 Vict. c. 43, and reliance was placed upon the judgments of the Court of Appeal in *Lord Auckland v. The Westminster District Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597). It was further contended that, assuming the prohibition contained in sect. 75 of 25 & 26 Vict. c. 102, did apply to the appellants' building, the complaint upon which the summons herein was issued had not been made within six calendar months of the time when the matter of such complaint arose, and that the decision of the court in *Nathan v. The Metropolitan Board of Works* had so far as related to such point been overruled by the decision of the Court of Appeal in the *London County Council v. Cross* (66 L. T. Rep. N. S. 731; 61 L. J. 160, M. C.).

4. I was of opinion that the appellant had by the works erected by him erected a building in advance of the general line of buildings in the Fernhurst-road, contrary to sect. 75 of 25 & 26 Vict. c. 102, and I ordered the appellant to demolish within one calendar month so much of the building as was erected by him beyond the general line of buildings in Fernhurst-road, as defined by the superintending architect.

5. The question for the opinion of the court is, whether my determination was right in point of law; if not, my said order is to be quashed, otherwise it is to stand.

Sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), enacts that

No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses, in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of building therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building structure or erection be erected or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also

Q.B. Div.]

WENDON v. THE LONDON COUNTY COUNCIL.

[Q.B. Div.]

make an order for the payment of the costs incurred up to the time of the hearing.

R. Cunningham Glen for the appellant.—The former owner of the piece of land on which the house in question is built preserved his right to build on it by the commencement he made in 1890. It is not as if he had intended at first that the building line should be at the margin of his land, and then changed his mind and put it further back. By building at first to the margin he made it immaterial where the line was afterwards fixed. Nor does the change in the ownership make any difference. There was a similar change of ownership in the case of *Lord Auckland v. Westminster Local Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597), which governs this case. In that case, which was followed in *Barlow v. Vestry of St. Mary Abbots, Kensington, and Elsdon* (48 L. T. Rep. N. S. 348), it was held that where old buildings have been demolished they may be rebuilt on the old site, even though it may be in front of the building line. So here there was a building, though an unfinished building, on the site before the building line was fixed. Even apart from authority it would be clear that what was not an offence in the first instance cannot become an offence. [WRIGHT, J.—The cases of *London County Council v. Cross* (66 L. T. Rep. N. S. 731; 61 L. J. 160, M. C.), and *Spackman v. Plumstead District Board* (53 L. T. Rep. N. S. 157; L. Rep. 10 App. Cas. 229), show that he might have got the line fixed before beginning to build.]

Avory for the respondents.—The point has been decided by a divisional court (Mathew and Smith, JJ.), in the case of *Nathan v. Metropolitan Board of Works*, (a) which is not reported. In that case

(a) It appears from the shorthand note of the judgment in that case, which was decided the 3rd April, 1886, that the buildings concerning which the complaint was made had been carried up to the first floor before June 1883. In that month an application was made to the architect of the Metropolitan Board of Works to determine whether the proposed buildings were within or without the building line. He decided that they were in advance of the building line. The original builder soon afterwards absconded, and a mortgagee, eventually obtaining conveyance of the property, arranged in June 1885 with the appellant that he should complete the buildings in question. After the appellant had so constructed a portion of the buildings (in addition to the portion constructed by the previous builder), a summons was taken out against him under sect. 75 of 25 & 26 Vict. c. 102, and the order for demolition appealed against was made. In giving judgment Mathew, J. said: "What was complained of in the summons against Nathan was that of which Nathan was alleged to have been guilty, and nobody else. If it were not so, it would be flying in the face of a difficulty which there was no need whatever for encountering, because I am satisfied that under sect. 75 such a complaint is a complaint that might have been made, and that it was made I have no doubt. The matter of complaint here was not what was done two years before, but what had been done by Nathan. I am perfectly clear that Jervis' Act creates no difficulty in the way of the Metropolitan Board of Works in this case. . . . We uphold the magistrate's order." And Smith, J. said: "I am of the same opinion. My learned brother has covered the whole ground except one point on which I know that he agrees with me, and that is the meaning of this order. What Mr. Marsham decided here was that Nathan had been erecting this structure in the year 1885. That was the complaint that was for his determination. All he decided in this case was that that which Nathan put up was to come down. That is all I have to say, except that I entirely agree with my learned brother.

the original builder had carried the building further before the line had been fixed than here; and the learned judges who decided it expressly limited their decision to the new part. The magistrate has done the same in this case. [WRIGHT, J.—Are there not really two questions in this case: (1) Was it competent for the architect to lay down the line without considering existing buildings? (2) Is raising from old foundations a "raising" within the section?] I submit that the first point does not arise in this case. The second is decided by *Nathan's* case, and even apart from authority would be clear on the words of the section. [WILLS, J.—In *Cross v. London County Council* (*ubi sup.*) the Court of Appeal seems to have said that there was an offence as soon as it was apparent what the builder was going to do, and that afterwards there was no fresh offence.] Here there was no question of time as there was in that case. Moreover in that case the appellant and the original builder were the same person. [WILLS, J.—Surely the present tenant has all the rights of the original builder for the purposes of this case?] The cases clearly show that the line can be certified after buildings have been erected, which will be in front of it. *Lord Auckland's* case (*ubi sup.*) has no bearing on this case. It only shows that where there has been an old building line, and where houses have been pulled down, you cannot prevent any of those houses from being rebuilt. Here it is clear that the architect not only considered all the houses, but had the appellant before him.

R. Cunningham Glen in reply.—There has been no attempt to evade the Act in this case. The facts are not the same as in *Nathan's* case. There the plan shows that from the first there must have been a building line, so that from the first there was an offence. Here there was no offence when the building was commenced. The words in the section as to erecting, beginning to erect or raising, are only intended to prevent the hardship of a man's being obliged to complete the house before proceedings can be taken against him. *Lord Auckland's* case (*ubi sup.*) shows that where there is no vacant ground built on there is no offence.

WILLS, J.—I do not myself profess to understand all the decisions which have been cited to us. I should follow most loyally the authority of *The London County Council v. Cross* (*ubi sup.*), wherever it governs the case; but to say that I understand the reasoning of that case would be untrue, because I do not. Except upon the very narrowest view of the case, namely, that it is a decision upon what the meaning of the word "erecting" is, and not upon the whole scope of the section, I do not understand it. I do understand it upon that view. I should have thought that, if it was contrary to the Act to raise a building so as to make it project beyond the building line, then every stone that is put upon a wall for that purpose is a fresh act in contravention of the statute, and constitutes a fresh offence; but a different view seems to have been taken in that case, and, of course, whenever that question arises I shall certainly follow it. But not being able to understand the decision sufficiently to apply it to the present case, I think the wisest course is to look simply at what the Act of Parliament says, and to be guided by that. Now

Q.B. Div.] *Re* ARBIT. BETWEEN L.C.C. AND LONDON STREET TRAMWAYS CO. [Q.B. Div.]

the Act of Parliament says that it shall be an offence to erect a building in front of the building line as ascertained by the architect, and it goes on further to say, elucidating this, that if the owner shall cause any building structure or erection to be erected or begun to be erected or raised without the licence of the county council, the offence shall be complete, and an order may be made upon him to pull it down. What is that but saying that "erecting" in the first clause covers not only "erecting" in its fullest sense, but covers every act of beginning to raise, and that every act which is a beginning to raise or a raising of a structure, which, when raised, will project beyond the line which has been laid down, shall be an offence. In this case, what has happened is this: The predecessor in title of the appellant here, the person against whom these proceedings were taken in the police-court, had partly built a building outside of what has since become the building line, and that having been erected there at the time that it was lawful to do it, it cannot be ordered to be pulled down. But then the present appellant after having bought the property in that condition, proceeded to raise the walls and to build upon them, and in the meantime he had himself or his predecessor in title—to my mind it is quite immaterial which, because I cannot believe that rights of this kind are affected by the question as to into whose hands the property has passed—but somebody in the meantime after these walls had been put up and before they were raised, created a definite frontage line which the surveyor had adopted, looking to the situation and position of the houses in the street; and therefore at that time there was a building line ascertained by the architect. Then that being so, after that, the present appellant proceeds to raise his building. It seems to me that he has brought himself within the words of the Act. I cannot tell whether it is a hardship, or whether it was a thing which ought to have been or ought not to have been. There are plenty of hardships from one point of view in modern legislation, plenty of cases in which the rights of private property are interfered with on what are considered to be (by the only authority who is competent to say how it shall be) very great public grounds of general health, convenience or utility, and people must submit to these diminutions of their private rights. It seems to me therefore the magistrate was right, and I should say, looking to the words of the Act, unless some inroad is made upon them by the decision I have quoted (I do not think there is), he could not do otherwise than say, inasmuch as the appellant has raised walls even though based upon structures which had already been brought to a certain stage, and the raised parts do project beyond this line, that those raised parts for which he is responsible must come down.

WRIGHT, J.—In 1890 there was a street laid out for building, without any buildings in it, by the appellant's lessor. The appellant's lessor put up a blank wall at one end, and put in the footings of one or more houses without raising those footings above the ground. In doing that I do not think he established any building line at all. He did nothing more until the early part of 1892. In the early part of 1892 on a different part of the ground he built a number of houses standing further back, and completed them, and

by doing so I think he created a building line where there was none created before. Having created that building line in July 1892 he leased to the appellant, and in Jan. 1893 the appellant built up houses on the footings which his lessor had left three years before, or nearly three years before. I give no opinion as to what would have happened if the appellant's lessor instead of putting in mere footings had built up a floor above the ground. It may be that even then—even if he had built up to a second floor—it would have been within the words of the Act as to raising the building beyond the general line. He had nothing in but the footings. It seems to me under those circumstances, the act of the appellant in erecting buildings on those footings after a general line had been established by his own lessor in the early part of 1892, is a violation of the Act, and, under these circumstances the judgment was right.

Appeal dismissed.

Solicitors for the appellant, *Newman, Paynter, and Co.*

Solicitor for the respondents, *W. A. Blaxland.*

Jan. 16, 17, and 22.

(Before MATHEW and COLLINS, JJ.)

Re AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE LONDON STREET TRAMWAYS COMPANY. (a)

Tramways—Purchase of undertaking by local authority—Principle of valuation—Value without allowance for past or future profits—London Street Tramways Act 1870 (33 & 34 Vict. c. 171).

The London Street Tramways Act 1870 provides by sect. 44 that the London County Council may within six months after the expiration of a period of twenty-one years from the passing of this Act with the approval of the Board of Trade by notice in writing require the tramway company to sell, and thereupon the company shall sell to them their undertaking upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the company, suitable to, or used by them for the purposes of their undertaking; such value in case of difference, to be determined by a referee to be appointed as therein mentioned.

In an arbitration under the above provision the referee refused to take into consideration evidence of the actual profits made by the company from traffic on the tramways, or of the rental value of the tramways considered as let, or capable of being let to a tenant.

Held, that the referee was wrong, as the value should be assessed by ascertaining the rental value of the undertaking, and not by taking the cost of construction less depreciation.

THIS was an application that an award might be set aside, or that the matters of the award might be referred back to the arbitrator for his reconsideration and determination, with such directions thereon as the court might think fit to give.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. Div.] *Re ARBIT. BETWEEN L.C.C. AND LONDON STREET TRAMWAYS CO.* [Q.B. Div.]

The London Street Tramways Act 1870 (33 & 34 Vict. c. 171, enacts:

Sect. 3. The expression "the tramways" or "the undertaking" shall mean the tramways and works and undertaking by this Act authorised, or any part thereof.

Sect. 44. The Metropolitan Board of Works may, if by resolution passed at a special meeting they so decide, within six months after the expiration of a period of twenty-one years from the passing of this Act, and within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under either of the two next preceding sections, with the approval of the Board of Trade, by notice in writing require the company to sell, and thereupon the company shall sell to them their undertaking, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the company, suitable to and used by them for the purposes of their undertaking, such value to be, in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs; and when any such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking sold, or, where any order has been made by the Board of Trade under either of the next preceding sections, all the rights, powers, and authorities of the company, previous to the making of such order in respect of the undertaking sold, shall be transferred to, vested in, and may be exercised by the Metropolitan Board of Works in like manner as if that board had been authorised by this Act to construct the tramways, and had been named in this Act instead of the company.

By the Local Government Act 1888 (51 & 52 Vict. c. 41), the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council.

The London County Council having under the above provisions given notice in writing to the London Street Tramways Company that they required them to sell to the County Council the tramways and works and undertaking authorised by the London Street Tramways Act 1870, the Board of Trade appointed a referee to determine the value thereof.

The referee upon the 11th March 1893 made his award, the material part of which was as follows:

And whereas in the course of the proceedings before me, the tramways company proposed to tender evidence of the actual profits made by them from traffic on the purchased tramways, and stated that the object of such evidence was to arrive at the value of the tramways by taking a certain number of years purchase of the profits to be shown by such evidence, and the County Council gave notice of objection to such evidence, on the ground that having regard to the terms of the London Street Tramways Act 1870, the referee was prohibited from taking past profits into consideration for the purposes aforesaid, and I refused to receive such evidence on the ground that the terms of the said Act, and of the instrument by which I was appointed referee did not authorise or permit me to adopt a method of valuation based on years' purchase of profits. And whereas in the subsequent course of the said proceedings the Tramways Company tendered evidence to show the rental value of the purchased tramways considered as let, or capable of being let to a tenant, and stated that the object of such evidence was to arrive at the value of the purchased tramways, "exclusive of any allowance for past or future profits of the undertaking," within the meaning of sect. 44 of the London Street Tramways Act 1870, and the County Council objected to such evidence, but I admitted the same, subject to such objection as might be taken on its being shown by cross-examination, or further evidence that the proposed mode of arriving at a value by means thereof, involved an allowance for

past or future profits of the undertaking, and on such evidence and cross-examination being completed, and such objection taken. I have abstained from taking such evidence into consideration, in arriving at the value hereby awarded, on the ground that the mode of valuation to which such evidence was directed involves an allowance for past or future profits, within the meaning of the said section. And whereas the County Council tendered evidence to show the opinion of expert witnesses as to the proper cost of construction of the purchased tramways, and the depreciation of such value by comparing the condition at the time of sale and purchase with the condition when newly constructed, and stated that the object of such evidence was to arrive at the value on the basis of cost less depreciation, and the tramways company objected to such evidence, on the ground that evidence of the cost of construction, either with or without depreciation, was admissible for the purposes of ascertaining the value according to the true intent and meaning of sect. 44 of the London Street Tramways Act 1870, but I admitted such evidence as giving information which I might properly take into consideration in determining the value within the meaning of the said section under the circumstances aforesaid. . . . I determine and award that the sum of 64,540*l.* is the value of the purchased tramways and the works thereof, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory purchase or other consideration whatever, except the consideration of the value to the tramways company or to the County Council, measured by what it would cost either the tramways company or the County Council to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation, and accordingly I determine and award that the value of the purchased tramways, and of all lands, buildings, works, materials, and plant of the Tramways Company, suitable to and used by them for the purchased tramways is the sum of 64,540*l.*, and that such sum forms the "then value" of the premises, within the meaning of sect. 44 of the London Street Tramways Act 1870.

It was now sought, on behalf of the London Street Tramways Company to set aside his award, on the ground that the referee ought to have taken into consideration the evidence as to the rental value of the tramways, and the evidence as to the profits made from the traffic, and should not have based his award upon the evidence as to the cost of construction, either with or without depreciation.

Sir R. Webster, Q.C., Cripps, Q.C., and H. Sutton appeared for the London Street Tramways Company.

Finlay, Q.C. and Freeman for the London County Council.

The arguments appear fully from the judgments of the Court.

Jan. 22.—MATHEW, J.—This is a motion to set aside or to send back an award made by an arbitrator under sect. 44 of 33 & 34 Vict. c. 171. By the terms of the section, to which I will presently refer, the arbitrator was appointed to determine the price at which the London County Council, in succession to the Metropolitan Board of Works, was to take over certain tramways belonging to the company, and in the course of the arbitration a dispute arose as to the meaning of the section, and as to the mode in which the valuation of the undertaking to be transferred was to be ascertained: the company contending that the valuation was to be arrived at in the ordinary way with reference to such undertakings, namely, by arriving at the rental, and capitalising the rental. On the other hand, it was said by the London County Council that the meaning of the section was that the value was to be ascertained by arriving at the

Q.B. DIV.] *Re ARBIT. BETWEEN L.C.C. AND LONDON STREET TRAMWAYS CO.* [Q.B. DIV.]

cost of construction, less depreciation. The difference between the two figures was a very large sum, and the case therefore is one of great as well as of general importance. Now sect. 44, after providing for dealing with two other cases referred to in sects. 42 and 43 of the Act, goes on to provide with reference to the tramway of this particular tramway company, that after the expiration of twenty-one years from the passing of the Act, and within three months after an order made by the Board of Trade under either of the two preceding sections, the Metropolitan Board of Works, now represented by the London County Council, may, by notice in writing, require the company to sell, and thereupon the company shall sell to them their undertaking upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all buildings, works, materials, and plant of the company, suitable to and used by them for the purposes of their undertaking, the value in case of difference to be ascertained by arbitration. The section then goes on to provide: "And when any such sale has been made, all the rights, powers, and authorities of the company in respect of the undertaking sold, or where any order has been made by the Board of Trade under either of the next preceding sections, all the rights, powers, and authorities of the company previous to the making of such order in respect of the undertaking sold, shall be transferred to, vested in, and may be exercised by the Metropolitan Board of Works in like manner as if the board had been authorised by this act to construct the tramways, and had been named in this Act instead of the company." Now, the differences that arose before the arbitrator are set forth in the preamble to his award [His Lordship then read so much of the award as is set out above.] Now the question for us is whether the arbitrator was right in rejecting the evidence offered by the company, and acting upon the evidence, as his award shows that he did, tendered by the London County Council. We have to ascertain the meaning of this section which has given rise to this difficulty. It certainly is not easy to construe, and we must therefore examine its terms critically. The phraseology used is this: the company may be required to sell, and thereupon the company shall sell to the Council their undertaking. The word "sell" is very important. The word "sell" implies buying and selling, and buying implies equality of consideration. If the council be right here the company is selling a great deal more than the council buy, and there is no equality in the transaction. "Thereupon the company shall sell to them their undertaking upon terms of paying the then value"—"paying," obviously as it seems to me for what has been sold, "the then value"—value to whom? Value of course to the vendors. Omitting the words in brackets, the section reads: "paying the then value of the tramway." Now by sect. 3 of the Act "tramway" is defined to mean "tramway and undertaking." The phrase "undertaking" is therefore used twice over; to sell the tramway, meaning the tramway and undertaking, and "all the lands, buildings, works, materials, and plant of the company." Passing by the words in brackets for a moment, and supposing those

words not in the section, what would be the meaning of that provision? It is said that the meaning is perfectly obvious, and that the word "value" has a well ascertained meaning in connection with statutory directions of this sort. "Value" is to be ascertained, as it would have to be ascertained where for instance the property was rated, and therefore it must be used in its proper sense. This tramway is a hereditament, capable of earning profits, and assessable under the Poor Law Act. In arriving at its value it is clear, from the decision in *Pimlico Tramway Company v. Greenwich* (29 L. T. Rep. N. S. 605; L. Rep. 9, Q. B. 9) that that meaning of the word "value" is recognised in many cases *in pari materia* statutes, as for instance the Metropolitan Valuation Act 1869 (32 & 33 Vict. c. 67), and also the Union Assessment Act 1862 (25 & 26 Vict. c. 103). To get at the value you take the profits, deduct the tenant's charges and profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit, and which would be earned by the occupier who is the tenant. That is the rent, and by capitalising that rental you get at the value of the hereditament in question. It is unnecessary, it seems to me, to dwell upon this part of the case. It has been pointed out, and fairly pointed out that in arriving at the value of land or buildings (a duty also cast upon the arbitrator) you cannot proceed in any other way; you cannot arrive at the value of land or buildings without ascertaining what rent a tenant would pay for one and the other. It is said that that is the governing intention of the Legislature under this section. On behalf of the London County Council it is said that you are passing by that which governs the whole section, namely, the words in the brackets. Those words it is contended are not words qualifying those which go before, but are words which contradict, which is certainly not the ordinary function of a parenthesis. And it is said that if you turn to those words you see that arriving at the value by means of rental is what is prohibited by the statute. The words in the brackets are, "exclusive of any allowance for past or future profits of the undertaking, or any compensation"—that is exclusive of any allowance for compensation—"for compulsory sale or other consideration whatsoever." Suppose we pass by, in the first instance, the first clause, "exclusive of any allowance for past or future profits of the undertaking;" and the clause ran, "exclusive of any allowance for any compensation for compulsory sale or other consideration whatsoever," it would be quite clear that the word "allowance" there meant an addition; to ascertain the value you are not to add to that value the ordinary percentage allowed for compensation for compulsory sale or similar consideration whatsoever; that would be all intelligible, and entirely consistent. Take the earlier clause, "exclusive of any allowance for future profits," the whole sentence would be consistent, because it would mean exclusive of any addition for future profits. Then it is said that because the words "past profits" are thrown in the whole meaning of the section is altered, and that you introduce this result, that in estimating the value you are to take the structural cost less depreciation. But there is not a trace in the section of anything tantamount to that. The argument is, that if

Q.B. DIV.] *Re* ARBIT. BETWEEN L.C.C. AND LONDON STREET TRAMWAYS CO. [Q.B. DIV.]

you estimate rental that involves an allowance in respect of past and future profits, and that is what is prohibited, but it seems to me that if that construction is correct "allowance" is to be used in a different sense in connection with past profits, to the sense in which it is used with reference to compensation, and you are construing the section to mean some such word as "estimate" instead of "allowance." I cannot come to the conclusion that it was ever meant that such consequences should follow, as are insisted upon by the County Council. That is how the contest stands on each side. The contention of the company on the one hand is perfectly plain. They say look at the whole terms of the section. Do not suppose this parenthesis is the potential part of the section. Do not rely on the use of the phrase "past profits" having so potential and drastic a meaning as suggested by the County Council. Consider it all, and see if the whole section cannot be made consistent each part with the other. It is said for the company that what is meant is this: You are to ascertain the then value (the word "then" is very important) without looking to the past or without looking to the future. Take the present earnings, and assume that those earnings were made in the past, and assume that they will be made in the future, and calculate the then value, and make no addition to the value so ascertained by any compensation for compulsory sale, or by any allowance for past or future profits of the undertaking. The use of the word "then" certainly suggests the interpretation put on the entire section by the tramway company as being the correct one. On the part of the London County Council it was argued that it was intended to grant a concession for twenty-one years to the company, and at the end of that time Parliament was free to enact that there should be a complete or partial confiscation of what the company had. Parliament, it is said, has declared that there shall be a partial confiscation, and that is the result of the section. But it seems to me that Parliament has made no such declaration. If Parliament meant to inform the public that at the end of twenty-one years they should not have compensation for the value of the undertaking, but that the undertaking should be sold, and the materials valued *in situ*, less depreciation, I cannot help thinking that very few tramways would have been constructed under those circumstances, and very few shareholders would have invested their money in undertakings of this kind. I do not dwell on the other very powerful observations which have been made as to the language of this Act of Parliament. I think that the best answer to those observations is a familiar one. Before we can come to the conclusion that the County Council is right in this case we must be satisfied that Parliament meant what the council says it did. Certainly, on the face of the section, there is no clear indication of any such meaning, and nothing would have been easier than to have said that at the end of twenty-one years there should be a transfer of the undertaking of the tramway company to the Council, and that the company should be paid for the cost of the materials *in situ*, capable of being worked, less depreciation. That is not the language used, but the language we are asked to infer. I am therefore of opinion that the award must go back to the referee, who must deal with

the question of valuation in accordance with what I have stated. At the same time we are not to be supposed to say what the rental figure is, nor how the rental figure is to be arrived at, nor do we presume to say for how many years that rental should be capitalised; those are all matters for the referee.

COLLINS, J.—I am of the same opinion. It is not necessary for me to go through the award or the sections which have already been referred to by my learned brother Mathew, but the point we are called upon to decide is which of the two contentions put before us is the right one. The arbitrator has arrived at the value of the tramways upon this view: "I award the sum of 64,540*l.* as the value of the purchased tramway and works thereof, measured by what it would cost either the tramways company or the County Council to establish the purchased tramway if such tramway did not now exist, but taking into account a proper deduction in respect of depreciation." The tramway company say that that mode of arriving at the value is wrong, and they say that the value in this case ought to be arrived at in the same manner and on the same principle as the value of a hereditament is arrived at for the purpose of rating. They say that a tramway is a hereditament, and that if it were a case of ascertaining its rateable value it would be ascertained in the ordinary way familiar to everybody who has had anything to do with rating. Those are the two rival contentions which have been put before us. There is this element of difficulty in this case that we cannot derive much assistance from a comparative view of what would be a complete compensation or an incomplete compensation, as may be done in other cases, because, whatever the true view of this section which determines the rate of compensation to be paid to the tramway company, the conditions were ascertained and determined by Act of Parliament when the tramway company itself came into existence. We are not called upon to construe an Act of Parliament, passed after the tramway company came into existence, determining on what conditions it is to cease. We have to construe an Act which contains this provision at one and the same time, as the tramway company was authorised to have its being, therefore, whatsoever the terms are, or the true view of the terms of this section is, the company must be taken to have had a notice of them, and to have formed itself in view of its possible extinction hereafter under the terms of the section. Nevertheless, I think that having regard to the words of the section and of the scheme of the Act, it is tolerably clear what the Legislature must have intended to have meant by this section. As has been pointed out, the tramway company came into existence on the terms that after the expiration of twenty-one years, the Metropolitan Board of Works, for which the County Council is now substituted, might acquire their undertaking. The question is whether on that acquisition they are to pay—not for the whole thing acquired, but part of the whole thing acquired, and, if so, what part? Of course it was competent for the Legislature to confiscate absolutely the whole of the undertaking of the company. It was also possible for them to pass the whole of it to the County Council, while not imposing on the County Council the

Q.B. Div.] *Re ARBIT. BETWEEN L.C.C. AND LONDON STREET TRAMWAYS CO.* [Q.B. Div.]

payment for more than a part of it. The question is, have they done so; or to what extent have they done so? It seems to me that the most material consideration in the matter is what is the tramway company taken to sell by the terms of this section? Is it to be taken as selling only the plant and materials *in situ*, or is it to be taken as selling the whole undertaking, that is, the plant and materials, and the right to use them? I say that appears to me to be the crucial question, because that was the governing distinction upon which the case that has been so much referred to in argument, *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (69 L. T. Rep. N. S. 661; (1893) A. C. 444), was decided. We had in that case the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials. In that case the corporation had under the power of an Act of Parliament acquired the whole undertaking of a water company, but there was a provision that when the outlying districts within the area of the corporation chose themselves to supply their own water, that they should be at liberty to acquire the pipes and fittings belonging to the board within their district, at a price to be fixed in default of agreement by arbitration, and in that case it was held that the proper price to be paid was the price practically arrived at on the same principle as the arbitrator has in this case arrived at the price to be paid to the tramway company. But the cardinal distinction, or the ground of decision in that case was that the buying authority there had in its own right, under the terms of a totally distinct Act of Parliament, namely, the Public Health Act, the right to supply water in its district, and all that it wanted, and all that the Legislature intended it to take was the pipes through which, when it had got them, it had by virtue of its own existence a right to pass the water, and in that view, that being what the corporation had to sell, and that being the only thing that the buying authority wanted, the Legislature said you shall have that thing on paying not the value but the price, and that, as has been pointed out in argument, was the ground put most distinctly by Smith, L.J., on which that case was decided. Is there any light thrown on what the Legislature must have intended the tramway company to sell in this case, as distinguished from *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (*ubi sup.*)? As has been pointed out by my brother Mathew, what the company are required to sell is the undertaking, and what they are to be paid for is the value—I will leave out the brackets—"of the tramway, and all lands, buildings, works, materials and plant of the company, suitable to and used by them for the purposes of the undertaking," and after that follows this provision: "When any such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking sold, &c.," shall vest in the Board of Works, now the London County Council. So the scheme is that by virtue of a sale the London County Council are to take over the entire undertaking, with all the powers thereto annexed, as if they were original constructors. That is what is intended to be sold (I will afterwards deal with the question of what is to be paid for it), but that is the crucial question when we are dealing

with this case in reference to the *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (*ubi sup.*). Am I right in saying that what is intended to be sold here is not merely the materials *in situ*, but the right attached to those materials? I think that is made more clear by reference to sect. 46. That section enables the company six months after it has begun to work to sell—to sell what? To sell their undertaking to any person, corporation, and so on, "and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of the company in respect to their undertaking shall be transferred to, vested in, and may be exercised by, and shall attach to" the persons buying them. Can it be contended that, on the sale contemplated by that sect. 46, the company are not empowered to sell their whole undertaking with the rights thereto attached? The machinery by which that is to be done is there; there is to be a sale by the company, and on that sale the Legislature declares that the buying authority shall have all the rights and authorities that the tramway company theretofore had. The Legislature uses precisely the same language in dealing with a sale by the company for its own benefit, in defining the thing sold and what shall follow on the sale, as it does in the section under consideration. Therefore it seems to be conclusive that what the company is selling in this case is not what the company was taken to be selling in *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (*ubi sup.*). It was selling in this case the thing with the right to use the thing, and in the other case it was selling the thing only. Why? Because in that case it was selling to an authority which had, *aliunde* by its own right—the right to use the thing bought in a particular way, and, therefore, could not be called upon, and ought not to be called upon, to pay anything for that right. In the present case it is selling to a body who have not *aliunde*, but who derive from this Act, and this Act only, the right to use the thing sold. Therefore it seems to me that we get to this, that what is sold is not merely the thing but the right to use the thing. That carries us a long way to see what ought to be paid for it. I adopt the argument in full which my brother Mathew has used in interpreting this section. I have dealt with the thing sold. Now what is to be paid for it? "The then value of the tramway, and all lands, buildings, works, materials, and plant." The then value—now I read the bracket—"exclusive of any allowance for past or future profits of the undertaking, or other compensation for compulsory sale or other consideration whatever." It was quite fair as it seems to me that inasmuch as this company came into existence with foreknowledge that at the end of twenty-one years it might be called upon to cease to exist, that any sum for compensation for compulsory purchase would be out of place. It is quite fair that, inasmuch as it came into existence on this condition that it should never have any right to be paid anything for compulsorily ceasing to exist. It may also be fair that inasmuch as it knew that at some time or other there would be a term drawn, beyond which it could not go on earning profits that it might not be paid for the loss of the possibility of earning more profits. But when they have said that, it seems to me that

Q.B. Div.] WORCESTER CITY, &C., BANKING CO. v. FIRBANK, PAULING, AND CO. [Q.B. Div.]

the equities of the case are exhausted, and that it is fair to give the company the then value of the thing sold, measured in the ordinary way in which a hereditament is measured, namely, by reference to what could be made by the use of it, supposing you were measuring the value to the owner of the thing, who was not himself going to become a trader and make trade profits, which of course is not the subject-matter of rating at all. It seems to me that the word "then," as has been pointed out by my brother Mathew, is of very great importance in dealing with the question of what is the meaning of "allowance for past or future profits of the undertaking." To begin with, I adopt the argument that has been put before us on behalf of the company, that when you get something to be valued, exclusive of something else, *prima facie*, but for the exclusion, the thing excluded would be taken into the primary subject-matter of the value, but if the contention of the County Council is correct that the thing to be valued here is simply the value of the materials *in situ*, profits would have no place in the discussion, profits would not require to be excluded, because they were not contained in the original thing. Here you are to have the then value of the tramway exclusive of any allowance for past or future profits. You are to have the then value assessed in the ordinary way in which a hereditament would be assessed for rating, you are not to make any addition, or give any compensation to the person selling it for compulsory purchase, for the profits that he has earned in the past, or those he is likely to earn in the future—he is not going to be allowed to earn those in the future—and he knew when he came into existence that he would lose the opportunity of earning them after twenty-one years, and that right he surrendered, and he surrendered that without consideration. He is now called upon to give up the value, measured in the ordinary way, of the hereditament of which he is owner. It seems to me upon these grounds that the arbitrator was wrong in adopting an interpretation which excluded all these considerations, and, therefore, I agree that the award must go back.

Award sent back to referee.

Solicitor for the London County Council, *Bloxland*.

Solicitors for the London Street Tramways Company, *Ashurst, Morris, Crisp, and Co.*

Jan. 20 and 22.

(Before MATHEW and COLLINS, JJ.)

WORCESTER CITY AND COUNTY BANKING COMPANY v. FIRBANK, PAULING, AND CO. (a)

Practice—Writ—Service—Action against a firm—“Carrying on business within the jurisdiction”—Partners resident abroad—Order XLVIII., rr. 1, 3.

Order XLVIII. provides by rule 1 that any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were copartners at the time of the accruing of the cause of action; by rule 3 that where persons

(a) Reported by W. H. HOBBS, Esq., Barrister-at-Law.

are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business, upon any person having at the time of service the control or management of the partnership business there.

A writ was issued to recover the amount due upon a promissory note against a firm who drew the note, and who at the time the writ was issued carried on business in England and elsewhere. The partners of the firm before the writ was served went to reside out of the jurisdiction, but from time to time returned for short periods to this country.

Leave was obtained to effect substituted service of the writ upon one of the partners who entered a conditional appearance thereto. The writ and order for substituted service were subsequently set aside upon the ground that the firm was a foreign firm.

Held, that the order setting aside the writ was wrong, as the defendants were Englishmen carrying on business in this country, and could not, by residing abroad claim to be treated as a foreign firm.

THIS was an appeal from the decision of Bruce, J. at chambers, who ordered that the writ issued in the action and an order giving leave to effect substituted service of the writ on George Pauling should be set aside, on the ground that the defendant firm was a foreign firm.

The writ was issued on the 26th May 1892, and was renewed on the 19th May 1893, and the 18th Nov. 1893; it was indorsed with a claim against the defendants Firbank, Pauling, and Co., as makers, and against the defendant H. P. du Preez as indorser of a promissory note for 3000*l.*, dated the 14th Sept. 1885, payable to the order of H. P. du Preez nine months after date, and indorsed by him to the plaintiffs; the note was duly presented and dishonoured; of which dishonour the defendant, H. P. du Preez had notice. The particulars of the claim were: principal due, 3000*l.*; interest thereon at 5*l.* per cent., from 17th June 1886, 892*l.* 4*s.*; noting, 4*l.* 13*s.*; law costs and expenses, 32*l.* 14*s.* 2*d.*; total, 3929*l.* 11*s.* 2*d.*

An order for substituted service of the writ on George Pauling, a partner in the defendant firm, was obtained in June 1893, and he entered a conditional appearance thereto, denying that he was a partner in the firm.

Upon a summons taken out by the plaintiffs to strike out the appearance entered by George Pauling, on the ground that he was a partner in the defendant firm at the time the debt was incurred, and upon a summons taken out by the said George Pauling to set aside the writ and order for substituted service, on ground that the defendant firm was a foreign firm, Bruce, J. made the order above referred to.

Order XI. provides:

Rule 1. Service out of the jurisdiction of a writ of summons or notice of a writ may be allowed by the court or a judge, whenever (a) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled, or ordinarily resident in Scotland or Ireland.

Q.B. Div.] WORCESTER CITY, &C., BANKING CO. v. FIBBANK, PAULING, AND CO. [Q.B. Div.]

Order XLVIII. provides :

Rule 1. Any two or more persons claiming or being liable as copartners and carrying on business, may sue or be sued in the name of the respective firms, if any, of which such persons were copartners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action copartners in any such firm, to be furnished in such manner, and verified on oath or otherwise as the judge may direct.

Rule 3. Where persons are sued as partners in the name of their firm, under Rule 1, the writ shall be served either upon any one or more of the partners, or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary; provided that in the case of a copartnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable.

Jelf, Q.C. and Toller for the plaintiffs.—It is submitted that the order of the judge at chambers was wrong. This writ was good as against Englishmen who have not been proved to be domiciled anywhere out of this country. It may be that the order for substituted service is an irregularity, but that would be no ground for setting aside the writ :

Fry v. Moore, 61 L. T. Rep. N. S. 545; 23 Q. B. Div. 395.

If the defendants had happened to be in this country at the time the writ was issued they could have been served personally, and the proceedings would have been quite regular. The defendants are not foreigners, and are not entitled to claim to be treated as such. This case differs from *Indigo Company v. Ogilvy* (64 L. T. Rep. N. S. 846; (1891) 2 Ch. 31), as in that case the defendant firm was a foreign firm, although some of its members resided in this country. [MATHEW, J. referred to *Great Australian Gold Mining Company v. Martin*, 35 L. T. Rep. N. S. 874; 5 Ch. Div. 1.]

A. Lyttelton for the defendants.—The plaintiffs ought to have proceeded under Order XI., r. 1 (e), this being a case in which the contract was to be performed in this country. The defendants are resident out of the jurisdiction, and must be treated as foreigners; the writ cannot be served therefore on their agent here :

Indigo Company v. Ogilvy (ubi sup.);

Russell v. Cambefort, 61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526;

Grant v. Anderson, 66 L. T. Rep. N. S. 79; (1892) 1 Q. B. 108.

The writ should have been issued against the individual members of the defendant firm :

Western National Bank of the City of New York v. Peres, Triana, and Co., 64 L. T. Rep. N. S. 543; (1891) 1 Q. B. 104.

[COLLINS, J.—If the issuing of the writ involves the service of persons out of the jurisdiction, you say that you require leave to issue the writ?'] Yes. The plaintiffs should have asked for leave to serve the writ out of the jurisdiction at the time of issuing writ, they did not do so, and the defendants are entitled to set up that against them now.

MATHEW, J.—This is an appeal from Bruce, J. at chambers, directing the writ to be set aside. The writ was issued to recover the amount due on a promissory note for 3000*l.*, the note being dated as far back as May 1885. It was a nine months promissory note, which matured in 1886, and it was payable by its terms "at our London office." The facts appear to be that the defendants, who are sued in the name of their firm, had been carrying on business here and at the Cape of Good Hope, and after this promissory note became due, and after the Statute of Limitations had begun to run, they confined themselves for the most part to the Cape of Good Hope and Asia Minor, though one of them from time to time came to this country. The writ issued was renewed so as to save the operation of the law under the Statute of Limitations. An application was made at chambers for an order for substituted service of the writ, and an order to that effect was made. Upon the writ being brought to the knowledge of the defendants there was an appearance entered under protest intimating that objection would be taken to the jurisdiction. There was an objection to the writ, and there was an objection to the order for substituted proceedings under it, and a summons having been taken out at chambers to set the writ aside, after the appearance under protest, the judge ordered the writ to be set aside. The effect of that order being that, the writ having gone, the remedy is gone, which shows that the materiality of the question raised in this case is one of general importance. Now two objections are made to this writ. It is said, in the first place, that this was a writ intended for service upon persons abroad, and that such a writ should not have been issued without leave. We referred during the argument to *Great Australian Gold Mining Company v. Martin* (35 L. T. Rep. N. S. 874; 5 Ch. Div. 1), and having referred to that decision, and the language of the rules upon the subject, it is quite clear that where a writ is intended to be served abroad leave should be obtained before it is issued. Leave also must be obtained for service abroad of the writ under Order XI. Generally the applications are made compendiously for the writ and the order—both together. The order specifies the time within which the writ should be returned. Mr. Lyttelton says that the writ was served abroad, because the order for the substituted service under it is tantamount to service abroad, *ergo* the writ is bad by reason of the rules which require that leave to issue should be obtained before it was issued, and the service was bad because no leave was obtained under Order XI. But the answer to that seems to me to be that there is no evidence whatever that this writ was issued for service abroad. It was an English writ, and an English writ issued against persons who might be expected to be in this country; in fact they were carrying on business in England. I see nothing to prevent English plaintiffs from suing out a writ in that form, in the hope that they may be able to serve it and proceed upon it. That objection seems to me entirely to fail. The second objection was, that this was a writ issued against two persons carrying on business in England, it may be, but abroad as well, in the name of a firm. They are, the argument ran, precisely in the same position as partners carrying on business abroad, and

Q.B. Div.] WORCESTER CITY, &C., BANKING CO. v. FIREBANK, PAULING, AND CO. [Q.B. Div.]

foreigners cannot be dealt with in the manner in which it is proposed to deal with the defendants in this case. There is abundant authority for saying that a writ cannot be sued out against a foreign firm in the firm's name. There were a series of cases mentioned in the course of the argument where a court has held that in the case of proceedings against foreign firms a plaintiff may be entitled in cases specified in Order XI. to institute proceedings, but he must proceed in accordance with Order XI., and he cannot escape from the obligation of that order by having recourse to Order IX., which was attempted to be done by the decision to which I have referred. Order IX. and the rules under it do not apply to a foreign firm. For what reason? The reason is given in *Russell v. Cambefort* (61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526), an authority which has been recognised ever since, and it is not necessary to refer to the passage in the judgment (which is to be found in many subsequent authorities) of Cotton, L.J. The *ratio decidendi* was that Order IX. could not have been intended to apply to foreigners, because that would involve that the Imperial Parliament was legislating for foreigners in cases other than those provided for by Order XI. That authority has been followed over and over again. Now apply that reasoning to this case, is the case an authority against the writ in this case, or is it not clear that the writ is within the exception which Fry, L.J. made? Did Parliament profess in this case to have dealt by Order IX. with such a case as the present? On the other hand, with regard to British subjects not shown to be domiciled abroad, and not shown to be permanently resident anywhere else, can Parliament be supposed to have intended to deal with such British subjects who formerly carried on business here, but are not here at the present time? Their absence does not entitle them to strip off their allegiance to the Imperial Parliament, and the Imperial Parliament is entitled to legislate for them. That being so, these orders apply. If that be so, the writ was properly issued against the defendants in the name of their firm, and the writ so issued can be served on either of the partners here. In this case the writ has been properly issued in the expectation of the defendants coming over here. The difficulty in *The Indigo Company v. Ogilvy* (64 L. T. Rep. N. S. 846; (1891) 2 Ch. 31), which Mr. Lyttelton pointed out so very clearly, seems to me to be disposed of by the language of the new rule. I agree with my brother Wright that the new rule was intended to get rid of the difficulties in cases like this, and in *Indigo Company v. Ogilvy* (*ubi sup.*) too, and it was not intended that a British subject out of the jurisdiction, should, for the purposes of these rules be treated as a foreigner. That I do not think was the intention, and I do not see the necessity for that mode of legislation. This writ was issued against the defendants in the name of their firm, and if either of the partners appear in this country it may be served upon him, and rule 3 of Order XLVIII. appears to me to apply to the case. If that be so the writ cannot be set aside. I say nothing about the subsequent proceedings under it, nor do I say anything upon the point whether leave should not be obtained to serve that writ abroad. No question is presented to us which calls for any decision upon that

point. In my judgment the writ is regular, and ought not to be disturbed, and therefore this appeal must be allowed.

COLLINS, J.—I am of the same opinion. This case is no doubt rather a difficult one by reason of the numerous decisions which at first sight are not very easy to reconcile. Now it seems to me on the facts that we are here dealing with a firm composed of Englishmen, and there is no evidence that they have adopted or acquired any other domicile than that of Englishmen; neither is there any evidence that they have come under any jurisdiction other than that of the Imperial Parliament. The firm carry on business in London, where one of them appears to reside often, and where the other occasionally resides. They also carry on business elsewhere, and one of them spends more of his time abroad, though not in any one particular place, than the other. Under these circumstances the question is whether the writ against them in the firm name is right, and within the jurisdiction. It is established in *Russell v. Cambefort* (61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526) that the rules which enable a firm to be sued in the firm's name do not apply to foreigners at all. That case was extended in *Indigo Company v. Ogilvy* (64 L. T. Rep. N. S. 846; (1891) 2 Ch. 31) to the case of a firm composed of Englishmen, carrying on business in India and in London. And it was extended to them on a principle, not of international comity, but on a broader principle, that by serving as a firm individuals who were carrying on business, some of them in this country and some of them elsewhere, you were bringing into litigation persons who were in point of fact outside the jurisdiction at the time when the proceedings were initiated, and that you ought not by suing them in the name of their firm to deprive them of the right which they would have had if they had been sued as individuals; writing the name of the firm was merely a short way of writing the names of individuals who could not have been sued as they were out of the jurisdiction, without leave to serve the writ out of the jurisdiction, and therefore the plaintiff was not entitled as against the firm, whether composed of Englishmen or not, some of whose members were abroad, to adopt this mode of procedure. That was the decision in *Indigo Company v. Ogilvy* (*ubi sup.*). The court held, as in *Russell v. Cambefort* (*ubi sup.*), that the writ was irregular, but not that it was a nullity, and, as the irregularity was cured by appearance they did not set the writ aside. Now, that law has been repeatedly acted on in other cases, as for instance, *Western National Bank of the City of New York v. Perez, Triana, and Co.* (64 L. T. Rep. N. S. 543; (1891) 1 Q. B. 104), and *Heinemann and Co. v. Hale and Co.* (64 L. T. Rep. N. S. 548; (1891) 2 Q. B. 83). That was the state of the law when the rules under Order XLVIII. were made, and by rule 1 of that order it is provided that any two or more persons claiming, or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were copartners at the time of the accruing of the cause of action. After that rule was made, *Grant v. Anderson* (66 L. T. Rep. N. S. 79; (1892) 1 Q. B. 108) came before a divisional court, consisting of Lord

Q.B. Div.]

NEWBY v. SIMS.

[Q.B. Div.]

Coleridge, C.J. and Wright, J., who held that the defendants were a Scotch firm, and that they did not carry on business here, but they also agreed that whether they had a place of business here or not they were outside the ambit of these rules, notwithstanding the words "carrying on business within the jurisdiction." When that case came before the Court of Appeal the learned judges refrained from pronouncing any opinion as to whether Order XLVIII., rule 1, had in any way affected the decision in *Russell v. Cambefort* (*ubi sup.*). If that rule had affected or overruled that decision, of course the present case, whatever view of the facts were taken, would be an *a fortiori* case, because if *Russell v. Cambefort* (*ubi sup.*) were overruled the whole fabric built upon it would fall. The Court of Appeal rested their decision upon the facts of the case that the defendants did not carry on business, and had no place of business within the jurisdiction. In the course of his judgment Wright, J. says: "The words in rule 3, 'whether any of the members thereof are out of the jurisdiction or not' were merely intended to meet the difficulty that arose in *Indigo Company v. Ogilvy* (*ubi sup.*). So that we have the expression of opinion that the decision in *Indigo Company v. Ogilvy* (*ubi sup.*) is practically, I will not say overruled, but annulled by the effect of this rule; and if the defendants in an action are an English firm it is no answer to their being embraced within the ambit of this rule that some members of the firm were out of the jurisdiction at the time when the writ is issued. Now in this case I quite agree with what has fallen from Mathew, J. This is an action against Englishmen, therefore, *prima facie* the writ is good. It is also against Englishmen who were carrying on business in this country, and who are occasionally resident in this country. Therefore there seems to me to be no shadow of ground in principle why they should not be taken to be amenable to all the municipal laws of this country, one of them being that if they carry on business in partnership they may be sued as a partnership. Therefore it seems to me that this writ was a perfectly good writ against them in the first instance, and if they had all come back to this country there is no doubt they could all have been served. I think, also, if one of them had come back he might have been served, and such service would have been good upon the whole firm; and, in point of fact, if the writ was properly issued by the provisions under Order XLVIII. service on a partner or a manager would be good service. I think the writ was properly issued and therefore that the decision of Bruce, J. was wrong, and must be set aside.

Appeal allowed.

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*

Solicitors for the defendants, *Slaughter and May.*

Wednesday, Jan. 17.

(Before DAY and LAWRENCE, JJ.)

NEWBY v. SIMS. (a)

Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 18, 21, schedule — Diluting rum — Certificate of analyst — Form of — "Excess of water beyond that allowed by Act of Parliament" Food and Drugs Amendment Act 1879 (42 & 43 Vict. c. 30), s. 6.

In an information against the respondents under sect. 6 of the Food and Drugs Act 1875, for selling to the prejudice of the purchaser one pint of rum, which was not of the nature, substance, and quality of the article demanded, the certificate of the analyst was as follows: "I find that the sample contains an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of opinion that the said sample is not a sample of genuine rum."

By sect. 18 of the Act the analyst's certificate must be in the form contained in the schedule to the Act. By sect. 21 the certificate of the analyst is sufficient evidence of the facts therein stated, unless the defendant require that the analyst be called as a witness. In this case the analyst was not called as a witness.

Held, that the certificate was not in such a form as to amount to evidence upon which the defendant could be convicted. The duty of the analyst was to state the proportion of water in the rum, leaving it to the justices to decide whether it was in excess of that allowed by Act of Parliament.

CASE stated by justices of Durham.

At a petty sessions holden at South Shields, in the county of Durham, on the 3rd Oct. 1893, an information was preferred by the appellant, the inspector of Food and Drugs, for the district of the Hebburn Local Board of Health, against the respondent, a publican of Pelaw Main, in the said county, under sect. 6 of the Sale of Food and Drugs Act 1875, charging him with having sold to the prejudice of the appellant, the purchaser, one pint of rum which was not of the nature, substance, and quality of the article demanded by the said purchaser.

At the hearing of the information there was put in evidence the following certificate:—

County of Durham.—The Sale of Food and Drugs Act 1875.—To Mr. John Newby, Sanitary Inspector, Hebburn.—Analyst's Certificate.—I, the undersigned, public analyst for the county of Durham, do hereby certify that I received on the 1st day of Aug. 1893, from yourself, a sample of rum for analysis, which then weighed , and have analysed the same, and declare the result of my analysis to be as follows:—I find that the sample contains an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of opinion that the said sample is not a sample of genuine rum. As witness my hand, this 4th day of Aug. 1893.—W. J. KEATING STOCK.

The justices were of opinion that the certificate of the analyst in the above form whereby he purported to "estimate" the excess of water at 13 per cent. of the entire sample, although in other parts of the same certificate he used the words "I find" and "I am of opinion" was not sufficient evidence of the offence charged to justify them in convicting the respondent, and

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

Re AN ARBITRATION BETWEEN GREGSON AND ARMSTRONG.

[Q.B. Div.]

dismissed the information. The question for the opinion of the court was, whether the justices were right in so doing.

Macmorran for the appellant.—The justices were wrong. "I estimate" means exactly the same thing as I am of opinion. [He was stopped by the Court.]

Strachan for the respondent.—The certificate is not sufficient evidence of the offence. The statute being a penal one must be strictly construed. The analyst ought to have given a quantitative analysis of the sample, and left the justices to decide whether the water contained in the sample was in excess of that allowed by Parliament. Instead of that he has undertaken to give his own view as to what the Act allows.

Macmorran in reply.—It is fair to assume that the analyst knew what is allowed by Act of Parliament, and he has stated that there is 13 per cent. of water more than is allowed. That was sufficient evidence for the magistrates to act upon.

DAY, J.—I have come to the conclusion that the decision the magistrates arrived at was the correct one, and should be supported, although I am clearly of opinion that the grounds on which their decision was based were wrong. I come to this conclusion with regret, because I think a statute directed against adulteration of food ought to be liberally construed. All frauds are most properly the objects of penal legislation, and therefore I do not yield at all to the argument of *Mr. Strachan* that simply because it is a penal statute, we are to construe it strictly. I will construe it with the same strictness only that I should apply to any other statute. We are bound, however, to see that an offence under this or any other statute is adequately proved. In this case the proof depends wholly upon the certificate given by the analyst, and in my opinion that certificate is clearly defective in form. The person summoned for adulteration in this case did not require, as he might have done, the attendance of the analyst at the hearing of the charge. Had he done so the defect in the certificate would have been amended. But as he did not the only evidence in support of the charge was the certificate itself, and the question is whether it supplied evidence on which the defendant could be convicted. Now the certificate is entitled under the Act of 1875. There is no evidence that the analyst was acting under the Act of 1879, or even that he knew of its existence. He purports to be acting solely under the Act of 1875, and his certificate is as follows: [The learned judge read the certificate and continued:] I find that that certificate is defective, not, as the justices thought, because of the words "I estimate." The word is appropriate enough, and implies no want of certainty. My difficulty is that prior to the Act of 1875, the word "proof" was clearly in use, extending as far back as a statute of Geo. 3, in which "proof" is defined to be 50/76 of water, and 49/24 of pure alcohol, or about half and half. That was "proof" at the passing of the Act of 1875, which constitutes it an offence to sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded. That Act leaves utterly at large the question what is genuine rum. It appears to be

left to popular judgment whether you have got the thing you asked for. There always must have been some water, and the justices have to determine whether the article sold answered the popular estimation of what genuine rum is. In the amending Act of 1879, which also relates to food and drugs, there is still no definition of what shall constitute an offence under the Act of 1875. But there is this negative provision that there is no offence if the water added has not reduced the spirit more than 25 degrees under proof for brandy, whisky, or rum, recognising as "proof" the proportions contained in the Act of Geo. 3. Now the analyst says—and this is all the proof the justices had before them—"I find that the sample contains an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent of the entire sample." Now that is taking upon himself to judge the law and the facts. He has assumed to determine the question that is for the justices. The analyst's province is to find the facts, and it is for the justices to say whether the quantities found by the analyst are more or less than are allowed by Act of Parliament. The 13 per cent. of water found by the analyst cannot mean all the water in the sample, because rum necessarily contains more. It is in excess of something, but in excess of what? Then he adds that the sample is not one of genuine rum. That was not a question for him. His duty was only to say how much water the sample contained; the rest was for the justices. For these reasons I am of opinion that the certificate is not in such a form as to amount to evidence upon which the justices could convict.

LAWRANCE, J.—I am of the same opinion. The justices inadvertently came to the right conclusion. The form of this certificate is open to every objection. The certificate ought to contain the evidence upon which the analyst's conclusion was based.

Solicitors for the plaintiff, *Mabane and Graham*, South Shields.

Solicitor for the defendant, *James Kirkley*.

Saturday, Feb. 3.

(Before *MATHEW and COLLINS, JJ.*)

Re AN ARBITRATION BETWEEN GREGSON AND ARMSTRONG. (a)

Arbitration—Legal misconduct of arbitrators—Information taken from one side in the absence of the other—Award set aside.

By agreement between the landlord of a farm and his outgoing tenant certain matters in dispute between them were referred to arbitration, the Arbitration Act 1889 and first schedule thereto being incorporated in the agreement. All the evidence on both sides having been heard, the arbitrators on a subsequent day before making their award, held a meeting on the farm at which the outgoing tenant was present, but without the knowledge and in the absence of the landlord.

Held, that the award must be set aside, it being improper to take information from one side in the absence of the other.

THIS was a motion to set aside the award of an umpire on the ground that the arbitrators and

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

Re ROGERS; *Ex parte* COLLINS v. FORD.

[IN BANK.]

umpire had misconducted the arbitration, and that the award was improperly procured.

The following facts appeared from the affidavits:

By an agreement of reference dated the 5th Oct. 1893, between Lancelot Allgood Gregson, the landlord of the Seaton Moor Farm, in the county of Durham, and Richard Armstrong, the outgoing tenant, it was agreed that certain matters in dispute between them relating to the said farm should be referred to the award and determination of two arbitrators, and that the provisions of the Arbitration Act 1889, and the first schedule thereto, should be incorporated with the agreement. The arbitrators appointed one Marriott to be the umpire. It was agreed that the umpire should sit with the arbitrators to save expense. The hearing of the arbitration took place before the arbitrators and the umpire on the 22nd Oct., when both parties attended with their solicitors and witnesses. At the conclusion of the proceedings on that day the arbitrators and umpire intimated that if they required a view they would inform the parties. On the 5th Dec. the umpire made and published his award, the arbitrators having disagreed. Meanwhile on the 15th Nov. the arbitrators and the umpire met upon the farm for the purpose of viewing it, and held a conference which lasted two hours, at which Armstrong was present. No notice of this meeting was given to Gregson, who therefore was not present. A notice of the meeting had however been sent to one Weightman, a person who had given evidence on behalf of Gregson, at the hearing of the arbitration, and whom the umpire stated upon affidavit that he understood to be acting on Gregson's behalf, and with his authority. The notice to Weightman was only received by him on the morning of the day on which the conference took place, and he consequently only arrived on the scene when the conference was nearly over. He had no authority to act on behalf of Gregson. On the 15th Dec., Gregson having discovered the fact of this conference having been held in his absence, gave notice to the other side of his intention to move to set aside the award.

Lawson Walton, Q.C. and *Simey* for Gregson.—The rules which ought to guide an arbitrator have been departed from. If it appears that the arbitrator has given exclusive audience to one party—that has always been a ground for setting aside the award, because it creates dissatisfaction with the award in the mind of the party not present:

Phipps v. Ingram, 3 Dowl. 669;
Dobson v. Grave, 6 Q. B. 637.

Scott Fox, for Armstrong, in support of the award.—The affidavits show that the arbitrator intended that Weightman should be present on behalf of Col. Gregson. The cases cited only show that, where the arbitrator has taken evidence in the absence of one party, he cannot be heard to say that it has not affected his mind. But in this case no evidence was taken. There was only conversation:

Re Hopper, L. Rep. 2 Q. B. 367.

MATHEW, J.—I think this application must be granted, and the award set aside. Arbitrators are not merely valuers; they have judicial functions to perform. Though intending no injustice they must observe the fundamental rules

which govern judicial proceedings. In this case they received information from one party to the arbitration in the absence of the other party. After the evidence had all been heard the arbitrators agreed that a view should take place, and notice be given to the parties. No notice was given to Col. Gregson, but notice was given to a principal witness who had appeared on his behalf at the hearing. That was the mistake which the arbitrators made. But even that witness did not attend the meeting for a considerable time after its commencement. Meanwhile the arbitrators had before them the other party to the dispute, and held conference with him for some time. That being so, the arbitrators have undoubtedly taken information from one side in the absence of the other. I do not feel sure that the landlord had not some inkling that the meeting was going to take place. The tenant, however, is in no way to blame. The result is, that the award must be set aside, but without costs.

COLLINS, J. concurred.

Solicitors for Gregson, *H. C. Coote and Ball*, for *Simey, Son, and Iliff*, Sunderland.

Solicitors for Armstrong, *Johnson, Weatherall, and Stuart*, for *Marshall*, Sunderland.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Oct 30 and 31, 1893.

(Before *WILLIAMS, J.*)

Re ROGERS; Ex parte COLLINS v. FORD. (a)

Bankruptcy—Surgeon-dentist's practice—Personal earnings—Partnership—Bankruptcy Act 1883 (46 & 47 Vict. c. 53), ss. 53 and 54.

A dental surgeon, carrying on business with a partner, mortgaged his share of the profits to the respondents, and they subsequently had a receiver appointed under the mortgage deed. The debtor became bankrupt, but the partnership was still carried on, and the receiver continued to receive the debtor's share of the profits. The trustee in bankruptcy now claimed the debtor's share of the profits since the bankruptcy.

Held, that the trustee was entitled to the debtor's share of the profits since the bankruptcy, even though the business was one which very largely depended upon the exercise of personal skill by the debtor.

THIS was a motion by the trustee in bankruptcy for an order declaring that the respondents, who were the mortgagees of certain assets of the bankrupt, were accountable to the trustee in bankruptcy for those assets which they held as representing the bankrupt's share of certain profits arising from his business.

In 1883 the debtors *J. Rogers* and *W. Maggs* agreed to carry on the practice of dental surgeons for ten years from the 1st May 1880. In Oct. 1887 the debtor assigned his share in the partnership to *J. Ford* and *A. J. Rhodes* by way of mortgage to secure the sum of 2000*l.* advanced by them. In March 1891 the partnership between *Rogers* and *Maggs* was terminated, and a new agreement made between them for ten years from Jan. 1891; the debtor to have two-thirds of the stock, plant, &c., of the business and *W. Maggs* one-third. In

(a) Reported by *WALTER B. YATES, Esq., Barrister-at-Law.*

IN BANK.]

Re ROGERS; *Ex parte* COLLINS v. FORD.

[IN BANK.]

May 1891 Ford and Rhodes commenced an action to realise their mortgage, and on the 10th June 1891 a receiver of the debtor's interest in the partnership was appointed. On the 17th Sept. 1891 a receiving order was made against the debtor on which he was adjudicated bankrupt. Notwithstanding bankruptcy, the debtor continued to carry on the business, and his share of the profits was handed over to the receiver. The trustee in bankruptcy now claimed as against the mortgagees the profits made since the date of the receiving order.

Channell, Q.C. and Muir Mackenzie for the trustee of the bankrupt.—Although this was a business of a surgeon-dentist, and all the profits derived from it might appear to be personal earnings, nevertheless the business consisted of a workshop, stock-in-trade, &c., and would properly come within *Emden v. Carte* (45 L. T. Rep. N. S. 328; 17 Ch. Div. 169, 768), which decided that the trustee should be added as a co-plaintiff, in an action where the bankrupt was an architect, and sued for his remuneration as such. *Elliot v. Clayton* (16 Q. B. 581) was a similar case, where a surgeon and apothecary became bankrupt, and his assignees were held entitled to the proceeds of his trade thus carried on. In *Ex parte Nichols; Re Jones* (48 L. T. Rep. N. S. 492; 22 Ch. Div. 782), the debtors had assigned their future earnings in a business, and on bankruptcy the trustee was held to be entitled to the moneys owing to the debtors between the dates of the petition and appointment of the trustee; and to the same effect are the cases of

Wadling v. Oliphant, 33 L. T. Rep. N. S. 837;
Re Dowling; Ex parte Banks, 36 L. T. Rep. N. S. 117; 4 Ch. Div. 689.

H. Reed, Q.C. and Eve for the respondents, the mortgagees of the debtor.—The trustee in bankruptcy is not entitled to these assets, because they are the personal earnings of the bankrupt. The money in possession of the bankrupt at the time of his bankruptcy, the trustee has a right to follow, but these assets never came into the hands of the bankrupt; they remained in the possession of the mortgagees. In *Cohen v. Mitchell* (63 L. T. Rep. N. S. 206; 25 Q. B. Div. 262) it was held that until the trustee intervenes all *bona fide* transactions by the bankrupt after bankruptcy, as to after-acquired property, are valid against the trustee. And in *Re Hutton; Ex parte Benwell* (51 L. T. Rep. N. S. 677; 14 Q. B. Div. 301) it was decided that the word "income" in sect. 90 of the Bankruptcy Act 1869 (which has been re-enacted in sect. 53 of the Bankruptcy Act 1883) applies only to "income" *ejusdem generis* with "salary," and the Court there would not set aside any part of the prospective earnings of a bankrupt for the benefit of creditors when those earnings were derived from the exercise of the bankrupt's personal skill and knowledge. The Master of the Rolls (Lord Esher) said, in his judgment on p. 677 (51 L. T. Rep. N. S.), "the bankrupt" in that case was known "as what is popularly called a bone-setter. In carrying on that business he exercised great and well known skill. What he does is all done by means of his own personal skill and knowledge, and all the emolument which he receives is earned by means of his own personal skill and knowledge." The present case is similar to that case. The trustee has not in

this case made out a paramount claim to these assets. They also cited

Re Shine; Ex parte Shine, 66 L. T. Rep. N. S. 146 (1892) 1 Q. B. 522.

WILLIAMS, J.—Mr. Rogers, an eminent dentist having got into financial difficulties, borrows a sum of money from the respondents to enable him to pay his creditors their claims; and the respondents took this mortgage deed as a security for the repayment of this sum of 2000*l.* which they lent, and the interest thereon. At the time when the mortgage deed was entered into which was 1887, there was in existence a partnership between Mr. Rogers and his partner Mr. Maggs. That partnership deed apparently afterwards was determined, and a different one was entered into in 1891, but in substance the partnership was the same in 1887 as it was in 1891. Then some time shortly prior to the making of the receiving order the mortgagees were minded to enforce their security by bringing a foreclosure action in the Chancery Division, and they did so, and they got their receiver appointed. Then comes the receiving order. It is quite plain that the effect of the receiving order was to put an end to the partnership; but subsequently to the receiving order Mr. Rogers went on carrying on his business as before, and availing himself for the purpose of so carrying on his business of the assistance of Messrs. Ford and Rhodes just in the same way as he had done under the provisions of the mortgage deed in 1887. I very much doubt myself whether the mortgage deed covered the new arrangement which Mr. Rogers made subsequently to the receiving order, but I do not know that I have to determine that. As I have said, as a fact Messrs. Ford and Rhodes and the bankrupt and his partner all continued to act just as if there had been no bankruptcy. The result of that was that the earnings of the partners were carried in the ordinary way to the partnership account. Ultimately the net share of the proceeds to which Mr. Rogers was entitled under this new arrangement, which was based, as I have said, upon the old partnership deed, was paid from time to time to the receiver under the mortgage deed, and the receiver proceeded to apply the moneys in the way which the mortgage deed provided, just as though there had been no receiving order, and as though the business carried on by Mr. Rogers subsequently to the receiving order had been the business, the subject of the old partnership deed, and the subject of the mortgage deed of 1887. Now, that being the state of things, a correspondence ensued between the trustee and the respondents, and in the course of that correspondence the trustee admittedly made it clear that he considered that the mortgagees and their receiver were liable to render an account to him, the trustee, of their dealings. Eventually the trustee claimed the moneys, payable to Mr. Rogers under this new arrangement of the partnership as being moneys which, although acquired after the receiving order and in a sense by the personal earnings of Mr. Rogers, his creditors were entitled to have treated as part of his estate; and the notice of motion in effect asks that I shall say as to these moneys which either have been or in future shall be received as Mr. Rogers' share of the partnership earnings under the new arrangement that they are

[IN BANK.]

Re ROGERS; *Ex parte* COLLINS v. FORD.

[IN BANK.]

moneys to which the trustee was entitled in the past and will be entitled to in the future. Now, that being the notice of motion, I have arrived at the conclusion that in substance the trustee is right as to this matter. The first thing that is said is this: That the trustee cannot be entitled to the net share of earnings of this partnership which is due to Mr. Rogers because such moneys are the personal earnings of Mr. Rogers. It is said—and rightly said—that the personal earnings of a bankrupt do not pass to his trustee, at all events in cases where there is no margin shown after sufficient has been applied for the maintenance of the bankrupt. Now, that principle has only been applied to cases where the personal earnings are personal earnings strictly so-called. As I understand the cases, if what the bankrupt is earning is earned by him in his business it is not sufficient to bring the earnings within this rule as to personal earnings that the business is of a character which involves a large amount of personal skill and attention by the bankrupt. As I understand, it was on this ground that it was decided in the case of the surgeon apothecary and in the case of the architect, that the earnings did not fall within the rule, because those were cases where the court, in considering what was the nature of the earnings of the bankrupt, decided that the earnings could not be treated as mere personal earnings within this rule because, although the bankrupt would have, for the purpose of making these earnings, to use his personal skill and attention, yet the business was of a character which involved much that was independent of the personal exertion of the bankrupt; it was not like the case of the bone-setter, or like the case of an actor or singer, whose earnings depend really upon the personal exertion of the bankrupt and on nothing else. In the case of the medical man, the surgeon apothecary, in his character as apothecary, he sold medicines, and in the case of the architect, in his character as an architect, he sold plans, and it was held that in both those cases the fund, arising partly from the bankrupt's personal exertions and partly from his carrying on this business, did not fall within the rule. That being so, I start in my judgment in this case by saying that I do not think that the earnings of Mr. Rogers can be treated as personal earnings within the rule at all. Mr. Channell called my attention to the fact that in the partnership deed which has ceased to be in force, but which, it is admitted, is, in a sense, the basis of the present arrangement, there is mention of the stock in trade, of the workshops, and of assistants; and under all those circumstances, in my judgment, the earnings here are not personal earnings within the meaning of this rule. I think that these are not moneys personally earned by the bankrupt in the course of carrying on this partnership business, and that being so, it seems to me that I need really trouble myself no further with the question of what would have been the consequence had these been personal earnings. I wish to add two observations. One is this: I wish to say that, even if the receipts here would fall properly within the description of personal earnings as intended by the rule in question, yet I am by no means prepared myself to say that such personal earnings would not lose that character by being dealt with by the bankrupt

himself as property for the purpose of a partnership with other people. It seems to me that that which the bankrupt earned, although it might originally have been his personal earnings, ceased to have that character and came to be property in the true sense of the word. It is the net share which the bankrupt is entitled to of the partnership earnings under his arrangement with his partner. It seems to me that such net share, although its origin might have been personal earnings and personal exertions, becomes mere property and that the trustee is entitled to it. I wish to say further that a good deal has been said in the course of the argument about the 53rd section, the section relating to salary. I do not think that I need trouble myself with that, having come to the conclusion I have done about these moneys so received not being personal earnings. But in order to prevent any misapprehension I must say that, according to my view, the fact that moneys are properly described as personal earnings does not necessarily prevent their falling within the 53rd section. It seemed to be rather assumed in argument that because money was personal earnings it could not be within the 53rd section. I do not agree. If you happen to receive your personal earnings under a contract, so that your personal earnings are not daily earnings but take the shape of a yearly salary, I conceive that, subject to the rule of not depriving the bankrupt of the means of livelihood, if it be shown that after providing fairly and liberally for the support of the bankrupt there will be a balance of salary, that that balance of salary, even though the salary is a salary for personal exertions, might be the subject of an order under the 53rd section. Now, having dealt with this first point and arrived at the conclusion that these moneys received in this partnership between Mr. Rogers and his partner are not personal earnings of Mr. Rogers, I have to consider whether there is any other ground upon which it might be said that the trustee is not entitled to these moneys as against these gentlemen, the mortgagees. As I understand, it is put in this way: It is said that, although there vests by virtue of the statute in the trustee all the property of the bankrupt coming to him before his discharge, whether it is acquired before or after the receiving order; yet that there is a difference between property acquired before the receiving order and that acquired after it, and that that difference is expressed in the judgment in the case of *Cohen v. Mitchell* (63 L. T. Rep. N. S. 206; 25 Q. B. Div. 262). That there is such a difference nobody doubts. It is perfectly plain that with regard to after-acquired property, if the trustee does not intervene and prevent the bankrupt carrying on the business, those who deal with the bankrupt have a right to say that upon the trustee's intervention he is not to insist upon his title to their detriment. That is a principle to which I entirely assent, and one which, according to my understanding, was by no means established for the first time by the judgment in *Cohen v. Mitchell*. It is an older principle. That being the case, I have to consider whether that has any application here to prevent the trustee insisting upon his rights. Now I wish to point out that the mortgagees here, in so far as they claim any title under the old mortgage deed of 1887, clearly do not come within the rule, because they are not

APP.] NEW ZEALAND GOLD EXTRACTION CO. (NEWBERRY-VAUTIN PROCESS) v. PEACOCK. [APP.]

people who have dealt with the bankrupt by the sufferance of the trustee since the receiving order. Then it is sought to be said that the respondents have dealt with the bankrupt under the new arrangement, and that that new arrangement is since the receiving order. With regard to that I can only say that the respondents as mortgagees have done nothing of the sort. They have not lent money since the receiving order, and they have acquired no security since the receiving order. The declaration that I make is, that the respondents are not entitled to receive further earnings, and that the moneys in the list furnished by the trustee consisting of remuneration, payment of policies, and the like, ought to be returned to the trustee.

Solicitors for the trustee in bankruptcy, *Leggatt, Rubinstein, and Co.*

Solicitors for the respondents, *Hyde, Tandy, Mahon, and Sayer.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 4, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

THE NEW ZEALAND GOLD EXTRACTION COMPANY (NEWBERRY-VAUTIN PROCESS) LIMITED v. PEACOCK. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Company—Call—Ultra vires—Amalgamation—Sale—Undertaking—Death of shareholder—Notice—Liability of personal representatives—Companies Act 1862 (25 & 26 Vict. c. 89), s. 23.

Where the memorandum of association of a company empowers it to sell its undertaking, the company can, as a preliminary to and as one of the terms of the sale, call up its unpaid capital and transfer the same to the purchaser.

Until something is done to transfer the interest of a member of a company who has died, the deceased—that is his estate—remains a member of the company, and his legal personal representatives are in their representative capacity liable for calls, so long as his name remains on the register without notice to the company of his death.

THIS was an action by the liquidator of the above named company (which was in course of voluntary liquidation), in the name of the company, against the executors of John Thomas Peacock, a deceased shareholder, to recover 190*l.*, being the amount of a call of 10*s.* per share on 380 shares of the plaintiff company, which had belonged to the testator, and which had passed to the defendants as executors of his will.

The defendants resisted the claim on the ground that the call was made for purposes which were *ultra vires* of the plaintiff company, and was therefore invalid; and further, that they had not been served with notice of the call in accordance with the articles of association of the plaintiff company.

The plaintiff company was registered in Dec. 1887, and its memorandum of association stated

that the objects of the company were (*inter alia*) to acquire patent rights and privileges subsisting in New Zealand, relating to improvements in certain methods of extracting metal from ores, materials, and furnace products; to acquire mining property and other property or interests convenient to be held therewith; to work, develop, and maintain the mines, minerals, and other properties of the company; and to carry on and conduct the business of mining, &c..

Clauses 7, 11, and 12 of the memorandum of association of the plaintiff company were as follows:

7. To amalgamate, unite, or co-operate either generally or to or for any limited extent or period determinable, continuous, or otherwise with any corporations, companies, or persons already or hereafter to be established for or engaged in objects which are or shall be within the scope of the objects of this company, and to purchase or acquire the business or any interest in the business carried on by any such corporation, company, or persons, and being a business which this company is authorised to carry on, and for any such purpose to make and enter into any contracts, agreements, or arrangements, and to undertake any liabilities.

11. To sell the undertaking of the company or any part thereof for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company, or for any other consideration which the company may think fit.

12. To do all such things as are incidental or conducive to the attainment of the above objects or any of them.

By the articles of association of the plaintiff company the directors had power to make calls of which fourteen days' notice was to be given, specifying the time and place of payment and to whom such calls should be paid.

Article 133 was as follows:

A notice may be served by the company upon any member whose registered place of address is in the United Kingdom, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of address.

The articles provided for forfeiture of shares for nonpayment of calls, and for transfers by representatives of deceased members either to themselves or to other persons; but there was no provision that notices to the representatives of a member who had died should be valid if left at his registered address or sent by post addressed to him.

Another company, called the Newberry-Vautin (Patents) Gold Extraction Company Limited, had been registered in Oct. 1887, with the object, as stated by its memorandum of association, of purchasing the rights, property, assets, and effects of the Newberry-Vautin Gold Extraction Syndicate Limited and the Newberry-Vautin Gold Extraction Company Limited, or of either of them.

That company was also empowered (*inter alia*) to purchase, take on lease, or otherwise acquire inventions, patent rights, lands, mines, minerals, and mining and other rights, and to deal with or in or work the same in such manner as the company might determine; to carry on the general business of extractors of metals, &c.; to acquire by purchase or otherwise lands, rights, privileges, property, business or businesses, for the purpose of the company; to amalgamate the company with any company or companies having similar objects, and to assist in the formation of the company; to sell, lease, and dispose of all or any of the property of the company, and to accept in payment for the same money or shares or bonds

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

APP.] NEW ZEALAND GOLD EXTRACTION CO. (NEWBERRY-VAUTIN PROCESS) v. PEACOCK. [APP.]

or debentures of any other company, but so that such shares, bonds, or debentures should be fully paid up, and involve no liability to this company, and to hold such shares, bonds, and debentures; and, lastly, to do all things which should be necessary and conducive to effecting any of these purposes.

In Jan. 1892 the directors of the plaintiff company resolved to recommend to the shareholders the amalgamation of their company with the Newberry-Vautin (Patents) Gold Extraction Company Limited, and entered into an agreement on the 7th Jan. 1892 with the latter company to convene a meeting to approve the agreement and to call up the remaining 10s. per share upon the 20,000 shares of the plaintiff company by instalments; such call to be made before the time for the confirmation of special resolutions passed by the Newberry-Vautin, &c., Company sanctioning the scheme. In the event of the agreement being duly approved by the shareholders of the two companies and the special resolutions being duly passed, the plaintiff company agreed to sell and transfer, and the Newberry-Vautin, &c., Company agreed to purchase and take over, all and singular the patents, goods, chattels, moneys, credits, debts, and things in action, including all amounts due and to become due for calls on the shares of the plaintiff company, and the undertaking, business, and goodwill thereof, and other the assets of the plaintiff company, with the full benefit of all contracts and agreements and all securities held by the plaintiff company or to which the plaintiff company was entitled, and all other the property of the plaintiff company whatsoever and wheresoever upon the terms thereafter expressed. The Newberry-Vautin, &c., Company agreed to allot and issue to the plaintiff company, or the liquidators thereof or their respective nominees, 47,500 shares in the capital of the Newberry-Vautin, &c., Company as fully paid up to the amount of 47,500*l.*; that was to say, one fully paid-up share of 1*l.* for every complete number of two shares held by any member in the plaintiff company, and one fully paid-up share of 10s. for every single share in a holding or odd share beyond a multiple of two. Provided that the Newberry-Vautin, &c., Company should not be bound to issue or allot such shares in respect of any shares in the plaintiff company until the said calls for 10s. and any other calls that might be in arrear or payable thereon should have been paid, except to the holder of such unpaid shares in the plaintiff company at his request, and on an assignment to the Newberry-Vautin, &c., Company of the amount of such calls.

The agreement was to be conditional on the same being approved by an extraordinary resolution, as defined in sect. 129 of the Companies Act 1862, of the shareholders in general meeting of the plaintiff company and the Newberry Vautin, &c., Company respectively.

The agreement was duly approved by the shareholders of both companies, and in order to carry the scheme into effect a resolution of the directors of the plaintiff company was duly passed on the 1st Feb. 1892 for a call of 10s. per share payable by four instalments of 2s. 6*d.* each, the last payment being due on the 19th Sept. 1892.

A resolution was also passed and confirmed on the 6th and 28th April 1892 for the voluntary liquidation of the plaintiff company.

Notice of the call was given through the post by letter addressed to John Thomas Peacock at his registered address. Peacock, however, had died on the 15th Feb. 1889, and his will, by which the defendants were appointed his executors, had been duly proved by them some time prior to the making of the call. The letter inclosing the notice of the call was returned through the post to the company with the words "gone away" marked on the outside.

The plaintiff company did not become aware of Peacock's death until Sept. 1892, and thereupon the liquidator, in a letter dated the 3rd Sept. 1892, applied to Peacock's executors for payment of the call, informing them that the notice sent to Peacock's registered address had been returned through the post. The executors had not received the notice sent to Peacock's registered address, and they did not know, until the liquidator made this application, that Peacock held any shares in the plaintiff company.

The defendants' solicitors having, on the 9th Sept. 1892, acknowledged the receipt of the liquidator's letter of the 3rd Sept. and promised attention to the matter, some further correspondence passed between the parties, and on the 12th Dec. 1892 the defendants' solicitors wrote that the defendants were doubtful whether they were liable to pay the four calls of 2s. 6*d.* each upon 380 shares which the liquidator had informed them were applied for by Peacock in the plaintiff company; and that they were taking counsel's opinion upon the matter; and that, of course, if he advised that the defendants were liable they would forthwith pay the amount.

On the 29th Dec. 1892 the defendants' solicitors wrote that their counsel had advised the defendants that they should not pay the call, which he was of opinion was *ultra vires*.

The defendants having thus declined to pay the call, this action was brought on the 5th Jan. 1893.

The action came on for trial before Kennedy, J., sitting without a jury in Middlesex, in Aug. 1893.

Channell, Q.C. and C. T. Mitchell for the plaintiffs.

Jelf, Q.C. and Eustace Smith for the defendants.

Cur. adv. vult.

Aug. 12, 1893.—The following written judgment was delivered by

KENNEDY, J.—[His Lordship stated the facts of the case, read the correspondence which had passed between the parties, and continued as follows:—This action was brought on the 5th Jan. 1893 to recover the amount of the call. The defendants, in answer to the plaintiffs' claim, relied upon two distinct contentions: first, that the call itself was *ultra vires*; and secondly, that the defendants had not had notice of the call served upon them as required by the articles of association of the plaintiff company. The plaintiffs traversed each of these allegations; and further, as to the second, they replied that, even if the defence could have been otherwise insisted on, any absence of or defect in the notice was waived by the defendants. In support of the alleged waiver the plaintiffs relied upon the correspondence which I have read, and especially upon the letters of the defendants' solicitors of the 12th Dec. 1892 and the 29th Dec. 1892. I will

APP.] NEW ZEALAND GOLD EXTRACTION CO. (NEWBERRY-VAUTIN PROCESS) v. PEACOCK. [APP.]

proceed to deal with these two points in order. The plaintiff company, as appears by its memorandum of association, had for its objects the following: [His Lordship read the provisions of the memorandum of association of the plaintiff company, and continued:] In Jan. 1892 the directors of the plaintiff company resolved to recommend to the shareholders the amalgamation, as it is called, of the plaintiff company with the company to which I have already referred which was registered and carrying on business as the Newberry-Vautin (Patents) Gold Extraction Company Limited. The objects of that company, so far as it is at all material to refer to them, were as follows. [His Lordship read the provisions of the memorandum of association of the Newberry-Vautin, &c., Company, and continued:] The fair general effect of these memorandums, when compared in the summary way in which I have stated them, appears to be, that the objects of this second company are wider in area and in scope than those of the first company, but still may at any rate in large part be spoken of as similar to those of the first company. In order to carry out the scheme the directors of the plaintiff company in the name of the company entered into an agreement on the 7th Jan. 1892 with the Newberry-Vautin, &c., Company, the material parts of which may be shortly stated as follows: [His Lordship read them and continued:] The advantages and the general outline of the scheme were stated by the directors of the plaintiff company in their report, dated the 12th Jan. 1892, which was put in evidence and to which I need not specially refer. The agreement of the 7th Jan. 1892 appears to have been duly approved by the shareholders of the two companies respectively, and the necessary resolutions duly passed and confirmed. For the purpose of carrying the amalgamation into effect the resolution already mentioned for a voluntary winding-up was duly passed and confirmed by extraordinary general meetings of the shareholders of the plaintiff company on the 6th and 28th April 1892. I have already said that the call in respect of which this action was brought was duly made by the resolution of the directors of the plaintiff company on the 1st Feb. 1892. The argument of the learned counsel for the defendants upon this the main matter argued in the case was shortly this: The call made by the directors of the plaintiff company in pursuance of the agreement was *ultra vires*, because the scheme itself for the carrying out of which it was made was not one which was authorised by the company's memorandum of association; the scheme was an amalgamation and not a sale; and as an amalgamation it was not authorised by clause 7 of the memorandum, because some of the objects for which the Newberry-Vautin, &c., Company was established were objects which were not within the scope of the objects of the plaintiff company. It was further argued that it was not a sale authorised by clause 11 of the memorandum; and that if it was a sale within clause 11 it was *ultra vires* so far as it included these moneys, because as regards them it was a sale of uncalled capital. Reliance was placed especially upon the decision of Lord Cairns, L.C. and other members of the Court of Appeal in the case of *Clinch v. The Financial Corporation Limited* (19 L. T. Rep. N. S. 334; L. Rep. 4 Ch. App. 117). After the best consideration which I have been

able to give to this case, I am unable to concur with the view for which the defendants contend on this point. It appears to me that this call was a call made for one of the authorised purposes of the company. It may be doubtful, I think, whether the scheme for the purpose of effecting which the call was made is an amalgamation within clause 7 of the plaintiff company's memorandum. I am inclined to think that the object of that clause is, as Mr. Channell suggested, to authorise the acquisition by the plaintiff company of the business of some other company, corporation, or firm. But I am of opinion that the scheme was a sale within clause 11. A sale is surely none the less a sale because it also may be an amalgamation—a word which, as pointed out by Lord Hatherley in *Re The Empire Assurance Corporation; Ex parte Bagshaw* (16 L. T. Rep. N. S. 346; L. Rep. 4 Eq. 341, 347), and by Lindley, L.J. in his work on Companies (last edit. 91), has acquired no technical or well-defined legal meaning. If the scheme is a sale within clause 11 then the call was, as it seems to me, a call made for one of the purposes authorised by the company's memorandum of association, and is not *ultra vires*. The case of *Clinch v. The Financial Corporation Limited* (*ubi sup.*) does not appear to be an authority precluding me from holding as I do in this case. The question there was as to the validity of an amalgamation, but an amalgamation which, if it could be supported at all, could be supported only under the 161st section of the Companies Act of 1862. It was, as Lord Cairns states in his judgment on p. 121 of L. Rep. 4 Ch. App., admitted in the argument, and indeed it could not be denied, that there was no power under the special constitution of the corporation which would warrant an arrangement of this nature. The reverse, as it seems to me, is the case here. The transaction here is warranted to my mind by the memorandum of association. Again, in that case with regard to the call, the provisions of the scheme as construed by the Court of Appeal, were that it should be made for the purpose of fulfilling a guarantee, if the surplus assets of the corporation should not reach 150,000*l.*, to make good the deficiency. Here there is nothing of the kind. The call of 10*s.* per share is made, if I understand the facts, substantially to provide an asset in the shape of a certain sum of capital for which the buying company had stipulated as a part of their purchase. The amount was by the terms of the agreement itself to be provided, and was provided so far as regards the valid making of the call, before the sale became binding upon the parties to it. If a sale of the company's undertaking is authorised by clause 11 of the memorandum, why should it be *ultra vires* to provide a part of the undertaking in this form? Suppose that the buying company had made it a condition of purchase that the plaintiff company should hand over to them a certain mining property such as the plaintiff company was authorised to acquire under the 2nd clause of their memorandum, and the directors of the plaintiff company had made this call in order therewith to buy the mining property, and so be enabled to negotiate the sale, could it have been said, a sale being an authorised purpose, that the call was *ultra vires*? If not, why should it be *ultra vires* to provide an asset in money for the same authorised purpose? As to

the second point, the purely technical point as to notice of the call, I have also come to the conclusion that the defence fails. So far as regards the fourth instalment of 2s. 6d. per share payable on the 19th Sept. 1892, I should be disposed to hold, if it were necessary, that the liquidator's letter of the 3rd Sept. to the solicitors, who were acting apparently as the defendants' agents throughout this matter, inclosing the notice sent in February to the testator's address and returned through the post, would be sufficient. But as to the other instalments, as well as to the last, I have come, though not without hesitation upon a matter of construction, to the conclusion that the notice sent in ignorance of his death to the registered address of the testator in Feb. 1892 ought to be held to be sufficient notice, as against these defendants, his representatives, in regard to the liability created by the call in respect of the testator's shares. It seems to me that to take this view, while it gives an elastic construction to the clause, presents, at any rate, less difficulty than to put so strict a construction on the word "member" in the 133rd article as to make it impossible for the company (as Mr. Jelf, in fact, contended it was impossible) to enforce payment of a call in the event which happened here. A member to whose address notice of call was duly sent was in fact at that time dead, though not to the knowledge of the company. The company, being wound-up, became unable, by reason of his death, to send any notice until after the due date of the call was past. It is not necessary, if this view is correct, to decide the point as to the waiver of any defence on the ground of absence or defect of notice, upon which some argument was addressed to me by the learned counsel on both sides. Having considered it, however, I think that I ought to add that I could not, as invited by the plaintiffs' counsel, read the correspondence, consisting of the letters of the 12th and 29th Dec., which I have already read, coming from the defendants' solicitors, as constituting any waiver of this point of the defence. It appears to me that in the first letter the defendants' solicitors limit their promise to pay forthwith by a condition that they should be shown to be legally liable. In other words, they do not preclude themselves from contesting their liability on any ground whatever. They cannot fairly be held by the statement in the second letter—that their counsel has advised that the call was *ultra vires*, and that they should not pay it—to limit themselves to that single defence, and so become shut out from any other defence which may be open to them in law. I give judgment for the plaintiff company with costs.

From that decision the defendants now appealed.

Cozens-Hardy, Q.C. and *Eustace Smith* for the appellants.—We submit that the liquidator cannot enforce the call against the defendants on two grounds: first, because the call was made for purposes which were *ultra vires* of the company, and was therefore invalid; secondly, because the defendants were not served with notice of the call. As regards the first objection, it was not a good amalgamation, for the plaintiff company had no power to amalgamate with the Newberry-Vautin, &c. Company, inasmuch as the objects of the latter company were much wider than those of the

former. *Kennedy, J.* has held that the transaction was not an amalgamation, but a sale of the plaintiff company's undertaking under clause 11 of its memorandum of association. But we say that the transaction was neither good as an amalgamation nor as a sale. An "undertaking" does not include uncalled capital, and therefore the call could not be made:

King v. Marshall, 33 Beav. 565.

[*DAVEY, L.J.* referred to *Re The Pyle Works Limited*, 62 L. T. Rep. N. S. 887; 44 Ch. Div. 534.] The term "undertaking" means the enterprise; the business as a going concern. A power to sell the undertaking does not give a power to sell the right to call on the shareholders for unpaid capital; an unpaid call is only a right, it is not an asset. Nor could the liquidator make the call, as it would be equally invalid if made by him. A call to be valid must be made for the purposes of the undertaking. [*DAVEY, L.J.* referred to *Re The Sankey Brook Coal Company Limited*, 22 L. T. Rep. N. S. 784; L. Rep. 9 Eq. 721; 10 Eq. 381.] As regards the second objection, no notice of the call has been given to the defendants in accordance with the articles of association of the plaintiff company. The plaintiffs do not dispute that the defendants have not been served with notice personally. It follows from that that no notice whatever can have been given. Notice to a deceased shareholder is not good, unless it is specially provided for in the articles. A call cannot be made on executors till they have become shareholders. The liquidator might make a call, but only for certain purposes: (Companies Act 1862, sect. 102.) He could not make this call, as the whole transaction was *ultra vires*. [*DAVEY, L.J.* referred to *Clinch v. The Financial Corporation Limited*, 19 L. T. Rep. N. S. 334; L. Rep. 4 Ch. App. 117.] That decision turned upon sect. 161 of the Companies Act 1862, and is, we submit, not applicable to the present case. If a shareholder dies, and his executors refuse to become members, the company must proceed under sects. 23 and 24 of the Act. The directors can forfeit the shares, but they cannot sue the executors. The money due for a call is a debt due from a member, but there is at this moment no member of the company in respect of these shares. No one can be sued for the debt. That is why it is now usual to provide in articles of association for giving notices to the representatives of deceased shareholders. There might be a difficulty in giving notice sufficient to support a forfeiture, as all notices have to be given to members. The articles in the present case may be imperfect; but they contain the bargain between the parties. The company ought to have amended the articles, and adopted the modern form. [*DAVEY, L.J.* referred to the note to clause 12 of Table A in Buckley on the Companies Acts, 6th edit. p. 461.] This company is not governed by Table A, and that observation does not apply here. [*Channell, Q.C.* referred to *Turquand v. Kirby*, 16 L. T. Rep. N. S. 260; L. Rep. 4 Eq. 123.]

Channell, Q.C. and *C. T. Mitchell*, for the respondents, were not called upon to argue.

LINDLEY, L.J.—I do not see any difficulty in deciding the first point—that the call was bad because it was made for purposes which were *ultra vires* of the company. This is an action brought by the liquidator of a company now in

APP.] NEW ZEALAND GOLD EXTRACTION CO. (NEWBERRY-VAUTIN PROCESS) v. PEACOCK. [APP.]

course of voluntary winding-up to enforce a call not made by him, but made by the directors before the commencement of the winding-up. The first point then is that it is invalid as being made for purposes which are *ultra vires*. That question depends upon what were the objects for which the company was formed. The provisions of the memorandum are in extremely wide terms, and, amongst others, are clauses 7 and 12. [His Lordship read them, and continued:] Whilst their shares were still not fully paid up the company agreed to sell their undertaking to the Newberry-Vautin, &c., Company; that is to say, the transaction in which they are engaged. It is said that the word "undertaking" does not include uncalled capital. Perhaps it does not, but, although there may be no power to sell uncalled capital as part of the undertaking, it is, nevertheless, one of the terms of the sale of the undertaking that the uncalled capital should be called up before the sale is completed. There is nothing *ultra vires* in that; there is no reason why they should not make that a condition of the sale; and I see no difficulty in that point at all. The next point is a purely technical one. This shareholder, Mr. Peacock, obtained, and was registered in respect of, 380 shares, and he died on the 15th Feb. 1889. At the time of his death his name and address were still on the register, and that address was the place to which notices were to be sent. The company were not informed of Mr. Peacock's death; if they had been it would have been their duty to rectify the register. On the other hand, Mr. Peacock's executors had no information that he had been the holder of these shares, and did not ascertain the fact for some time after the agreement for sale. After his death, and before the fact of his being a shareholder came to the knowledge of his executors, the call was made, and it is said that, he being dead, the directors could not make a call on him, and that, his executors not having been made members of the company in his place, there was no member in respect of his shares to whom notice could be given in accordance with the articles, and that consequently the call cannot be enforced against his estate. Notice of the call was sent addressed to him at his registered place of address, but it came back to the company marked "Gone away." The question is whether under these circumstances his executors are liable to pay the call out of his assets. Let us go by steps. He became a member, but his executors did not become members, and were not bound to do so against their will. The articles are so drawn that they do not provide for dead men, nor for notice to dead men, nor for notice to anybody in the place of dead men. It is said that it is part of the bargain between the shareholders and the company that, if a member dies, and the company are going on, and have no notice of his death, his estate cannot be called upon to pay calls. On the construction of the articles I think it is obvious that no such bargain was intended. We must put a reasonable construction on the articles, and I have no doubt that the key to the difficulty is to be found in the suggestion made by Mr. Buckley in his book on the Companies Acts (6th edit., p. 461), and that until notice of his death reaches the company the dead man, or his estate, continues to be a member. I have no doubt at all that that is the true construction of the articles.

In order not to make these articles absurd, we must hold that a deceased member remains a member until notice is given.

SMITH, L.J.—I agree, and I have nothing to add.

DAVEY, L.J.—I agree with the judgment and opinion which have just been expressed, and I agree with the reasons given for his decision by Kennedy, J. On the first point I should have been almost prepared to admit that the scheme might have been an amalgamation, and I only hesitate because I do not know the exact meaning of the word "amalgamation," and whether it must be a joining of two companies so as to form a third entity. If so, the scheme is not within clause 7; but I think it is clearly within the power of sale. The memorandum ought to be read in the widest possible way, and not so as to make this scheme *ultra vires* if it is otherwise unobjectionable. I quite agree that, if this is not an amalgamation, it is a sale within clause 11. The question is, whether the call is included in the sale. It has been held that the word "undertaking" does not include uncalled capital, and it would be *ultra vires* to sell the right of making calls to another company. But there is nothing to prevent the directors exercising their power of making calls and then selling the assets thus produced. Mr. Cozens-Hardy has quoted no authority against that proposition, and I do not see anything to make such a proceeding *ultra vires*. The second question is, whether article 133 can be read so as to include a deceased member, so that the company could serve him with notice in the way there provided. I do not think that, if they had notice of the death of the member, they could rely on service upon him at his registered place of address, and nothing that we say in this case touches that question. It is the duty of the representatives of a deceased member to give notice of his death to the company at the earliest possible opportunity; and if they want to go on treating him as still on the books, it is the duty of the executors to give notice to the company and send notice to them of their desire to become members in his place. It is to be observed that table A contains no such article as is said to be necessary, and it is surprising to me to hear that such a clause is requisite in order to make the estate of a deceased member liable. It would surprise most people to hear that without such an article you cannot make a call upon and enforce it against the estate of a dead member. I am prepared to adopt Mr. Buckley's suggestion, and to hold that a deceased member, or his estate, remains a member so long as his name continues on the register without notice to the company of his death.

Appeal dismissed.

Solicitors for the appellants, Dalston, Son, and Elliman.

Solicitors for the respondents, Snell, Sons, and Greenip.

CT. OF APP.]

Re BUCKLE; WILLIAMS v. MARSON.

[CT. OF APP.]

Wednesday, Dec. 6, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re BUCKLE; WILLIAMS v. MARSON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Direction for payment of annuities, "clear of all deductions whatsoever except income tax"—
Codicil—Direction for payment of annuities.
 "Free of legacy duty and every other deduction."

A testator, who died in Nov. 1886, by his will dated in Feb. 1877 devised and bequeathed his real and residuary personal estate to trustees upon trust (inter alia) to pay certain annuities, including one to the plaintiff; and he directed that all the annuities should be paid "clear of all deductions whatsoever except income tax." By a codicil to his will, dated in Feb. 1882, the testator directed that every legacy and other interest, as well derivable under his will as any codicil thereto, should be "free of legacy duty and every other deduction."

Held, that, the testator having thought proper to treat income tax as a deduction, there was no reason why it should not be so treated; and that therefore the plaintiff's annuity was payable free from income tax.

Decision of North, J. reversed.

By his will, dated the 16th Feb. 1877, Henry Buckle, after appointing executors and bequeathing certain legacies, devised and bequeathed all his real and all his residuary personal estate to trustees upon trust for sale, conversion, and investment as therein mentioned, and out of the proceeds to pay his debts, funeral and testamentary expenses and legacies, and to invest the surplus, and out of the annual income arising from such investment to pay certain annuities, including an annuity to a child of his brother, William Boyd Buckle. The testator then proceeded as follows:

And to such of the other children of my said brother, William Boyd Buckle, as and when they shall respectively attain the age of twenty-one years or be married, an annuity of 100*l.* to continue payable until the time when, under the directions and bequests hereinafter contained, the legacies or shares hereinafter given to them respectively will become payable, all the said annuities (except where otherwise directed) to be paid clear of all deductions whatsoever, except income tax, by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from the date of my decease, or other the time of their respectively becoming payable.

The testator made a codicil to his will, dated the 4th July 1879, not material to be mentioned. He made a second codicil, dated the 8th Feb. 1882, whereby he directed as follows:

And I expressly direct that every legacy and other interest, as well derivable under my will as any codicil thereto, shall be free of legacy duty and every other deduction.

The testator died on the 28th Nov. 1886.

The time when, under the directions contained in the will, the legacies and shares thereinafter given to the other children of William Boyd Buckle would become payable had not yet arisen; and as regarded the annuities there was nothing in the will contained, whereby they were directed to be paid otherwise than clear of all deductions whatsoever except income tax.

Alice Temple Williams (then Alice Temple Buckle) attained the age of twenty-one years on

the 28th Nov. 1886. She was one of the children of the testator's brother William Boyd Buckle, and was married to Frederick Sims Williams on the 1st Aug. 1889.

Since Alice Temple Williams had attained the age of twenty-one years the trustees of the testator's will had always paid her the annuity of 100*l.* in full, without any deduction on account of income tax or otherwise, but now threatened to deduct income tax from future payments of the annuity, and also to deduct from future payments a sum equal to the total amount of the income tax upon the annuity already paid.

An originating summons was thereupon taken out on behalf of Alice Temple Williams, against the executors and trustees of the will and codicils of the testator and Frederick Ainger Buckle, an annuitant under the will, for the determination of the question whether or not, upon the true construction of the will and codicils, the annuities by the will bequeathed to or in trust for the plaintiff and other annuitants ought to be paid free from any deduction in respect of income tax.

On the 5th June 1893 the summons came on to be heard before North, J. at chambers, when his Lordship made an order declaring that the plaintiff's annuity was not payable free from income tax, being of opinion that the case was distinguishable from *Turner v. Mullineux* (1 J. & H. 334).

From that decision the plaintiff now appealed.

G. P. C. Lawrence for the appellant.—No doubt the gift of an annuity "free of legacy duty and every other deduction" would not make it free of income tax, income tax not being considered as a deduction:

Gleadow v. Leetham, 22 Ch. Div. 269, 271.

But in the present case the testator has explained himself, the words "except income tax" in the will showing that he included income tax among deductions. The distinction taken by North, J. is not well founded. The codicil shows that the testator had the will before him when he made it, and the two must be read together. The case, therefore, is governed by

Turner v. Mullineux, 1 J. & H. 334.

[DAVEY, L.J. referred to Theobald on Wills, 3rd ed. p. 137.]

W. B. Coltman for the respondents.

LINDLEY, L.J.—I am of opinion that the argument of the appellant is well founded. Although a direction to deduct income tax from an annuity is not general, yet if a testator thinks proper to treat income tax as a deduction, there is no reason why it should not be so treated. In his will the testator in the present case says that the annuitants are to be paid their annuities "clear of all deductions whatsoever except income tax." And in his codicil he says that the annuities are to be "free of legacy duty and every other deduction." In my opinion he treated income tax as a deduction of which the annuities were to be free. The case is governed, if at all, by *Turner v. Mullineux* (*ubi sup.*) rather than by *Gleadow v. Leetham* (*ubi sup.*). I think that the appeal must succeed.

SMITH, L.J.—I concur. It is quite clear that the testator treated income tax as a deduction; and therefore the plaintiff is entitled to have her annuity paid to her free from income tax.

DAVEY, L.J.—I am of the same opinion.

Appeal allowed.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

BOWES v. PRESS.

[CT. OF APP.]

Solicitors for the appellant, *Hollams, Sons, Coward, and Hawksley.*

Solicitors for the respondents, *Marson and Son.*

Nov. 11 and 13, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

BOWES v. PRESS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Employer and workman—Conduct of workman amounting to absenting himself from employment—Breach of contract—Damages—Employers and Workmen Act 1875 (38 & 39 Vict. c. 90).

The contract of service of a workman employed in a colliery was determinable on fourteen days' notice on either side.

One of the rules of the colliery provided that the banksman should regulate the manner in which persons should enter and leave the cage, subject to the direction of the manager.

A notice was sent to the owners by the workmen belonging to the trade union that after fourteen days from that date all non-unionists must descend and ascend the colliery by themselves. On the expiration of this notice several of the workmen refused on three following days to go down the pit to work in the same cage as a non-unionist, when requested to do so by the manager. The cage, which held eight men at one time, was then sent down with the non-unionist alone. When the next cage came up, a few seconds later, the unionists were willing to go down in it, but the manager refused to allow them to do so. The employer then summoned the men under the Employers and Workmen Act 1875, claiming damages in consequence of their having absented themselves from their employment on those three days without giving the required fourteen days' notice.

Held, that the men had been guilty of a breach of contract, and that the refusal to enter the cage being a preconcerted course of action, they did for the three days refuse to go to their work except on terms which they had no right to impose, and the employer was entitled to substantial damages.

Decision of Divisional Court (Day and Lawrance, JJ.) affirmed.

THIS was a case stated by justices for the county of Durham, under the provisions of 20 & 21 Vict. c. 43, and of the Summary Jurisdiction Act 1879, s. 33.

At petty sessions held for the West Division of Chester Ward, in the county of Durham, on the 29th Dec. 1892, a complaint under the Employers and Workmen Act 1875 was made by John Bowes and Partners Limited, a firm of colliery owners, against Robert Press, claiming the sum of 15s. damages for that he, being a workman, and having entered into a contract of service with them as his employers, determinable by fourteen days' notice on either side, wrongfully absented himself from his employers' service, without having given such notice as is required, on the 20th, 21st, and 22nd Dec. 1892.

On the hearing of the complaint, with the consent of the justices, pursuant to rule 3 of the

Employers and Workmen Rules 1886. Press made a counter-claim for 15s. damages against Messrs. Bowes and Partners, on the ground that they had wrongfully refused to allow him to follow his lawful employment on the same day without having given him the required notice.

At the hearing it was agreed that the case of Robert Press should be taken first, and that the decision should bind about thirty other cases arising out of similar circumstances, and that the damages should be a nominal sum of 5s. only on either side, and that the evidence adduced for the 20th Dec. should be taken as applying to the 21st and 22nd Dec.; the same conduct on both sides having taken place on each of those days.

The only evidence given was that of Thomas Bowes, the under-manager at the Pontop Colliery, from which it appeared that Robert Press was employed as a hewer at that colliery on the usual conditions of fourteen days' notice to terminate the hiring being required on either side. He was employed in the foreshift, which goes down at 4 a.m. Press and the thirty-one other men summoned were members of a trade union.

On the 1st Dec. the following letter was sent to the manager of the colliery from the Pontop Lodge of the Durham Miners Association:

We, the workmen of Pontop Colliery do hereby give you fourteen days' notice that after the expiration of this notice all non-unionists must descend and ascend by themselves.—Signed on behalf of the workmen of Pontop Colliery, J. H. THOMPSON, Miners' Secretary.

On the 20th, 21st, and 22nd Dec. 1892, Press and the other men were at the pit's mouth at 4 a.m. The pit was all ready for work, and the cage was ready for the men to go down, but no one went to get in. After a few seconds a man of the name of James Embleton, who was a non-unionist, went into the cage. Eight men ought to go down at a time, and Bowes requested the unionists to go down the pit. They all refused to get into the cage, and said they would not get in with a non-unionist. After they refused, Bowes told the banksman to send Embleton down, which was done. When the next cage came up a few seconds later some of the men went forward to get into it, but Bowes told them that they could not get down for that shift. The men remained from 4 a.m. until 10 a.m., but Bowes refused to allow them to go down.

One of the rules of the colliery was as follows:

Each banksman shall have control of the shaft top and each onsetter of the shaft bottom shall not allow any person to descend or ascend without permission from the proper authority. He shall regulate, subject to any directions of the manager or under-manager, the order in which persons shall enter and leave the cage and see that the authorised number only descend or ascend at one time, and shall not allow any person to descend in a state of intoxication, nor allow any intoxicating drink to be taken down the pit, except by special permission.

On the part of Messrs. Bowes it was contended that Press absented himself from his employer's service by refusing to descend in the cage as ordered by the under-manager, and that Messrs. Bowes were entitled to damages, and also that the contract was not broken on their part.

On the part of Press it was contended that there was no evidence that he had absented himself from his employers' service, and that Messrs. Bowes had determined the contract, and

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

[CT. OF APP.]

BOWES v. PRESS.

[CT. OF APP.]

could not both determine the contract and sue for damages.

The justices, being of opinion that Press did absent himself from his employers' service, and that Messrs. Bowes did not determine the contract, ordered Press to pay 5s. damages and 4s. 6d. costs, and dismissed the counter-claim.

The question of law stated for the opinion of the court was, whether the justices were right.

The case came before a divisional court (Day and Lawrence, JJ.) on the 31st May 1893.

Tindal Atkinson, Q.C. and Atherley Jones for the workman.

Robson, Q.C. and Willes Chitty for the employers.

DAY, J.—I am clearly of opinion that the justices were right in their decision in this case. The question is solely whether the appellant and his fellow-workers absented themselves from the service of their employers by their conduct. He and the other thirty-one men were on duty to go down the pit on the first shift. It was necessary that they should be taken down in the cage or cages provided by their employers. A cage was so provided. It would have held eight men in relays. All the thirty-three men were invited to take such places as were vacant for them in the cage. They all refused—whether singly or in a body is immaterial. Each and every one of them had the option of fulfilling their duty of service at the right time—that is, when their employers had provided for them a safe and proper cage. The employers were not bound, after the men had refused to go into the cage, as requested, to provide any other convenience for them by which to reach their work than that offered, or even to pull up the cage again for them at all. There was a reasonable convenience provided for them at the proper time which they refused to take advantage of. That is equivalent to the men absenting themselves from work when in the service of their employers. Sufficiently convenient access to their work is provided for them, of which they refused to avail themselves. That, in my opinion, amounts to an absenting of themselves. No doubt other courses were open to the employers, but they have chosen to take such legal and proper course as they were entitled to do.

LAWRENCE, J.—I am entirely of the same opinion.

From this decision Press appealed.

At the hearing of the appeal it was agreed that the case should be treated as amended so as to raise the question whether the damages ought to be substantial or merely nominal, it being admitted that there had been a breach of contract on the part of the men.

Tindal Atkinson, Q.C. and Atherley Jones for the appellant.—The men were kept from work by the conduct of the under-manager, who refused to allow them to go down in the next cage, which could have started ten seconds later than the one in which Embleton went down alone. The employers only suffered damage between the time the first cage arrived at the bottom of the pit and the time that the men would have arrived there if they had been permitted to go by the second, which was a period of a few seconds. The breach of contract on the part of the men was the natural result of the employer refusing to allow them to go down at all, and this act of the employer was

not the natural result of the men refusing to go down when they ought. If the employer therefore is entitled to any damages at all, they are merely nominal. The men might have been dismissed on the spot, or have been prosecuted under the Coal Mines Regulation Act. They were not dismissed, but refused access to their employment, and the employer therefore is not entitled to damages for their absence. The employer was guilty of a breach of contract in refusing to allow them to go to their work.

Robson, Q.C. and Willes Chitty for the respondents.—The employer could only proceed against the men under the Coal Mines Regulation Act for breaches of rules, discipline, &c., relating to the safety of the mine. The masters here are entitled to substantial damages for the breach of contract by the men. They deliberately refused, and announced their intention to continue to refuse, to go down with a non-unionist. It is said that the masters were bound to conduct themselves in such a way as if possible to reduce the damages. They were only bound to act reasonably. They were only bound to give them an opportunity of going down at the commencement of each shift. They provided a proper cage at the proper time, and were under no contractual obligation, nor under an obligation in order to mitigate the damages, to provide another cage. It is not reasonable to say that, in order to save the 5s., which they have obtained as damages, they were bound to break through the regulations of the pit, and that at the instance of a tortfeasor. They could not offer further facilities to the men except by condoning their breach of contract. The magistrates have found that they acted reasonably by giving them 5s. damages. The men had no right to insist on a second cage being provided for them, and therefore they absented themselves from their work:

Tomlinson v. Ashworth, 50 J. P. 164.

Tindal Atkinson in reply.

LINDLEY, L.J.—At our suggestion the counsel on both sides have agreed to treat the case as amended, so as to raise the question which is really the point for us to determine; that is to say, they have agreed that we shall not be bound by the expression "absenting himself from his employers' service," which is to be found in the summons, but that we should treat it as a question of breach of contract. I attach no importance myself to that particular expression, although I think the magistrates did, but I shall explain my views upon that presently. Now, the facts appear to be as follows: The colliery owners carry on business under contracts with their men determinable at fourteen days' notice, and subject to certain regulations under which the owners have power not only to dismiss the men if they disobey orders, but also to suspend them. Rule 84 requires the men, in going up or coming down the cages in the mine, to obey all the orders of the banksman. Now, it appears, for reasons which I do not go into, that the men thought it right, on the 1st Dec. 1892, to send to the colliery owners this notice: "We, the workmen of Pontop Colliery, do hereby give you fourteen days' notice that, after the expiration of this notice, all non-unionists must descend and ascend by themselves." Now, I pause there to ask what right the men had to send that notice. What right

CT. OF APP.]

BOWES v. PRESS.

[CT. OF APP.]

had they to impose that as a condition of their service? It is not in accordance with their contract, and it was no part of their contract that they should be at liberty to say what they do say here, "that all non-unionists must descend and ascend by themselves." On the contrary, it is in the teeth of the contract which embodies the regulations to which I have referred. They had no right to take that course, and to assert the power of dictating to the masters how the men should ascend and descend. However, they gave that notice, and, accordingly, after the expiration of those fourteen days, some of the miners came to this pit, and there being a non-unionist who got into the cage to go down the pit, they would not go. Now, pausing there for a moment, was that in accordance with the contract or not? It is clearly a breach of contract, and that is so clear that their own counsel could not hope to argue the contrary. Then what is the consequence of that? The moment that one non-unionist had got in (it does not appear that there was any other non-unionist who wanted to go down), and the cage came up again, the men who had refused to go down with the non-unionist then said, "Now we are ready to go down," but the under-manager then declined to allow them to go down, and that happened on three successive days. Now the question which arises is this: Whether the offer of the men to go down under the circumstances, and at the time when they made the offer, has reduced their breach of contract to one which in point of time endured only for a moment or two, and in that point of view the masters would be entitled only to nominal damages; or whether it is a more serious continuing breach, in which case it is agreed that the damages shall be 5s. as assessed by the magistrates. Now, it is upon that particular point the only real difficulty turns, and it appears to me, having regard to the fact that this was a preconcerted course of action, that the real solution of the problem presented to us is this, that the men did absent themselves, not that I attach much importance to that particular expression, but for three days they did refuse to go to their place of work in accordance with the rules and terms of their contract. I think, having regard to the preconcerted notice, and the absence of all right on their part to impose those terms, that the true effect of what they did was to say, "We will not go to our work according to our contract;" and if so, then it appears to me that the view taken of the damages was quite right. With respect to the counter-claim of Press, it appears to me, I confess, to be absolutely unfounded. The counter-claim is based on the theory that there has been some breach of the contract by the master. The answer to that is, that there is no breach of contract, absolutely none. I think that the counter-claim is hopeless upon those grounds. The real difficulty is, whether on the breach of contract the masters are entitled merely to nominal damages or to substantial damages. For the reasons I have given, I think they are entitled to substantial damages. This case has been fought out like a great many other cases; it has been a struggle for mastery. It appears to me that the men deliberately put themselves in the wrong, and that they had continuously and persistently refused to work except upon terms

which they had no right to dictate. The appeal must be dismissed with costs.

SMITH, L.J.—This is a case stated by justices, and it has been well argued in this court. There are two questions arising, as it appears to me, for determination. The first is, whether upon the facts stated, the men have committed a breach of contract with their masters; in other words, whether they have absented themselves from their work, and so broken the contract? There is a cross-claim by the men against the masters, in which they claim damages on the basis that the masters have committed a breach of contract with them. The whole of this controversy may be said to commence with a notice which the men sent to the masters on the 1st Dec. 1892. [His Lordship then read the notice.] Now, there is not a pretence that they had any right to send any such notice. That is conceded at the bar. The meaning of that notice, as it appears to me, is this: "As long as you have non-unionists going up and down your shaft, so long will we not obey the orders you are by law entitled to give us." Now, that notice having been given on the 1st Dec., the first engagement between the men and the masters took place on the 20th Dec. The men, to the number of about thirty-three, came to the pit bank on the morning of that day. It was the men's duty to be there to go down by the 4 a.m. shift, and the cage, which will hold eight at a time, was ready for them. The first cage having a non-unionist in it, the other men one and all refused to enter that cage. They carry out distinctly by their act on the 20th Dec. what they have announced to the masters on the 1st Dec. Not a man went down. The same thing happened on the morning of the 21st, and the same thing happened on the morning of the 22nd, and now the question is asked upon these facts, Is there evidence to establish that these men absented themselves from their work, or, in other words, refused to obey the lawful orders of their masters? I can only answer that in one way, that they did absent themselves from their work. There is ample evidence to support that. The justices so found, and stated a case upon it for the decision of the court, and my learned brothers, Day and Lawrance, J.J., have so found, and in my judgment their finding is correct. If that be right, the other question which has been raised in the course of argument in this case in my judgment does not arise, because, assuming that there be evidence that these workmen did absent themselves from their employers' service, then it is agreed that the damages shall be the sum of 5s., which I take in this case to be, and hold to be, a sum of 5s. for the three days over which the controversy arises. In this court an attempt was made to show that it was 5s. a day; but I cannot read this case without coming to the conclusion that the fine imposed upon the men was at the rate of 1s. 8d. per day, that is to say, 5s. for the three days. Therefore the question as to what would be the measure of damage, if there had been no case of absenting themselves from their employers' service, and only a breach of contract continuing for a short period of time, does not arise; and therefore I need not go into that question. But, in my judgment, counsel put the law truly, that where a person has had a contract broken with him and he sues for damages, he is only bound to

do what is reasonable to mitigate the damages, and he is not bound to do what is unreasonable. I abstain from saying whether it is reasonable or unreasonable in a case like this for a master, where there is a pitched battle between him and his men, to give facilities to the men to go on perpetually breaking the contract. I say nothing about that. Now I come to the other cause of action; that is the claim by the men against the masters. The men cannot substantiate any claim against the masters unless they make out a breach of contract on the part of the masters. What contract have the masters broken? The masters, I apprehend, were bound to provide a cage or cages for the men to go down to their work for this 4 a.m. shift on the morning of the 20th Dec. The cage or cages were provided, and the men one and all declared that they would carry out their intention, and that they would not go down with the non-unionist; either go down or come up the shaft. What duty, after such a refusal as that, was there on the masters to provide other cages to accommodate the men without non-unionist men? No duty at all. It is quite true there were cages in the ordinary course of business that would be up and down in the course of a few minutes, but there was no obligation on the masters to provide them, and it is impossible to say, in my judgment, that the masters in this case committed any breach of duty towards their men. Therefore, the action by the men against the masters fails, and they are not entitled to the damages they sue for, namely, wages for the 20th, 21st, and 22nd Dec.

DAVEY, L.J.—The question upon which our opinion is asked is, whether “we were right in holding that on the 20th, 21st, and 22nd Dec. 1892 the appellant did absent himself from his employers’ service by refusing to descend the pit in the cage which the respondents’ under-manager thought proper for him to descend?”—whether the appellant was thereby guilty of a breach of contract entitling the respondents to recover damages as aforesaid; or whether the contract was determined by the respondents, and the appellant was entitled to recover damages for breach thereof. Now it is admitted that there has been a breach of contract, and it has been very fairly and properly admitted that the act of the unionists in endeavouring to force their rule upon the masters could not be justified in this court. But the question which we have to consider is, whether there was on those three days, which are mentioned in the paragraph I have read, such an absenting of the appellant from his employment as would entitle the employers to substantial damages. Now I must confess that I have found this a question of very great difficulty. It seemed to me at first a stretch of language, and a stretch of language which I was not disposed to make, to say that a refusal by the workman at four o’clock in the morning to descend in the cage indicated by the banksman, but followed ten seconds afterwards, we were told, when the next cage came up, by a willingness to go down to his work and to do the ordinary daily work, constituted an absenting himself from his employment during the continuance of a shift. But I must also confess that further consideration of the facts and the proper inference to be drawn from the facts of this case, and Mr. Robson’s very able argument, have removed that

impression. I agree with Lindley, L.J. that the key to the unlocking of the problem which we have to answer is, that the whole course of conduct on the part of Press was founded, not on a casual refusal to go down in the particular cage, but on a settled policy and a preconceived course of action, preconceived and agreed with other members of the trades union. There was, therefore, during the whole three days, a continued refusal to work except upon terms which the appellant had no right to impose upon the company, and during the whole of those three days, therefore, he must be taken, in my opinion, to have refused to work in accordance with his contract. Whether that is properly described as “absenting himself,” I do not know, but it is substantially the same thing. It is a refusal to work in accordance with the contract; not an absolute refusal, but refusal to work in accordance with the contract. That being so, I am of opinion we must answer this question by saying that the appellant did absent himself from his employers’ service in the sense which I have said I put upon those words. If so, it appears to me that the damages are settled for us. I agree that the point which has been argued with so much ability on both sides, as to whether the damages should be nominal or substantial, does not really arise, if we once come to the conclusion that there was a continued refusal to work according to the contract during the three days. I will not express any opinion upon the nice question as to the exact obligation upon a person who complains of a breach of contract—what he is exactly bound to do in mitigation of damages. I will, however, observe that one cannot help seeing, after Mr. Robson’s argument, that the mitigation of damages in this case by employing the men, would really have involved allowing them to work on conditions different from those on which they contracted to work. On the point, as to the counterclaim, I agree with what has been said by the other members of the court, and I agree in the result.

Solicitors: *Crossman and Prichard*, agents for *H. Forrest*, Durham, and for *Cooper and Goodger*, Newcastle-on-Tyne.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 11 and 24.

(Before STIRLING, J.)

Re TALBOT'S TRADE MARK. (a)

Trade mark—Rectification of register—Descriptive word—Invented word—Persons aggrieved—Delay—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64, sub-sect. 1 (c), ss. 73, 90—Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 10, sub-sect. 1 (d) (e).

The applicants had since the year 1869 manufactured, and still manufactured, a preparation or dressing for softening harness, &c. and all kinds of leather, called “Molliscorium.” This name they in 1876 registered for this preparation in Class 50 as an old mark. The respondent in 1886 registered in the same class, as a new mark, a label, with the distinctive word “Emolliololum,”

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re TALBOT'S TRADE MARK.

[CHAN. DIV.]

for a fluid preparation for rendering harness, &c. and all kinds of leather, waterproof and supple. Held, that "Emolliolorum," being likely to convey to an ordinary English mind the notion of a preparation for softening purposes, is descriptive and not a "fancy word" within the meaning of sect. 64, sub-sect. 1 (c) of the Patents, &c. Act 1883, as settled by the Court of Appeal in *Re Van Duzer's Trade Mark* (56 L. T. Rep. N. S. 286; 34 Ch. Div. 623). That the fact that the word is an invented word within sect. 10, sub-sect. 1 (d) of the Patents, &c. Act 1888 does not entitle it to registration, if it is descriptive, and consequently falls within the prohibition in sect. 10, sub-sect. 1 (e) of the same Act.

That the applicants being in the same way of business as the respondents and liable, it might be, to be hampered in their future business by the respondent's mark remaining on the register, were "persons aggrieved" within sect. 90 of the Patents, &c. Act 1883.

THIS was a motion by Messrs. Vanner and Prest, carrying on business as oil merchants, to rectify the register of trade marks by removing from it trade mark No. 58,922, registered in Class 50 in the name of the respondent James Talbot, on the ground (1) that it was calculated to deceive, and (2) that it was a descriptive word which ought not to be on the register.

The applicants had from the year 1869 manufactured, and were still manufacturing, a preparation or dressing for softening, preserving, and waterproofing all articles of leather, called "Molliscorium," which they alleged had gained a wide reputation under that name. This name they registered on the 1st June 1876 in respect of goods in Class 50 as an old mark in use for two years and upwards before the 25th May 1876, and they duly renewed the registration before the 1st June 1890.

The respondent, a manufacturing chemist carrying on business at Salisbury, applied on the 15th Nov. 1886 for registration, in the same class, as a new mark, of a label of which the word "Emolliolorum" was the distinctive feature, and it was registered in due course, the manufacture being described as a "fluid preparation for rendering harness, reins, saddles, bridles, carriage hoods, aprons, and every description of leather, thoroughly waterproof and supple." In 1890 the applicants' solicitors complained that the respondent's mark was calculated to deceive, but the respondent refused to have the register rectified or to meet their views in any way. No further step was taken till the 19th Nov. 1893, when the applicants' solicitors wrote to the respondent asking whether he would consent to rectification of the register, and stating that in the event of his refusal they were instructed to commence legal proceedings. The respondent refused, and the applicants, on the 4th Dec. 1893, served notice of the present motion.

The evidence of Mr. Prest, one of the applicants, stated that the respondent's preparation was sold to the same classes of persons as that of the applicants, and at a cheaper rate; that the resemblance of name was calculated to deceive the customers of the applicants, and that he feared the respondent's preparation was often supplied when the applicants' was asked for.

Buckley, Q.C. and Stokes for the motion.—The respondent's mark ought not to have been

registered under sect. 73 of the Act of 1883. "Emolliolorum" so closely resembles "Molliscorium" as to be calculated to deceive. We, being persons aggrieved, are entitled to have it expunged under sect. 90:

Eno v. Dunn, 63 L. T. Rep. N. S. 6; L. Rep. 15 App. Cas. 252;

Slasenger and Sons v. Feltham and Co., 6 Pat. Rep. 531; 5 Times L. Rep. 169, 365;

Re Grossmith's Trade Mark, 60 L. T. Rep. N. S. 612;

Re The Trade Mark of the Société Anonyme des Verreries de l'Etoile, 66 L. T. Rep. N. S. 703; (1894) 1 Ch. 61;

Re Goodall's Trade Marks, 42 Ch. Div. 566.

"Emolliolorum" is descriptive and means a softening substance. On this ground it should not be on the register, either under sect. 64 of the Act of 1883, or sect. 10 of the amending Act of 1888:

Re Myerstein's Trade Mark, 62 L. T. Rep. N. S. 526; 43 Ch. Div. 604;

Richards v. Buicher, (1891) 2 Ch. 522;

Waterman v. Ayres, 59 L. T. Rep. N. S. 17; 39 Ch. Div. 29;

Thompson v. Montgomery; *Re Joule's Trade Marks*, 41 Ch. Div. 35;

Re Paine and Co.'s Trade Marks; *Paine and Co. v. Daniel and Sons' Breweries Limited*, 68 L. T. Rep. N. S. 801; (1893) 2 Ch. 567;

Sebastian's Law of Trade Marks, 3rd ed. p. 401;

Lawson's Patents, Designs, and Trade Marks Acts, 2nd ed. p. 309.

[STIRLING, J. referred to *Re J. B. Palmer's Trade Mark*, 50 L. T. Rep. N. S. 30; 24 Ch. Div. 504.]

The respondent might, if his mark remained on the register, make use of the fact that it is there adversely to us, and we are therefore entitled to have it removed:

The Great Tower Street Tea Company v. Smith, 6 Pat. Rep. 165, 173; 5 Times L. Rep. 232.

Graham Hastings, Q.C. and C. E. E. Jenkins for the respondent.—Assuming that "Emolliolorum" is merely a descriptive word, the applicants cannot complain, for they are not persons aggrieved within sect. 90 of the Act of 1883. The respondent's mark is not sufficiently similar to theirs to prejudice them:

Re Lambert's Trade Mark, 61 L. T. Rep. N. S. 138; W. N. 1889, p. 65; 6 Pat. Rep. 344.

[STIRLING, J.—Bowen, L.J. says, in *Paine and Co. v. Daniel and Sons' Breweries*, that when the attention of the court is called to an entry which cannot in law be justified it may be the duty of the court to expunge the entry whatever the demerits of the applicants may be.] It is not sufficient to say that it ought never to have been on. They must show that they will be embarrassed by its remaining there. [STIRLING, J. referred to *Re Powell's Trade Mark*, 69 L. T. Rep. N. S. 60; (1893) 2 Ch. 388.] "Emolliolorum" is not descriptive; it may be defended as a "fancy word" within sub-sect. 1 of sect. 64 of the Act of 1883, for to an ordinary Englishman it would be meaningless. This mark has been on the register nearly five years. The fact that it is there is *prima facie* evidence that we are entitled to it.

Stokes in reply.—The respondent's trade mark is bad, and the applicants, as they are in the same line of business, are aggrieved by its continuance on the register;

Re Ainalie and Co.'s Trade Mark, 4 Pat. Rep. 212.

The applicants may be restricted in carrying on their business; they may wish to register a mark in connection with their goods, and be unable to do so, so long as the respondent's mark remains

CHAN. DIV.]

Re TALBOT'S TRADE MARK.

[CHAN. DIV.]

on the register and the applicants run the risk of infringing it:

Re The Apollinaris Company's Trade Marks, 63 L. T. Rep. N. S. 162; 65 L. T. Rep. N. S. 6; (1891) 2 Ch. 186;

Re Powell's Trade Mark (ubi sup.).

If this case is within the Act of 1888, sect. 27, providing that no liability incurred before the commencement of the Act shall be affected, saves us, for the respondent was liable to have his mark expunged. Chitty J., in *Re Burgoyne's Trade Mark* (61 L. T. Rep. N. S. 39; 6 Pat. Rep. 227), was of opinion that the Act of 1888 was not retrospective so as to apply to a mark to register which an application was made before the coming into operation of that Act, and the applicant there had acquired a right to registration subject to opposition and the like; but, in *Re Baschiera's Trade Mark* (5 Times L. Rep. 580; 33 Sol. J. 469), his Lordship regarded the point as still open, and did not then decide it;

Lawson's Patents, &c. Acts, 2nd ed. p. 408;

Sebastian's Law of Trade Marks, 3rd ed. p. 426.

Jan. 24.—STIRLING, J., after stating the facts, continued as follows:—The grounds on which the mark is sought to be removed from the register are (1) that it is calculated to deceive, and (2) that it is a descriptive word which ought not to be on the register. As to the first ground, I cannot treat it as established. No explanation is given of the long delay since the first complaint was made in 1890; and no evidence is given of anyone having been deceived during the seven years which have passed since the respondent's mark was first registered. I am unable, therefore, to make any order on the first of these grounds. The second requires more consideration. In support of it, reliance is placed on the law laid down by the Court of Appeal in *Thompson v. Montgomery (ubi sup.)* and *Paine and Co. v. Daniel and Sons' Breweries (ubi sup.)*. In both these cases, actions brought by the owners of registered trade marks were met by motions on the part of the defendants for the removal of the trade marks alleged to be infringed. In the former case the court, although of opinion that the defendant had been guilty of fraudulent conduct, nevertheless acceded to his application for the removal of one of the plaintiff's trade marks. The ground of the decision is thus stated by Lindley L.J.: "We have given the defendant his rights in that respect, and we have given them not for his sake—at least I have not—but because it was the duty of the court when its attention was called to the improper entry upon the register to rectify upon an application being made; and, for the purpose of keeping the register right, I have come to the conclusion that we ought to rectify it." In the second case the application failed, but Bowen, L.J., in giving his judgment, made the following observations which are of great importance: "The purity of the register of trade marks—if one may use the expression—is of much importance to trade in general, quite apart from the merits or demerits of particular litigants. If on a motion like the present the attention of the court is called to an entry on the register of a trade mark which cannot in law be justified as a trade mark, it seems to me that the court's duty may well be, whatever the demerits of the applicant, to purify the register and to expunge the illegal entry in the interest of trade, as was done in the 'Stone Ale' case (*Thompson v. Montgomery*). As a rule

the court, on being seised of the matter, would doubtless put an end to the existence of a trade mark which could not possibly be justified by law." I have then to inquire whether the respondent's mark is one whose existence cannot be justified by law. At the time when it was registered it could only be justified on the ground that it was (in the terms of sect. 64 of the Act of 1883) a "fancy word." The meaning of "fancy word" was settled in *Re Van Duser's Trade Mark* (56 L. T. Rep. N. S. 286; 34 Ch. Div. 623), and the definition there given was that it must either have, to ordinary English people, no meaning (like "Eureka" or "Aeilyton") or, if it had any meaning at all, it must be obviously not intended to be descriptive. It has since been decided, in accordance with this definition, that the word "Reversi" could not be registered as a trade mark for a game (*Waterman v. Ayres (ubi sup.)*), and it was intimated by Kay, J. that the word "Emollio" ought not to be registered as a trade mark for toilet cream: (*Re Grossmith's Trade Mark (ubi sup.)*). It is very possible that an ordinary Englishman would not entirely understand the composition of the word "Emolliolorum," but I think it would convey to his mind the impression that the substance so designated would act by softening the articles to which it was intended to be applied, and consequently it is descriptive. In my opinion, therefore, it is not a "fancy word" within the definition given in *Re Van Duser's Trade Mark (ubi sup.)*. That case having been decided by the Court of Appeal in 1887, an Act was passed in the following year (51 & 52 Vict. c. 50) by which the definition of a trade mark capable of registration was altered. According to this amending Act (sect. 10) a mark may be registered if it is "(d) an invented word, or words; or (e) a word, or words having no reference to the character or quality of the goods, and not being a geographical name." It was contended that this Act does not require that an invented word shall not have any reference to the character or quality of the goods, and consequently that an invented word may now be registered, although intended to be descriptive. I confess that, at the hearing, I was favourably impressed by this argument; but I find that it has already been considered and rejected by Kay, L.J., when a judge of first instance, in *Re Meyerstein's Trade Mark (ubi sup.)*. In that case the question was raised as to the registration of the word "Satinine," and it was proposed to register it, in respect of the goods in Class 47, in the third schedule to the Trade Mark Rules 1883, comprising "starch, blue, and other preparations for laundry purposes." The argument used was, that under the old section it was necessary that a word, to be registered as a trade mark, should be a "fancy word," but that under the late Act it was sufficient if the word was an "invented word," or "a word having no reference to the character or quality of the goods." Kay, J. said: "This is a word which describes the quality of the goods; and there is certainly little invention in the matter, for the only invention is putting at the end of a common word 'satin'—which brings to every man's mind in a moment the notion of a glossy surface—the common conclusion 'ine,' which one finds in 'saline,' 'saccharine,' and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of

CHAN. DIV.]

Re WHITEHEAD; PEACOCK v. LUCAS.

[CHAN. DIV.]

invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitations which the decisions have put on the former Act, that you cannot possibly use any word, fancy or otherwise, if it is a descriptive word." And then he goes on to say that the word "Satinine," was descriptive. I think I am bound to follow that decision, and therefore I have not got to consider the question of the effect of sect. 27 of the Act of 1888, which provides that nothing in the Act shall affect the validity of any act done, right acquired, or liability incurred, before the commencement of the Act. In my opinion, the respondent's mark ought not to be on the register. It is said, however, that the applicants are not persons aggrieved within the meaning of sect. 90 of the Act of 1883, and consequently that no order for the rectification of the register could be made at their instance. On this question, the recent decision of the Court of Appeal in *Re Powell's Trade Mark* (*ubi sup.*) has a most material bearing. [His Lordship very fully considered that case, and proceeded:] Applying that to the present case, the applicants here are persons who make a substance, to which they give the name "Molliscorium," just as in that case the applicants appear to have manufactured an article, to which they gave the name of "London Relish." So far as I can see, the applicants may hereafter, in the development of their trade, wish to apply the name "Emolliolorum" to some substance of their manufacture (similar to, but not identical with, their "Molliscorium"), and if they can honestly do so, they have a right, in the words of Bowen, L.J., to have that door left open to them. In my judgment, therefore, the motion succeeds, and I make an order in the terms of the notice of motion; but, having regard to the great delay, and the failure of one of the grounds on which it is based, I make no order as to costs.

Solicitors: G. S. Warmington and Co.; Taylor, Hoare, and Box, for Nodder and Trethowan, Salisbury.

Saturday, Jan. 13.
(Before STIRLING, J.)

Re WHITEHEAD; PEACOCK v. LUCAS. (a)

Administration—Legacies vested but not payable until future date—Discretionary annuity—Funds set apart to answer legacies and annuity—Residuary bequest—Tenant for life and remainderman of residue—Income of funds until payment—Capital or income.

The income of a fund set apart to answer a legacy vested but not payable until a future date falls into the residue as capital, and must, as between the tenant for life and the remainderman of the residue, be invested, and the income only arising from such investment paid to the tenant for life.

Crawley v. Crawley (7 Sim. 427) followed.

Allhusen v. Whittell (16 L. T. Rep. N. S. 695; L. Rep. 4 Eq. 295) distinguished.

The unapplied income of a fund set apart to answer an annuity payable at the discretion of trustees belongs to the tenant for life of the residue as income.

Cranley v. Dixon (29 L. T. Rep. O. S. 119; 23 Beav. 512) followed.

(a) Reported by W. IVIMY COOK, Esq., Barrister-at-Law.

ORIGINATING SUMMONS.

Sarah Allen Abbott by her will, dated the 6th Dec. 1890, after appointing T. Peacock and H. A. Dowse executors and trustees thereof, devised and bequeathed to them all her real and personal estate upon trust to sell and convert, and, after payment thereof of her debts and funeral and testamentary expenses and the legacies and annuities thereby given, to invest the residue as therein mentioned. Then, after giving certain specific legacies, the testatrix bequeathed to her stepson, Samuel Thomas Abbott, an annuity of 50*l.* a year during his life, conditionally on his not returning to Europe or until he should assign, alien, charge, incur, or by bankruptcy, insolvency, or otherwise, lose the personal benefit of the same or any part thereof, and so that this annuity should be for his personal maintenance only, and for no other purpose whatever. And she gave to her executors and trustees free power and authority in their uncontrolled discretion to pay the said annuity from time to time in such manner in all respects as they might think fit, or to withhold and discontinue payment of the same whenever from time to time they might think fit in their own absolute discretion, and without being compelled to assign or give any reason for the exercise of such discretion either to the said Samuel Thomas Abbott or to any other person claiming any interest, beneficial or otherwise, under the trusts of that her will. And the testatrix directed her trustees to stand possessed of the residue of her real and personal estate upon the following trusts:

I give, devise, and bequeath the sum of 3500*l.* out of the same to each of the following children of my late dear husband, Samuel Abbott, viz. E. H. Abbott, E. W. B. Abbott, F. W. P. Abbott, S. J. Abbott, H. D. L. Abbott, O. C. Abbott, the said C. R. Abbott, A. M. Abbott, S. A. Abbott, and R. O. S. Abbott. . . . And I direct that the said sums shall not be paid to any of my said step-children, being sons, until he shall have completed his twenty-fifth year . . . and I give the ultimate residue (if any) of my said estate to my said sister Matilda Whitehead for her life, and after her death as she may by will appoint . . .

Mrs. Abbott died on the 18th Jan. 1892, and her will was duly proved on the 17th Feb. 1892 by the executors therein named.

At the date of her death there were seven children of Samuel Abbott being sons under the age of twenty-five years, viz., E. H. Abbott, S. A. Abbott, F. W. P. Abbott, R. W. B. Abbott, S. J. Abbott, O. C. Abbott, H. D. L. Abbott, of whom E. H. Abbott had since attained that age.

By an order dated the 3rd June 1892, and made in the matter of Mrs. Abbott's estate, the court declared (*inter alia*) that, upon the true construction of the will of Mrs. Abbott, and in the events which had happened, the legacies given to the sons of Samuel Abbott, except S. J. Abbott, carried interest from the date of the such sons respectively attaining the age of twenty-five years, or the expiration of one year from the date of the death of the testatrix, whichever should last happen.

The residue of Mrs. Abbott's estate was sufficient to answer the legacies given to such sons as aforesaid. All the other legacies given by the said will had been paid.

Mrs. Whitehead, by her will, dated the 3rd Feb. 1892, after appointing T. Peacock and H. A. Dowse executors and trustees thereof, and bequeathing certain legacies and annuities, devised,

bequeathed, and appointed (such appointment being expressed to be made in exercise of the powers given to her by Mrs. Abbott's will) all the residue of her property, whether real or personal, to her trustees upon trust for sale and conversion and investment, and to hold the same, after payment or providing for debts and legacies and annuities given by the will, upon trust for the benefit of Rosa Ellen Lucas, the wife of William Lucas, that is to say, to pay the income thereof to her for life, for her separate use without power of anticipation, and after her death upon trust for such one or more of her children by her present or any future husband as she should by deed or will appoint, and in default of and in so far as any appointment should not extend, in trust for all her children equally. And the testatrix directed her trustees to invest the residue of her estate in such securities as should be by law permitted, and she authorised them to retain existing investments.

Mrs. Whitehead died on the 19th Nov. 1892, and her will was duly proved by the executors therein named on the 20th Jan. 1893.

Mrs. Lucas was, at the time of the death of Mrs. Whitehead, and still was, married to William Lucas, by whom she had had two children only, viz., W. Lucas and E. L. Lucas, both of whom were infants. Mrs. Lucas had not executed the power of appointment given to her by the will of Mrs. Whitehead.

The estate of Mrs. Whitehead was sufficient to pay the debts and funeral and testamentary expenses, and to provide for the legacies and annuities given by the will.

This was an originating summons, taken out by the executors and trustees of Mrs. Whitehead's will, for a declaration whether the interests hereinafter mentioned, over which the testatrix had a power of appointment by will under the will of Mrs. Abbott as part of the residuary estate of Mrs. Abbott, were to be treated as capital or income of the residuary estate of the testatrix, namely (A) the interim income of a fund held by Mrs. Abbott's executors to meet the six legacies of 3500*l.* each, which were vested at Mrs. Abbott's death but were payable only as the legatees respectively attained the age of twenty-five, and did not carry interest in the meanwhile; and (B) the unapplied income from time to time of the fund held by the same executors to meet the discretionary annuity of 50*l.* a year.

Sankey for the summons.

R. Dodd for Mrs. Lucas.—A tenant for life is entitled to the income of a fund set apart to pay contingent legacies:

Allhusen v. Whittell, 16 L. T. Rep. N. S. 695; L. Rep. 4 Eq. 295.

And it makes no difference, I submit, whether the legacies are vested or contingent. The whole scheme of Mrs. Whitehead's will is to benefit Mrs. Lucas, and not her children. The residue is given "for the benefit of" Mrs. Lucas, with added directions to pay the income to her for life, &c. The provisions for her children are only a portion of the benefit to her. It could not have been intended to take away from her a portion of the income for the benefit of her children. Moreover, the trustees have an express power to retain existing investments. In such cases the income of those investments is payable to the tenant for life in specie:

Re Thomas; Wood v. Thomas, 65 L. T. Rep. N. S. 142; (1891) 3 Ch. 482.

[STIRLING, J.—Would it not be the duty of the trustees to convert wasting securities under *Howe v. Earl of Dartmouth*, 7 Ves. 137? I submit not. The intention of the testatrix was, that Mrs. Lucas should receive the whole of the unapplied income of these funds as income.

Fossett Lock for the children of Mrs. Lucas.—The unapplied income of the fund set apart to answer the legacies falls into the residue as capital, and must be invested, and the income only of the investments paid to Mrs. Lucas. *Allhusen v. Whittell* (*ubi sup.*), which was relied on by the other side, does not apply, as in that case the legacies were contingent. The Vice-Chancellor himself in that case intimated that if the legacies had been vested his decision would have been the other way. The ground for so treating the interim income on contingent legacies was that the capital pending the contingency is residue, and the income is, therefore, income of residue. But with vested legacies the case is different. The capital is not and never can be residue. All that goes to the residue is the interest on the capital pending the period for payment, and it is exactly equivalent to an annuity for a term of years. But it has been decided that the instalments of such an annuity are capital of residue:

Crawley v. Crawley, 7 Sim. 427.

So the income produced within the first year by sums held for payment of legacies is capital of residue:

Holgate v. Jennings, 24 Beav. 623.

With reference to the second point, having regard to *Cranley v. Dixon* (29 L. T. Rep. O. S. 119; 23 Beav. 512), I cannot seriously dispute that the unapplied income of the annuity fund is income of the residue, for the capital of that fund is residue, and can never cease to be so. The only question that can be raised is whether what was certainly income under Mrs. Abbott's will has been converted into capital under Mrs. Whitehead's will. [STIRLING, J.—I can see no distinction.]

STIRLING, J.—In this case two questions arise under the will of Mrs. Whitehead. They both relate to funds derived by her under the will of Mrs. Abbott. The first and more important question relates to the income of the fund set aside by the executors of Mrs. Abbott's will to meet the six legacies of 3500*l.* [His Lordship stated the provisions of the will with reference to these legacies and continued:] Mrs. Abbott gave the residue of her property to Mrs. Whitehead, who thus became entitled to the income of the amount of the legacies till each of the stepsons attained the age of twenty-five, which has not happened as yet as regards most of them. Mrs. Whitehead, therefore, had under the will a terminable interest in the income of the legacies which she could dispose of by her will. Mrs. Whitehead made her will, and gave her residuary estate to Mrs. Lucas for life, with remainder to her children. The question is, whether the income accruing from the funds set apart to answer these legacies, and which, it is not disputed, passed under the gift of the residue of Mrs. Whitehead's estate, is income to go to the tenant for life under her will, or capital which ought to be invested, and the income only arising from the investments paid to the tenant for life. I have been referred to cases

CHAN. DIV.]

THORNELOE v. HILL.

[CHAN. DIV.]

where it has been held that the income of a fund set apart to answer contingent legacies ought to be treated as income as between a tenant for life and remaindermen. I need only refer to one of them, *Alhusen v. Whittell* (*ubi sup.*). In that case a fund had been set apart to meet contingent legacies, and it was contended that the income of that fund fell into the residue as income, and not as capital. Wood, V.C., in giving judgment, says: "As regards the contingent legacies, there is a great deal of force in the argument that, if these legacies become payable, they are like any other legacies no longer residue; and being no longer residue, the tenant for life ought not, upon principle, to be entitled to the income of the fund set apart to meet them, any more than to the income of any other part of the fund which may be necessary for the payment of any other legacy." The Vice-Chancellor, therefore, was plainly of opinion that, as regarded other legacies, that is vested legacies, this doctrine did not apply. He goes on to say: "I am not sure that the courts, in some of the authorities cited, have sufficiently adverted to this reasoning; and whether they have not too narrowly followed words rather than things when they said that this income is income of residue, because when it comes to be taken out it is no longer residue. However, I think I am bound by authority, and, upon principle, I consider the question as analogous to the cases like *Sitwell v. Bernard* (6 Ves. 520) and others, where the court has been obliged, for the sake of not deferring to inconvenient periods the distribution of property, as it were to intervene and cut the knot. I apprehend the principle may be rested upon this, that the fund is residue until it is wanted; and if it be said that it ceases to be residue when it is not wanted, that rule may be a very simple one in one case, and a very complicated one in another." That was undoubtedly directed to a case where the legacies were contingent, and the reasoning was based upon the fact of the contingency, and, so far as I can judge from the language of the Vice-Chancellor, he seems to have been of opinion that if the legacies had been vested his reasoning would not have applied. It seems to me that the reasoning as regards a fund set apart to meet contingent legacies does not apply in the present case where the legacies are vested, and I must treat the case as if the second testatrix, Mrs. Whitehead, had been entitled to a terminable annuity of a like amount as the interest of the fund set apart for the legacies. If that is so, the principle of *Crawley v. Crawley* (*ubi sup.*) applies, and the fund must be dealt with in the same way as the fund in that case, and the interest which accrues on the fund, until the legatees respectively attain twenty-five years, must be treated as capital and invested, and the tenant for life under Mrs. Whitehead's will can only receive the income arising from the investments. I cannot see anything in Mrs. Whitehead's will which prevents that principle from applying. [His Lordship then referred to the residuary clause of Mrs. Whitehead's will and continued:] Reliance was placed by Mr. Dodd upon the trust for the benefit of Mrs. Lucas, which preceded the trusts limited to her for life, with remainder to her children. That gift might, if she had had no children, have taken effect upon the principle of *Lassence v. Tierney* (15 L. T. Rep. O. S. 557; 1 Mac. & G. 551), but it does not seem to me to affect the reasoning upon which I think that

the fund in this case should be dealt with in the way which I have mentioned. Then again it was said that the clause in the will which empowered the trustees to allow the testatrix's estate to remain in the state of investment in which it was at her death, showed that the intention was that Mrs. Lucas should enjoy the income as income, and in support of that I was referred to a case of *Re Thomas*; *Wood v. Thomas* (*ubi sup.*), before Kekewich, J. In my opinion, that case does not apply to the present. Under the clause in question the trustees would, no doubt, be justified in retaining the terminable annuity, but the clause is an administrative one only, and cannot affect the rights of the parties. This fund must be dealt with in the way I have indicated, and I answer the first question by saying that the income of the fund is to be treated as capital and invested, and the income only of these investments paid to Mrs. Lucas. Then there is the question as to the unapplied income of the fund set apart to meet the contingent annuity, payable at the discretion of Mrs. Abbott's executors. [His Lordship referred to the clause in question in Mrs. Abbott's will, and continued:] Subject to the payment of the annuity, the sum set apart to meet it forms part of Mrs. Abbott's residuary estate, and will pass under the gift of the residue in Mrs. Whitehead's will. As pointed out during the argument, this question is covered by the authority of *Cranley v. Dixon* (*ubi sup.*), and the surplus income of the fund, if any, after providing for the annuity, must be paid to the tenant for life, and need not be capitalised. The costs of all parties must come out of Mrs. Whitehead's residuary estate.

Solicitors: *H. A. Dowse*; *Esmonde Dowse*.

Jan. 12, 13, 15, 16, and 22.

(Before ROMER, J.)

THORNELOE v. HILL. (a)

Trade name—Assignment—Validity of—Goodwill—Injunction.

The right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public.

C. and Co., a firm of watchmakers, granted to another firm for seven years a licence to put a particular name upon watches, and after the expiration of the licence practically ceased themselves to sell or manufacture watches so marked. Held, that C. and Co. had lost all right to prevent other persons from marking their watches with the particular name, and could not therefore assign any such right, even if it was one capable of being validly assigned.

THIS was an action by Richard Thorneloe, a watchmaker at Coventry, to restrain the defendant, Charles John Hill, who was another watchmaker at Coventry, from putting the name of "John Forrest" upon his watches. The facts with regard to the dealings with the name "John Forrest" were as follows:

From the year 1851 and onwards a man called John Forrest had carried on business as a watch and chronometer maker at Clerkenwell, London, and stamped on the face of his watches "John Forrest, London," and on the back "John

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

Forrest, chronometer maker to the Admiralty, London, E.C." He was not, as a matter of fact, chronometer maker to the Admiralty. On the 15th Feb. 1871 John Forrest died, and by an indenture of the 12th June 1871 his administratrix, Georgiana Leitch, assigned to persons trading under the name of Carley and Co., at 30, Ely-place, London, all that the trade and goodwill and other the interest of the said administratrix in the business of a watch manufacturer carried on by the said John Forrest, deceased, and all benefit and advantage thereof.

Carley and Co. never carried on business under the name of John Forrest, or at any house or in any street where John Forrest ever carried on business. They used the name up to Feb. 1874 by placing it on some watches which they sold to James Edey, of Peebles. On the 7th Feb. 1874 Carley and Co. purported to grant to Henry Stuart and Co. Limited, of Liverpool, the sole right to make watches with the name of "John Forrest" thereon for the term of seven years from that date. Accordingly, during these years Henry Stuart and Co., in the course of their watchmaking business, manufactured and sold watches with the above-mentioned inscriptions thereon; and Carley and Co. ceased to put the name of John Forrest on any of their watches. After the expiration of the seven years, and until their failure, Carley and Co. only put the name of John Forrest on a few watches, so that there was no substantial sale of them.

It appeared that about the year 1888 the plaintiff marked watches made by himself with the name "John Forrest, chronometer maker to the Admiralty, London, E.C."

On the 14th Aug. 1890 Carley and Co. assigned the whole of their estate and effects to George Norton Read for the benefit of their creditors. On the 28th Feb. 1891 Read assigned to one Clemence the business carried on by Carley and Co., and the goodwill, and the lease and premises at which Carley and Co. had carried on their business. Immediately afterwards, on the same 28th Feb. 1891, Read purported to assign, so far as he lawfully could, to the plaintiff, for a sum of 20l., the name, title, and goodwill of the business of John Forrest, trading under the style or title of "John Forrest, chronometer maker to the Admiralty, London, E.C."

On the same 28th Feb. 1891 the plaintiff issued a circular setting out that he had bought the name, title, and goodwill of John Forrest, and that no authority existed in any other person than himself to register or use the said name. On the back of this circular was printed the address, "15, Northampton-square, Clerkenwell, London, E.C. Bought of John Forrest, wholesale watch manufacturer and chronometer maker to the Admiralty, established a century." The plaintiff did not claim to be chronometer maker to the Admiralty.

The defendant also sold watches at Coventry, stamped with "Forrest," "John Forrest," and "John Forrest, London," and by advertisements and invoices represented that he was the said John Forrest, or his successor in business.

The plaintiff claimed an injunction to restrain the defendant from so doing.

Sir Richard Webster, Q.C. and Sebastian for the plaintiff.—In the watch business trade names are

assets, and can be sold or assigned independently of the manufacture. A trade name is practically part of the goodwill of the business, and the goodwill of a business can be assigned by a man trading under another name. In this case Carley and Co. were entitled to continue the use of the name "John Forrest," and we contend that a man does not lose his right to use a name which he has lawfully bought, because he does not use it to the full extent. When the goodwill of a business is purchased, the purchaser has the right to do whatever the vendor had done in order to secure the business for himself. Here the defendant has improperly endeavoured to acquire for himself the goodwill of the business under the name "John Forrest." The cases establish that there can be at law a goodwill in a trade name:

Lindley on Partnership, 6th edit. p. 441;

Potter v. The Commissioners of Inland Revenue, 10 Ex. 147;

Churton v. Douglas, John. 174;

Llewellyn v. Rutherford, 32 L. T. Rep. N. S. 610; 10 C. P. 456;

Dent v. Turpin, 4 L. T. Rep. N. S. 637; 2 J. & H. 139;

Ford v. Foster, 27 L. T. Rep. N. S. 219; 7 Ch. 611.

The fact that the plaintiff himself improperly marked some few watches with the name John Forrest, before he had acquired the right, does not disentitle him to relief. This is the first case in which it has been attempted to say that the destruction of a trade, which may have been effected by the very act of the defendant himself, destroys the value of a trade name which has been lawfully purchased and assigned.

Moulton, Q.C. and Willis Bund for the defendant.—The principle which goes to the root of this case is that a man cannot buy the right to make a representation to the public. He must earn it, that is to say, he must render it truthful. Is the representation made by the plaintiff truthful? We submit not. So far as goods are concerned there is no distinction between a trade name and a trade mark. You cannot assign the right to use a trade name, or trade mark, on goods, unless thereby there passes that which makes the representation a truthful one:

Pinto v. Badman, 8 Pat. Cas. 181, 194.

Further, the goodwill of a firm is one and indivisible; you cannot divide it up. Where there is no goodwill and no business you cannot get any right at all by a formal assignment. Those principles, when applied to the facts of this case, are fatal to it. As to the licence to Stuart and Co., when that terminated Carley and Co. had lost all right to represent that the "John Forrest" watches were manufactured by them:

Wood v. Lambert and Butler, 54 L. T. Rep. N. S. 314; 32 Ch. Div. 247.

The sale of Forrest watches was never taken up by the plaintiff at the end of the licence. Again, if there was any goodwill to sell, it was bought by Clemence, who became the successor to Carley and Co. Lastly, there has been a false trade description within the Merchandise Marks Act 1887 (50 & 51 Vict. c. 28), ss. 2, 3.

ROMER, J. stated the facts of the case, and remarked that he would disregard the fact that John Forrest was not chronometer maker to the Admiralty, as he was going to decide the case on broader grounds. His Lordship found on the

CHAN. DIV.]

THORNELOE v. HILL.

[CHAN. DIV.]

evidence that there was a wholly unsubstantial sale of "John Forrest" watches by Carley and Co. after the termination of the seven years' licence, and continued:—Assuming that the assignment to the plaintiff could be said to pass anything, having regard to the prior assignment to Clemence, it is clear that it could only pass the right to use the name "John Forrest" as a thing in gross, wholly unconnected with any real or substantial business. It is under this assignment that the plaintiff claims. No doubt the plaintiff, who was and is a watch manufacturer at Coventry, ventured this small sum of 20*l.* for such right to the name of John Forrest as Read might be able to assign, because he had some experience in the name of John Forrest. That experience was derived from the fact that prior to the failure of Carley and Co., and without any leave either sought or given, he had made for four different customers watches with the words "John Forrest, London," put upon them by their directions. The plaintiff never has carried on business in London, or under the name "John Forrest," nor has he, since the so-called assignment to him, ever used the name except by placing it upon some of his watches. Under these circumstances, has the plaintiff the right contended for by him? I think not, and for the following amongst other reasons. Carley and Co. undoubtedly bought the goodwill of John Forrest's business. Now, speaking generally, a purchaser of a business, if he continues it, has the right to use the trade name and trade marks of the business in any way he pleases which is not calculated to deceive. And, in particular, as a rule, the purchaser may mark goods made by him in the course of that business with the name of the vendor, although the vendor, or his old workmen, did not make or assist in making such goods, and by so marking the goods the purchaser would not be considered as doing that which was calculated to deceive his customers or the public. The reason of that is, that in most cases, and especially where the purchaser is continuing the business in the vendor's name, the mark might fairly be held to be only a representation that the goods were manufactured in the course of the business without any representation as to the persons by whom that business was being carried on, and there would be no substantial risk of deception. But in cases where deception would arise, or would probably arise, from the marking of the vendor's name, or from the way in which it was marked, then the marking would be fraudulent, and the purchaser could not be heard to say, after a course of such fraudulent marking, that thereby his goods so marked had come to represent goods made by him as the vendor's successor in business. For instance, when the goods sold in a business are of an artistic character, and during the vendor's time acquired their reputation and depended for their value upon his personal skill, then, if his retirement from the business were kept secret, a purchaser of his business would not be entitled to sell the goods not made by the vendor marked with his name. But I will assume in the present case, in favour of the plaintiff, that until the 7th Feb. 1874, the watches made by Carley and Co., and marked by them with John Forrest's name, were rightly so marked, and that up to that date they could honestly say that watches so marked represented goods made either by John Forrest or by his successors in

business. I say I will assume this, as I wish to guard myself from the supposition that I so decide having regard to the facts, and in particular to the fact that Carley and Co. marked their watches not only with the words "John Forrest, London," but also with the description "John Forrest, chronometer maker to the Admiralty." I think that description was marked in order to set forth the personal qualification of the maker and as a matter of importance, and in order to impress those into whose hands the watches should come with the idea that the watches were made by or under the supervision of one holding the responsible position of chronometer maker to the Admiralty. And, even if Carley and Co. could justify their marking of the name of John Forrest on the ground that it only meant themselves as the successors of John Forrest, I do not see how they could at the same time with propriety identify themselves with the description of chronometer makers to the Admiralty when they were nothing of the kind. But, passing this over, and on the assumption I have mentioned, how did matters stand on the expiration of the seven years' licence? During these seven years Henry Stuart and Co. Limited were expressly authorised by Carley and Co. to manufacture and sell watches stamped with the name of "John Forrest, London." That company, who carried on business in their own name, were not John Forrest or successors in the business of John Forrest, and were carrying on business in Liverpool, and not in London, and this to the knowledge of Carley and Co. How, after that, could Carley and Co. be heard to assert that the name of John Forrest, London, on watches, still represented and meant that the watches were made either by John Forrest or by his successors in business? To so assert would be to admit that they had authorised the Liverpool company to commit a fraud on the public. The deed of the 7th Feb. 1874 did not assign or purport to assign any business or any part of the business of Carley and Co. to the Liverpool company. It was a mere grant of a licence to use the name of John Forrest, and I need scarcely say that, apart from the other objections to the licence purported to be granted, a trade name or mark cannot validly be assigned in gross. When the licence expired, Carley and Co., who had ceased during the seven years to use the name of John Forrest in any way whatever in their business, had, in my opinion, lost any right they might previously have had to say that, any person marking watches "John Forrest" thereby represented that they were watches manufactured by them or in the course of their business (see *Wood v. Lambert*, 54 L. T. Rep. N. S. 314; 32 Ch. Div. 247, and in particular the observations of Lindley, L.J. at p. 260 of 32 Ch. Div.). This being the position of affairs at the end of the licence, certainly Carley and Co. did not by the time of their failure regain any right, even if they could possibly have done so, for, as I have pointed out, there was in the meantime no substantial manufacture or sale by them of watches marked. And if Carley and Co. at the date of their failure had no such right, they could not assign it to Read, nor could Read assign it to the plaintiff. And if Carley and Co. had no such right at the time of their failure, they could not have then obtained an injunction against the defendant for stamping watches with

the name of John Forrest, nor could the plaintiff acquire through them the right to such an injunction, even if he had acquired all their business, for all that the defendant is doing that can be complained of by the plaintiff is marking his watches with John Forrest's name. That is, in my opinion, a very improper proceeding, because it is a fraud on the public, but it does not enable the plaintiff to support this action. To entitle the plaintiff to an injunction he must have been able to establish (there being no question of trade mark) that such marking by the defendant was calculated to deceive the public or customers into the belief that the goods so marked were goods made in the course of the business belonging to the plaintiff. And this he could not do for the reasons I have pointed out. But the matter does not stop there. Even assuming that Carley and Co., or Read as their trustee, could, if no assignment had been made, have restrained the defendant, the plaintiff, who, in my opinion, can only claim to be a mere assignee in gross of the right to the name of John Forrest, cannot sue the defendant. The plaintiff is in no real or true sense an assignee of the business of Carley and Co. or of any severed or severable part of it. The wording of the so-called assignment to him is relied on by him, and in particular the use of the word "goodwill." But the words used meant nothing more than that Read purposed to transfer, if and so far as he could, to the plaintiff, the right to the mere name of John Forrest, and such advantages, if any, as could be said to attach to such a right. As I have before pointed out, the right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public, nor can any advantages whatever as against the public attach to any attempted assignment of the sort. Lastly, I should point out that, ever since the death of John Forrest, Carley and Co. and those claiming through them have never used the name of John Forrest except by stamping it on goods—that is to say, as a trade mark. They could not insist that it was or is a trade mark or claim rights on that ground for many reasons, one of which is, that they have never registered or applied it under the Trade Marks Acts; and, not being able to do this, still less could or can they do what in substance the plaintiff is seeking to do in this action—namely, treat a name as being property in itself which gives a right of action against any person using the name without their permission, wholly irrespective of any other consideration. I need not deal with further defences raised by the defendant. I have stated sufficient to show why, in my judgment, the action should be dismissed, and I accordingly dismiss it. But, having regard to the conduct, or rather misconduct, of the defendant in relation to his use of the name of John Forrest, I dismiss the action without costs.

Solicitors for the plaintiff, *A. H. Arnould and Son, for Buller and Cross, Birmingham.*

Solicitors for the defendant, *Crowders and Vizard, for Messrs. Browetts, Coventry.*

Dec. 7, 8, 1893, and Jan. 27, 1894.

(Before ROMER, J.)

Re TUCKER; TUCKER v. TUCKER. (a)

Trustee and cestui que trust—Investment—On deposit in hands of a particular firm—Change of partners—Liability of trustees—Payment of interest on debt in name of firm—Liability of retired partner—Statute of Limitations.

By his will, dated in 1870, a testator empowered his trustees to invest certain moneys by placing the same "on deposit in the hands of the firm of B., T., and Co.," should they be willing to receive it, at interest. At the date of the testator's death a considerable sum belonging to him was on deposit with the said firm, which then consisted of W. and H. The trustees left it in the hands of the firm, and subsequently added other sums to it. H. died in 1875; and W., later on in the same year, admitted two new partners into the firm. By a deed of dissolution of April 1883 W. retired from the partnership by arrangement, and the continuing partners agreed to pay the debts and liabilities of the firm, including the debt due to the testator's trustees. Down to March 1891 the continuing partners paid interest on the debt, in the name of the firm of B., T., and Co., to the person beneficially entitled. In an action by the beneficiaries under the testator's will, to have the money restored:

Held, that W. was liable for the debt due from the firm, inasmuch as the payment of interest since the deed of 1883 must be regarded as a payment made by the continuing partners for, or on behalf of, W., and therefore the Statute of Limitations was no bar.

Held also, in the event of loss arising, that the testator's trustees were liable for not having got in the debt when the firm of B., T., and Co., became dissolved on the death of H., since the will only authorised the lending of the money to the firm as constituted at the date of the testator's death.

THIS was an action brought by Mary Eliza Tucker, her four infant children, and Mary Tucker and others (all beneficiaries under the will of Stephen Tucker), against Stephen Baker Tucker and Charles Cannon (trustees of the will of Stephen Tucker), William Tucker, and others, to have certain trust funds replaced. The material facts were as follows:—

Stephen Tucker was at the dates of his will and death in the employment of the firm of Baker, Tuckers, and Co.

On the 18th March 1870 Stephen Tucker made his will, appointing Matthew Howitt and James Kayess trustees and executors, and after certain devises and bequests he bequeathed certain policies of insurance to the trustees upon trust to get in the moneys recoverable by virtue thereof, together with all his personal estate, and the will proceeded:

And I direct my said trustees or trustee for the time being to stand possessed thereof and to invest the money to be gotten in as aforesaid, either by placing the same on deposit in the hands of the firm of Baker, Tuckers, and Co., of No. 30, Graham-street, in the city of London, silk warehousemen, should they be willing to receive it, at interest, but if not, to invest the said trust moneys upon guaranteed securities, or in the public stocks or funds of the United Kingdom, or on

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

CHAN. DIV.]

Re TUCKER; TUCKER v. TUCKER.

[CHAN. DIV.]

mortgage of freehold property in England, with liberty to call in, vary, and transpose the investments from time to time, at his or their discretion, for any other investment or investments of the description contemplated by this trust.

The testator proceeded to direct that his trustees should stand possessed of the trust fund upon trust to permit his wife, the plaintiff Mary Tucker, to receive the annual income thereof for her life, and immediately after her death upon trust to realise 6000*l.* from the trust fund, and upon trust, as to a moiety thereof, to invest the same in the manner thereinbefore directed, and pay the annual income to the testator's daughter Mary Eliza during her life; and as to the other moiety thereof upon the like trust for the testator's daughter Jane Elizabeth; and after their decease, as therein mentioned, with an ultimate bequest of the residue of his estate to Stephen Baker Tucker.

The testator died on the 7th April 1870, leaving his widow, the plaintiff Mary Tucker, his son, the defendant Stephen Baker Tucker, and the two daughters named in the will.

The two daughters had married, and they and their children were plaintiffs.

Matthew Howitt and James Kayess got in and converted all the estate of the testator except a sum of 7485*l.* 10*s.* 3*d.*, which at the death of the testator was owing to him from the firm of Baker, Tuckers, and Co. upon deposit account or loan.

The executors administered the estate, and out of the net residue increased the total sum on deposit to 8633*l.* No security was given. At the date of the testator's death the firm of Baker, Tuckers, and Co. consisted of Henry Tucker and William Tucker.

Henry Tucker died on the 17th Jan. 1875, having by his will of Aug. 1874 appointed the defendant William Tucker, James Kayess, and Eli Henry Mead trustees and executors thereof. Subsequently, in June 1886, the defendants Arthur John Tucker and George Hambrook Dean were appointed trustees in the place of J. Kayess and E. H. Mead deceased.

On the death of Henry Tucker, William Tucker took over the whole assets of the business, and in July 1875 admitted one of his sons and the defendant Stephen Baker Tucker into partnership with himself under articles of partnership. There was no novation in respect of the debt.

In 1879 there was another change in the firm, and William Tucker, Stephen Baker Tucker, and Arthur John Tucker became the partners.

In April 1883 William Tucker, by arrangement, retired from the partnership, and by an agreement of the 13th April 1883 the partnership was dissolved, as from the 31st Dec. 1882, and it was agreed that the assets and effects should be taken over by the continuing partners, Arthur John Tucker, and the defendant Stephen Baker Tucker, and that they should pay all the debts and liabilities of the late partnership, and jointly and severally indemnify the defendant William Tucker and his estate therefrom.

At this time the assets of the firm were more than sufficient to discharge all its liabilities, including the debt of 8633*l.*

It did not appear that the dissolution of the partnership was ever gazetted, and there was a clause in the deed of dissolution of the 13th April

1883 to the effect that the announcement of the dissolution should not be gazetted for a time.

In July 1881 Matthew Howitt and James Kayess retired from the trusteeship of the testator's will, and appointed the defendants Stephen Baker Tucker and Charles Cannon to be new trustees thereof; and the 8633*l.* deposited with Baker, Tuckers, and Co. was assigned to them.

Matthew Howitt became bankrupt in 1881, and James Kayess died, leaving William Tucker and Stephen Baker Tucker his legal personal representatives.

The residuary legatees under his will were also made defendants in the action.

In May 1890 the firm of Baker, Tuckers, and Co. was turned into a limited liability company, and 8633*l.* preference shares were allotted to Stephen Baker Tucker as in satisfaction of the sum of 8633*l.* representing the residuary estate of Stephen Tucker.

Interest on the said sum of 8633*l.* was paid to Mary Tucker, in the name of the firm of Baker, Tuckers, and Co., down to June 1891, since which date no interest had been received.

The defendant Charles Cannon was adjudicated bankrupt on the 12th Aug. 1890, and had taken no active part in the trust.

The plaintiffs alleged that it was the duty of Matthew Howitt and James Kayess, as trustees of the will of Stephen Tucker, on the reconstitution of the firm of Baker, Tuckers, and Co., to get in the said sum of 8633*l.*, as the firm was no longer the same firm or partnership as at the date of the testator's death; and also that it was a breach of trust on the part of the defendants, Stephen Baker Tucker and Charles Cannon, since their appointment as new trustees of the will of Stephen Tucker, not to have required payment of the said sum of 8633*l.*

The plaintiffs claimed (1) a declaration that William Tucker was, constructively or otherwise, trustee of a sum of 8633*l.* for the benefit of the plaintiffs, and an order for payment of that sum; (2) a declaration that William Tucker, Stephen Baker Tucker, and Charles Cannon, and the estates of Henry Tucker and James Kayess, deceased, were jointly and severally liable to replace the said sum of 8633*l.* and interest to the trust estate of Stephen Tucker.

William Tucker, by his statement of defence, pleaded that no demand had been made upon him as legal personal representative of Henry Tucker, or as a member of the firm of Baker, Tuckers, and Co., for payment of the 8633*l.* until the writ in the action, and he relied on the Statute of Limitations. He also denied any payment of interest upon the 8633*l.*, or his individual or representative capacity, since April 1883, when he retired from the firm, or that he had procured any other person so to pay, or that he was constructively or otherwise a trustee for the plaintiffs.

The trustees of Henry Tucker's will, by their defence, pleaded that no part of Henry Tucker's estate had been applied in payment of principal or interest of any debt due to the estate of Stephen Tucker, and they relied upon the Statute of Limitations and sect. 8 of the Trustee Act 1888. The residuary legatees under the will of James Kayess also relied upon the Statute of Limitations, while denying any liability on the part of James Kayess.

CHAN. DIV.]

Re TUCKER; TUCKER v. TUCKER.

[CHAN. DIV.]

Charles Cannon pleaded that, if ever he was under any liability, which he denied, such liability was provable in and would be discharged by his bankruptcy.

Chadwyck Healey, Q.C. and W. B. Heath for the plaintiffs.—As to the investment by the trustees of Stephen Tucker's will, we submit that the words in the will only authorised a loan to the firm of Baker, Tuckers, and Co., as constituted at the date when the will would take effect, that is, the death of the testator. Directly the change in the partnership occurred, the trustees were bound to call in the money on deposit. It was a breach of trust to continue the loan:

Lindley on Partnership, 6th edit., p. 121;
Fowler v. Reynal, 2 De G. & Sm. 749.

[ROMER, J.—Suppose a third person was introduced into the firm, why would it not be a good loan? That third person might speculate and ruin the business. The testator only trusted the existing partners. We are entitled to go against the estate of Henry Tucker, the deceased partner:

Kendall v. Hamilton 41 L. T. Rep. N. S. 418; 4 App. Cas. 504.

There is a joint and several liability. [ROMER, J.—Not for all purposes. There was no breach of trust here until the death of one partner, and the surviving partner remained liable.] As against William Tucker we submit that at the death of Henry Tucker he became a constructive trustee, having notice of the trust money in his hands:

Ernest v. Croysdill, 2 L. T. Rep. N. S. 616; 2 De G. F. & J. 175, 198.

But in any case William Tucker is liable as a partner in the firm; and the payment of interest on the debt prevents the Statute of Limitations from being a bar. The payment must be taken to have been made by him or on his behalf.

[ROMER, J.—As against the beneficiaries under Kayess's will, and the trustees of Henry Tucker's will, why does not the statute apply? We say the payment of interest by William Tucker, who was also an executor of Henry Tucker, prevents the application of the statute.

Neville, Q.C. and D. F. Stokes (Sir Edward Clarke, Q.C. with them) for William Tucker.—No case of constructive trusteeship has been made out against William Tucker. Nor is he liable for this debt after retiring from the partnership in 1883. The continuing partners of the firm took over all debts and liabilities, and agreed to indemnify him:

Watson v. Woodman, 20 Eq. 721.

The payment of interest on the debt by Stephen Baker Tucker to the beneficiaries was made by him as trustee, and not for William Tucker. Baker, Tuckers, and Co. were not agents for William Tucker to make this payment. The *cestuis que trust* must look to their trustees alone for the security of their trust funds.

Haldane, Q.C. and S. T. Hart for the residuary legatees of James Kayess.—The investment we submit was a proper one in the first instance, as the firm had been selected by the testator himself. It was no breach of trust not to call it in when the change in the partnership took place. The firm was then in a prosperous condition, and why should the trustees have called it in? [ROMER, J.—The case is that, it is improper to let trust prop-

erty remain out on personal security.] Here there was express power so to do, and the testator's idea was that it should be a permanent security. [ROMER, J.—The words of the will point to the individual members comprising the firm, "should they be willing to receive it." The words must, we submit, apply to the firm for the time being, because, at the death of the widow, there was power to invest in the same way, though there might have been changes in the firm meanwhile. There was also power to vary investments into others "of the description contemplated" by the trust. It is not like a case of an unauthorised investment, but it is one where it was right at first, and unless there was afterwards a breach of duty by the trustees they are not liable.

Oswald, Q.C. and Fooks, for the trustees of Henry Tucker, relied upon the Statute of Limitations, and referred to

Thompson v. Waithman, 3 Dr. 628.

A. à B. Terrell, for the defendant Cannon, submitted that the debt was discharged by the bankruptcy, and referred to

Re Basham, 48 L. T. Rep. N. S. 476; 23 Ch. Div. 195;

Re Vowles, 54 L. T. Rep. N. S. 846; 32 Ch. Div. 243.

Chadwyck Healey, Q.C. in reply.

ROMER, J.—Several questions arise in this case. First, as to the alleged liability of Henry Tucker's estate. I think that liability cannot now be enforced by reason of the Statute of Limitations. The payment of interest by William Tucker must be attributed to him in his personal capacity, and not in his capacity of executor of Henry Tucker: (see *Thompson v. Waithman*, 3 Dr. 628.) This action must therefore be dismissed with costs as against those representing the estate. Only one set of costs will be allowed to those representatives, and of course William Tucker, as one of them, will only get the costs incurred in his representative capacity. So far also as the action sought to establish that Arthur John Tucker and G. H. Dean were trustees, or were liable as trustees for the plaintiffs, the action must be dismissed against them with costs. The second question is, whether the right to make William Tucker liable for the loan from the trustees of the will of the testator, Stephen Tucker, is barred by the Statute of Limitations. The facts are shortly these: The loan was to Henry Tucker and William Tucker, partners in the business of Baker, Tuckers, and Co. After Henry Tucker's death in Jan. 1875 William Tucker continued the business in the old name by himself until July 1875, and after that date by himself and divers partners. As between William Tucker and his copartners, the debt to Stephen Tucker's estate was treated as a partnership debt. But so far as concerns the trustees of Stephen Tucker's will William Tucker alone remained liable. There was no novation, no new loan to the new firms. Interest was paid on the debt in the name of Baker, Tuckers, and Co. until William Tucker retired from the partnership. That partnership was dissolved by agreement on the 13th April 1883, to take effect as from the 31st Dec. 1882. So that there is no question of William Tucker's liability up to the 13th April 1883. By the deed of dissolution between William Tucker and his then copartners, dated the 13th April 1883, it was agreed between them that the latter, who

CHAN. DIV.]

Re TUCKER; TUCKER v. TUCKER.

[CHAN. DIV.]

were to continue the partnership business, should pay and discharge (*inter alia*) the debt due to Stephen Tucker's trustees. Accordingly, the continuing partners, till March 1891, paid interest on the debt in the name in which interest had always previously been paid, that is to say, in the name of the firm, Baker, Tuckers, and Co. If this payment of interest is to be regarded as a payment by William Tucker through his authorised agents, the continuing partners, then it is clear that the recovery of the debt is not barred by the statute. Now, let me first consider the question on principle. If a debtor arranges with a third person that that third person shall pay the debt for and on behalf of the debtor to the creditor, and that third person, in pursuance of and in accordance with the arrangement, makes payments to the creditor in respect of the debt, how will matters stand? In the first place, if the arrangement between the debtor and the third person is not communicated by them to the creditor, and the third person, in pursuance of and in accordance with the arrangement, makes the payments in the debtor's name to the creditor, then it is clear that the creditor is entitled to say, as against the debtor, that those payments were the payments of the debtor. To hold otherwise would lead to the most astonishing results. For the creditor, relying on the part payment as preventing the statute running, might nevertheless find his debt lost to him without the slightest fault or delay on his side. But now, suppose the arrangement is communicated to the creditor, and the creditor accordingly receives payments from the third person, then, there being no question of novation, it appears to me equally clear that the creditor having been told to look to the third person for payment on the debtor's behalf, and having received payments accordingly for and on behalf of the debtor, is entitled to say, as against the debtor, that those payments are the debtor's payments. Now, apply these principles to the present case. It cannot be disputed, and indeed it is contended at the bar, on behalf of William Tucker, that the arrangement came to between him and his copartners by the deed of the 13th April 1883 was not one whereby there was to be any novation of the debt by the trustees of Stephen Tucker's will, or whereby the trustees were to accept the continuing partners as debtors, or to cease to regard William Tucker as the debtor. This being so, the arrangement came to by that deed is an arrangement whereby the debtor, William Tucker, arranges with third persons (the continuing partners), who were not debtors, that the latter should pay his debt. Seeing that these persons were not debtors, for whom and on whose behalf were they to pay the debt? Clearly for and on behalf of William Tucker. Now, some complication appears to arise from the fact that one of the continuing partners was one of the then two trustees of Stephen Tucker's will. But this fact, in my view, really does not matter. Either the arrangement is to be treated as communicated to the trustees, or not. If the former, then the trustees know that William Tucker has authorised the continuing firm to pay the debt for him and on his behalf. If the latter, then William Tucker has, without informing his creditors, authorised third persons to pay for him and in his name. And in either view, the trustees are entitled to treat the payments as made by

William Tucker. And no distinction can be drawn in this case between a payment of or on account of principal and a payment on account of interest. I have not to consider here a case where the authority to the third person to pay is expressly limited to payment within a specified time, or to payment of principal only, and where, if the limitation be communicated to the creditor, he would be prevented from relying on payments beyond the authority. There was no time limited by the deed of the 13th April 1883 within which the continuing partners were to pay. Nor was anything said about interest, and an authority to pay an interest-bearing debt in a case where no express time is limited for payment of the principal, is an authority to pay the interest accruing due before payment of the principal. And, clearly, where a person is authorised to pay a debt for another, for and on that other's behalf, he is entitled to payment in the name of the debtor. And that is what was done here, for the continuing partners paid in the name of Baker, Tuckers, and Co., which was the name under which the debtor, William Tucker, had always made his payments on account of the interest. Moreover, in this case the special provisions of the deed of the 13th April 1883 convince me that it was not contemplated by the parties thereto that the debts of William Tucker should or would be paid off speedily. I may specially refer to the provisions in clause 2 as to notice of the dissolution not being given or gazetted, and I gather that the dissolution never was gazetted. It appears to me that a provision of that class is aimed (*inter alia*) at preventing the creditors of the firm from knowing of the change in the *personnel* of the firm, lest they should require speedy payment of their debts, a result which the parties to the deed were desirous of avoiding. And I further gather that the continuing partners were entitled to continue the business in the old name. And lastly, seeing that William Tucker retained a considerable interest in the business after his retirement up to the end, and looking to his dealings with the firm which are admitted by the pleadings, coupled with the fact that William Tucker has not thought fit to go into the box, or to call any witnesses on his behalf, I infer that he was aware that the payments of interest on the debt in the name of Baker, Tuckers, and Co. were being continued as above stated. For these reasons I hold that William Tucker remains liable for the debt. I ought, perhaps, before leaving this part of the case to refer to the decision in *Watson v. Woodman* (20 Eq. 721). That decision in no way conflicts with the views I have above expressed. What the Vice-Chancellor had there to deal with was a case of joint debtors, one of whom arranged with his co-debtor that the latter should pay and discharge the debt, and all that the Vice-Chancellor decided was that, with reference to the operation of sect. 14 of the Mercantile Law Amendment Act 1856, the subsequent payments on account of the debt by the co-debtor, in his own name, must be held to have been made by him in respect of his own liability, and not for or on behalf of the other debtor. That this really was the ground of his decision appears on page 730 of the report. It was not the case of a secret retirement of one member of a firm owing a debt, and of payment being made on account of the debt in the old name of the firm

CH. DIV.] MERCANTILE INVESTMENT, &C., CO. v. RIVER PLATE TRUST, &C., CO. [CH. DIV.]

by the partners continuing the business under the private arrangement. Nor was it a case where the partner continuing the business in part made payments for or on behalf of the member who had retired, and with his authority. The defendant William Tucker must be ordered to pay into court the amount of the principal debt with interest due since the last payment of interest. He ought to have a reasonable time within which to make such payment. He must be ordered to pay the costs of the action against him so far only as it sought to establish his personal responsibility for the debt. The statement of claim also sought to make William Tucker liable on the footing of his being constructively or otherwise a trustee of the debt for the plaintiffs. No doubt, William Tucker knew the debt was due to the trustees of Stephen Tucker's will, but the plaintiffs did not establish before me a case for making him liable as trustee, and so far as his costs have been increased by this claim the plaintiffs must pay them with set-off. All that remains now is to consider the question of the liability of the trustees for not having previously got in the debt. If William Tucker can and does pay, then no loss has resulted by the neglect. I gather that he can pay. But as this is not certain, and moreover in any case it may be material upon the question of costs, and as the point has been raised and argued before me, I think I ought to decide it. Now, hard as the case is against the trustees, and reluctant as I am under the circumstances to decide the point against them, I cannot bring myself on the terms of the will of the testator, Stephen Tucker, to hold that they were authorised to lend the money in question to any firm but that which, at the date of the will and of the testator's death, carried on business under the name of Baker, Tuckers, and Co. I do not think he contemplated or authorised the lending of the money to any persons (not being the members of the last-mentioned firm) who might, as purchasers or otherwise, be for the time being carrying on business under the same name. I think the testator authorised the lending of the money only to the firm of Baker, Tuckers, and Co., as constituted at the date of his death, and the continuance of the loan was a "deposit" with that firm so long as it existed and no longer. There is nothing in this will which points to a continuance of the deposit after any member of the firm may have died or retired. *Prima facie* a testator when authorising by his will a loan to a firm does so because he has faith in and places reliance on the members of that firm as constituted at his death; and in this case it is to be observed that the testator was during his lifetime connected with the business when carried on by William and Henry Tucker, and that in his will he speaks of the money being placed "in the hands" of the firm should "they be willing to receive it." This being so, I am of opinion that, when the firm existing at the testator's death became dissolved by the death of Henry Tucker, it was the duty of the then trustees and of the subsequent trustees to have got the money in, and that they committed a breach by not so doing for which they are responsible, if any loss has resulted therefrom, to the extent of such loss, so far as necessary to make good the plaintiffs' interest in the money, and subject, as to the plaintiff, Mary Tucker, to the operation of sect. 8 of the Trustee Act 1888,

and I so declare. [His Lordship then directed inquiries, as against those representing the estate of the deceased trustee James Kayess and as against Stephen Baker Tucker, whether any loss had accrued by reason of the neglect to get in the debt after Henry Tucker's decease. But such inquiries were not to be proceeded with without the leave of the court.]

Solicitors for the plaintiffs, *Tocque and Rodyk*.

Solicitors for the defendants, *Kennedy, Hughes, and Kennedy; Tufnell, Southgate, and Sons; Theodore Allingham; Hughes and Son*.

Dec. 11, 12, 13, 14, 1893, and Jan. 15, 1894.

(Before ROMER, J.)

MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY. (a)

Company—Debentures—Power to sanction compromise of rights—Difficulty in enforcing rights—Special resolution to accept shares in lieu of debentures—Power of majority to bind minority of debenture-holders—Estoppel by matter of record—Under what circumstances persons not parties to an action may be estopped by the judgment.

An American company, incorporated with the object of buying and selling land in Mexico, having acquired over seventeen million acres in the territory of Lower California in that country, borrowed under its powers a very large sum on debentures. A trust deed was executed between the company of the first part, a trustee for the debenture-holders of the second part, and an advisory committee of three persons of the third part. By the deed, which contained a covenant by the American company that the land in Lower California should be charged with the payment of the principal money and interest payable on the debentures, the committee were empowered to call meetings of the debenture-holders, to be conducted like meetings of shareholders under the Companies Act 1862, and a meeting was to have "power to sanction any modification or compromise of the rights of debenture-holders against the company or against its property, whether such rights shall arise under the debentures or under these presents," and a special resolution was to be binding on all the debenture-holders. In 1889 an English company was formed, with power to buy and sell land, and other very wide powers, and on the 4th May of that year, the American company, being in difficulties, transferred its assets, business, and liabilities to such English company, subject, as to the lands in Lower California, to the debentures and the deed of trust. The English company, being desirous that the debenture-holders should exchange their debentures for fully paid preference shares in the English company, the committee called a meeting of the debenture-holders, at which a special resolution to accept such preference shares in lieu of their debentures was passed by the necessary majority. Certain debenture-holders who did not attend the meeting dissented from the arrangement, and brought an action against the American company

(a) Reported by R. H. DEANE, Esq., Barrister-at-Law.

to recover interest on their debentures, which was ultimately decided in favour of the dissenting debenture-holders by the Court of Appeal (reversing Day, J.), on the ground that a power to compromise rights presupposes some dispute about, or difficulty in, enforcing them, and there being no evidence of any such dispute or difficulty, there was nothing to bring the power to compromise into play. The dissenting debenture-holders now brought an action against the trustee of their deed, the advisory committee, and the English company for an account of their interest in arrear and unpaid; a declaration that by the trust deed the debenture-holders were entitled to a first charge on the property comprised in the deed, and to have all necessary acts done to make such charge effectual; a declaration that the committee and the trustee of the deed had been guilty of wilful neglect and default in failing to procure and register a certain hypothecation of the land, and to put in force the powers of the deed; and for other relief.

The defendants contended (*inter alia*) that the plaintiffs were bound by the special resolution passed at the meeting of the debenture-holders, but it was urged on behalf of the plaintiffs that the judgment in the action against the American company estopped the English company in the present action from saying that the plaintiffs were bound by the said special resolution. The judge found, upon the evidence, that there were difficulties (not brought before the court in the former action) of such a substantial character in the way of the debenture-holders enforcing their rights, that the majority of them might have *bonâ fide* considered it desirable to compromise those rights against the American company and its property by passing the special resolution; and that there was no reason to doubt that the resolution was in fact honestly arrived at, and passed *bonâ fide*, at the meeting, by the necessary majority acting solely in what they believed to be the interests of the debenture-holders.

Held (1) that the English company, not having been parties to the action against the American company, were *primâ facie* not bound by the judgment, and, although the English company, by reason of the covenant of indemnity given by them to the American company, were interested in assisting the latter company, and did assist them in the action brought against them, yet that this did not put them in the position of defendants to that action, or estop them in the present action from contending that the plaintiffs were bound by the special resolution; (2) that, with reference to the contention that the English company were estopped by the judgment because they were "*privies in estate*" of the American company, that judgment could not have bound the land, and, moreover, a prior purchaser of land cannot be estopped, as being *privy in estate*, by a judgment obtained in an action against the vendor commenced after the purchase; (3) that, although the English company would be estopped under their covenant of indemnity from disputing the judgment as against the American company suing them on that express covenant, there were no grounds in a totally different action like the present, to which the American company were not even parties, for holding that the English company were so estopped; and (4) that evidence

being accordingly admissible as to the question whether the dissenting minority were bound by the special resolution, the case was by such evidence shown to fall within *Sneath v. Valley Gold Limited* (68 L. T. Rep. N. S. 602; (1893) 1 Ch. 477) upon that question, and the plaintiffs were therefore bound by the special resolution, and the action must accordingly be dismissed with costs.

THIS was an action brought by the Mercantile Investment and General Trust Company Limited, on behalf of themselves and all other holders of a series of debentures issued by an American company entitled the International Company of Mexico, against the River Plate Trust, Loan, and Agency Company Limited (which acted as trustee for the debenture-holders under their deed of trust), and against Messrs. John Morris, E. M. Denny, and J. W. Todd as the members of an advisory committee appointed by the said trust deed, and against the Mexican Land and Colonisation Company Limited, an English company which had taken over the assets, business, and liabilities of the International Company of Mexico above mentioned. The last-named company also had been originally joined as defendants, but were struck out in the course of hearing on the ground of having parted with all their interest. The plaintiff company were holders of 125 of the debentures in question.

The main point in dispute on the merits was, whether a special resolution passed by a majority of three-fourths at a meeting of the debenture-holders, and pledging them to accept preference shares in the English company in lieu of the debentures issued by the American company, was binding on the dissenting and absent debenture-holders, but there was an important preliminary question — whether the defendants were not estopped by the decision in a former action brought by the present plaintiffs against the American company from contending that such resolution was valid.

The material facts were as follows:

The International Company of Mexico was incorporated by a charter of the State of Connecticut, with the object of buying and selling land in the Republic of Mexico, and it subsequently acquired 17,500,000 acres of land in that part of the country known as Lower California. The company had power to borrow money and to issue debentures on the security of its land, and it accordingly issued 6 per cent. debentures for 500 dollars each to a very large amount, and the plaintiffs were the holders of some of them. These debentures were issued subject to the conditions indorsed upon them, and subject to and with the benefit of the provisions of a deed of trust, dated the 10th March 1888. The parties to that deed were the American company of the first part, the River Plate Trust, Loan, and Agency Company of the second part, and the above-mentioned advisory committee of the third part, the River Plate Company acting as the debenture-holders' trustee under the deed. This trust deed, after reciting the existence of 570,000 dollars only of a prior series of debentures (secured by a deed of the 1st June 1887, whereby the American company had charged and agreed to charge the 17,500,000 acres of land with the payment of the principal moneys and interest of

such prior series), and reciting that, in order to further secure the payment of the debentures then to be issued, the American company had agreed to make a special hypothecation, in favour of the trustee of the debenture-holders, of the said 17,500,000 acres of land in Lower California, subject only to the said indenture of the 1st June 1887, and to the payment of the 570,000 dollars and interest, being the balance of moneys thereby secured, and that the American company had given a power of attorney to the committee to constitute a special hypothecation of the said land, the American company covenanted with the trustee and assigns that the said 17,500,000 acres of land in Lower California should be charged with the payment of the principal moneys and interest, payable according to the tenor of the debentures, and that such principal moneys and interest should be a first charge on the said land, subject only to the said indenture of the 1st June 1887 and the money thereby secured, and to the provisions for a free sale of land; and it was agreed that the American company should pay the principal sum and interest of the new series of debentures, and should pay over to the committee one half the net proceeds of sales of the said land, subject to any payments which had to be made to the trustees of the first series of debentures; that the American company should issue no more of the first series of debentures, and should purchase or redeem the existing 570,000 dollars thereof, or exchange them for debentures of the new series as soon as possible, and after giving the committee power to retain 500,000 dollars out of the proceeds of the debentures, the deed contained the following power:

5. If for any reason whatever the committee shall at any time in their uncontrolled discretion consider it necessary for the protection of the debenture-holders, it shall be lawful for the committee, in pursuance of a resolution passed by or with the consent of a majority of them, to request the trustee to register in Mexico the hypothecation, to be given by the company to the trustee as aforesaid, of lands in Lower California, and for the committee . . . to do, permit, and consent to, judicially and extra-judicially, all such acts, deeds, or things as may or shall be conducive to the validity of such hypothecation, or necessary for the purpose of making an effective hypothecation of the lands hereby charged, and the trustee shall forthwith have such hypothecation registered in Mexico.

The deed also contained powers for the committee, upon the company making any default in payment of principal or interest moneys secured by the debentures, or committing any breach of any of the covenants contained in the deed, or upon any steps being taken or threatened to wind-up the company, at their discretion, or on the requisition of the holders of half the debentures, to require the trustee to take possession, and for the trustee in that case to sell. But it was provided that until default or the occurrence of such events, the company should remain in possession and have unrestricted power of sale.

No hypothecation of the American company's property was ever registered in Mexico under the provisions of this deed.

The committee were empowered by the deed to call meetings of the debenture-holders, to be held in the city of London, and to be subject to the special provisions of the deed, but in other respects to be conducted, as nearly as the circum-

stances of the case permitted, like meetings of shareholders under the Companies Act 1862.

Clause 22 of the deed was as follows:

A meeting of debenture-holders shall, in addition to any other powers hereby given, have the following powers exercisable by special resolution, namely: (1) Power at any time after such entry as aforesaid (that is, entry by the trustee of the deed for breach of any of its provisions) to give authority to the trustee to give up possession of the said lands to the said company, either unconditionally, or upon any conditions that may be arranged between the company and the committee with the sanction of a special resolution. (2) Power to sanction the release of any of the mortgaged premises. (3) Power to sanction any modification or compromise of the rights of debenture-holders against the company or against its property, whether such rights shall arise under the debentures or under these presents.

Clause 24 provided that a special resolution should bind all the debenture-holders. Debentures were issued under this deed to the amount of about 3½ million dollars.

The Mexican Land and Colonisation Company (the English company) was formed in 1889 with extremely wide objects and powers, including powers to buy and sell land, and to carry on commerce, banking, promotion of companies, and almost every conceivable kind of business, and in the same year (on the 4th May) all the assets, business, and liabilities of the American company were transferred to it, subject as to the lands in Lower California to the debentures, and to the above-mentioned trust deed of the 10th March 1888. The consideration for the transfers consisted of fully paid-up shares in the English company, and a covenant of indemnity given by the English company to the American company against the liabilities of the latter. It appeared that, at the time, the American company's financial position was the reverse of flourishing, and the prospects of the debenture-holders being paid their money were by no means assured. The evidence went to show that, though the American company had a concession of this great tract of land, they had no completed title to it, and that such title could only be acquired according to Mexican law by registration, which would involve an enormous outlay for surveying and measuring and fencing off the land.

Under these circumstances, the English company being desirous that the debenture-holders should exchange their debentures for fully paid-up first preference shares in the English company, the advisory committee summoned a meeting of the debenture-holders for the 8th Oct. 1889, in order to pass a special resolution, a deed having been previously executed (on the 20th September) between the English company and Mr. W. E. Strickland, the secretary to the committee, for carrying a proposal for the purpose into effect. The meeting was held and a special resolution was duly passed by the necessary majority in the following terms:

That all rights of the debenture-holders of the International Company of Mexico, whether against its property or against the company, be compromised by the acceptance in lieu of such debentures and the coupons accrued and not due, and in discharge of such rights, of fully paid 6 per cent. cumulative preference shares (entitled to dividend as from the 1st July 1889) in the Mexican Land and Colonisation Company Limited, at the rate of 110% in shares for every 500 dols. in debentures, in accordance with the proposal dated the 20th Sept. 1889, and that

the deed dated the 20th Sept. 1889 between the company and Mr. W. E. Strickland, referred to in such proposal, be approved and confirmed, and be forthwith carried into effect.

The plaintiff company were not present at the meeting, and dissented from the arrangement involved in the resolution. In 1890 they brought an action against the American company (*Mercantile Investment and General Trust Company v. International Company of Mexico*, 68 L. T. Rep. N. S. 603; (1893) 1 Ch. 484) to recover certain arrears of interest on their 125 debentures. The case was heard before Day, J., who held that the arrangement and resolution were binding on the minority of the debenture-holders and on the plaintiffs, and accordingly gave judgment in favour of the American company. The plaintiffs, however, having appealed, the decision of Day, J. was reversed, and Lindley, L.J., in the course of his judgment, made the following observations: "A power to compromise their rights presupposes some dispute about them, or difficulty in enforcing them, and does not include a power to exchange their debentures for shares in another company where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money becomes a power to accept less than 20s. in the pound, if the debt is undisputed and the debtor can pay; a power to compromise does not include a power to make presents. Assuming, therefore, as I do, that the majority of the debenture-holders present at the meeting acted honestly and did what they thought best under the circumstances, I think that those circumstances were not such as to bring the power into play, and that, on this ground also, what they did cannot bind absentees or dissentients." It should be stated that, in the action aforesaid, no evidence was put before the court to show that there was any dispute as to the rights of the debenture-holders or difficulty in enforcing those rights by obtaining payment of the interest on the debentures.

On the 4th Nov. 1891 the plaintiffs commenced the present action, claiming (1) an account of the interest in arrear and unpaid on the debentures; (2) a declaration that by the deed of the 10th March 1888 the plaintiffs and other debenture-holders were entitled to a first charge on the property comprised in the deed, and to have all (if any) necessary acts done to make such charge effectual; (3) an account of what was due to the plaintiffs on the outstanding debentures; (4) execution of the trusts of the deed; (5) accounts of purchase money and considerations received on sales; (6) a declaration that the committee and the trustee of the deed had been guilty of wilful neglect and default in failing to procure and register a certain hypothecation of the land, and to put in force the powers of the deed; and incidental relief.

The action came before North, J., on motion for a receiver of the proceeds of land sold, and rents and profits of lands not sold (66 L. T. Rep. N. S. 711; (1892) 2 Ch. 303), when the motion was refused on the ground that a receiver would be useless.

The action came on for hearing before Romer, J. on the 11th Dec. 1893.

Cozens-Hardy, Q.C., Chadwyck Healey, Q.C., and Vernon R. Smith for the plaintiffs.—This case is really concluded by the decision of the Court

of Appeal in *Mercantile Investment and General Trust Company v. International Company of Mexico* (68 L. T. Rep. N. S. 603, note (a); (1893) 1 Ch. 484, note (2)). The defendants are estopped by that decision from contending that the special resolution of the 8th Oct. 1889 was valid or binding, and ought not to be allowed to go into independent evidence on the question, the matter being really *res judicata*. That action was really defended by the English company, who were interested through the covenant of indemnity given by them to the American company, and the costs were paid by the English company; moreover, the English company are bound by that judgment as being "privies in estate" of the American company. They are also estopped by their covenant of indemnity from disputing the judgment. Apart from the technical point of estoppel, we rely on the reasons given by the judges in the Court of Appeal, and especially those in the judgment of Lindley, L.J. The power to compromise did not arise. The English company took the land in Mexico subject to all rights of the debenture-holders. When this case came before North, J., on motion for a receiver, he held that the English company were accountable to the debenture-holders for the proceeds of land come to their hands: (66 L. T. Rep. N. S. 711; (1892) 2 Ch. 303.) Large sales have already been made.

ROMER, J. called on counsel for the English company, and afterwards for the committee, on the point whether fresh evidence ought to be allowed upon the question of the validity of the special resolution, but ultimately it was arranged to take the evidence subject to objection.

Finlay, Q.C. and Creed for the River Plate Trust, Loan, and Agency Company.

Neville, Q.C., Whinney, and W. F. Hamilton for the committee.—We are not estopped by the judgment in the former action, unless the plaintiffs can show that it was binding on the whole world. Judgment *inter partes* is inadmissible as against strangers: (Taylor on Evidence 8th edit., sect. 1682, p. 1436.) You cannot fix a stranger with a decision to which he was not a party except on a question of public rights. It is clear we were strangers. The committee are strangers even if the English company are not, but even the latter are not estopped by the decision:

Parker v. Lewis, 29 L. T. Rep. N. S. 199; 8 Ch. App. 1035, 1056, 1059, *et seq.*

However much the decision might be relied on by the then plaintiffs against the English company, it could not be relied on by the present plaintiffs against either the English company or the committee:

Ex parte Young, 45 L. T. Rep. N. S. 90; 17 Ch. Div. 668, 670-3.

Here it is a new plaintiff bringing an action against new defendants, so that the defendants are not estopped, though they may have nearly the same interests as the defendants in the other action:

Spencer v. Williams, 24 L. T. Rep. N. S. 513; L. Rep. 2 P. & D. 230, 237.

The case made against the committee is twofold: (1) their failure to obtain half the proceeds of sale; (2) their failure to enforce the obligation of hypothecation against the land. The answer is very simple—that they had by clause 5 an absolute and uncontrolled dis-

creation as to that. The committee had nothing to do with the issuing of the debentures—their duties arose after the issue. They were not responsible in any way for the prospectus, in which no doubt very favourable and untrue statements were made. In a sense the company were owners of enormous tracts of country in Mexico; they were concessionaires of it, not owners strictly. You have no real title to land in Mexico until you get it defined by metes and bounds. That would require an enormous outlay. The American company was in a very bad way. If the land had been sold at the date of the transfer to the English company, there would have been nothing for the debenture-holders. The company were in bad odour with the Mexican Government, without whom nothing could be done. It was for that reason that it was proposed to transfer the concern to the English company. What was done then was done in the interest of all the debenture-holders. It would have been suicidal to realise the property as mortgagees; at any rate, there were very great difficulties. The committee never had a farthing of money. In any case there could have been nothing for the debenture-holders. We say that, on the transfer to the English company, the charge was kept alive—we disagree with the English company as to that—but the personal remedies were not, and could not be, kept alive. All the money was gone at the time the Court of Appeal decided that the rights of the minority were not gone. At any rate persons in the position of the committee are entitled to a reasonable time to decide on their course of action. It is not true that the committee did nothing except allow the concern to drift to ruin.

Crackanthorpe, Q.C. and *A. R. Kirby* for the Mexican Land and Colonisation Company (the English company).—There is nothing in the case before the Court of Appeal which prevents us from arguing that the debenture-holders were all bound by the resolution. As to estoppel and privity of estate there is a great difference between a judgment *inter partes* obtained before, and one obtained after the property is acquired: (2 Taylor on Evidence, p. 1441, sect. 1689.) Privies in estate are bound by a judgment only where they acquire the estate after judgment:

Doe d. Foster v. Earl of Derby, 1 A. & E. 790.

The charge is gone by virtue of the resolution. Even if it is not so, this company is not bound by the charge. Something more than a contract with someone else, with notice to us, would be required to create a charge against us:

Norris v. Chambres, 3 L. T. Rep. N. S. 720; 4 L. T. Rep. N. S. 345; 29 Beav. 246, 253; 3 De G. F. & J. 553-4.

[ROMER, J.—You can be compelled to do that which you knew your vendors were liable to do when you took over their liabilities.] As to that doctrine, see *Smith v. Widdlake* (3 C. P. Div. 10, 16), in which there is a comment on *Prettyman's* case (2 Vern. 279), cited in *Walton v. Stamford* (Ib.), it being *Prettyman's* case on which the doctrine is based. There is in fact no charge here, and giving notice of what is not a charge does not make a charge. [ROMER, J.—Here you bought subject to the charge and undertook the debt.] A decision against the former owner of land does not estop a transferee who

bought before the judgment. There was no charge in Mexico; it all rested in covenant. We are not estopped from showing that there were circumstances which, if known to the Court of Appeal, would, as appears on the face of their judgment, have affected the decision. We can show that the debenture-holders could not have enforced their charge; the Mexican Government would not allow mortgagees as such to become in the position of owners. There is nothing fraudulent in the position taken up by the English company. There was a real difficulty and a *bona fide* compromise. It was not in the power of the committee to register the charge. As to the question of jurisdiction, *Penn v. Baltimore* (1 Ves. sen. 444) does not apply, and the principle of *Lord Cranstown v. Johnston* (3 Ves. 170) is not to be extended. *British South Africa Company v. Companhia de Mocambique* (69 L. T. Rep. N. S. 604; (1893) A. C. 602) shows that the jurisdiction of the English courts in relation to foreign land is confined to cases of fraud, trust, and contract, as to which our courts can act *in personam*. To enforce such an equity as is suggested here would be a great extension of *Cranstown v. Johnston* (*ubi sup.*). In *Sneath v. Valley Gold Limited* (68 L. T. Rep. N. S. 602; (1893) 1 Ch. 477) the Court of Appeal held that the circumstances did warrant what was there done in the way of compromise. The circumstances here bring this case within that decision, and the evidence showing that this is so ought to be gone into. The property in Mexico is a vast tract of country, as big as Scotland and half England, never surveyed, or ascertained by metes and bounds, and incapable, therefore, according to Mexican law, of effective registration. The financial condition of the American company was almost hopeless. There was absolutely nothing to meet the debenture interest that fell due on the 1st July 1889. Under those circumstances the only alternative to the carrying out of this conversion scheme would have been the winding-up of the English company and the entire disappearance of the debenture-holders' security. In *The Mercantile Investment and General Trust Company v. International Company of Mexico* (*ubi sup.*) the Court of Appeal proceeded upon the hypothesis that there were no doubts or difficulties in the way of the debenture-holders, and that the conversion scheme, therefore, amounted to making a present, which of course would have been *ultra vires*. In his judgment Lindley, L.J. remarked: "There is no evidence to show that the debenture-holders had any difficulty in obtaining the interest on their debentures, nor that such interest would not have been paid, in fact, regularly, if matters had been left as they stood." The present case falls within *Sneath v. Valley Gold Limited* (*ubi sup.*), in which it was pointed out that the *ratio decidendi* in *The Mercantile Investment and General Trust Company v. The International Company of Mexico* was what I have stated. [ROMER, J.—What you ought to show is, that there was difficulty in the debenture-holders asserting their rights, having regard to the fact that the American company had the English company behind it, under the covenant of indemnity.] The English company itself would have had to go into liquidation but for this arrangement. The English company was really almost the same company under a different name. The same shareholders belonged to both

companies. The debenture-holders could not have taken possession of the land, and if they had attempted to do so, the concession might have been forfeited to the Mexican Government. Registration would have been an enormous expense, besides the necessary surveys, as the property has to be described by metes and bounds before registration. But the judgment here was obtained after the transfer to the English company, so that *Doe d. Foster v. Earl of Derby* (*ubi sup.*) is against the plaintiffs, and also Taylor on Evidence, sect. 1689. The judgment must precede the creation of the interest which is to be estopped. But the plaintiffs now say that the English company were really defending that action under the covenant of indemnity. We were not defendants, but are willing to assume that practically we were in the same position as if we had been present as third parties. Now, a third party in that position is not a defendant so as to be estopped by the judgment:

Eden v. Weardale Iron and Coal Company, 56 L. T. Rep. N. S. 281, 464; 35 Ch. Div. 287.

If we had been made complete defendants it might have been different. In *Edison and Swan United Electric Light Company v. Holland* (61 L. T. Rep. N. S. 32; 41 Ch. Div. 28) it was held that the third parties were not really defendants for all purposes, though in that case they were liable for costs. They had appeared as third parties and admitted their liability to the defendants, and the court had ordered that they should have liberty to appear at the trial, and should be bound by the decision of the court on any question as to the indemnity arising between them and the defendants. Cotton, L.J. remarked: "If a plaintiff has a direct claim against a third party, his proper course, as soon as that is known, is to amend the statement of claim, and make the third party a defendant." That was not done in our case, and we cannot be treated as having been defendants for the purposes of estoppel. There are only about 680 debentures outstanding, of which the plaintiff company hold 125, and they claim to bring the action on behalf of the other 555 as well as themselves; and even if we were estopped as against the plaintiff company we should not be so as against the holders of those other outstanding debentures, for estoppel must be mutual:

Baroness Wenman v. Mackenzie, 5 Ell. & Bl. 447; *Spencer v. Williams* (*ubi sup.*).

Again, though we are liable under our indemnity to pay the debt established against the American company, that does not give the plaintiffs any equitable right to call upon us to give them a charge:

Duffield v. Scott, 3 T. R. 374; *Parker v. Lewis* (*ubi sup.*).

Even if the special resolution were held not binding, the plaintiffs could not succeed. This is not an action for specific performance; there is nothing to base such an action on. They also referred to

Tulk v. Moxhay, 2 Phil. 774; *Duchess of Kingston's case*, 2 Sm. L. C., 9th edit. 812; *London and South-Western Railway Company v. Gomm*, 46 L. T. Rep. N. S. 449; 20 Ch. Div. 562; *Haywood v. Brunswick Permanent Benefit Building Society*, 45 L. T. Rep. N. S. 699; 8 Q. B. Div. 403; *Lord Cranstown v. Johnston* (*ubi sup.*); *Norton v. Florence Land and Public Works Company*, 38 L. T. Rep. N. S. 377; 7 Ch. Div. 332.

Cozens-Hardy, Q.C. in reply.—After hearing the evidence, I do not think we can make out a case of wilful default against the committee. As to the estoppel point, the evidence shows that the action against the American company was really defended by the English company. The counter-claim actually asked for relief for the English company, who also paid the costs of the action. As to the charge we claim, the obligations of the American company to us were two-fold: to pay the principal and interest of the debentures, and to give a valid charge on the land. The obligations of the English company to the American company were not merely an obligation to pay the debts, but the words of the deed are, "that the English company shall undertake and pay, fulfil, and satisfy all the obligations and debts, engagements, and liabilities properly incurred by or existing against the American company." Therefore they are bound to fulfil the obligations of the American company to give a good hypothecation and charge upon the land in Mexico. We are therefore in the same position towards the English company as we were towards the American. The registration of the company's title to the land was subsequent in date to our judgment in the Court of Appeal, and the land could not pass till registration. The judgment against the vendor is therefore an estoppel against the purchaser. The difficulties of obtaining registration were overstated, as shown by the fact that the English company got it. *Sneath v. Valley Gold Limited* (*ubi sup.*) does not assist the defendants. He also referred to *Lord Cranstown v. Johnston* (*ubi sup.*) and *Norris v. Chambres* (*ubi sup.*).

Cur. adv. vult.

Jan. 15.—ROMER, J.—The first question to be considered is, whether the defendants, the Mexican Land and Colonisation Company Limited (which, for brevity, I shall refer to as "the English company"), are estopped by the judgment in the action brought by the plaintiff company against "the American company"—the International Company of Mexico. Now, the English company were not parties to that action, and, *prima facie*, are not bound by the judgment. The American company defended that action. The English company, by reason of the covenant of indemnity given by them, were interested in assisting the American company, and accordingly they did assist the American company in their defence and counter-claim, and, when the American company failed, paid their costs. But this in itself did not put the English company in the position of defendants to that action, or estop them in the present action. But then it is said that the English company are bound as being "privies in estate" of the American company, the estate being the land in Mexico purporting to have been charged in favour of the debenture-holders. But it is not in dispute that throughout that action the debenture-holders had no charge on the land valid or binding according to the law of Mexico. In that action the plaintiff company were only seeking to enforce in this country a personal claim against the American company, and the American company in their defence and counter-claim were seeking to free themselves and their assets, including the land in question, from a personal claim, and not from a claim constituting *ipso facto* an estoppel.

blished a valid charge on the land. Nothing was decided in that action which in any way bound the land, and I cannot see how the English company, even if they could be regarded as having acquired the land subsequent to the judgment, can be said to be estopped as purchasers of that land by a judgment in no way binding the land. Moreover, if the claim of the plaintiff company could be regarded as one affecting the land, notwithstanding that no registration of that claim had been made in Mexico, which alone could validly bind the land there, then the English company would be entitled to say that they were purchasers of the land prior to that action, notwithstanding that their title may also not have been perfected by registration. A prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase. Lastly, it was said that, inasmuch as the American company defended with the knowledge and approval of the English company, the latter would be estopped under their covenant of indemnity from disputing the judgment as against the American company suing them on the express covenant of indemnity. That is quite true. But this is not an action on the covenant of indemnity. The estoppel last referred to is only between the party indemnifying and the party indemnified, and arises only by virtue of a term employed in an express covenant of indemnity, as was pointed out in the case of *Parker v. Lewis (ubi sup.)*. In the present case not only are the American company not suing, but they are not even parties to the action. The plaintiffs are suing the English company on grounds which, the plaintiffs maintain, make the English company directly liable to them, and not merely to the American company. In such an action I can find no grounds for estoppel merely because the English company may be estopped as against the American company if and when the latter sue on their covenant of indemnity. And nothing that I decide now will affect the American company should they sue, or will affect the plaintiffs so far as they sue to enforce as against the American company the judgment they have obtained against that company. For these reasons I think that the English company are not estopped as against the plaintiffs, and are at liberty to try in this action the question whether the debenture-holders are not bound by the resolution passed on the 8th Oct. 1889, and to rely on the evidence bearing on that question which has been given by the defendants in this action. Having that evidence before me, I have come to the conclusion that the plaintiffs are bound by the resolution of the 8th Oct. 1889. The defendants have, in my opinion, succeeded in bringing this case within the authority which has been cited of *Sneath v. Valley Gold Limited (ubi sup.)*, and by the principles of that authority I am of course bound. No doubt the facts of this case are not identical with or so strong in favour of the debenture-holders being bound as those which occurred in the authority referred to. But what I have to consider is not whether, if the debenture-holders did not accept the resolution, they would altogether lose their security or all chance of being paid, but whether there were not difficulties in the way of their enforcing their rights of so substantial a character that the majority of debenture-holders might *bonâ fide* come to the conclu-

sion that it was desirable, in face of those difficulties, to compromise those rights on the terms of the resolution; and on the facts established before me, I think there were such difficulties. I think the position of affairs was such that under the trust deed the debenture-holders had the right, if they were so minded, to compromise their rights against the American company and that company's property, and to pass the resolution of the 8th Oct. 1889, and I see no reason to doubt that that resolution was honestly arrived at and was *bonâ fide* passed at the meeting by the necessary majority, acting solely in what they believed to be the interests of the debenture-holders. The difficulties I have referred to are these: Neither the American company nor the English company had any available means for paying the interest on the debentures. The interest that had been paid had only been provided by the hands of certain gentlemen, who, I think, would certainly not have continued to provide moneys if the debenture-holders had insisted on their rights. Registration in Mexico of the charge of the debenture-holders, which was necessary to make it valid, could only have been effected, if at all, with great difficulty, and probably after considerable litigation and at great expense, and there were no moneys available for the purpose in the hands of the trustees of the debenture-holders, or, so far as I can see, obtainable by them. The Mexican Government might have objected to such registration, and possibly after all efforts registration might never have been effected. And I remark that the counsel for the plaintiffs was obliged to admit at the beginning of his reply that the case against the trustees of the debenture-holders (in which term I include the committee) for not properly protecting the interests of the debenture-holders by registering their charge and otherwise could not in the face of the evidence brought before me be supported. Even if registration had been effected, the charge could only, I think, have been utilised for the benefit of the debenture-holders with difficulty and after considerable time and expenditure, and the debenture-holders and their trustees might well shrink from the formidable undertaking of taking possession of and trying to manage or sell the millions of acres in Lower California included in the charge. Then, if I consider what chance the debenture-holders would have had at that time, if they had insisted on their rights of recovering everything from the American company or the English company, I find that matters looked very bad for the debenture-holders. I see no good reason for differing from the view expressed by Sir Edward Jenkinson that if the resolution had not been carried the English company would probably have had to go into liquidation, and the debenture-holders would have lost both their security and their money. For these reasons I have come to the conclusion that the plaintiffs are bound by the resolution, and accordingly that their action must be dismissed, with costs.

Solicitors for the plaintiffs, *Badham and Williams*.

Solicitors for the River Plate Trust, &c., Company and for the Advisory Committee, *Ashurst, Morris, Crisp, and Co.*

Solicitors for the Mexican Land and Colonisation Company, *Norton, Rose, Norton, and Co.*

Q.B. Div.] REG. v. POWNALL AND OTHERS (Justices of the County of London). [Q.B. Div.]

QUEEN'S BENCH DIVISION.

Monday, June 12, 1893.

(Before MATHEW and WRIGHT, JJ.)

REG. v. POWNALL AND OTHERS (Justices of the County of London). (a)

Licensing — Notice of intention to apply for a certificate of justices—Notice to be given twenty-one days "before he applies"—Computation of the twenty-one days—Adjournment—32 & 33 Vict. c. 27, s. 7.

It is required by sect. 7 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), that "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish."

Held, that a notice given twenty-one days before an adjourned meeting, at which the application is actually heard, but less than twenty-one days before the first day of the general annual licensing meeting, is in time.

Mandamus to justices to hear and determine an application for a licence to sell intoxicating liquors.

The justices of the Tower Division of London held their general annual licensing meeting on the 6th March 1893. On the 13th Feb. notices were published of their intention to hold their meeting on that day, but to these notices a note was appended that applications for new licences would not be taken before the 20th March. On the 13th Feb. the applicant, one Adelaide Watts, served the notices of her intention to apply to the justices for a certificate at the general annual licensing meeting held on the 6th March, as required by sect. 7 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). On the 6th March the justices adjourned the hearing of applications for new licences to the 20th March, and at this adjourned meeting the application was heard and granted, but, on the hearing by the county licensing committee of the application for the confirmation of the licence, the objection was for the first time taken that there had been insufficient notice, the notice not having been given twenty-one clear days before the 6th March. The justices allowed the objection to prevail and refused the licence. Under these circumstances the applicant obtained a rule *nisi* for a *mandamus*.

Avory against the rule.—By sect. 40 of the Licensing Act of 1872 (35 & 36 Vict. c. 94) every person intending to apply for a new licence is required to publish notice of his intention in the manner directed by sect. 7 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). That section enacts that "every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, &c." Now, it is clear on the authorities that twenty-one days in this section means twenty-one clear days, and it is conceded by the other side that, if the twenty-one days' notice is to be computed from the 6th March, the first day of the sessions, it is not in time; but they contend that, if the notice is given twenty-one days before the application is actually heard, that is in this case before the 21st March, it is sufficient. They rely on the notice published on

the 13th Feb. that no business of this sort would be taken before the 20th March; but this notice, which is only issued for the convenience of persons wishing to apply, has in law no binding force, since these sessions are held under 9 Geo. 4. c. 61, which gives the justices no power of adjournment until the meeting itself, that is, until the 6th March. The matter must be looked at from the point of view of the outside public. As far as any person who might wish to come and oppose the application is concerned, the 6th March would be the day. It is true that it is said to be the usual practice of these justices to postpone this part of their business for a fortnight, but that is immaterial, since the Act cannot be construed one way for the Tower division and otherwise elsewhere. The very form of their notice, which is that they will apply on the 6th March, shows that at the time of giving it they computed the twenty-one days from that date and not from any later day. There is no case which decides that all applications are held to be taken on the first day, but that this must be so is shown by the analogous practice at quarter sessions. *Reg. v. Justices of the West Riding; Drake's case* (21 L. T. Rep. N. S. 490; L. Rep. 5 Q. B. 33) is not an authority against me. It only holds that you may, if you can, get your notice in between the original meeting and the adjourned meeting. The circumstances of the present case are clearly quite different. If then the notice was insufficient it cannot be said that it was waived because it was not taken until the case came before the confirming committee. In the first place, the attention of the justices was not called to the insufficiency of the notice before; and secondly, they were acting under a standing order they have duly made under the power given them in sect. 43 of the Licensing Act of 1872 (35 & 36 Vict. c. 94), to make rules by which they require proof that notices have been duly given in opposed cases. In any case the giving of the notice is a condition precedent of the application for a licence, so that there really could be no waiver of an objection to it.

Poland, Q.C. and *Bodkin* for the rule.—Apart from authority, the words of the section would clearly be held to apply to the actual date of the making of the application, and the matter is really settled by *Drake's case* (*ubi sup.*); in *Reg. v. Justices of Anglesey* (1892) 1 Q. B. 850 it was held that a notice required by sect. 42 of the Act of 1872 (35 & 36 Vict. c. 94), to be given within seven days was in time if given before the day on which that particular class of business was to be taken. That section may be said to be part of the same code with the section now in question, and the cases are strictly analogous. The intention of the Legislature is simply that applicants should not rush in at the last moment and get a licence without giving anyone time to oppose. Here there could clearly be nothing of that sort. The rule as to quarter sessions is really beside the question, as the Court of Quarter Sessions is a court of record, and not a court of summary jurisdiction like that at which this application was made. The other point is also good. The licence was granted, as the very form in which it is drawn up shows, at the first hearing at which no objection was taken to the notice. When it came before the committee it only required confirmation, and at that stage no objection could

(a) Reported by MERVYN LI. PERL, Esq., Barrister-at-Law.

Q.B. Div.]

PHARMACEUTICAL SOCIETY v. DELVE.

[Q.B. Div.]

be taken to the notice. Whatever power magistrates may have to make rules as to their own procedure, they cannot by those rules put a new condition upon an applicant.

MATHEW, J.—In this case I am of opinion that the *mandamus* must go. The magistrates have decided that there was no proper notice before them at the licensing sessions of the applicant's intention to apply. It is agreed on all hands that the notice was not sufficient if it must be reckoned from the first day of the sessions. No notice was taken at first by anyone of the objection now raised, but eventually, when the licence came before the committee for confirmation, the attention of the magistrates was called to it, and they decided that they could not grant the licence. It seems to me that the magistrates have not sufficiently observed the terms of sect. 7 of 32 & 33 Vict. c. 27. They construed the section as if it provided that notice should be given twenty-one days before the first day of the general annual licensing meeting. But the section really says twenty-one days "before he applies." It is quite possible that justices may appoint a particular day for hearing applications of this sort; and that is what has been done in the present case, as appears from a notice issued by the justices themselves fixing a day for the hearing of this class of cases. Under these circumstances it appears to me that there is no foundation for the argument that we are to construe the section as meaning that notice must be given twenty-one days before the first day of the sessions. It has been argued before us that there is such a rule at quarter sessions, where all business is supposed to be done on the first day. The reason of that is, that the Court of Quarter Sessions is a court of record; but the court now in question is not a court of record, but one of summary jurisdiction, so that there is really no analogy between the two cases. Then it is said that it has been made necessary by a standing order of the justices that, on an opposed application coming before the committee for confirmation, the notices should be proved. It is unnecessary for us to decide whether this was so or not; it is sufficient for us to say that there was no ground on which the committee ought to have refused to hear the application.

WRIGHT, J.—I am of the same opinion. I think that *Drake's case* (*ubi sup.*) is binding on us, and it governs the principle applicable to this case. It has been argued before us that the application must be deemed to be made on the first day of the sessions. *Drake's case* (*ubi sup.*) is a direct authority to the contrary, and it is a decision on this very section. The only difference between the two cases is, that in that case the notice was given on the first day of the sessions, while here it was given before. Without giving any decision as to whether the justices have jurisdiction to make such a standing order as that requiring proof of the notices when the application comes up for confirmation, I may say that I think they probably have not.

Rule made absolute.

Solicitors for the applicant, *Clapham, Fitch, and Co.*

Solicitors against the rule, *Maitlands, Peckham, and Co.*

Tuesday, Oct. 31, 1893.

(Before CHARLES and WRIGHT, JJ.)

PHARMACEUTICAL SOCIETY v. DELVE. (a)

Pharmacy Acts—Sale of poisons—Medicine containing a scheduled poison—Small quantity sold—Pharmacy Act 1868 (31 & 32 Vict. c. 121), ss. 1, 2, and 15.

By sect. 15 of the Pharmacy Act 1868, any person who sells or keeps an open shop for the retailing, dispensing, or compounding poisons, not being a duly qualified chemist, or chemist and druggist, is made liable to a penalty of 5l.

By sect. 2, the articles described in schedule A. are to be deemed poisons within the meaning of the Act. The schedule includes, amongst other articles, opium, and all preparations of opium. The drug sold was morphine, which is the active principle of opium.

The County Court judge held that there was not evidence of a sufficient amount of morphine to make the drug sold a poison within sects 2 and 15 of the Pharmacy Act of 1868.

Held, that the finding of the County Court judge could not be dissented from.

THIS was an appeal by the plaintiffs from the decision of the County Court judge of Manchester giving judgment in favour of the defendant in an action brought by the Pharmaceutical Society, to recover penalties for the sale of poison by an unqualified person contrary to the provisions of sects. 1, 2, and 15 of the Pharmacy Act 1868 (31 & 32 Vict. c. 121).

The respondent kept a drug store, and not being a qualified chemist was charged with selling a preparation which contained, as one of its ingredients, morphine. Morphine is the active principle of opium. One of the poisons scheduled in schedule A. of the Pharmacy Act is "opium and all the preparations of opium or of poppies."

The respondent sold at his shop a mixture called "licoricine." The appellants caused a bottle of this to be bought at the respondent's shop; the bottle had a notice upon it as follows:

This preparation combines the properties of licorice root, chlorodyne, &c., and to insure its careful use according to the printed directions, the Pharmacy Act 1868 requires it to be labelled "Poison."

The contents of this bottle were analysed, and morphine was found in it.

The appellants thereupon sued the defendant for penalties for the keeping open a shop for retailing, dispensing, or compounding of poisons—to wit, a preparation of morphine called licoricine.

The analyst stated in evidence on behalf of the appellants that the actual quantity of morphine in the bottle was not estimated, but that there was "more than a trace," and that there might have been one-fiftieth to three-fiftieths of a grain per ounce. The analyst was not prepared to say whether the taking of the whole contents of the bottle would do an adult any harm.

The County Court judge was of opinion that there was no evidence of a sufficient quantity of morphine to make it a poison, and so to bring the sale of it within the Pharmacy Act 1868, and allow the appellants to recover the penalty, and he gave judgment for the respondent.

Finlay, Q.C., and T. R. Grey for the appellant society.—The learned County Court judge was

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

ULTZYEN v. NICHOLS.

[Q.B. Div.]

wrong. The smallness of the quantity sold was not the proper ground for deciding in the defendant's favour. The whole object of the Pharmacy Acts was to prevent the sale of poisonous drugs by unqualified persons. No matter how infinitesimal was the amount sold, it was sold contrary to the statute. There was no evidence to say that the amount sold would not be sufficient to poison a child. In the recently decided case of *The Pharmaceutical Society v. Piper and Co.* (68 L. T. Rep. N. S. 490; (1893) 1 Q. B. 686) chlorodyne was the medicine sold, and not being protected by letters patent it did not come within the exception under sect. 16 of the Pharmacy Act 1868, but was held to be a poison within the meaning of sect. 15 of the Act, as it was a compound containing as one of its ingredients one grain of morphine, one of the scheduled poisons in the Act. Lawrance, J., in giving judgment in that case, took the proposition of an article containing an infinitesimal small quantity of poison, and he says (on p. 493 of 68 L. T. Rep. and 692 (1893) 1 Q. B.): "Of course, every case can be so put as to appear ridiculous, and the case has been put to us of a medicine containing an infinitesimal quantity of poison; but it is obvious that, at any rate, no harm would be done by labelling such medicine 'poison.'" Collins, J. (on p. 495 of 68 L. T. Rep. and 698 (1893) 1 Q. B.) says: "Can there be anything more dangerous than to allow a medicine which is called a proprietary medicine, but which may contain poison to any amount, to be sold or compounded by an unskilled person who chooses to compound or sell it? Such a person intending to put in a grain of poison might put in a drachm, and then the mischief and danger would be open to the public which this Act was passed to meet." [WRIGHT, J.—Suppose a poisonous salt was sold with an acid which nullified the poison?] So long as there is any semblance of a poison it would come within the Act.

Bonsey, for the respondent, not called upon.

CHARLES, J.—I am not able in the present case to come to a different conclusion from the one which the learned County Court judge has come to. An action has been brought in the County Court to recover from the defendant a penalty under sect. 15 of the Pharmacy Act 1868 (31 & 32 Vict. c. 121) for selling poison without having been duly registered as required by that Act. It was proved that the medicine which was sold by the defendant contained a very small quantity of morphine; but the analyst to whom the medicine was submitted for examination was not instructed to ascertain the exact quantity of the morphine which it contained. He did mention a very small quantity which he said there might be in the medicine; but the learned County Court judge was not satisfied that the evidence as to the quantity was sufficient to justify him in giving his judgment for the plaintiff society, and he accordingly decided that the defendant was not liable to the penalty. I am therefore of opinion that the learned County Court judge was right in so deciding.

WRIGHT, J. concurred.

Appeal dismissed.

Solicitors for the plaintiff society, *Flux, Son, and Co.*

Solicitors for the defendant, *Neve and Beck.*

Wednesday, Nov. 1, 1893.

(Before CHARLES and WRIGHT, JJ.)

ULTZYEN v. NICHOLS. (a)

Restaurant-keeper—Bailment—Negligence.

Upon entering defendant's restaurant, plaintiff's coat was taken from him by a waiter in the employ of defendant, who hung it up immediately behind plaintiff. On plaintiff leaving the restaurant, the coat was missing. The jury having found that there was want of reasonable care on defendant's part:

Held, that the defendant was liable.

This was an appeal by the defendant from the County Court, where the plaintiff had recovered a verdict and judgment.

The plaintiff went to dine at the defendant's restaurant. Upon entering the restaurant his coat was taken from him by a waiter in the defendant's employment, who hung it up immediately behind the plaintiff.

When the plaintiff left the restaurant his coat was missing.

The jury found that there was want of reasonable care on the part of the defendant, and the learned judge held that the coat was bailed by the plaintiff to the defendant.

Longstaffe for the defendant.—There was no evidence of a bailment of this overcoat by the plaintiff, it never came into the exclusive custody of the defendant or his servants; the coat was hung up within touch of the plaintiff. It does not appear to have been any part of the duty of the defendant's servant, the waiter, to take charge of the coat of the customers who came into the restaurant. What the waiter did was no more than an act of courtesy towards the plaintiff. There was no suggestion that the theft was committed by any of the defendant's servants, and the defendant is under no greater liability towards his customers than a lodging-house keeper, who is not responsible to his lodger for a theft committed by a stranger:

Holder v. Souby, 2 L. T. Rep. N. S. 219; 29 L. J. 246, C. P.; 8 C. B. (N. S.) 254.

R. M. Bray and Beard for the plaintiff.—There was ample evidence of a bailment of this overcoat. The evidence was, that the defendant's servant, the waiter, took the overcoat without being asked by the plaintiff to do so, and hung it up. The jury, therefore, are entitled to infer that the defendant's servant, the waiter in question, offered to take the coat, and did so in the ordinary course of his duty as a servant of the defendant. Whether the waiter did so in the course of his duty, or merely as an act of politeness, is purely a question for the jury, who were justified in finding that the waiter took the overcoat out of the plaintiff's possession into his own care in the course of his duty to the defendant. [WRIGHT, J.—If the defendant's waiter had placed the overcoat on a chair by the plaintiff's side, would there have been any bailment?] If that had happened, the case for the plaintiff would not have been so strong, but it then would have been a question for the jury. The liability of the defendant bears a strong analogy to that of a railway company for the loss of the small luggage of a passenger when taken charge of by a porter, as determined in the

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

case of *Richards v. The London, Brighton, and South Coast Railway* (7 C. B. 839; 18 L. J. 251, C. P.). They also cited

Great Western Railway Company v. Bunch and Wife, 58 L. T. Rep. N. S. 123; 57 L. J. 361, Q. B.; 13 App. Cas. 31.

Longstaffe in reply.—The cases cited are distinguishable. It was clear it was the duty of the railway porter to assist the passengers with their luggage, but there was no evidence in the present case showing that there was any duty whatever on the waiter's part to take the plaintiff's coat.

CHARLES, J.—This appeal, I think, must be dismissed. There are two questions we have to consider: first, whether the defendant was a bailee of the coat; secondly, whether there was on his part any negligence, owing to a want of reasonable care. There was, in my opinion, ample evidence of negligence. The first point is more troublesome; whether the facts show a bailment of the coat, or merely show that it was taken by the waiter as an act of good nature or an act of service, without any intention of taking charge of it. I think that the jury were justified in finding, upon the evidence before them, that the coat was bailed to the defendant. The evidence really came to this, that it was the waiter who relieved the plaintiff of his coat, and who selected the place where it was put. As I suggested during the argument, there might have been a waiter at the door of the dining-room or in the vestibule to take the coats of guests before entering the dining-room. If such a person takes a customer's coat, the mere fact of his taking and disposing of it where he chooses would be evidence that the restaurant-keeper was a bailee of the coat, for such a system might obviously add to the popularity of the restaurant, and would probably be adopted with that very object in view. In my opinion, there is only a difference in degree between the case of the restaurant-keeper providing a servant to take his customers' coats in that way and the present case.

WRIGHT, J.—I agree with my learned brother that, if there was a bailment, there was sufficient evidence of negligence. The point as to the question of bailment not having, it appears, been clearly raised at the trial in the court below, in my opinion, according to the case of *Smith v. Baker* (65 L. T. Rep. N. S. 467; H. of L. (1891) App. Cas. 325), there is no need for us to decide it. For the purpose of this decision I must assume that there was a bailment.

Appeal dismissed. Leave to appeal refused.

Solicitors for the plaintiff, *Beard and Sons*.

Solicitors for the defendant, *Tyrrell, Lewis, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Dec. 15, 1893.

(Before Lord HALSBURY, LOPES and KAY, L.JJ.)

Re VITORIA; Ex parte VITORIA. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bankruptcy—Practice—Appeal—Notice to registrar of County Court—"Forthwith"—Irregularity—Enlargement of time by court—Special circumstances—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 104 (2) (d); 105 (4); 143—Bankruptcy Rules 1886, r. 132.

By the Bankruptcy Rules 1886 it is provided by rule 132 that, "upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the court appealed from."

Held, that in a bankruptcy appeal from a County Court, the appellant's strict compliance with this rule is necessary, and that the court cannot in any particular case enlarge the time for compliance unless special circumstances can be shown to exist in the case.

THIS was an appeal from an order of the Queen's Bench Division (Williams and Kennedy, JJ.), whereby they reversed a decision of the registrar of the Croydon County Court, and made a receiving order against the debtor, J. F. Vitoria, upon the petition of the Spanish Corporation Limited.

In appealing from the refusal of the registrar to grant a receiving order, the petitioning creditors omitted to send a copy of their notice of appeal forthwith to the registrar in accordance with the requirements of rule 132 of the Bankruptcy Rules, nor had they sent any such copy to the registrar at the time when this matter came before the Court of Appeal.

Rule 132 of the Bankruptcy Rules 1886 is as follows:

Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the court appealed from, who shall mark thereon the date when received, and forthwith file the same with the proceedings.

The omission to send this copy of the notice of appeal was said to be accidental, and due to the fact that after the entry of the appeal the petitioning creditors changed their solicitors.

By the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), it is provided as follows:

Sect. 104 (2). Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows: . . . (d) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.

Sect. 105 (4). Where by this Act or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof upon such terms, if any, as the court may think fit to impose.

Sect. 143 (1). No proceeding in bankruptcy shall be invalidated by any formal defect, or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.]

Re VITORIA; *Ex parte* VITORIA.

[CT. OF APP.]

the injustice cannot be remedied by any order of that court.

Upon the hearing of the appeal before the Queen's Bench Division a preliminary objection was raised on behalf of the debtor that the appeal could not be heard by reason of the appellant's non-compliance with the requirements of rule 132.

The Court held that the omission to send to the registrar a copy of the notice of appeal was a mere irregularity which had caused no injury to the debtor, and they therefore enlarged the time for compliance with rule 132, and, allowing the creditor's appeal, made the receiving order asked for.

The debtor appealed.

Jelf, Q.C. and F. Cooper Willis (Ivor Bowen with them) for the debtor.—The Divisional Court was wrong in hearing the creditor's appeal. The requirements of rule 132 that a copy of the notice of appeal shall be sent forthwith to the registrar are strict, and have never yet been complied with by the creditors. Rule 144 of the Bankruptcy Rules made under the Bankruptcy Act 1869 was in similar terms to the present rule 132, and there an objection that the appellant had not complied with the rule was held fatal to his right of appeal:

Ex parte Sillence; Re Sillence, 37 L. T. Rep. N. S. 676; 7 Ch. Div. 238;

Ex parte Lamb; Re Southam, 45 L. T. Rep. N. S. 639; 19 Ch. Div. 169;

Ex parte Donnithorne; Re Green, 40 L. T. Rep. N. S. 660.

Sect. 104 (2) (d) of the Bankruptcy Act is drawn in the strictest terms, and the court can only enlarge the time limited by rule 132, if there are special circumstances in the case. Here there are no special circumstances, and the Divisional Court therefore had no power to enlarge the time, and were wrong in doing so:

Ex parte Vinay; Re Gilbert, 36 L. T. Rep. N. S. 43; 4 Ch. Div. 794.

Finlay, Q.C. and Ringwood for the creditors.—The three cases which have been referred to were decided upon the Bankruptcy Rules under the Act of 1869. The *ratio decidendi* in those cases does not apply to the present case, because now the practice in the mode of appealing is different. Now the notice of appeal is served on the respondent. The only object now in serving a notice on the registrar is that he may bring up the file to the court. There is really not much use in the rule, and the non-compliance by the appellant has caused no harm to anyone. No harm having been done, and the non-compliance being due only to a mistake, we ask the court to treat the matter as an irregularity, and to extend the time for compliance. As to the meaning of "forthwith," they referred to

Ex parte Williams; Re Jones, 46 L. T. Rep. N. S. 242.

As to the mode of calculating time they referred to

Christopher v. Croll, 53 L. T. Rep. N. S. 655; 16 Q. B. Div. 66.

Jelf, Q.C. replied.—It is no ground for being allowed an extension of time that the appellant considers the requirements of the statute to be useless and absurd.

Lord HALSBURY.—I am of opinion that the preliminary objection which has been raised on behalf of the debtor, is fatal to the respondents.

I shall lay down no general rule in this case, but when there is a statutory regulation that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal," and when I am asked to exercise my discretion and to enlarge the time within which under the rules an appeal must be brought, it is impossible not to see that what the Legislature has given is a rule, and that it has not left the matter entirely to the discretion of the court. The court has a discretion, but the Legislature has given it a criterion to guide it in exercising its discretion, and the Legislature has provided that an appeal shall only be entertained when the rules as to appeals have been complied with. Even if the case of *Ex parte Lamb; Re Southam (ubi sup.)* had not been decided, I should have come to the same conclusion as I do now. There the Court of Appeal held that because a copy of the notice of appeal had not been sent to the registrar of the County Court "forthwith" as required by rule 144 of the Bankruptcy Rules 1870, the appeal could not be heard. In the present case special circumstances are urged, but the only excuse which has been offered is that a slip in the procedure has been accidentally made. Yet to this hour the regulations of rule 132 have not been complied with. It would be of the worst example to lay down, as we are in fact asked to do here, that when the court is asked to enlarge the time which by statute has been limited by doing an act, it will be satisfied with an excuse of a solicitor's forgetfulness. The Legislature having provided certain fixed limits of time, the interpretation which I put upon the rule is that the circumstances of the case must be something special before the court, in the exercise of its discretion, will enlarge the time. In the present case no special circumstances exist, and I am therefore of opinion that this appeal must be allowed. I cannot help thinking that the exigency of the statute and rule 132 was not really called to the attention of the Divisional Court.

LOPES, L.J.—I entirely agree, and have nothing to add.

KAY, L.J.—I agree. I should be sorry if, in no possible case, the court were able to exercise its discretion. Sect. 104 (2) (d) of the Bankruptcy Act 1883 provides that no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal. If the general rules are not complied with in the case of an appeal, then it is only when there are special circumstances in the case that the court can extend the time for obedience to the rules. No special circumstances are alleged here, and the appeal must therefore be allowed.

Appeal allowed.

Solicitor for the debtor, *H. W. Christmas.*

Solicitors for the creditor, *Jenkins, Baker, and Co.*

Dec. 4 and 19, 1893.

(Before LOPES and KAY, L.JJ.)

Ex parte THE OVERSEERS OF WORKINGTON. (a)

*Justices—Jurisdiction—Appeal against assessment to poor rate—Disqualification by interest—Special sessions—*16 Geo. 2, c. 18, ss. 1 and 3—*Parochial Assessment Act 1836* (6 & 7 Will. 4, c. 96), ss. 6 and 7—*Union Assessment Committee Act 1864* (27 & 28 Vict. c. 39), s. 6.

Justices at special sessions are not disqualified from hearing and determining an appeal against an assessment to poor rate by reason of their being themselves liable to the rate in question.

THIS was an *ex parte* application by the Overseers of Workington, by way of appeal from a refusal of a prohibition by the Queen's Bench Division (Wills and Wright, JJ.) for a rule for a prohibition restraining the justices at the special sessions at Workington, from hearing an appeal against an assessment to poor rate.

A building society which had been assessed for poor rate in the parish of Workington appealed to the assessment committee, but obtained no relief.

The society then appealed to the special sessions of the petty sessional division of Workington, which is coterminous with the parish of Workington. All the justices at these special sessions, with only one exception, were ratepayers of the parish of Workington.

The overseers of Workington appeared under protest as respondents to the appeal before the special sessions, and contended that the justices by being ratepayers, were disqualified from adjudicating on the appeal. The justices then adjourned the hearing of the appeal for the question of jurisdiction to be decided.

The overseers moved in the Queen's Bench Division for a rule *nisi* for a prohibition to restrain the justices from hearing the appeal.

The Queen's Bench Division (Wills and Wright, JJ.) refused to grant a rule.

The overseers now moved for a rule in the Court of Appeal.

By 16 Geo. 2, c. 18, it is provided as follows:—

Sect. 1. It shall and may be lawful to and for all and every justice or justices of the peace for any county, riding, city, liberty, franchise, borough, or town corporate within their respective jurisdictions to make, do, and execute all and every act or acts, matter or matters, thing or things, appertaining to their office as justice or justices of the peace, so far as the same relates to the laws for the relief, maintenance, and settlement of poor persons . . . or to any other laws concerning parochial taxes, levies, or rates, notwithstanding any such justice or justices of the peace is or are rated to, or chargeable with taxes, levies, or rates, within any such parish, township, or place, affected by any such act or acts of such justice or justices as aforesaid.

Sect. 3. Provided always that this Act or anything therein contained shall not authorise or empower any justice or justices of the peace for any county or riding at large, to act in the determination of any appeal to the quarter sessions for any such county or riding, from any order, matter, or thing, relating to any such parish, township, or place, where such justice or justices of the peace is, or are so charged, taxed, or chargeable as aforesaid, anything herein contained to the contrary in any wise notwithstanding.

Sects. 6 and 7 of the *Parochial Assessment Act 1836* (6 & 7 Will. 4, c. 96) empower justices to hold special sessions for hearing appeals against the rates of the several parishes within their respective divisions.

By sect. 6 of the *Union Assessment Committee Act 1864* (27 & 28 Vict. c. 39) it is provided that

No justice of the peace shall be disqualified for acting in the determination of any appeal against a poor rate at any quarter or special sessions by reason of such justice being rated, or being liable to be rated in some other parish in the union than that for which the rate appealed against is made.

A. Henry for the applicants.—The decision of the Divisional Court was founded upon the case of *Reg. v. Bolingbroke* (69 L. T. Rep. N. S. 717; (1893) 2 Q. B. 347). That case, however, is distinguishable from the present case, because that case related to a city, and sect. 3 of 16 Geo. 2, c. 18, does not apply to a city. Sect. 3 provides that nothing in that Act shall authorise any justice for a county to act upon any appeal to quarter sessions for such county from anything relating to the parish or place where the justice is taxed or chargeable. Sect. 6 of 27 & 28 Vict. c. 39, removes the disqualification only to the extent of enabling a justice to act when the appeal relates to some other parish in the union other than that for which he is rated, or liable to be rated. This latter section shows that justices are disqualified from acting at special sessions in the same way as at quarter sessions, because it mentions both "quarter" and "special" sessions. The case of *Rees v. Justices of Essex* (5 M. & S. 513) shows that before 16 Geo. 2, c. 18, justices were disqualified from acting on rating appeals where they were rated, and therefore persons interested, and that the statute only removed the disability from justices in cities, boroughs, &c. In this case there was only one justice who was not disqualified, and therefore proceedings could not be taken at special sessions. *Cur. adv. vult.*

Dec. 19, 1893.—LOPES, L.J.—This is an application for a writ of prohibition to restrain justices sitting at special sessions from hearing an appeal against an assessment to poor rate on the ground that the justices are disqualified owing to their having been assessed to the rate which is the subject of the appeal. I think that the prohibition must be refused. The question turns on 16 Geo. 2, c. 18, s. 1. [His Lordship read the section.] That seems to me to be a perfectly clear enactment. It was suggested that that section deals with justices sitting at petty sessions, and that there is a distinction between petty sessions and special sessions. I do not agree to that. Special sessions are nothing more than petty sessions held for a special purpose. These special sessions are held under 6 & 7 Will. 4, c. 96, ss. 6 and 7, but there is nothing there to limit the power of the justices to act, because they are themselves subject to the rate. Then there is a proviso in sect. 3 of 16 Geo. 2, c. 18, to the effect that nothing in that Act shall authorise a justice to act in the determination of an appeal to quarter sessions from any order, matter, or thing, relating to any parish where such justice is taxed or chargeable with the rate in question. But that proviso only relates to quarter sessions, and no doubt if a justice came within that proviso he would be disqualified accordingly, though I must add that by 27 & 28 Vict. c. 39, that proviso is somewhat mitigated. Sect. 6 of that Act provides that, "No justice of the peace shall be disqualified for acting in the determination of any appeal against a poor rate at any quarter or special

(*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

[CT. OF APP.]

Re HELSBY; *Ex parte* THE TRUSTEE.

[CT. OF APP.]

sessions by reason of such justice being rated, or being liable to be rated in some other parish in the union than that for which the rate appealed against is made." In the present case it is enough for me to say that it seems to me perfectly clear that, under the general words of 16 Geo. 2, c. 18, s. 1, these justices are fully able to adjudicate on this rate, and there is nothing in any subsequent statute which repeals that section either in express terms, or by necessary implication. This case seems to me to be on all-fours with *Reg. v. Bolingbroke (ubi sup.)*. It is true that that was a case of *certiorari*, and not of prohibition, but that makes no difference in principle. I entirely agree with that case, and I think that in the present case the judgment of the Divisional Court was right, and this application must be dismissed.

KAY, L.J.—This is an application for a rule nisi for a prohibition to the justices of Workington, forbidding them to hear an appeal to special sessions against a rate, upon the ground that they were interested persons as being ratepayers themselves within the parish. In *Re v. The Justices of Essex (ubi sup.)* it was held that 16 Geo. 2, c. 18, s. 1, enabled the special sessions to hear an appeal against a poor rate, notwithstanding that they were so interested. This has been followed in the recent case of *Reg. v. Bolingbroke (ubi sup.)*, and it was there decided that the power of the justices to hear and determine the appeal was not impliedly taken away by sect. 6 of 27 & 28 Vict. c. 39, which provides that no justice of the peace shall be disqualified for acting in the determination of any appeal against a poor rate at any quarter or special sessions by reason of such justice being rated, or being liable to be rated in some other parish in the union than that for which the rate appealed against is made. It was held that this section did not apply to the jurisdiction given by sect. 1 of 16 Geo. 2, c. 18, but referred to sect. 3 of that Act. I see no reason for departing from these authorities, and am therefore of opinion that the rule should be refused.

Rule refused.

Solicitors for applicants, Wood and Wootton, agents for J. E. Birkett, Workington.

Friday, Jan. 12.

(Before Lord HALSBURY, LOPES and DAVEY, L.JJ.)

Re HELSBY; *Ex parte* THE TRUSTEE. (a)
APPEAL IN BANKRUPTCY.

Bankruptcy—Practice—Appeal to the Court of Appeal—Time—Order "signed, entered, or otherwise perfected"—Extension of time—Mistake—Special circumstances—Bankruptcy Rules 1886, rr. 130 and 351.

By rule 130 of the Bankruptcy Rules 1886, no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of twenty-one days from the time at which such order is "signed, entered, or otherwise perfected." An order of the court was signed by the registrar, and sealed on the 1st Dec., and was filed on the 2nd Dec. Notice of appeal against the order was served on the 23rd Dec.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Held, that the order appealed against was perfected when it was signed and sealed, and that the appeal was therefore out of time.

Held also, that a mistake by the appellant's solicitors was not such a special circumstance as would enable the court to enlarge the time for appealing.

THIS was an appeal from an order of the Queen's Bench Division (Williams and Kennedy, JJ.), setting aside an order of the Blackburn County Court, and discharging a receiving order made against a married woman.

The debtor appealed from a refusal by the County Court to set aside a receiving order made against her, and the Queen's Bench Division on the 20th Nov. 1893 allowed the appeal, and set aside the receiving order.

The registrar gave the parties notice of an appointment for the 30th Nov. for the settling of the order of the court, and accordingly on that day the order was settled, though the trustee was not represented at the appointed time.

On the 1st Dec. the registrar signed the order, and sealed it with the seal of the court, but there was nothing on the face of the order to show the date when this was done. On the same date the solicitors of the married woman obtained a copy of the order.

On the 2nd Dec. the registrar filed the order.

On the 23rd Dec. the trustee served a notice of appeal against the order.

By rule 109 of the Bankruptcy Rules 1886, it is provided as follows:

Every order for payment of money and costs, or either of them, shall be sealed, and be signed by a registrar, and shall be forthwith filed with the proceedings.

By rule 130:

Subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected.

By rule 351:

The court may, under special circumstances and for good cause shown, extend or abridge the time appointed by these rules, or fixed by any order of the court for doing any act or taking any proceeding.

The trustee's appeal now came on for hearing.

Muir Mackenzie for the respondent, the married woman, raised a preliminary objection that the appeal was out of time, and therefore could not be heard.—The order appealed against was perfected on the 1st Dec.; the appeal was not brought till the 23rd Dec., and under rule 130 of the Bankruptcy Rules 1886, the appeal ought to have been brought within twenty-one days from the 1st Dec. The order was perfected when it was signed and sealed; the filing has nothing to do with making the order valid, that is done merely to keep the record of the proceedings. The court is strict in requiring an appellant to bring his appeal within the statutory limits, and will not enlarge those limits except under special circumstances:

Re Vitoria; Ex parte Vitoria (ante, p. 141).

Here there are no special circumstances. It is true that there is nothing on the face of the order to show when it was perfected, but at the same time there is nothing on the face of it which could mislead the appellant, and the appellant

having known the date when the order was to be settled, must have known that it would probably be perfected the next day. Many orders are perfected as soon as they have been pronounced.

Herbert Reed, Q.C. and Waugh for the appellant.—First, this appeal was brought within the time limited by the Bankruptcy Rules. The order was perfected on the 2nd Dec. when it was filed. Until the order was filed the trustee could not know for certain what it really was. The object of filing is to enable persons interested in the case to find out the state of the proceedings: see rule 12 of the Bankruptcy Rules. There is nothing to show when the order was perfected except the registrar's diary, which only shows that the order was filed on the 2nd Dec. The only possible way in which the appellant could find out when the order was perfected was by inquiring at the registrar's office, and then he is told that the order was filed on the 2nd Dec. As an order has, by rule 109, to be filed "forthwith" on being signed and sealed, the appellant had the right to assume that this was done, and that the signing and sealing were done on the 2nd Dec. Secondly, if the court should be of opinion that the appeal is out of time, we ask that the time may be extended under the powers of the court given by rule 351 of the Bankruptcy Rules. There has been a mistake, and that is sufficient ground for extending the time:

Ex parte Luxon; Re Pidsley, 47 L. T. Rep. N. S. 211; 20 Ch. Div. 71.

[*LORD HALSBURY*.—That was a case of a mistake by an officer of the court. *LOPES, L.J.*—*Ex parte Viney; Re Gilbert* (36 L. T. Rep. N. S. 43; 4 Ch. Div. 794) the court held that a mistake by a solicitor's clerk was not a sufficient reason for extending the time.] Other circumstances are that here there has been no gross delay, no damage has been caused to anyone, and the very slight delay can have had no possible effect in inducing the respondent to alter her position in any way.

LORD HALSBURY.—The court is bound to obey the language used by the Legislature, and if the Legislature has thought it right to put a limit to the time within which an appeal must be brought if it is brought at all, then I think that that limit should not be exceeded unless the appellant can show that there are special circumstances in his case why the time should be extended so as to enable him to bring his appeal. The first question therefore is whether this case is within the exact words of the Legislature under which no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of twenty-one days from the signing, entering, or otherwise perfecting of the order. The question here is what was the day on which the twenty-one days elapsed. I think there can be no doubt that the days must be counted from the time when a perfect operative order was made in the court below. Such an order was made in the present case on the 1st Dec. 1893. The words of rule 130 according to which the period is calculated "from the time at which the order is signed, entered, or otherwise perfected," were probably intended to comprehend by their generality the great variety of the forms of procedure used in the various courts. We must calculate the time in this case from the day when the order appealed against

was "signed, entered, or otherwise perfected," that is to say, from the day when it was perfected, whether that was done by signing it, or by entering it, or by whatever other means it may have been perfected. That is the *terminus a quo*. Here the order was signed and sealed, and delivered to the parties, and became operative on the 1st Dec. 1893. The notice of appeal was served on the 23rd Dec. Therefore the appeal is out of time. But though it is out of time, the court has power to allow the appeal to be heard, if any special circumstances exist in the case why the time should be extended. The only circumstance which the appellant urges here is a mistake. If that is a special circumstance, then special circumstances exist in every case. No ground has been shown by the appellant why we ought to extend the time limited by the Legislature, and as he is out of time his appeal must be dismissed.

LOPES, L.J.—I entirely adopt the view of my Lord as to the meaning of the expression "signed, entered, or otherwise perfected." In this case a perfected order was delivered to the respondents on the 1st Dec. 1893, and from that date the twenty-one days began to run within which the appellant was allowed to bring his appeal. The appeal not having been brought within those twenty-one days, it is out of time. Then it was urged by the appellant that there were special circumstances in this case, and the court was asked to extend the time appointed by the rules, under the power given by rule 351. I think that neither "special circumstances" nor "good cause" within the meaning of that rule have been shown. The only ground put forward was a mistake by the appellant, but that alone will not justify the court in using its power to extend the time. I agree that the appeal must be dismissed.

DAVEY, L.J.—I agree that this appeal is out of time. The question depends on the meaning of rule 130 of the Bankruptcy Rules 1886, which I may remark repeats, almost *totidem verbis*, Order LVIII., r. 15, of the Rules of the Supreme Court. Rule 130 provides that an appeal to the Court of Appeal must be brought within twenty-one days from the date at which the order appealed from is "signed, entered, or otherwise perfected." Those words must, in my opinion, be read disjunctively; that is to say, "either signed or entered, or otherwise perfected." There is no doubt that in this case the order was perfected on the 1st Dec., and the time therefore began to run on that day. It is the signing and sealing by the court that makes an order valid. The requirements of the rules as to filing orders is directory only, and the filing is done for the purpose of the proper keeping of the records, and has nothing to do with the perfecting of the order. As to the other question of relaxing the stringency of rule 130, I am of opinion that a party has a vested right to an order when it has been made by the court, and his right should not be affected unless some good cause be shown which affects the party wishing to maintain the order. Here there is no cause shown, but an unfortunate mistake by the appellant's solicitor. That, in my opinion, is not a special circumstance, and I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Jaques and Co.*, agents for *Duckworth and Mathers*, Bradford.

CT. OF APP.]

BRETT v. MONARCH INVESTMENT BUILDING SOCIETY.

[CT. OF APP.]

Solicitors for the respondent, *Pritchard, Englefield, and Co.*, agents for *Southam and Harwood*, Manchester.

Nov. 2, 1893, and Jan. 16, 1894.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

BRETT v. MONARCH INVESTMENT BUILDING SOCIETY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Building society—Loans on deposit—Withdrawal of deposits—Condition—"To be paid in rotation according to the priority of their notices"—"Available balance in hand" insufficient—Suspension of right of action.

One of the conditions upon which the plaintiff deposited money at interest with a building society was, that "withdrawals of deposits are made upon the same principle as applies to the withdrawal of shares, viz., if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation according to the priority of their notices." The deposit note given to the plaintiff by the society stated that the deposit was received subject to fourteen days' notice of withdrawal. The plaintiff gave due notice of withdrawal, but at that time the available balance in hand was not sufficient to pay the depositors who had given notices of withdrawal prior to the plaintiff.

Held, by Lord Esher, M.R. and Lopes, L.J., Kay, L.J. doubting (reversing the decision of the Divisional Court), that the condition was not limited to the mode of dealing with the available balance in hand, but suspended the depositor's right of action to recover his deposit until there was a balance sufficient to pay him in rotation according to the priority of his notice.

THIS was an appeal from the judgment of the Divisional Court in favour of the plaintiff.

The action was brought in the Mayor's Court, London, to recover 140*l.* deposited by the plaintiff with the defendants, and 1*l.* 1*s.* 9*d.* interest thereon.

The defendants were a building society incorporated under the Building Societies Act, and one of the main objects of the society was to advance money to members desirous of becoming owners of their houses, the society taking mortgages of the houses from the members, and the loans being repayable by instalments.

The defendants were empowered by sect. 15 of the Building Societies Act 1874 to receive deposits or loans at interest from the members or other persons, to be applied to the purposes of the society, so that the total amount so received and not repaid should not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. The plaintiff, who was not a member of the defendant society, between 1880 and 1887, deposited with the defendants various sums of money, and on each occasion he signed the following document, which he received from the defendants, and which was headed, "Application for a deposit account":

Dear Sir,—Herewith I beg to hand you the sum of pounds, which I will thank you to place to my credit on

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

deposit with the society at per cent. interest, subject to the conditions and terms specified on the back hereof, by which I agree to be bound.—I am, yours truly,

The following were the conditions, so far as material:

3. A deposit certificate (called a deposit note), signed by three directors, and countersigned by the secretary, is given for each sum deposited, within fourteen days following, in exchange for the interim certificate signed by the secretary. On withdrawal the deposit certificate has to be given up to the society.

4. Interest will be calculated as follows: for deposits lodged for one year certain, subject thereafter to notice as below, 4 per cent. per annum; fourteen days' notice for sums not exceeding 250*l.*; one month's notice for sums exceeding 250*l.*

5. Interest is calculated to within fourteen days of the date of the cheque drawn for repayment of deposits.

6. Withdrawals of deposits are made upon the same principle as applies to the withdrawal of shares, viz., if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation according to the priority of their notice.

The plaintiff on each occasion received a deposit note duly signed in the following form:

Received on of £ to be placed to the credit of his deposit account with the Monarch Investment Building Society, at 4 per cent., subject to fourteen days' notice of withdrawal, and to the rules and regulations bearing upon deposit accounts.

The earlier deposit notes did not contain the words, "and to the rules and regulations bearing upon deposit accounts."

In the autumn of 1892 there was a run upon the defendant society, and in Oct. 1892 the plaintiff gave due notice to withdraw the amount standing to his credit upon deposit, amounting with interest to 141*l.* 1*s.* 9*d.*, and upon non-payment of this sum by the defendants he brought this action in April 1893 to recover the amount. The defendants in defence relied upon condition 6, and proved that, at the time when the plaintiff gave notice of withdrawal, depositors to the amount of 23,000*l.* had given prior notices of withdrawal, and that between that date and the date when the action was brought, they had had funds in hand sufficient to pay only 20,000*l.* out of the above 23,000*l.* The Common Serjeant held that, by reason of condition 6, the deposit had not then become payable, and gave judgment for the defendants. (a) The Divisional Court (Charles and Wright, JJ.) reversed this judgment, holding that condition 6 only regulated the distribution of the available balance in hand among the depositors *inter se*, so as to prevent the defendants from arbitrarily preferring one depositor to another, and did not take away the depositor's right of action until there was an available balance in hand sufficient to pay him in his rotation. They accordingly entered judgment for the plaintiff, but gave leave to appeal.

Channell, Q.C. and Montague Lush for the defendants.—Condition 6 means that, if the available balance in hand at any time is not sufficient to pay all the depositors who have given notice of withdrawal, the depositors are only to be paid in rotation according to the priority of their notices. The deposit does not become payable until there is an available balance in hand to pay it. The depositor's right of action is taken

(a) It appeared that since the action was commenced the plaintiff's deposit had been repaid to him out of funds subsequently coming to the defendants' hands.

away, or postponed, until there is an available balance in hand. The object of the condition is to protect the society against a run being made upon it, and to allow them time to get in money to pay the depositors. That object would be defeated if each depositor could bring an action to recover his deposit, though the available balance were not sufficient to pay him. The words in condition 6 "paid in rotation" mean paid in rotation, and not before. The depositor, upon giving notice of withdrawal, is entitled to have his deposit repaid subject to the society having funds in hand available to pay it. They referred to

Walton v. Edge, 52 L. T. Rep. N. S. 666, at p. 670; 10 App. Cas. 33, at p. 44.

Willis, Q.C. and *Cannot* for the plaintiff.—The deposit note which the plaintiff received from the defendants stated that the deposit was repayable upon giving fourteen days' notice. Condition 6 upon the application form did not alter that term of the contract between the society and the depositor; it merely dealt with the right of the depositors *inter se*. The depositors, as between themselves, were to be paid in rotation out of the available balance in hand, but that did not affect their rights as against the society. It did not take away their right of action to recover their deposits. The rotation only applies to the available balance in hand, and the effect is to allocate the moneys in hand towards payment of the depositors in the order of their notices. The plaintiff therefore is entitled to maintain this action.

Channell, Q.C. replied.

Cur. adv. vult.

Jan. 16.—The judgment of Lord Esher, M.R. and Lopes, L.J. was read by

LOPES, L.J.—This action is brought to recover 140*l.* deposited with the defendants, and 1*l.* 1*s.* 9*d.* interest. The defendants admit that the said sum of 141*l.* 1*s.* 9*d.* was at the end of fourteen days' demand *prima facie* due to the plaintiff, but say that, having regard to the terms of the contract between them, the time for payment had not arrived when the action was brought. In other words, that the sum, though then due, was not then payable. Since the action was brought the whole amount has been paid to the plaintiff. The case entirely depends on the construction to be placed upon condition 6 on the back of the application for a deposit account. When there is an insufficient available balance in hand to pay all the depositors wishing to withdraw, does that condition only regulate the rotation of payment so as to prevent undue preference, or does it postpone the payment until there is an available balance in hand sufficient to pay depositors in rotation according to the priority of their notices? The case was tried in the Mayor's Court, by the Common Serjeant, and he adopted the latter alternative. There was an appeal to the Divisional Court (consisting of Charles and Wright, J.J.), and they, without hesitation, adopted the former alternative. After careful consideration we find ourselves unable to agree with the construction put upon the condition by the Divisional Court. [His Lordship then read the form of application signed by the plaintiff, and conditions 3, 4, and 6, indorsed thereon, and the deposit note handed by the defendants to the plaintiff.] Condition 6 must be a part, and a material part, of the contract,

and it is beyond question that the money was deposited subject to that condition. In construing this condition, it is essential to bear in mind the nature and objects of the defendant society. The defendants are a building society, created primarily for the purpose of advancing money to persons desirous of becoming possessed of their houses. The houses are mortgaged to the defendants, the money being repayable by instalments extending over a period of years. When the whole mortgage debt is repaid with interest, the mortgagor becomes entitled in fee simple to his house. These instalments would come in by degrees, and at fixed periods, and it would not be reasonable that a society having a right to borrow to the extent of two-thirds of the amount of their mortgages should be called upon suddenly to repay sums of money which they might not have in hand, or under their immediate control. Such a contingency would not be beneficial either to the defendant society or to the depositors. Owing to some panic or want of confidence there might at any time be a run upon the defendant society which would end in their ruin, if they could be called upon to pay all their depositors at once. In the autumn of 1892 there was an uneasiness in the minds of depositors in various building societies, and the result was that there was a steady application by depositors in this society to withdraw sums which they had deposited. It was proved at the trial that a sum amounting to 23,000*l.* was demanded from the defendants by depositors at the time the plaintiff sent in his application for repayment of his deposit. If it was not for the 6th condition it is clear that the plaintiff and each of those depositors would have been entitled to have had their deposits at once repaid them, and might then and there have brought actions. But the defendants rely on the 6th condition, and say that they by evidence have brought themselves within it, and have thereby answered the *prima facie* case of the plaintiff. Are they entitled to rely on this condition? We are of opinion that they are. It was proved, in our opinion, on behalf of the defendants that at the time the plaintiff sent in his application the defendants, having regard to previous applications by other depositors, had no available balance in hand sufficient to pay the plaintiff's deposit. The 6th condition, in our judgment, was annexed to the application for the express purpose of meeting a case like the present. It was inserted in order to meet any extraordinary run made on the defendant society by terrified depositors, and to give the society time to meet such claims by postponing sudden and unexpected demands made upon them until money came to their hands to satisfy them. We cannot think that it was only intended, or that the true meaning of the condition is, to regulate the course of payment amongst depositors, and thus to prevent any undue preference; that would give it really no effect. If all the depositors could bring their actions and recover their deposits at the same time, what would be the advantage of the provision for rotation and priority? The construction contended for by the plaintiff would afford no protection to the defendant society, and would leave it in the power of a certain number of panic-stricken depositors to wreck the society, which would not be for the interest of the society or the depositors. The condition means that the defendant society

APP.]

REG. v. JUSTICES OF COUNTY OF LONDON AND LONDON COUNTY COUNCIL.

[APP.]

may postpone payment and the depositor's right to recover until there is an available balance in hand sufficient to pay depositors in rotation according to the priority of their notices. The plaintiff brought his action too soon, and at a time when, according to condition 6, the money though due was not payable. We do not understand "available balance in hand" merely to mean money in the coffers of the defendant society, but money which without undue loss or undue delay they could realise, as, for example, money invested in consols or any other security capable of being readily realised. "An available balance in hand" of this kind the defendant society did not possess at the time of the plaintiff's notice of withdrawal, nor at the time when the action was brought. The appeal must be allowed with costs.

KAY, L.J.—I must say that I am inclined to attach to condition 6 the meaning placed upon it by the Divisional Court rather than that which has been placed upon it in the judgment that has just been read. The condition is on a printed form supplied by the defendants to persons wishing to make deposits of money with them. The plaintiff, when he made his deposit, signed one of those forms, by which he agreed to be bound by the conditions on the back. Those conditions were drawn by the defendants, and for their wording the defendants must be treated as responsible. I agree with the other members of the court that the words "available balance in hand" do not mean only the cash at the time in hand, but include also the cash which can be readily obtained by calling in investments, subject to the right of the society to retain sufficient in hand for the purpose of carrying on their ordinary business, as, for instance, to pay officials and other expenses. "Available balance in hand" therefore means moneys at the time in hand, or which can be easily called in, but the balance must be available; that is, it must be the balance remaining after paying the current expenses of the society. The real difficulty which I feel in this case is, whether condition 6 is so clearly worded as to take away the depositor's right of action if the available balance in hand is not sufficient to pay him in his rotation, or whether sufficient operation is not given to it by limiting its application to the mode of dealing with the available balance in hand. It occurs to me that, if it were intended to take away the right of action altogether, it ought to have been expressed in clearer terms. I confess I do not think that it deprives the condition of its useful operation to give it the more limited construction. If the available balance in hand is not sufficient to pay all the depositors wishing to withdraw, payment will be made in rotation according to the priority of their notices. The effect is, that the society cannot in an arbitrary way prefer one depositor to another. It is an advantage both to depositors and to the society. It lays down an intelligible rule as to the mode in which the available balance in hand is to be dealt with. I should be more content to give the condition that restricted meaning rather than the wider meaning which has been placed upon it, namely, that, if the available balance is not sufficient to pay the depositor who has given notice of withdrawal, the right of action is taken away altogether until there is a balance in hand sufficient to pay him. For myself, I do not feel inclined to

place that wide construction upon the condition, but at the same time I content myself with stating the difficulty that I feel in the matter.

Appeal allowed.

Solicitor for the plaintiff, *Henshall Fereday*.

Solicitors for the defendants, *Howard and Shelton*.

Nov. 20, 1893, and Jan. 16, 1894.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

REG. v. THE JUSTICES OF THE COUNTY OF LONDON AND THE LONDON COUNTY COUNCIL. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Costs — Jurisdiction — Prohibition — Judicature Act 1890 (53 & 54 Vict. c. 44), ss. 4 and 5.

The Queen's Bench Division has jurisdiction, upon making absolute a rule nisi for a prohibition, to give costs to a successful applicant.

APPEAL of the London County Council from an order of the Queen's Bench Division (Charles and Williams, JJ.) for a prohibition, by which order the London County Council were ordered to pay the costs of the applicants (69 L. T. Rep. N. S. 438).

The London County Council gave notice of an appeal to the Quarter Sessions for the County of London against the valuation list of the parish of St. George's, Hanover-square, on the ground that the totals were too low.

The assessment committee of the St. George's Union obtained a rule nisi for a prohibition prohibiting the justices of the county of London from proceeding to hear the appeal.

Upon argument, this rule was made absolute by the Queen's Bench Division (Charles and Williams, JJ.), and the London County Council were ordered to pay the costs of the applicants.

The London County Council appealed against the order making absolute the rule nisi for a prohibition, and also against the order directing them to pay costs.

The appeal against the order for a prohibition was heard and dismissed in Aug. 1893 (69 L. T. Rep. N. S. 682).

The appeal against the order as to costs stood over, and came on for argument in November.

Horace Ivory for the appellants.—The Divisional Court made the rule absolute with costs. They had no jurisdiction to order us to pay costs. That has been established by the decision of this court in

London County Council v. Churchwardens and Overseers of West Ham, 67 L. T. Rep. N. S. 363; (1892) 2 Q. B. 173.

That case established two propositions: (1) that, at common law, no common law court had any common law jurisdiction to give costs, but that their only jurisdiction to give costs was that conferred by statute; and (2) that the Judicature Acts have not altered that rule. Lord Esher, M.R., in his judgment in that case, says: "I accept the doctrine that at common law no court of common law had jurisdiction to give costs at all, and that the whole power in those courts to give costs is given them by statute;" and Lopes, L.J. says: "There

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

would have been no inherent or original jurisdiction in the courts to deal with costs. The only jurisdiction they would have would be under a statute or under the recognisances." In that case there was a special case stated by quarter sessions, which would formerly have been brought before the court by *certiorari*, a proceeding on the Crown side of the Queen's Bench Division. The Judicature Act 1890 (Finlay's Act) does not give any jurisdiction as to costs in proceedings on the Crown side of the Queen's Bench Division. This is a case of prohibition, and in prohibition there never was any jurisdiction to give costs, except where there were pleadings, in which case it may become an ordinary action. This is a proceeding on the Crown side of the Queen's Bench Division, and therefore the Judicature Acts have not given any jurisdiction to grant costs, because there was no such jurisdiction before. The statute 1 Will. 4, c. 41, sect. 1, does not entitle an applicant for a prohibition to his costs where the rule is made absolute without pleadings, because in such case there is no "judgment" within the meaning of the section:

Ex parte the Overseers of Everton, 24 L. T. Rep. N. S. 361; L. Rep. 6 C. P. 245.

That decision followed an earlier case:

Rez v. Kealing, 1 Dowl. 440.

The Divisional Court, without having the point fully argued, said that they would make the rule absolute with costs, because costs had been given in the case:

Wallace v. Allen, 32 L. T. Rep. N. S. 830; L. Rep. 10 C. P. 607.

The decision in that case seems to have been founded upon something contained in Tidd's Practice, 8th edit., p. 508. That is, however, no authority for saying that the court may make absolute or discharge the rule with or without costs at its discretion. In that case the rule was moved "with costs," but that fact cannot make any difference to the jurisdiction of the court. The fact that costs are asked for cannot give the court a jurisdiction which it does not otherwise possess. In the present case the rule was not moved with costs. [LOPES, L.J. referred to Gray on Costs, p. 447.] In the case of *Reg. v. Parlbay* (W. N. 1889, p. 190), Huddleston, B., after obtaining the opinion of the Master of the Crown Office, which he read, held that there was no power to award costs in *certiorari* because there was no such power before the Judicature Acts. That case was approved of in *London County Council v. Churchwardens and Overseers of West Ham* (*ubi sup.*). It was laid down in *Garnett v. Bradley* (39 L. T. Rep. N. S. 261; 3 App. Cas. 944) that courts of common law have no jurisdiction to give costs unless that power is conferred by statute. The power of the court to dismiss an application with costs is part of its inherent jurisdiction to make any person pay costs who wrongly sets it in motion, and is quite distinct from any power to make a person, who is brought before it, pay costs:

Pringle v. Secretary of State for India, 60 L. T. Rep. N. S. 796; 40 Ch. Div. 288.

Dankwerts for the respondent.—The question as to the jurisdiction to grant costs in this case does not depend upon whether this rule was moved with costs or not. The court has always

had power, whether in prohibition cases or any other cases, to dismiss any application with costs:

Lloyd v. Jones, 6 C. B. 81.

In that case a rule for a prohibition was discharged with costs. The ground upon which this power was exercised is stated in *Pringle v. Secretary of State for India* (*ubi sup.*) where Bowen, L.J., says: "I have always understood it to be a broad principle that a court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in motion wrongly, and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay the costs." Now a rule for a prohibition is made absolute when some person has wrongly set some court in motion, and there is no reason why he should not, upon the same principle, be made to pay costs. Before the Judicature Acts it was the inveterate practice of the courts to grant costs when a rule for a prohibition was made absolute. Where there were no pleadings, the court always had a discretion as to costs, and, where there were pleadings, the statute 1 Will. 4, c. 41, gave the successful party a right to his costs:

Ex parte Tucker, 4 M. & G. 1079.

That it was the inveterate practice to give costs in the discretion of the court appears from a number of cases:

Robinson v. Emanuel, 30 L. T. Rep. N. S. 500; L. Rep. 9 C. P. 414;
Quarley v. Timmins, L. Rep. 9 C. P. 416;
Worthington v. Jeffries, 32 L. T. Rep. N. S. 606; L. Rep. 10 C. P. 379;
Wallace v. Allen (*ubi sup.*).

All these cases were before the Judicature Acts, and no doubt was thrown upon the power of the court to grant costs. After the Judicature Acts the same practice was followed:

Evans v. Wills, 34 L. T. Rep. N. S. 679; 1 C. P. Div. 229;
Warwick Canal Company v. Birmingham Canal Company, 40 L. T. Rep. N. S. 846; 5 Ex. Div. 1;
Reg. v. Midland Railway Company, 57 L. T. Rep. N. S. 619; 19 Q. B. Div. 540;
Great Western Railway Company v. Waterford and Limerick Railway Company, 44 L. T. Rep. N. S. 723; 17 Ch. Div. 493.

It is noticeable that most of these cases were not in the Queen's Bench at all. The same practice was followed in the Court of Chancery, and the jurisdiction to grant costs in that court was established:

Eurford v. Lenthall, 2 Atk. 551;
Jones v. Coxeter, 2 Ark. 400;
Andrews v. Barnes, 58 L. T. Rep. N. S. 748; 39 Ch. Div. 133.

In the last-named case, Fry, L.J., in giving the judgment of the court, said: "The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity,' said Lord Hardwicke in *Jones v. Coxeter* (*ubi sup.*), 'is entirely discretionary, and is not at all conformable to the rule at law.' 'Courts of equity,' said the same great judge in another case, 'have in all cases done it' (i.e., dealt with costs) 'not from any authority' (i.e., as we understand, from any statutory or delegated authority), 'but from conscience and *arbitrio boni viri* as to the satisfaction on one side or other on account of vexation.' That shows that the Court of Chancery had an inherent jurisdiction

APP.]

REG. v. JUSTICES OF COUNTY OF LONDON AND LONDON COUNTY COUNCIL.

[APP.]

over costs. In granting writs of prohibition the Court of Chancery was exercising a common law jurisdiction. That power of the Court of Chancery is now, by virtue of the Judicature Acts, vested in every branch of the High Court. The statutes 8 & 9 Will. 3, c. 11, and 1 Will. 4, c. 21, gave the successful party in prohibition a right to his costs, and in cases where there were no pleadings left the costs to the discretion of the court. In *Ex parte The Overseers of Everton (ubi sup.)* the decision was only that the statute 1 Will. 4, c. 21, did not give costs as of right except in cases where there were pleadings. [Lord ESHER, M.R.—In *Reg. v. Keating (ubi sup.)* Patteson, J. said: "Before this Act (1 Will. 4, c. 21) costs were not granted, except in cases where there were pleadings." LOPES, L.J.—In Corner's Crown Practice, p. 248, it is stated: "It has been held that, where a rule has been made absolute for a prohibition, the costs of the rule cannot be granted to the successful party under 1 Will. 4, c. 21, s. 1; as that statute only applies to cases where there have been pleadings in prohibition." The statutes—8 & 9 Will. 3, c. 11, and 1 Will. 4, c. 21—are repealed by sects. 3 and 4 of the Statute Law Revision Act 1883 (46 & 47 Vict. c. 49), and that Act enacts, by sect. 6 (c) that "the enactments relating to Rules of Court contained in the Supreme Court of Judicature Act 1875, and the Acts amending it, shall be deemed to extend and apply to the matters contained in and regulated by the enactments repealed by this Act." Under the Judicature Acts, the Rules of the Supreme Court of 1883 were made, and Order LXV. is applicable to costs in prohibition. Prohibition is not a proceeding on the Crown side of the Queen's Bench, because a writ of prohibition might have been, and can now be, issued by any of the courts. Further, Order LXVII., r. 2, expressly provides that Order LXV. shall apply to proceedings in prohibition. [KAY, L. J. referred to *Re Mills*, 55 L. T. Rep. N. S. 465; 34 Ch. Div. 24.] The Crown Office Rules 1886, rule 300, provide that Order LXV. of the Rules of the Supreme Court shall apply to all civil proceedings on the Crown side. The Supreme Court of Judicature Act 1890 (53 & 54 Vict. c. 44), sect. 5, applies in this case, because proceedings in prohibition are not on the Crown side. If proceedings in prohibition were on the Crown side the other courts would not have had the jurisdiction to issue writs of prohibition which they undoubtedly possessed. The fact that this case is in the Queen's Bench Division cannot make it a proceeding on the Crown side, because the old Courts of Common Pleas and Exchequer are merged in the Queen's Bench Division. The case of *London County Council v. Churchwardens and Overseers of West Ham (ubi sup.)* does not govern this case. The proceedings in that case were, in effect, in *certiorari* which was undoubtedly a proceeding on the Crown side. This is not a proceeding on the Crown side.

Avory in reply.—In Tidd's Practice, pp. 945-9, it is stated that "no final costs were recoverable at common law," and prohibition is given as an instance in which costs were not recoverable under the Statute of Gloucester; and it is then further stated that under 8 & 9 Will. 3, c. 11, costs could only be recovered after plea or demurrer. In *Free v. Burgoyne* (6 B. & C. 538) Lord Tenterden, C.J. said: "By the common law there

were no costs in prohibition, and therefore, unless they are given in this case by statute, none can be awarded by the court." That case went to the House of Lords (2 Bligh N. S. 65), and it was said that "unless therefore it is clear from the Act of 8 & 9 Will. 3 that he is entitled to his costs, they cannot be given." The fact that a writ of prohibition might be issued by other courts does not prevent proceedings in prohibition in the Queen's Bench being on the Crown side. Order LXVIII. deals with such proceedings as being on the Crown side, and the Crown Office Rules 1886 also deal with them as proceedings on the Crown side—rules 81 and 82. Under sect. 6 (c) of the Statute Law Revision Act 1883 rules as to costs in prohibition could only be made for cases in which there were pleadings because the statutes of Will. 3 and Will. 4 only dealt with costs in such cases. In Short and Mellor, on the Practice of the Crown Office, the law as to costs is thus stated: "Where the application is made without pleadings, the order will be made absolute or discharged. If made absolute it is not an easy matter to state with certainty the practice as to costs. There is no statute under which they can be given."

Cur. adv. vult.

Jan. 16, 1894.—LOPES, L.J.—The Master of the Rolls concurs in the judgments which we are about to deliver. A writ of prohibition on motion had been granted by the Divisional Court against the assessment sessions. The prohibition was granted with costs. There was an appeal to this court, and this court affirmed the decision of the Divisional Court, but took time to consider whether the last-named court had the power to give costs. It is contended that the Divisional Court had no power to give costs. If the prohibition had been refused it is admitted, and it is clear, that there was jurisdiction to refuse the prohibition with costs. But has the Divisional Court power to give costs when a prohibition without pleadings is granted? It is contended that prohibition is not governed by sect. 4 of the Judicature Act 1890, which says "that nothing in this Act shall alter the practice in any criminal matter or in bankruptcy, or in the proceedings on the Crown side of the Queen's Bench Division." I will assume, if this was a case belonging to the Crown side of the Queen's Bench Division, that it would be covered by this section, and costs could not be given. If it was a case of a *certiorari* I will assume that this section would regulate the power to award costs because *certiorari* belongs to the Crown side of the Queen's Bench Division. But prohibition was not a jurisdiction belonging any more to the Queen's Bench than to the other courts. Prohibition might be applied for and granted either in the Queen's Bench, or the Exchequer, or the Common Pleas. They all had concurrent jurisdiction and power to inhibit inferior tribunals. Prohibition too could be, and was, granted by the Court of Chancery. Many cases were cited, both before and after the passing of the Judicature Acts, where prohibitions were granted without pleadings both by the Common Law Courts and the Courts of Chancery, and costs given. That a practice to grant costs had existed for many years, and had been followed before and after the Judicature Acts, was beyond controversy. It was objected, however, to these cases that the

APP.]

REG. v. JUSTICES OF COUNTY OF LONDON AND LONDON COUNTY COUNCIL.

[APP.]

point of want of jurisdiction was not taken; but the point of want of jurisdiction, in my opinion, was not taken because it was felt it could not be successfully maintained. Other grounds were suggested by Mr. Danckwerts in his able argument in support of the decision of the Divisional Court with regard to the costs, which I think it unnecessary to refer to. I am satisfied to rest my judgment upon the ground that the Courts of Chancery, Queen's Bench, Exchequer, and Common Pleas had formerly jurisdiction to grant prohibition with costs when there were no pleadings, and that the same jurisdiction is now vested in the High Court, and is not touched by sect. 4 of the Judicature Act 1890. Such a conclusion is consonant with authority and justice, for it is difficult to understand on what principle a litigant, who successfully impeaches the jurisdiction of a court into which his adversary has improperly dragged him, is to be deprived of the costs of a proceeding which the conduct of his adversary has rendered imperatively necessary. I am of opinion, therefore, that the Divisional Court had jurisdiction to give costs.

KAY, L.J.—The London County Council in this case commenced proceedings before the assessment sessions to dispute the totals of certain valuations for taxation and rating purposes. This Court of Appeal decided that they had no *locus standi* to raise the question which they had tried to raise, of the improper valuation of certain hereditaments, and granted a prohibition against them with costs. Costs had been given against them by the Divisional Court from which the appeal was brought. A question is now raised whether that court had jurisdiction to order them to pay costs on granting the prohibition against them. If the prohibition had been refused it is not disputed that the applicant, even though a stranger to the litigation sought to be prohibited, might be ordered to pay costs: (*Lloyd v. Jones, ubi sup.*) Sect. 5 of the Judicature Act 1890 would enable any judge of the High Court to give costs in such a case as this. But it is argued that its effect is controlled by sect. 4 which provides that nothing in the Act shall alter the practice in any criminal matter, or in bankruptcy, or in the proceedings on the Crown side of the Queen's Bench Division. That was decided to be the effect of sect. 4 in *The London County Council v. Churchwardens of West Ham (ubi sup.)* which was an appeal from the Queen's Bench Division on a special case stated by quarter sessions on an appeal against a poor rate. This, it was held, was a proceeding on the Crown side of the Queen's Bench Division in which, before the Judicature Act, it was said there was no power to give costs, and therefore by sect. 4 of the Act of 1890 that disability was continued. Lord Blackburn, in *Garnett v. Bradley (ubi sup.)*, said: "Costs in courts of common law were not by common law at all, they were entirely and absolutely creatures of statute"; and it was held in the West Ham case that there was no statute which enabled the court to give costs in a proceeding on the Crown side of the Queen's Bench Division. See also *London County Council v. Assessment Committee of Woolwich* (1893) 1 Q. B. 227. The West Ham case, however, was treated as a case of *certiorari*. This is a case of prohibition. Prohibition, it is argued, is not a jurisdiction peculiar to the Crown side of the Queen's

Bench Division. Prohibition was granted by the Court of Chancery, and by the Courts of Exchequer and Common Pleas. Those courts had power to give costs when the prohibition was granted against the person whose proceeding in the inferior court was prohibited. Now, by the Judicature Act 1873, s. 16, the High Court has all the jurisdiction capable of being exercised by any of those courts. This argument seems very cogent, and, if accepted, removes, at least in the case of prohibition, what seems to be an anomaly in practice as to costs. If a litigant commences proceedings in the wrong court which has no jurisdiction to entertain them, the proper course for his opponent to take is to apply to a superior court for a prohibition. It seems unreasonable that the defendant obtaining a prohibition should be unable to recover against the wrong doer the cost of the proceeding. Several cases were referred to in which, where a prohibition was granted without pleadings, costs were given: in the Common Pleas, *Robinson v. Emanuel (ubi sup.)*, *Quartly v. Timmins (ubi sup.)*, *Worthington v. Jeffries (ubi sup.)*. These were cases before the Judicature Act. Also since that Act the same practice was observed in *Evans v. Wills (ubi sup.)*, *Warwick Canal Company v. Birmingham Canal Company (ubi sup.)*, *Reg. v. Midland Railway Company (ubi sup.)*, *Great Western Railway Company v. Midland Railway Company (ubi sup.)*. These instances show what the practice has been in the Court of Chancery, Common Pleas, and Exchequer, and the only observation that can be made upon them is that there does not seem to have been any argument upon the question of costs; but that may have been because the practice in those courts was indisputable. The Court of Chancery has always exercised a large discretionary jurisdiction in this matter of costs, as is shown by the cases of *Jones v. Cozeter (ubi sup.)* and *Andrews v. Barnes (ubi sup.)*. If we adopt this argument, the appeal of the London County Council against these costs fails. But it is proper to notice other points of the very careful and ingenious argument of Mr. Danckwerts. The first point made was as to the effect of 1 Will. 4, c. 21. It is suggested that the true meaning of the statute was to make the costs follow the event where there were pleadings in prohibition and a judgment in the action so conducted without any mention of costs in the judgment, and to leave other cases to the discretion of the court to give or refuse costs at its pleasure. For this construction there is some authority in the case of *Wallace v. Allen (ubi sup.)*. Another argument was that, whatever might be the effect of 1 Will. 4, c. 21, that statute, as well as the previous Act 8 & 9 Will. 3, c. 11, s. 3, were repealed by 46 & 47 Vict., c. 49, ss. 3 and 4, and sect. 6 (c) of that Act gave power to deal with costs in prohibition by rules of court. Subsequently the Crown Office Rules 1886 were made. Rule 300 provides that Order LXV. of the Rules of the Supreme Court 1883 (Costs) shall, as far as it is applicable, apply to all civil proceedings on the Crown side. Rules 81 and 82 relate to applications for a writ of prohibition on the Crown side, which are to be by motion to a divisional court in criminal cases and to a judge at chambers in civil cases. Then it is pointed out that Order LXVIII. of the General Orders makes Order LXV. applicable to the Crown side of the Queen's Bench Division.

CT. OF APP.]

FARQUHARSON v. MORGAN.

[CT. OF APP.]

But it was decided in *Re Mills* (*ubi sup.*) that this order was not intended to confer jurisdiction as to costs which did not exist before. For this reason the Judicature Act 1890 was passed, sect. 5 of which embodies the terms of order 65, and no doubt enlarges the jurisdiction; but sect. 4 restricts the operation by excepting the Crown side of the Queen's Bench Division. I have come to the conclusion that the High Court, in cases of prohibition, which is not a jurisdiction peculiar to the Crown side of the Queen's Bench, has all the jurisdiction as to costs formerly exercised by the Courts of Chancery, Common Pleas, and Exchequer, and that as these last mentioned courts seemed to have had and exercised jurisdiction to give costs against the defendant when granting a prohibition, the High Court now has a like jurisdiction. It is not therefore necessary to consider the decision in *Wallace v. Allen* (*ubi sup.*), from which I should not dissent without careful examination.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blaxland*.
Solicitors for the respondents, *Caprons, Dalton, Hitchins, and Brabant*.

Jan. 15 and Feb. 2.

(Before Lord HALSBURY, LOPES and DAVEY, L.JJ.)

FARQUHARSON v. MORGAN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.
Prohibition—Want of jurisdiction apparent upon face of proceedings—Consent to jurisdiction by applicant—Discretion of Superior Court.

Where the want of jurisdiction is apparent upon the face of the proceedings the grant of a writ of prohibition is of course, and the applicant cannot be precluded by any consent or acquiescence.

By a lease it was provided that all the provisions as to procedure contained in sects. 7-28 of the Agricultural Holdings Act 1883 should be applicable to all claims for compensation under the lease. The tenant having claimed compensation in respect of matters which were, and also in respect of matters which were not, the subject of compensation under the Act, an arbitrator made an award giving the tenant compensation in respect of claims within the Act and also in respect of claims not within the Act, specifying the several matters in respect of which compensation was awarded. The tenant applied for and obtained an order from the County Court to enforce the whole award under sect. 24 of the Act. The landlord, who had acquiesced in the exercise of jurisdiction by the County Court, applied for a writ of prohibition against the enforcing of the award under sect. 24 of the Act, which was refused as a matter of discretion by the Queen's Bench Division.

Held, that, as the want of jurisdiction was apparent upon the face of the award in respect of the claims which were not within the Agricultural Holdings Act 1883, the writ of prohibition must be granted against enforcing that part of the award under sect. 24 of the Act.

THIS was an appeal by H. R. Farquharson from an order of the Divisional Court (Charles and

Wright, JJ.) discharging a rule nisi for a writ of prohibition to the County Court of Dorsetshire.

The appellant Farquharson let to the respondent, Morgan, a farm by a lease, in which it was provided that the clauses of the Agricultural Holdings Act 1883 relating to "procedure," and contained in sects. 7-28 inclusive, should apply as well to any claims of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the Agricultural Holdings Act.

The lease provided for certain allowances and compensation being made to the outgoing tenant at the expiration of the lease in respect of various matters which were not the subject of allowance or compensation under the Act.

The lease was determined on the 25th March 1891, and Morgan claimed allowances and compensation in respect of matters within the Agricultural Holdings Act, and in respect of matters not within that Act. These claims were referred to arbitration and an award was made.

Morgan made an application to the County Court to enforce the award under sect. 24 of the Agricultural Holdings Act. It was apparent that the award was bad because it awarded a lump sum in respect of all claims, and by consent of both parties it was remitted to the umpire.

An amended award was made which on its face showed the matters in respect of which the sums thereby awarded to Morgan were given. Some of these sums were awarded in respect of matters within the Act, and some in respect of matters not within the Act.

Farquharson appealed to the County Court against this amended award, and his appeal was dismissed. He thereupon appealed to the Queen's Bench Division when the matter was remitted to the County Court to be reheard.

Upon the rehearing in the County Court the award was wholly affirmed, and Morgan subsequently applied for an order enforcing the whole award under sect. 24 of the Agricultural Holdings Act. The County Court judge made an order to that effect.

The Agricultural Holdings (England) Act 1883 (46 & 47 Vict. c. 61) provides (sect. 1) that a tenant shall be entitled to compensation in respect of the improvements specified in the first schedule thereto; that the amount of compensation shall, in default of agreement, be settled by arbitration as therein provided (sects. 8-17); that the award shall specify the several matters in respect of which compensation is awarded (sect. 19); and that where the sum claimed exceeds 100*l.* either party may appeal to the County Court (sect. 23). Then it is provided by sect. 24 that,

Where any money agreed, or awarded, or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed, or awarded, or ordered to be paid, it shall be recoverable upon order made by the judge of the County Court, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable.

Farquharson then applied for and obtained a rule nisi for a prohibition to the County Court against enforcing the award under sect. 24 of the Act. Upon argument this rule was discharged by a divisional court (Charles and Wright, JJ.) upon

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

the ground that, under the circumstances, the court had a discretion to refuse the prohibition. Farquharson appealed.

Danckwerts for the appellant.—As to that part of the award which relates to matters not within the Agricultural Holdings Act 1883 the County Court had no jurisdiction at all. Parties cannot by consent or agreement give an inferior court jurisdiction which it does not otherwise possess. This is recognised by sect. 67 of the County Courts Act 1888, which provides that in certain specified cases jurisdiction may be given by consent. Such a case as this is not within that section. Except in cases within that section jurisdiction cannot be given to a County Court by consent or agreement. The cases in which prohibition has been refused upon the ground that the applicant has waived his right to object to the jurisdiction, are cases in which there were mere irregularities or in which the want of jurisdiction depended upon some fact which was not apparent upon the face of the proceedings:

Mayor of London v. Cox, L. Rep. 2 H. L. 239;

Broad v. Perkins, 60 L. T. Rep. N. S. 8; 21 Q. B. Div. 533.

In this case the want of jurisdiction is apparent upon the face of the proceedings, because it appears on the award that some of the matters are not within the Agricultural Holdings Act, and the County Court has, therefore, no jurisdiction to enforce that part of the award. Where the want of jurisdiction appears on the face of the proceedings the applicant is entitled to a prohibition, and the matter is not discretionary:

Worthington v. Jeffries, 32 L. T. Rep. N. S. 606; L. Rep. 10 C. P. 379.

Jones v. James, 19 L. J. 257, Q. B.

Moufet v. Washburn, 54 L. T. Rep. N. S. 16.

A. Clavell Salter for the respondent.—Assuming that there was an excess of jurisdiction in this case, yet the granting of a writ of prohibition is a matter of discretion, and under the circumstances of this case a prohibition ought to be refused. A party may by his conduct preclude himself from applying for a prohibition in any case:

Broad v. Perkins (*ubi sup.*).

The Divisional Court has rightly held in this case that the applicant had precluded himself from applying for a prohibition, and has rightly exercised its discretion by refusing to grant a prohibition. [Lord HALSBURY.—If an applicant can preclude himself from obtaining a prohibition in such a case as this we think that this applicant has done so.] A party can in any case by his conduct preclude himself from applying for a prohibition, and make it a matter of discretion whether the writ is granted or not:

Denton v. Marshall, 1 H. & C. 654.

Danckwerts in reply.—A Superior Court interferes by granting a prohibition, because there has been a usurpation of judicial functions, and no consent or acquiescence can affect that reason. The court is bound to interfere when the excess of jurisdiction appears upon the face of the proceedings.

Cur. adv. vult.

Lord HALSBURY.—In this case, with every disposition to decline to interfere with the course of litigation, and with a strong desire to prevent a persistent litigant from proceeding further, and with the conviction that, if it is pos-

sible for a person to render himself incapable of applying for a prohibition, this applicant has done so, I have striven to see whether we could not refuse this application, but I am constrained to say that the writ of prohibition must issue, so far as the application relates to any claim which is outside of the Agricultural Holdings Act 1883. It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior court from exceeding its jurisdiction. That is to say, where the want of jurisdiction appears upon the libel, as in an ecclesiastical court, or upon the face of the record, and does not depend upon a mere matter of fact, and a cause is entertained by an inferior court which is clearly beyond its jurisdiction, no consent of parties will justify the Superior Court in refusing a prohibition. Looking, then, at the present case and at what appears upon the face of the record, and considering the provisions of the Agricultural Holdings Act 1883, and what has been done in the County Court, it is impossible to doubt that the County Court judge, in seeking to give execution under the Agricultural Holdings Act in respect of the matters which were outside of that Act, was exceeding his jurisdiction. The things in respect of which there is jurisdiction under the Agricultural Holdings Act are set out in that Act, and by sect. 24, the County Court judge may order the compensation awarded in respect of those things to be recovered in the same way as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable. In this case, therefore, the position is this, that the parties seek to give the judge jurisdiction to put the powers of the court as to execution into force in respect of other matters which are not within the Act. Under these circumstances I repeat that I am unable to resist the conclusion that the writ of prohibition must issue; but considering the course which this litigation has taken, I think that the appellant should have no costs, except in this court.

LOPES, L.J.—This case raises the much-vexed question whether the grant of prohibition is discretionary, or whether it is demandable of right. It seems to me that there has always been recognised a distinction between what I will call a latent want of jurisdiction, *e.g.*, something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, *e.g.*, a want of jurisdiction apparent on the face of the proceedings. Whilst in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion as to whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that where the want of jurisdiction is patent the grant of the writ of prohibition is of course. Lord Mansfield, in *Buggin v. Burnett* (4 Burr. 2037), held, that the court was not bound to grant a prohibition to a party who had acquiesced in the proceedings of the court below, except where the absence of jurisdiction was apparent on the face of the proceedings. In *Bodenham v. Ricketts* (6 N. & M. 176) Lord Denman laid down the rule in the same terms as Lord Mansfield, and, about the same time, the same rule was adopted in a considered judgment

CT. OF APP.]

FARQUHARSON v. MORGAN.

[CT. OF APP.]

of the Court of Queen's Bench in *Yates v. Palmer* (6 Dowl. & Lowndes, 288). In the elaborate opinion of the judges, delivered by Willes, J. to the House of Lords in *Mayor of London v. Cox* (*ubi sup.*), it is said "that upon application being made in proper time upon sufficient materials by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court"; and at page 283 of the same case it is said: "where the defect is not apparent, and depends on some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction (*Knowles v. Holden*, 24 L. J. 223, Ex.); yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to interpose except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant." It was held in this case, that the writ was not of course, inasmuch as there might be circumstances which would justify the court in refusing it, such as undue delay, insufficient materials, or misconduct, or laches by the party applying for it; but there is nothing in the case contravening the rule I have mentioned where the absence of jurisdiction is apparent on the face of the proceedings; in fact there is an express exception of such cases. In 1888, in a case of *Broad v. Perkins* (*ubi sup.*), the question whether in the circumstances of that case the court had any jurisdiction to refuse a writ of prohibition was directed to be argued before the full Court of Appeal, and Lord Esher, M.R., delivering the judgment of the full court, repeated the opinion of Willes, J. in the *Mayor of London* (*ubi sup.*), which I have above cited. The result of the authorities appears to me to be this, that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that where the absence or excess of jurisdiction is not apparent upon the face of the proceedings, it is discretionary with the court to decide whether the party applying has not, by laches or misconduct, lost his right to the writ to which under other circumstances he would be entitled. The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by Lord Denman (6 N. & M. 176) to be for the sake of the public, because "the case might be a precedent if allowed to stand without impeachment"; and I would add for myself, because it is a want of jurisdiction of which the court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken. Now, if it were possible for him to do so, it is abundantly clear that Mr. Farquharson has by his conduct precluded himself from claiming the interposition of the court in his favour. That he has acquiesced in the proceedings is beyond dispute. I cannot imagine a stronger case of acquiescence. But I am of opinion that the

award on the face of it discloses a want of jurisdiction. It contains and deals with matters which are not the subject of the Agricultural Holdings Act, matters outside that Act and which cannot be enforced under the 24th section of that Act. In such circumstances most reluctantly I am compelled to hold that the writ of prohibition must issue, and that this appeal must be allowed.

DAVEY, L.J.—There are two principles which are engrained in our law. One is that parties cannot by contract oust the jurisdiction of the Queen's courts. This has been somewhat modified by the power given to the court by sect. 11 of the Common Law Procedure Act 1854 (now sect. 4 of the Arbitration Act 1889), to give effect to an agreement to refer disputes to arbitration subject to certain well known conditions; but, subject to this power, it is no defence to an action to allege that the parties have agreed to refer the question in dispute to arbitration, or to provide for its settlement in some other mode. The other principle is correlative to the first—that the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess. To do so would be an usurpation of the prerogative of the Crown, and it has always been the policy of our law, as a question of public order, to keep inferior courts strictly within their proper sphere of jurisdiction: (*Worthington v. Jeffries*, *ubi sup.*). It follows that a party, notwithstanding that he has contracted to have the dispute decided, or a decision in the matter enforced, by a court not possessing by law jurisdiction, may refuse to be bound by his contract and object to the jurisdiction, subject to the provisions embodied in the Arbitration Act 1889 so far as applicable. It also follows that you cannot give jurisdiction by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority. In the present case Mr. Farquharson, the applicant for a prohibition, has contracted by the lease of the 29th Nov. 1888, that the clauses of the Agricultural Holdings (England) Act 1883, relating to procedure, and contained in sects. 7 to 28 (both inclusive), shall apply as well to any claims of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the said Act. The lease makes provision for certain allowances and compensation being made to an outgoing tenant at the expiration of the lease as to various matters which are not the subjects of allowance or compensation under the Act. An amended award has been made dealing as well with matters which are properly subjects of allowance or compensation under the Act as with matters in respect of which allowance or compensation can only be claimed under the provisions of the lease; and the amended award on the face of it shows the matters in respect of which the sums thereby awarded are given. On the 24th Sept. 1893 the present respondent, Morgan, made an application to the County Court to enforce the award, and the learned judge, though he had doubts whether he had jurisdiction, made an order to that effect. The present applicant and appellant applied to the High Court for a prohibition against the County Court enforcing the award or proceeding further with the application. A Divisional Court has dismissed that application on the grounds that under the circumstances the

APP.] *Re ARBIT., KEIGHLEY, MAXTED, & Co. AND BRYAN, DURANT, & Co. (No. 2).* [APP.]

court had a discretion to refuse the prohibition on the application of the present appellant. The jurisdiction of the County Court in the matter is statutory, and is conferred by the Agricultural Holdings Act. Sect. 24 of that Act is in the following terms: "When any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable upon order made by the judge of the County Court, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable." It is obvious that this section only applies to money agreed, or awarded, or ordered on appeal, to be paid in respect of matters within the Act, and gives no jurisdiction over awards as to other matters made pursuant to a contractual submission or with the consent of parties. Indeed it was not, and could not be, denied that, so far as the award related to matters outside the Act, the County Court judge had no jurisdiction to enforce the award, and the appellant was *prima facie* entitled to the prohibition. But it was argued that the granting of a prohibition is discretionary, and that the applicant was estopped or precluded by his conduct from claiming a prohibition. Reliance was placed on a well-known passage in the judgment of Willes, J. in *Mayor of London v. Coz (ubi sup.)*, which has been cited by Lopes, L.J. This passage has been adopted by the full Court of Appeal as a correct statement of the law, in *Broad v. Perkins (ubi sup.)*. It will, however, be observed that the learned judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he might have brought forward in the court below, but has kept back without excuse, i.e., where the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the court. To the same effect is Lord Mansfield's judgment in *Buggin v. Burnett (ubi sup.)*, where he says: "If it appears upon the face of the proceedings that the court below had no jurisdiction, a prohibition may be issued at any time either before or after sentence, because all is a nullity; it is *coram non iudice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by or suffer that court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below." This passage was quoted by Parke, B. in *Roberts v. Humby* (3 M. & W. 120), in which case the court granted a prohibition at the instance of a party to the proceedings in a case where the want of jurisdiction appeared on the face of the proceedings even after execution in the inferior court. The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is explained by Coleridge, J. in *Marsden v. Wardle* (3 E. & B. 695, 701). The learned judge is there evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with the cases in

which it is apparent on the face of the proceedings. In the County Court it is true there is no record strictly speaking, but the distinction does not, I think, depend on the existence of a formal record, but is one of substance, whether the defect is apparent or depends on evidence. In the present case the jurisdiction invoked is the creation of a statute not even conferring jurisdiction in general terms, but confined to a particular defined subject-matter. The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction is, whether the case falls within the defined ambit of the statute, and it is his duty to decline to make an order as judge if and so far as the matter is outside the jurisdiction, and, if he does not do so, he may (if a judge of an inferior court) be restrained by prohibition. In the present case the limits of the jurisdiction appeared on the face of the statute, and the fact of the excess appeared on the face of the amended award which the court was asked to enforce. I am therefore of opinion that the appellant is not precluded from relying on the excess of jurisdiction in the County Court either by his covenant in the lease or by the previous proceedings in relation to the award. In *Jones v. James (ubi sup.)*, which was cited on behalf of the respondent, it is to be observed that it was doubtful whether the court had exceeded its jurisdiction, and Erle, J. seems to have treated the matter as an irregularity in practice which might be cured by the defendants' waiver; and the case of *Mouflet v. Washburn (ubi sup.)* seems to have been a case of the same character: (see *Jones v. Owen*, 5 Dow. & Lowndes, 669.) The summons asks for a prohibition against the County Court judge enforcing the whole award, but at the bar the learned counsel for the appellant limited the prohibition asked for to so much of the award as dealt with matters outside the Agricultural Holdings Act. Although I think that the appellant is not precluded from asking for a prohibition, yet he is doing so in breach of his contract, and I think there should be no costs in the court below, but the appellant should have the costs of the appeal.

Appeal allowed.

Solicitors for the appellant, *Rowcliffes, Rawle, and Co.*, for *J. Trevor Davies*, Sherborne.

Solicitors for the respondent, *Field, Roscoe, and Co.*, for *Brennard*, Blandford.

Jan. 29 and Feb. 2.

(Before Lord HALSBURY, LOPES and DAVEY, L.JJ.)

Re AN ARBITRATION BETWEEN KEIGHLEY, MAXTED, AND CO. AND BRYAN, DURANT, AND CO. (No. 2). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Sale of wheat to be shipped—
"3000 tons, 10 per cent. more or less"—Option
of vendors to ship more or less—Payment by cash
against bill of lading—Tender of bill of lading
for 3800 tons—Refusal to accept.

By a contract in writing K. bought from B.
"about 3000 tons of wheat (10 per cent. more or
less) to be shipped by steamer" from India,

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

APP.] *Re ARBIT., KEIGHLEY, MAXTED, & CO. AND BRYAN, DURANT, & CO. (No. 2).* [APP.]

payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause: "Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account."

B. informed K. that 3800 tons had been shipped on the Bombay, and that he appropriated 3000 tons of that shipment to the contract with K., and he subsequently sent K. an invoice for 3000 tons ex Bombay. The bills of lading of the 3800 tons were two for 1750 tons each and two for 250 tons each. K. offered to deliver to B. either all the bills of lading or two for 1750 tons each, but B. refused to accept the tender or to pay any part of the price.

Held (affirming the decision of the Queen's Bench Division), that the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought, and were entitled to refuse the tender made by the sellers.

THIS was an appeal by Bryan, Durant, and Co. from an order of the Divisional Court (Wills and Wright, JJ.) upon a special case stated by arbitrators.

The appellants, Messrs. Bryan, Durant, and Co. sold to the respondents, Messrs. Keighley, Maxted, and Co., a quantity of East Indian wheat under a written contract.

By the contract Keighley, Maxted, and Co. bought of Bryan, Durant, and Co., on the printed rules indorsed on the back of this contract, about 3000 tons Karachi wheat (10 per cent. more or less), to be shipped per first-class steamer from Karachi, shipment to be made, and bill or bills of lading to be dated, during July or August. Payment, cash in London, within seven days from the day on which invoice is handed, in exchange for bill or bills of lading and policies of insurance.

On the margin of the contract was indorsed a clause as follows:

Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account.

The appellants wrote to the respondents saying that 3800 tons of wheat had been shipped on the s.s. *Bombay*, "3000 tons of which we beg to appropriate against our contract with you." No reply was made to that letter.

On the 23rd Aug. the appellants wrote to the respondents with provisional invoice for 3000 tons of wheat *ex Bombay*.

On the 23rd Aug. the respondents inspected the documents, including four bills of lading, two for 1750 tons each, and two for 250 tons each.

The appellants were willing to deliver to the respondents either all the bills of lading, or the two for 1750 tons each, against payment of the amount of the invoice, leaving 800 tons, or 500 tons, as the case might be, balance of the cargo in the buyer's possession, but the property of the sellers.

The respondents rejected this tender, and

refused to pay the amount of the invoice or any part thereof, or to make any deposit.

The question whether the buyers were bound to accept the shipment was referred to arbitration under the provisions of the contract, and an award was made in favour of the buyers, and this award was confirmed by the appeal committee of the London Corn Trade Association.

The sellers, the appellants, applied to the Queen's Bench Division to have the award remitted, and obtained an order remitting the award.

This order was affirmed by the Court of Appeal (68 L. T. Rep. N. S. 61).

The appeal committee reheard the matter and made an award in favour of the sellers, Bryan, Durant, and Co. This award was made in the form of a special case.

The Divisional Court (Wills and Wright, JJ.) held that the arbitrators were wrong, and set aside the award in favour of Bryan, Durant, and Co.

Bryan, Durant, and Co. appealed.

Finlay, Q.C. and Pollard for the appellants.—Assuming that in an ordinary case of the sale of a definite amount the buyers would be entitled to a bill of lading for the amount which they had bought, yet, in a case of this kind, where the amount is not definite, but there is a special clause providing that the sellers may ship less than the minimum or more than the maximum amount which the purchasers are to take, the case is different. Such a clause as this contemplates that the cargo may exceed the maximum amount and provides that, if it does, the excess shall remain for the account of the sellers; and, therefore, this contract in effect provides that the buyers may have to take a bill of lading for a larger amount than they have purchased, and that in such case the buyers are to hold the excess for the sellers. The case of *Tanvaco v. Lucas* (28 L. J. 150, 301, Q. B.) upon which the respondents may rely, is clearly distinguishable from this case, because in that case there was not a "maximum" and "minimum" clause such as there is in this contract.

Cohen, Q.C. and Carver, for the respondents.—The special clause upon which the appellants rely has nothing to do with the tender of shipping documents to the purchasers: it does not say anything about the bill of lading. It would be necessary to read into this clause words giving the sellers power to tender a bill of lading for an amount larger than that purchased. This clause is inserted for the purpose of giving the buyer the advantage of a rising market up to a certain limit, and the sellers the advantage of a falling market up to a certain limit. [They were stopped by the Court.]

Finlay, Q.C. replied.

LORD HALSBURY.—I am of opinion that the decision of the arbitrators was wrong, and that the order of the Divisional Court was right. I feel compelled to say that the arbitrators were wrong because of the observations which have been made during the argument that these arbitrators were commercial men familiar with contracts of this kind. Parties ought either to be content with their decisions and not come to a court of law, or else be satisfied with a decision according to law in a court of law. In this case

CT. OF APP.] *MALLESON v. NATIONAL INSUR. AND GUARANTEE CORPORATION.* [CHAN. DIV.]

the arbitrators did not act upon any fixed principles of law. As to the question which arises from our decision here, whether there was a good tender by the sellers, when the facts are properly understood and made plain, it is not at all difficult to see what our decision must be. The contract is for the sale and delivery of wheat, the amount of which is to be ascertained thus: there is in the contract what is called a "maximum" and "minimum" clause, which provides that the sellers may ship less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity is to be settled at the value of the day of the appropriation; or that the sellers may ship more than the maximum quantity in which case the excess over the medium amount will remain for their account. The only question really is, whether there were shipping documents corresponding to the amount bought which the purchasers could have to deal with as they pleased. It has been argued that the seller could give a bill of lading for as much wheat as he liked under this contract. That, however, can only be so if contradictory words are added to the contract. It seems to me, therefore, that the purchasers had a right to have a bill of lading for the amount which they bought, 3000 tons. Such a bill of lading was not offered to them, and the tender by the sellers was therefore bad, and the purchasers are not liable. The appeal fails, and must be dismissed.

LOPES, L.J.—I am of the same opinion. It is conceded that, if the contract had been for 3000 tons, and there had been no maximum and minimum clause, the purchasers would have been entitled to a bill of lading for that amount, and that no other bill of lading would have been a good tender. It seems to me that the true construction of this contract was determined upon shipment of the wheat, and that the contract there became one for 3000 tons. A bill of lading was tendered to the purchasers for 3800 tons, and consequently the shipping documents tendered by the sellers were not in conformity with the contract. The purchasers were entitled to have a bill of lading which would, if they so desired, transfer the whole thing bought to anyone else, and were not bound to take a bill of lading for a larger amount which would make them trustees of a part of the cargo which they had not contracted to buy or to be trustees of. The tender by the sellers was therefore bad and the purchasers were not bound to accept it. This appeal must be dismissed.

DAVEY, L.J.—I agree. The case is perfectly clear when the facts are once understood. It is conceded that purchasers in an ordinary case are entitled to a bill of lading for the amount which they have purchased. The question is, whether the clause which has been indorsed upon this contract amounts to a special contract that that right of the purchasers shall be altered. It has been argued that this special clause will have no effect unless it is so construed. I think that is not so, and that the clause has another effect. I am not disposed in this case to alter the rule of law and of common sense that a purchaser of 3000 tons of wheat is entitled to a bill of lading for 3000 tons, unless there is a very express contract otherwise. This clause in this contract says nothing at all about a bill of lading, and to support the argument of the appellant it would be necessary to read in

words to the effect that the sellers should be at liberty to give the purchasers a bill of lading for more than the amount purchased. I cannot think that it was intended to insert such an important stipulation into this contract by such a clause as this framed in such words. This appeal entirely fails.

Appeal dismissed.

Solicitors for the appellants, *Freshfields and Williams.*

Solicitors for the respondents, *Simpson and Cullingford.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 24, 1893.

(Before NORTH, J.)

MALLESON v. THE NATIONAL INSURANCE AND GUARANTEE CORPORATION. (a)

Company—Reserve capital—Companies Act 1879—Alteration of articles—Power to call up capital declared by articles and prospectus to be reserve.

The N. Company was incorporated in 1891 with a capital of 2,000,000l. consisting of 100 founders' shares of 5l. each, and 399,900 ordinary shares of 5l. each. The articles of association provided the sum of 4l. in respect of each of the ordinary shares in the initial capital of the company is to be reserve capital, and is not to be capable of being called up except in the event and for the purpose of this company being wound-up, and a special resolution to that effect is to be passed in accordance with the Companies Act 1879. A prospectus was issued inviting subscriptions for 200,000 ordinary shares of 5l. each, which stated that 10s. would be payable at early dates therein mentioned, 10s. by calls of not more than 5s., with an interval of three months at such times as the directors should think fit, and that the remaining 4l. would be made reserve capital only capable of being called for the purposes of winding-up. M. applied for and took shares on the faith of the prospectus. A resolution making the 4l. per share reserve capital according to the Act of 1879 was passed on the 14th April, and confirmed on the 26th May 1893, but this interval being longer than that fixed by the Companies Act, the resolution was not a special resolution, and therefore ineffective for its purpose. In October the company, being advised that this resolution was void, passed and confirmed special resolutions altering the articles of association by declaring that 2l. of the uncalled capital should only be called by consent of a general meeting, that 1l. should be paid in seven days, 10s. in six months, and the remainder as called by the directors. M. brought an action, and now moved to restrain the company from acting on these resolutions.

Held, that there was nothing either in the prospectus or the original article to prevent the company from using their powers to alter this article any more than any other, and that a company cannot contract not to alter its articles; that the resolutions were therefore intra vires, and the plaintiff was bound by them, and his motion must be dismissed with costs.

(a) Reported by J. B. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.] MALLESON v. NATIONAL INSUR. AND GUARANTEE CORPORATION. [CHAN. DIV.]

THE National Insurance and Guarantee Corporation was registered as a limited company, under the Companies Act, on the 16th Dec. 1891, with a capital of 2,000,000*l.*, consisting of 100 founders' shares and 399,900 ordinary shares of 5*l.* each.

Subscriptions were invited for a first issue of 200,000 ordinary shares of 5*l.* each, by a prospectus dated the 14th Dec. 1891, which stated that 5*s.* per share was to be paid on application or allotment, and 5*s.* more before the 24th Feb. 1892, and proceeded:

A further 10*s.* per share may be called up, if the directors consider it expedient, in two instalments of 5*s.* each, with an interval of not less than three months between the instalments, one month's previous notice being given of the dates of each payment. The remaining 4*l.* will be constituted reserve capital, which, under the Act of 1879, it is not competent for the directors to call up.

The articles of association contained the following provisions as to reserve capital and calls:

RESERVE CAPITAL.

12. The sum of 4*l.* in respect of each of the ordinary shares in the initial capital of the company is to be reserved capital, and is not to be capable of being called up except in the event and for the purposes of this company being wound-up, and a special resolution to that effect is to be passed in accordance with the Companies Act 1879.

CALLS.

13. Subject as aforesaid, the directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments. A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed. No call shall exceed one-fourth of the nominal amount of the share, and two successive calls shall not be made payable at a less interval than three months.

14. One month's notice of any call shall be given, specifying the time and place of payment, and to whom such call shall be paid.

The Companies Act 1879, sect. 5, provides, amongst other things:

A limited company may, by a special resolution, declare that any portion of its capital which has not been already called up shall not be capable of being called up except in the event or for the purpose of the company being wound-up; and thereupon such portion of capital shall not be capable of being called up except in the event of, and for the purpose of, the company being wound-up.

With the intention of carrying out the prospectus and the articles, a resolution, intended to be special, was passed at a general meeting of the company on the 14th April 1892, that 4*l.* a share should constitute reserve capital not capable of being called up except in case of winding-up. By some mistake the necessary resolution confirming this was not passed until the 16th May 1892, which was out of time, and therefore the resolution never became a special resolution, and was invalid for its purpose.

In 1893 a committee of shareholders was appointed to inquire into the circumstances of the company, and in consequence of their report the articles of association of the company were altered by resolutions, duly passed at a meeting held on the 20th Oct. 1893, and confirmed at a meeting held on the 8th Nov. 1893, which provided, amongst other things:

1. That the following be substituted for clause 12,

viz.: (12.) The sum of 2*l.* in respect of each of the ordinary shares in the initial capital of the company is not to be capable of being called up, except with the sanction of a general meeting.

2. That a new clause be inserted immediately after clause 12, as follows: (12A) The sum of 2*l.* per share in respect of each of the ordinary shares in the initial capital of the company shall be payable as to 1*l.* 10*s.* by instalments, as follows, viz.: as to 1*l.*, at the expiration of seven days after this regulation comes into operation; and as to 10*s.* further part, at the expiration of six months from the expiration of such seven days; and as to the remaining 10*s.* further part, as and when the directors shall call up the same; but so that no part thereof shall be called up until after the expiration of twelve months from the expiration of the seven days aforesaid.

Immediately after the confirmation of these resolutions a notice was sent to all the shareholders requiring payment of the 1*l.* per share mentioned in the resolution to the company's bankers, on or before the 15th Nov. 1893.

The plaintiff, who was the holder of 415 ordinary shares which he had applied for on the faith of the prospectus, now brought an action for a declaration that the special resolutions passed on the 20th Oct., and confirmed on the 8th Nov. 1893, were *ultra vires*, and for an injunction restraining the defendants from acting thereon.

He now moved for an injunction, and the motion was treated as the trial of the action.

Everitt, Q.C. and *A. Young* for the plaintiff.—The Act of 1879 gives a company power to make part of their capital reserve capital by special resolution. This company have put into their articles of association a provision that such a resolution shall be passed. By the Companies Act 1862, sect. 16, the articles of association when registered bind the company and the members to the same extent as if each member had entered into a covenant to conform to all the regulations contained in the articles. The company were therefore bound by contract to take the necessary steps to carry out this provision; and they could not be excused by the accidental failure to confirm the resolution. Besides they had held out to the plaintiff by the prospectus that this capital would be made reserve capital, and it would be inequitable for them to alter their articles so as to break the implied undertaking. Even assuming that the special resolutions are valid, the company were bound by arts. 13 and 14 as to calls. They have not complied with those articles, and therefore could not enforce the calls now made.

Swinfen Eady, Q.C. and *Stokes* for the defendant company.—The prospectus and the original article 12 of the articles of association only expressed the intention of the company at that time, which they attempted to carry out in perfect good faith, though the special resolution accidentally failed to effect their purpose. There was nothing to prevent the company altering their intention. If they had intended to make it unalterable they would have put the provision as to reserve capital in the memorandum of association. No provision in the articles could be unalterable, for a company cannot contract itself out of its power to alter its article:

Walker v. London Tramways Company, 12 Ch. Div. 705.

And a representation in the prospectus that no

CHAN. DIV.] MALLESON v. NATIONAL INSUR. AND GUARANTEE CORPORATION. [CHAN. DIV.]

further calls are contemplated does not afford an equitable defence to an action for calls :

Accidental Marine Assurance Company v. Davis, 15 L. T. Rep. N. S. 182.

Arts. 13 and 14 must be read with the new article 12; and the words subject as aforesaid at the beginning of article 13 will then refer to the new article.

Everitt, Q.C. in reply.

NORTH, J.—The point raised here is a nice one, and, so far as I know, a new one; but I am of opinion that the company have taken a step which is within their powers. The memorandum of the company contains some fundamental provisions relating to the company, but nothing bearing in any respect on the point I have to decide. Then when we come to the articles, there is a very important article, the twelfth, under the head of "reserve capital." I should say that the shares are 5l. shares, and the article runs, "The sum of 4l. in respect of each of the ordinary shares in the initial capital of the company is to be reserve capital, and is not to be capable of being called up, except in the event and for the purpose of the company being wound-up, and a special resolution to that effect is to be passed in accordance with the Companies Act 1879." Now, referring to the Companies Act 1879, sect. 5 first makes provision with respect to an unlimited company, and that part of the section I need not read; and then says at the end: [his Lordship read the passage above set out.] That is to say, this section is to be brought into play and applied to a particular case by a declaration to be contained in a special resolution of the company. Now, the provision I read in article 12 (being contained in the articles of association) is, under sect. 16 of the Companies Act 1862, to bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of the Act. But sect. 50 of the same Act contains power for the company by special resolution, as mentioned in that section, to make new regulations to the exclusion of, or in addition to, all or any of the articles. First of all, the company "may in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association . . . or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution." Therefore, sect. 16 providing that the articles shall bind the members as if each member had affixed his seal, means the articles as originally framed, or as they may from time to time stand after they have been altered or varied under the provisions of this Act. Therefore, there is clear power to alter the articles, and as altered they will bind the members just in the same way as did the original articles. This article 12 having been inserted, it is not

suggested that it was not the intention of everybody at the time that it should be acted upon and carried out; and accordingly, when the prospectus was issued, a few days after the company was formed, it said with respect to the first issue, after providing for an interval of not less than three months between the instalments, and one month's previous notice being given of each payment, "The remaining 4l. will be constituted reserve capital, which, under the Act of 1879, it is not competent for the directors to call up—the prospectus does not say is reserve capital, but—will be constituted "reserve capital"; that is, when you look at the Act and look at the articles, it will be constituted, and that can only be by special resolution. Then the plaintiff applies for shares upon the footing of the articles as they stand and the prospectus, and becomes a member, and then he is a member in a company the articles of which may from time to time be altered in the way that I have mentioned. Steps were then taken to pass a special resolution to accomplish the object set forth in the original 12th article. I need not refer to what was done on that occasion further than to say that, by some mistake in all probability, the necessity of having a confirmatory resolution within a month was overlooked, and, though resolutions were passed on the 14th April 1892 to the necessary effect, yet these were never confirmed within the period in which it was necessary they should be confirmed. What was done then, therefore, did not amount either to a special resolution under the 12th article, or to such a special resolution as is contemplated by the Act of 1879. Afterwards, for reasons that have satisfied the directors and the company assembled in general meeting, they desired to depart from the scheme indicated in the original 12th article, and, therefore, resolutions were passed at the meeting of the 20th Oct. 1893, and duly confirmed on the 8th Nov., and there is no doubt that what was done then has the effect of passing special resolutions binding the company, if the subject of such resolutions was such as could properly be dealt with at such a meeting. Now the resolutions so passed provide: [his Lordship read the resolutions above set out.] Now it cannot be disputed that the provisions that those two clauses are to be substituted for clause 12 have the effect of getting rid of clause 12 altogether. That is followed by clauses 13 and 14, which are not dealt with in terms by these resolutions at all, though certain other clauses in the articles were modified. The question is, whether that resolution so passed and so confirmed is within the powers of the company. I see nothing to prevent it being so. Here is a special resolution, duly passed, inserting these words in the articles of the company, and all the shareholders are bound by it. It is said that it was contrary to the constitution of the company in some way; but I do not see that it is, for although no doubt the original articles did contemplate a different state of things, they contemplated giving effect to that different state of things, not by making it binding on all persons in such a way that it could not be altered, but by obtaining the passing of a special resolution to accomplish that object. No special resolutions altering the articles ever were passed before, but they have been now; and that being so, I do not see why an article drawn with a view to its being

CHAN. DIV.]

Re BEENY; FFRENCH v. SPOTSON.

[CHAN. DIV.]

carried into effect by a special resolution should not be displaced when the resolution never was passed, and the company have now resolved to get rid of the article and substitute other provisions in the place of it. In my opinion, therefore, what was done is not contrary to the provisions of the articles, and is within the power of the company assembled in general meeting, at two meetings held with a proper interval between them. But then it is said that, even assuming that to be so, the provisions of articles 13 and 14, which have not been at any rate expressly repealed or departed from, prevent this resolution from being good. Now those articles are not expressly repealed. To some extent they certainly are intended to stand, because they must be intended to apply to the 10s. of the 2l. remaining to be called under article 12A. But while they do apply to that, it is quite clear they are intended to be varied by that article; for article 14 having provided that one month's notice of a call shall be given, 12A. provides that as regards the last 10s. no part shall be called up until after the expiration of twelve months from the expiration of seven days. Therefore, this is dealing with what is the subject of article 14 in a way at variance with the provisions of article 14, and it is quite clear that, although article 14 is not expressed to be "subject as aforesaid," it is varied to some extent, and intended to be varied, by the resolutions passed at those two meetings in October and November. Well, then, what is the effect of article 12A as passed? Does it make the first 1l. and the 10s. calls or not? In one sense they may be said to be calls or sums which the shareholder has notice given to him that he has to pay, and it is not until he has been told that there is a demand upon him that he can be expected to pay it. On the other hand, it is quite clear that they are not calls to be made by the directors, and that it is all that the 13th and 14th articles refer to. If therefore the 1l. and the 10s. are to be called calls in any sense, in my opinion there is a fresh provision with respect to the time of payment which makes the 13th and 14th articles inapplicable to the case. If, on the other hand, they are not calls within article 13 because they are not calls made by the directors at all, but sums made payable by the articles of association, then, in my opinion, article 14 does not apply to them. I therefore think that article 12A. is not open to any objection. Under these circumstances the motion fails, and, as this hearing is by consent to be treated as the trial of the action, the action must be dismissed.

Solicitors for plaintiff, *Stretton, Hilliard, Dale, and Neuman.*

Solicitors for defendants, *Parker, Garrett, and Parker.*

Friday, Feb. 2.

(Before NORTH, J.)

Re BEENY; FFRENCH v. SPOTSON. (a)

Practice — Payment into court — Admission — Admission by parol — Order XXXII., r. 6.

F. and her children, the plaintiffs in this action, were entitled to a share of the residuary estate of a testator who died in 1872. Defendant, the

surviving trustee of the testator, had never given the plaintiffs any account, but down to Christmas 1892 had paid what he alleged to be the income of the share to F. After that date he paid nothing. The plaintiffs having applied in vain for accounts, took out a summons for administration of the testator's estate. After service of this summons the defendant called on the plaintiffs' solicitors and said that if the summons was adjourned for a short time he would appoint new trustees, and pay over to them the plaintiffs' share. Being questioned as to the investment of the trust funds, he admitted that the trust funds, the plaintiffs' share of which he said amounted to about 535l., were not invested, but that part of them was in a bank, and the remainder in his own hands. The defendant failed to find the money as promised, and the plaintiffs then commenced this action to have their share ascertained and paid. They now moved, under Order XXXII., r. 6, that the defendant might be ordered to pay into court the 535l. admitted to be in his hands as aforesaid. The defendant did not appear. The affidavits containing the above statement had been served upon him with the notice of motion.

Held, that an admission under Order XXXII., r. 6, need not be in writing, and as the statement that he had made such an admission had been brought to the defendant's attention and not denied, he must be ordered to pay the money into court.

THE plaintiffs in this action, Mrs. Ffrench and her children, were entitled under the will of S. Beeny, the father of Mrs. Ffrench, to one-fifth share of his residuary estate, which was bequeathed in trust for Mrs. Ffrench for life, with remainder to her children.

The testator had died in Aug. 1872.

The defendant, W. Spotsen, was the surviving executor and trustee of the testator's will, his co-trustee, Miss Beeny having died in 1873, within a year of the testator.

The defendant had never given Mrs. Ffrench or her children any account of the testator's property, but had paid Mrs. Ffrench, as the income of the said share, 25l. a year from the testator's death until 1883, and 20l. a year from that time until Christmas 1892, after which date he had paid nothing.

Being unable to obtain any further payment or accounts, Mrs. Ffrench in Oct. 1893 instructed her solicitors, who, after some letters which produced no answer, took out and served on the defendant an originating summons for accounts of the testator's estate.

The defendant did not appear, but called on the plaintiffs' solicitors and saw their managing clerk, whose evidence as to what took place was as follows:

"On the 17th Nov. 1893 the above-named defendant called upon me at my principal's office (in the absence of my said principal) with reference to the originating summons served upon him in this action, and said that if the plaintiffs would take an adjournment of the said summons for a few days he would find the principal to which the plaintiffs were equitably entitled under the will of the said S. Beeny, deceased, and would retire from the trusts of such will so far as the plaintiffs' family were concerned, and would appoint

(a) Reported by J. B. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.]

Re TAYLOR, SONS, AND TARBUCK (Solicitors, &c.).

[CHAN. DIV.]

new trustees of their portion of the estate. I pressed the defendant for information as to the security upon which the trust fund was invested, and he admitted that the trust fund, the plaintiffs' share of which he said amounted to about 535*l.*, was not invested, but that a portion of it was in a bank, and the residue was in his own hands. I was unable to obtain any more definite or detailed particulars from the said defendant."

In consequence of that interview the summons was adjourned, and on the 23rd Nov. the defendant called upon the plaintiffs' solicitor, and as he stated it was arranged that the defendant should appoint new trustees of the plaintiff's share in the said trust fund, and the defendant promised that he would pay the amount of principal and interest within a few days. After further letters pressing for payment had been sent to the defendant, he again called on the plaintiffs' solicitor on the 5th Dec. 1893, and renewed his promise to pay.

Nothing further was heard from the defendant, and on the 22nd Dec. 1893 the plaintiffs, abandoning their summons, commenced this action, claiming to have their share in the testator's estate ascertained; removal of the defendant, and appointment of new trustees, and payment by the defendant to the new trustees or into court of the amount of the plaintiffs' share.

They now moved that the defendant might be ordered to pay into court the sum of 535*l.*, admitted to be in his hands as aforesaid, with interest from Christmas 1892.

The affidavits of the plaintiffs' solicitor and his managing clerk, containing the statements above referred to, had been served on the defendant with the notice of motion.

S. L. Druce for the motion.—I submit that the verbal admission which is stated in the affidavits of the solicitor and his clerk is sufficient to enable the court to order the sum of 535*l.* to be paid into court. There is nothing either in the rule (Order XXXII., r. 6) or the practice of the court to make it necessary that the admission must be in writing. The admission is not denied, though we drew the defendant's special attention to it by serving him with the affidavit. The mere absence of denial was held sufficient in *Freeman v. Cox* (8 Ch. Div. 148). The judgment of the late Master of the Rolls in *London Syndicate v. Lord* (38 L. T. Rep. N. S. 329; 8 Ch. Div. 84) shows that there is no merit in any special form of admission. In *Porrett v. White* (53 L. T. Rep. N. S. 514; 31 Ch. Div. 52) *Freeman v. Cox* was approved and followed; and in *Hampden v. Wallis* (51 L. T. Rep. N. S. 357; 27 Ch. Div. 251) an admission by letters was held to be sufficient. In *Hollis v. Burton* (67 L. T. Rep. N. S. 146; (1892) 3 Ch. 226) some remarks were made by Kay, L.J. upon the decision in *Freeman v. Cox* (*ubi sup.*), but the question in that case was whether a defendant was to be allowed to withdraw an admission, and on what terms, and the earlier cases were not overruled. In this case it is plain that the defendant has had the money, and it is pre-eminently one in which he should not be allowed to defy the court.

NORTH, J.—Having regard to the observations made by the Court of Appeal in *Hollis v. Burton* (*ubi sup.*), I think that they did not intend to overrule the cases of *London Syndicate v. Lord*,

and *Freeman v. Cox*, and I think those cases are sufficient authority to show that an order may be made to pay into court money which is admitted to be in the hands of a defendant, though the admission was made verbally, and not contained in any written document. If the admission is verbal there is more difficulty in accepting it, because there might be considerable doubt whether it was made or not. But in this case there is no conflict of testimony; the admission was, in effect, more than once repeated. It is sworn to by the plaintiffs' witnesses. The affidavits which assert it have been brought to the defendant's attention by being served on him, with a notice that they would be read on the hearing of the motion. But he does not deny it in any way. I think on the authorities I can regard that as a sufficient admission to enable me to order this money to be paid into court; and that under the circumstances of the case I ought to do so. Then let us see what it is that the plaintiffs claim. [His Lordship read the indorsement on the writ.] That does not claim, and could not claim, any immediate administration or relief in respect of this particular share. It asks for a general administration of the testator's estate, with a view to ultimately ascertaining what the share of the plaintiffs is, and that when ascertained it may be paid. Now, what is the plaintiffs' admission. I will read it first, omitting certain words. The clerk of the plaintiffs' solicitor says: "I pressed the defendant for information as to the security upon which the trust fund was invested, and he admitted that the trust fund was not invested, but that a portion of it was in a bank, and the residue was in his own hands. I was unable to obtain any more definite or detailed particulars from the defendant." Those words are an admission that something was due from him in respect of this share; but it is plain that no order for payment into court could be obtained on those words alone, for there is nothing to show the amount. But if we add the words [his Lordship read the sentence], including the words "the plaintiffs' share of which amounted to about 535*l.*," which he had before omitted, I think that is enough to enable me to order the sum of 535*l.* to be paid into court. But I will not make an order which will enable the plaintiffs to get a special advantage from the payment of this money into court as against the other persons beneficially interested in the testator's estate. The money must come into court, but it must be carried to the account of the testator's estate generally, not to the account of this particular share.

Solicitors, *Gamden and Burnett*, agents for *Cottrell and Son*, Birmingham.

Friday, Feb. 2.

(Before *NORTH, J.*)

Re TAYLOR, SONS, AND TARBUCK (Solicitors, &c.). (a)

Practice—Solicitor and client—Costs—Taxation—Common order—Mistake in order—Right to obtain second order of course—Suppression of material facts.

T. and Co. acted as solicitors for F. in an arbitra-

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.]

Re TAYLOR, SONS, AND TARBUCK (Solicitors, &c.).

[CHAN. DIV.]

tion and other matters. On the 27th Oct. 1892 they delivered to him a list of counsel's and witnesses' fees in the arbitration, and on the 10th May 1893 they delivered their bill of costs other than those fees. On the 24th Oct. 1893 F. obtained an order of course to tax both bills. The taxing master, without formally extending the month within which the order, as usual, required the certificate to be given, fixed the 7th Dec. for the attendance of the parties. He then decided that the list of fees delivered on the 27th Oct. 1892 was not a bill of costs at all, and could not be taxed, and that he could not under the order to tax the two bills proceed to tax the bill of the 10th May 1893 alone. On the 19th Dec. 1893 the parties again attended before the taxing master, and he decided that his power to make any order had expired before the first appointment, and that he had no power to make any order or deal with the costs of the application; but he expressed an opinion that the applicant ought to pay the costs, and that 2l. 2s. would be a proper amount. F.'s solicitors wrote offering to pay T. and Co. 2l. 2s.; but, before they received any definite answer, obtained on the 8th June 1894 a second order of course to tax the bill of the 10th May 1893 only. F. now moved to discharge this order as improperly obtained, because the applicants had not disclosed the existence of the former order.

Held, that the order of course was improper; that the applicants would have been entitled to an order for taxation on special summons, but that such order would have provided for the costs of the former application. The taxing master was ordered to proceed under the present order, but to tax also the costs of the former proceedings and of this motion, and that these costs should be brought into the account.

Messrs. TAYLOR, SONS, and TARBUCK acted as solicitors for Mr. C. H. Fairclough in an arbitration and other matters. On the 27th Oct. 1892 they delivered to him a list of counsel's and witnesses' fees in the arbitration, and on the 10th May 1893 they delivered their bill of costs, excluding these fees. On the 24th Oct. 1893 Fairclough obtained an order of course for the taxation of both these bills. The order contained the usual direction that the taxing master should give his certificate within a month, unless he extended the time. The parties attended before the taxing master on the 7th Dec. An objection was then taken that the list of fees delivered on the 27th Oct. 1892 was not a bill at all. The taxing master upheld this objection, and held that he could not tax the bill delivered on the 10th May 1893 alone, under the order directing him to tax two bills.

On the 19th Dec. 1893 the parties again attended before the taxing master, when he decided that the order to tax had become inoperative before the date of the first appointment, because he had not extended his time for making the certificate, and that he had no jurisdiction to make any certificate under the order at all, or to give any direction as to costs, but he intimated an opinion that it would be fair that the petitioner should pay Messrs. Taylor and Co.'s costs, and that 2l. 2s. would be a proper sum.

Fairclough's solicitors then wrote to Messrs. Taylor's London agents offering to pay that sum.

The agents answered that they would consult their clients, and no further answer was ever given.

On the 8th Jan. 1894 Fairclough obtained an order of course to tax the bill delivered on the 10th May 1893 only.

Messrs. Taylor and Co. now moved to discharge this order, on the ground that the facts as to the previous order ought to have been told to the court.

Wurtzburg for the motion.—The case is covered by your Lordship's decision in *Re Webster* (64 L. T. Rep. N. S. 250; (1891) 2 Ch. 102). If an order of course for taxation becomes abortive, it is "suppression of a material fact" for the applicant to obtain another without bringing the first to the notice of the court, and an order obtained by such suppression cannot stand.

H. M. Humphry for the respondent.—In *Re Webster* (*ubi sup.*) the delay which made the order abortive was the fault of the client, and he suppressed another material fact, viz., the existence of an action between him and his solicitor, in which the solicitor claimed to set off the costs. Here the delay arose in the taxing master's office without any fault on Mr. Fairclough's part. His obtaining the order in the common form could not injure anyone; he was clearly entitled to an order on special summons, and the only difference in that order, if any, would have been that it would have provided for the costs of the former application which he has offered to pay.

NORTH, J. (after stating the facts of the case).—The client's solicitors sent an offer to pay 2l. 2s. for costs to Messrs. Taylor's London agents, and they very properly said they would consult their client. No further answer was received, but the client's solicitors did not write again, they took the law into their own hands, and applied for a second order of course for taxation, no mention being made of the first order. I think that in taking this course the solicitors made a mistake in practice, and a serious mistake, though there is no suggestion that it was made through any want of *bona fides*. They had suspended Messrs. Taylor and Co.'s remedy for a month by the first order, and when that proved abortive they apply for another order without mentioning the first. On a proper application by summons they would have obtained an order for taxation, but it would not have been the same. It would only have been made after notice to the other side, and would have included a direction for taxation and payment of the costs of the first application. It is said that that is a mere question of technicality, because an offer to pay the costs had been made. But that is not so; the only offer was to pay two guineas, and while the solicitors were considering whether they would accept this the client applied for a second order, and by a mistake in practice obtained one in the common form. It will be unnecessary to discharge the order, for the parties would be put to useless expense. The proper course is to direct the taxing master to proceed under the present order, but to tax also Messrs. Taylor's costs of the first proceedings and of this motion; these costs to be brought into account.

Solicitors: *Blake and Heseltine; Torr, Gribble, Oddie, and Sinclair*, agents for *H. J. Longton*, Warrington.

CHAN. DIV.]

SMITH v. HANCOCK.

[CHAN. DIV.]

Nov. 22 and 23, 1893.

(Before KEKEWICH, J.)

SMITH v. HANCOCK. (a)

Restraint of trade—Covenant not to "carry on, or be in anywise interested in," business—Married woman wife of covenantor—Separate estate—Breach of agreement—Injunction.

An agreement by a vendor of a business "not to carry on, or be in anywise interested in," a business of a similar character is not broken if the vendor has an interest of a merely domestic or sentimental character in such business, as for example, when it is carried on by his wife with her separate estate, trading separately from him. To constitute a breach of such an agreement, the vendor must have an interest, not necessarily in the profits of the business, but such as touches him directly, and gives him some right to interfere therein, or some means of gaining an advantage therefrom.

In March 1886 the defendant, T. P. Hancock, sold to the plaintiff a freehold shop in Heathcote-street, Kids Grove, in the county of Stafford, with the premises, fixtures, utensils, and goodwill, for the sum of 2000*l.* (exclusive of stock-in-trade), and by an agreement, dated the 11th March 1886, covenanted "not to carry on, or be in anywise interested in, the business of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the premises in Heathcote-street during a period of ten years.

In 1893 the defendant's wife opened a new shop in close proximity to the plaintiff's. She was anxious to start her nephew (aged twenty-two) in business, and she appointed him manager at a salary with a share of the profits. The money necessary for carrying on the business was found by the wife out of her separate estate, and the business was carried on in the name of Mrs. T. P. Hancock. She received the takings and paid the outgoings, and had a separate banking account in the name of Agnes Hancock, and the lease of the premises was made to her. The husband, however, assisted his wife in obtaining the lease, and distributed circulars inviting "old friends" to come to the shop. He also attended at the bank when his wife opened the business banking account in her own name, but did not otherwise concern himself in any way in the business, nor render any services in, or contribute any money to, the management of it. The wife had assisted her husband in the old shop, and the nephew was employed there as an errand boy. The defendant and his wife lived away from the shop.

On the 8th May 1893 the plaintiff brought this action, and claimed an injunction to restrain the defendant from carrying on, or being in anywise interested in, the business of a wholesale or retail grocer and provision dealer and baker, or any of them, within the distance and during the period prescribed by the agreement of the 31st March 1886, and damages.

Warmington, Q.C. and Tyssen for the plaintiff. —There has been a breach of the agreement by the defendant; his wife was acting as his agent, and the business was really carried on by the defendant. In any case the defendant was

"interested" in the business within the terms of the agreement:

Newling v. Dobell, 19 L. T. Rep. N. S. 403; 33 L. J. 111, Ch.

Then, on the evidence, the wife had no separate estate, and the business belonged to the husband:

Mews v. Mews, 15 Beav. 529.

Renshaw, Q.C. and Brinton for the defendant. —The defendant has in no sense "carried on" the business:

Allen v. Taylor, 22 L. T. Rep. N. S. 651; 19 W. R. 35;

Lewis v. Graham, 20 Q. B. Div. 780.

Nor was he "in anywise interested," that is, interested in the profits of the business:

Hill v. Hill, 55 L. T. Rep. N. S. 769; 35 W. R. 137.

As to the separate estate:

Lovell v. Newton, 39 L. T. Rep. N. S. 609; 4 C. P. Div. 7.

Warmington, Q.C. replied.

KEKEWICH, J.—Except so far as the construction of the agreement may be properly treated as a matter of law, there is no doubt as to the law applicable to this case. As the law now stands, a married woman may engage in business on her separate account; she may carry on business with all the responsibilities and all the advantages of a *feme sole*, and without in any way pledging the credit of her husband, or giving him any advantage arising therefrom. If therefore, this business which is attacked is the business of Agnes Hancock, it may be a business with which her husband, the defendant in this action, has nothing whatever to do, and which is also outside the meaning of this agreement, whatever its proper construction is. The real question for me to decide, apart from the question of construction, is whether it is the wife's business. That is the question which is submitted to me, and which might with propriety be submitted to a jury. Mr. Warmington says that the motive which induced the conduct of the defendant and his wife is clear. In one sense it is; that is to say, there was more than one motive. The first object or motive was to find some employment for the wife's nephew. I do not think, after having heard the whole of the evidence, that I can doubt that the intention and object of Mrs. Hancock, with the ultimate concurrence of her husband, was to make some provision for the nephew by giving him a start in trade; but there came in another motive, which was that, in the grocery business, in which it was decided to start him, it was desirable to secure, if possible, a large amount of the goodwill of the business which the defendant sold to the plaintiff; that is to say, to get together the old customers, and let them know that the wife of the gentleman who served them before was now carrying on a similar business. I agree that to that extent the motive is perfectly clear; and that may be conduct of which persons of delicate sentiment may not approve. Many persons may think that to evade an agreement of this kind is dishonest. With that I have nothing to do. If it is in truth an evasion; that is to say, if the parties concerned have kept outside the agreement, the plaintiff has no legal rights, and the action must fail. The question is whether the agreement has been evaded or

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

SMITH v. HANCOCK.

[CHAN. DIV.]

kept outside of, or has been broken. First, it is said that a married woman cannot carry on a separate business without separate estate. That is a somewhat broad proposition. But assuming that it is true in so many words, there is nothing here to throw any doubt on the sworn allegation that she had separate estate. It was conclusively proved by the evidence that Mrs. Hancock had separate estate. That money she put into the business. The lease was taken in her name. The goods were ordered in her name, and paid for in her name—it is true, not by herself, but by her nephew, the manager, by cheques on her banking account. The money received by her nephew was accounted for by him to her. She paid the ordinary weekly outgoings and his wages and board out of that, and she by his hand paid the balance into the bank. The evidence shows that from first to last it was her separate business, carried on by her on her own account. But that may be a cloak, a device in order to enable her to do ostensibly on her own account, but secretly as her husband's agent, what he could not, without breaking the agreement, do himself. What is the evidence against him? It is attempted to be shown that he acted for her in matters connected with the business. There is nothing, as I understand the law, to prevent a married woman, trading separately in respect of her separate estate, from having any agent she pleases. There is nothing to prevent her employing, and even paying, her husband as her agent. If in a case of this kind one finds facts of that character, it would of course increase and exaggerate the suspicion which is naturally felt in all such cases, and perhaps drive one to the conclusion that, instead of being an agent, the husband was the principal. Somebody else, namely her husband, sees about taking the lease; somebody else, namely her husband, introduces the manager to provision merchants, and he not unnaturally gives some assistance in preparing the circular, and does, I dare say, many more things for her than we have heard of. But that does not seem to me to convert him into a principal. He is still her agent, assisting her, perhaps going near the border, but at the same time not transgressing it. Then it is said that she trades in the name of "Mrs. T. P. Hancock" instead of "Agnes Hancock." Really, I fail to see anything in that, except that no doubt she wished the business to be known as something flowing from and not unconnected with the business formerly carried on by her husband. But I cannot see any evidence in that that the husband and not the lady herself is the proprietor of and carries on the business. Her name is Mrs. T. P. Hancock, and, though she might sign as Agnes Hancock, I do not know why she should not be called, as most married women are, by the name of her husband with the prefix "Mistress." Then as to the circular; no doubt it was an invitation to friends who used to know her and her husband in the old business, and I dare say—though the evidence does not quite come to that—that there is in the circular a reference to a tea which the customers of the old business used to buy. Then it is said that he took some part in framing the circular. I have no doubt he did. He certainly wrote it out with his own hand, she unfortunately being disabled from using hers; and more than that, he distributed it to certain persons, including his own tenant. That was a dangerous thing to

do; but I cannot think that the distributing of a circular concerning a business to be carried on by a man's wife would be a carrying on of or being interested in the business by him. What is the meaning of "carrying on or being in anywise interested in" a business? I do not propose to dwell upon the phrase "carrying on," as to which one or two cases were referred to. It cannot be maintained that the business was in any sense of the word carried on by him, unless it can be proved that his wife acted as his agent. There is a little more difficulty about the words "in anywise interested in." Reference has been made to an expression of my own in a case of *Hill v. Hill* (*ubi sup.*), where I said that "interested" in a commercial sense meant entitled to profits. So I apprehend it does. But I do not think that commercial language ought necessarily to be imported into such a contract as this, and construed strictly. I do not say so there, and I do not say so now. But, putting that aside, I have not much guide to the meaning of the word "interested," which is not enlarged, as I think, by the words "in anywise." Reference has been made to the case of *Newling v. Dobell* (*ubi sup.*). The comment on that case is, that it is not the case I have here. There the words were "concerned or interested in the business of a tailor," and the defendant was doing something quite different from what the facts show the defendant has been doing here. There the man, who was bound by a covenant not to be concerned or interested in the business of a tailor, had become foreman of a tailor within the prescribed radius. Malins, V.C. thought that he was concerned or interested within the meaning of the covenant. I need not criticise that case; I take it to have been rightly decided on the facts before the court. The Vice-Chancellor referred to *Balfe v. Balfe* (15 Sim. 88) as being, as he says, a similar covenant. I have referred to that case, and the covenant there was very differently worded. I do not think that the cases referred to lend me much assistance. It was argued on the part of the plaintiff that any interest in the widest sense of the word would be sufficient. I am glad to be interested in the professional success of my friends at the bar. Surely that is not being interested in their business. I put to Mr. Tyssen the case, which I dare say is familiar to some of us, of a man advancing money to start his son in a trade or profession. Is he interested in his son's business by reason of that advance? Yes, but I cannot conceive that that is being "interested" within the meaning of the word as used in this agreement. It is something more than that. No doubt, when a business is carried on by a wife, it is impossible that her husband should not be interested in her business, and in one sense he may even have a pecuniary interest in it, because, if the business fails and the wife's money is lost, he will have to make different provisions for his wife from those which he has made hitherto. But there, again, it would be stretching language far too much to say that he is in anywise interested in the business of his wife, within the meaning of an agreement such as this. It must be an interest not necessarily in profits, but an interest which touches a man directly, giving him some right to interfere in the business, or some means of gaining an advantage from it, and not an interest of a domestic or sentimental character, such as in

the illustrations which I have given, and which are only intended to be illustrations, and not to be exhaustive. Beyond that I do not intend to define the meaning of the word. All I say is, that, when I find it proved that a married woman is carrying on a business with her separate estate, trading separately from her husband, so as not to pledge his credit, or give him any share of the advantage to be gained from the success of the business, I consider that he cannot be said to be in anywise interested in the business. That seems to me to be the conclusion of this case; and the plaintiff, therefore, however much he may think—and I am not sure he has not some reason for thinking—that the agreement has been evaded, still must be content with the conclusion that it does not reach the actual case which has occurred. Therefore the action fails, and there must be judgment for the defendant with costs.

Solicitors: *Cronin, Orgill, and Cronin*, for *Llewellyn and Acrill, Tunstall; Chester and Co.*, for *E. A. Paine, Hanley*.

July 1, 1893, Jan. 11, 12, and 26, 1894.

(Before KEKEWICH, J.)

Re PARKER'S TRUSTS. (a)

Trustee—Appointment of new trustees—Personal representatives of surviving trustee—General executors—Special executors—Probate—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 31.

By his will, made in 1876, Cornelius Parker appointed two persons to be trustees thereof. He died in 1879. In 1881 one of the trustees died, and a sum of consols belonging to the estate became vested in the surviving trustee. In 1885, by will, the surviving trustee of the will of 1876 appointed A. and B. his general executors, and C. and D. executors for "the purpose of executing in continuation" to himself the trusts of the will of 1876. A. and B. obtained a grant of probate of the will of the surviving trustee (who had died) to themselves as general executors, and by a deed dated April 1893 they appointed C. and E. to be trustees of the will of Cornelius Parker. C. and D., the special executors, subsequently obtained two separate grants of probate of the will of the surviving trustee, "for the purpose only of executing in continuation to the surviving trustee the trusts of the will of Cornelius Parker, which vested in" the surviving trustee at the time of his decease, and they were sworn well and faithfully to administer "the same." A. and B. required D. to concur with them in transferring the consols to C. and E., and, on his default in so doing for twenty-eight days, presented a petition for a vesting order and transfer of the consols.

Held, that the will of 1885 did not operate as an exercise of the power conferred by sect. 31 of the Conveyancing and Law of Property Act 1881; but that, as A. and B. were in possession of a general grant of probate at the time of the execution by them of the deed of 1893, they were for the time being personal representatives of the last surviving trustee of the will of 1876 within the meaning of the section, and that, therefore, the appoint-

ment of C. and E. to be trustees of the will was valid.

Order directing D. to transfer his interest in the consols to C. and E.

By his will, dated the 11th Aug. 1876, Cornelius Parker bequeathed the residue of his personal estate to J. B. Parker and J. H. Bell upon trust for sale and conversion and investment, and upon the further trusts therein mentioned. The testator died on the 31st Dec. 1879. J. B. Parker realised the residuary personal estate of the testator, and invested the proceeds in the purchase of 5750*l.* consols.

On the 19th March 1881 J. H. Bell died, and on the 2nd Oct. 1892 J. B. Parker died. By his will, dated the 7th Jan. 1885, J. B. Parker appointed R. Benyon and W. G. Mount general executors of his will, and the Rev. John Parker and T. M. Parker executors for the purpose of executing in continuation the trusts of the will of Cornelius Parker.

On the 10th Dec. 1892 probate of the will of J. B. Parker was granted to R. Benyon and W. G. Mount as "general executors" of the will. By an indenture made the 17th April 1893 R. Benyon and W. G. Mount, in pursuance of the power conferred on them by the Conveyancing Act 1881, purported to appoint J. F. Wright and the Rev. John Parker to be trustees of the will of Cornelius Parker in the place of J. B. Parker and J. H. Bell, deceased.

On the 10th May 1893 a further grant was made out of the principal registry of the Probate Division, whereby, after reciting the grant of the 10th Dec. 1892, and that the testator was at the time of his death the sole surviving trustee of the will of Cornelius Parker, administration of the said J. B. Parker's will was granted to J. M. Parker "for the purpose only of executing in continuation to the said J. B. Parker the trusts of the will of Cornelius Parker which were vested in" the said J. B. Parker at the time of his death, but no further or otherwise, power being reserved of making the like grant to the Rev. John Parker, the other special executor named in the will of J. B. Parker, and T. M. Parker was sworn well and faithfully to administer "the same." A like limited grant was subsequently made to the Rev. John Parker.

This was a petition presented on behalf of R. Benyon, W. G. Mount, the Rev. John Parker, and J. F. Wright, under the Trustee Acts, asking that the right to call for a transfer of and to transfer into their own names the sum of 5750*l.* Consols (being the trust fund held upon the trusts of the will of Cornelius Parker) might vest in J. F. Wright and John Parker as trustees of the will of Cornelius Parker. T. M. Parker was a respondent to the petition.

The petition was first heard by Kekewich, J. on the 1st July 1892, and his Lordship made the order as prayed, but subsequently directed the petition to be set down for rehearing. On the rehearing an affidavit was filed, verifying a certificate by Mr. George D. Chadwick, principal clerk of the seal in the Probate Registry, as follows:

I certify, that in cases where the testator has appointed some executors generally and others whose functions are limited, it is the usual practice (when they do not prove together) to omit in the probate to the general executors any memorandum as to reservation of power of granting probate to the limited executors. This in no way bars the rights of the limited executors, who are allowed as a matter of course to take a limited

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

Re PARKER'S TRUSTS.

[CHAN. DIV.]

probate. The "general" executors are so styled in the probate to follow the wording of the will, and to call attention to the fact of the existence of limited executors.

The petition was allowed to be re-argued upon the point whether the general executors of the will of J. B. Parker were at the time when the deed of appointment of the 17th April 1893 was executed "personal representatives" of a last surviving trustee within the meaning of sect. 31 of the Conveyancing and Law of Property Act 1881.

Renshaw, Q.C., Bargrave Deane, and J. G. Wood for the petitioners.—This petition is presented under sect. 24 of the Trustee Act 1850 (13 & 14 Vict. c. 60). The general executors appointed by J. B. Parker's will became, on obtaining probate, his legal personal representatives:

Re Tharp; Tharp v. Macdonald, 38 L. T. Rep. N. S. 867; 3 Prob. Div. 76.

They could not execute the trusts of Cornelius Parker's will themselves:

Re Burt's Estate, 1 Dr. 319.

The law as to limited probates is stated at page 151 of *Tristram and Coote's Probate Practice* (11th edit.). In the case of *De Chatelain v. De Pontigny* (1 Sw. & Tr. 34) administration *pendente lite* was granted to the defendant in the suit. This was a general grant, not a *caterorum* grant; the general executors of the will of J. B. Parker are his personal representatives within the meaning of sects. 30 and 31 of the Conveyancing and Law of Property Act 1881, and are the proper persons to appoint new trustees, not the personal representatives of Cornelius Parker. We submit that this appointment was valid.

Warmington, Q.C., Barnard, and Macnaghten for the respondents.—*Tristram and Coote's Probate Practice* (11th edit.), cap. 6, sect. 7, deals with grants "*caterorum*." The same will may contain the appointment of one executor for general and of another for limited purposes:

Lynch v. Bellew, 3 Phillimore's Rep. 424.

The power to appoint limited executors is continuing, and not confined to a man's own estate: (*Williams on Executors*, 9th edit., vol. 1, pp. 201, 551.) In this case the limited executors are personal representatives under sects. 30 and 31 of the Conveyancing and Law of Property Act 1881. [KEKEWICH, J.—The last surviving trustee appoints executors; can the named executors before probate appoint trustees? Yes; they are personal representatives, and probate is only evidence. We say the appointment cannot be made without the concurrence of the limited executors. As to the form of the probate, there is not a double probate here: (see Appendix V., No 73, *Tristram and Coote's Probate Practice*, and Probate Court Act (21 & 22 Vict. c. 95). There power is reserved for others to prove; no power is reserved here. A *caterorum* grant is always made after a limited grant of either probate or administration. As to the date when the executors' duties come into operation, it is at the date of the death: (16th section of the Probate Act 1858 (21 & 22 Vict. c. 95).]

Renshaw, Q.C., in reply, referred to the case *Re Curry* (5 Notes of Cases, Eccl. & Mar. 54) as to the citation of a party having a prior right before administration was granted to another party. The question is, was the appointment of the 17th

April 1893 valid without the concurrence of the limited executors?

Williams on Executors (9th edit.) p. 204;
Re Pilling, 26 Ch. Div. 432.

As to the delegation of discretionary powers given by will:

Cole v. Wade, 16 Ves. 27;
Sugden on Powers (8th edit.) p. 131.

Cur. adv. vult.

Jan. 26.—KEKEWICH, J.—After judgment had been delivered in July last there was given to me, and by me communicated to counsel, some information respecting the practice of the Probate Division, which suggested a doubt whether my conclusions were not, as regards one point, the outcome of insufficient materials. The result was the re-argument of that point, after which I reserved judgment. On the original hearing two points were argued, and as the decision on one of them was not affected by the practice of the Probate Division, it was not made the subject of re-argument. It will, nevertheless, be convenient for me now to repeat what was then decided, and why. The testator, John Bartholomew Parker, was the sole surviving trustee of the will of Cornelius Parker. He appointed two general executors, and, in addition, two special executors "for the purpose of executing in continuation of himself the trusts of the wills of Lysimachus Parker (who may be left out of sight) and Cornelius Parker." The question is, whether the appointment of these special executors was an exercise of the power conferred on him by the 31st section of the Conveyancing and Law of Property Act 1881. That power of appointment is primarily given to "the surviving or continuing trustees or trustee for the time being" and it was therefore given to him. In the alternative it is given to "the personal representatives of the last surviving or continuing trustee." The appointment is to be made by writing, and the power is to "appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit, or being incapable as aforesaid." That language seems to me to be inapplicable to an appointment by the last surviving trustee in the place of himself and to take effect at his own death. An appointment operating in that event is not suggested by the language, and although there might be considerable convenience in so construing it, I do not think it would be a fair construction of the Act to hold that the writing points to or includes a will appointing a trustee in the place of the man who makes the will. The other question is closely connected with the former one, but is entirely different, and it is whether an appointment of new trustees of the will of Cornelius Parker made by the two general executors of John Bartholomew Parker, when they had proved his will, but the two special executors had not, is good, or whether by reason of their want of authority some further appointment is now necessary. The two general executors seeking to prove the will, probate was granted to them by that description thus: "Administration of the personal estate of the said deceased was granted to Richard Benyon and Wm. Geo. Mount, the general executors named in the said will, they having been first sworn to well and faithfully

administer the same." I am unfortunately without an authoritative statement respecting the practice of the Probate Division in such cases, or the reasons governing it, but it is stated by gentlemen competent to speak, and their statements are confirmed by Tristram and Coote's book (which in its later as well as in its earlier editions is well known as a trustworthy guide to practitioners), that the grant to general executors implies that there are other executors of a special character to whom a limited grant has been or may be made. This is not precisely stated in Mr. Coote's book, because he does not contemplate the actual event which has occurred here, but I hold it to be a fair inference from the rules given by him. The result is, that "general" must not be regarded as meaning "universal;" or rather, it must be regarded as implying that there is, or may be, another executor who is not general. When first Thomas Melson Parker, and secondly John Parker, subsequently applied for probate, special grants were made to them in forms (for they do not precisely agree) somewhat embarrassing. It is not my office to criticise the forms of the Probate Division, and I have no wish to undertake it. It seems to have been thought convenient and right to adapt the words of the will as far as possible to the common forms of grant, and accordingly these gentlemen were treated as executors for the purpose only of executing in continuation to the testator the trusts of the will of Cornelius Parker, which vested in John Bartholomew Parker at the time of his decease, and they were sworn well and faithfully to administer the same. I am at a loss to know what they were to administer. The only antecedent, to which "the same" can refer, is the trusts of the will of Cornelius Parker, and yet I can scarcely conceive that the Probate Division intended to control the administration of those trusts, which would not fall within its ordinary jurisdiction. I ought, however, to attribute to these grants whatever effect in substance, irrespective of form, may be fairly attributed to them, and it seems to me that they must have operated as evidential confirmation of the appointment by John Bartholomew Parker of executors of that part of his estate, which he held as trustee of the will of Cornelius Parker. It has long been settled that a man may appoint different executors for different parts of his estate, and the rule must, I think, hold good notwithstanding that some parts of that estate are his own property, and others belong to him as trustee. When this occurs, each executor takes by virtue of his appointment, of which the grant of probate is the conclusive and only evidence, that personal estate to which his appointment refers, and becomes the legal owner thereof, but, as regards what belonged to the testator as trustee, such ownership does not make the executor trustee in the testator's stead: (see *Re Burt's Estate*, 1 Drew. 319.) This, however, does not dispose of the question which falls for decision here. The power of appointing new trustees is given by the 31st section of the Conveyancing and Law of Property Act 1881 to the personal representatives of the last "surviving or continuing trustee," and the question is, whether the special executors were the personal representatives of John Bartholomew Parker within the meaning of the Act for the purpose of making the appointment. Even that is not the only

question, because it has been further argued that, if they were not competent to make the appointment, yet the general executors could not make it, that is, were not personal representatives of the testator within the meaning of the Act, and therefore their appointment is bad. It is to be observed that the Act says the personal representatives, and not executors or administrators of the last surviving trustee, and to my mind the distinction is all important. Passing by administrators who have no office and no authority until administration has been granted to them, it might be that executors would have included all named by the testator notwithstanding they have not proved the will, unless of course they had formally renounced probate. There would be manifest inconvenience in vesting the power of appointment in persons about whom there is a doubt whether they will prove or not, and who in the meantime may be inaccessible, and I cannot but think that those who can for the time being produce the only evidence of office and authority were intended by the Legislature to be the personal representatives of the testator for the purpose of appointing his successor as trustee. This testator clearly contemplated a different result. I have no doubt that, in using the language which he did use in the appointment of these special executors, he intended that they should themselves succeed him as trustees of the will of Cornelius Parker. I have already held that he could not do that so as to make them become trustees by accepting the office of executor. It follows that, unless they are really his personal representatives within the meaning of the Act, he has not delegated to them, and could not delegate to them, the power of appointing new trustees of Cornelius Parker's will, and I cannot see my way to holding that within the meaning of the Act a man may have one set of personal representatives for one purpose, and a different set for another purpose. This view is strongly confirmed by the 30th section of the same Act. That section was much discussed on the re-argument, and properly so, because it is closely connected with the 31st section, and is, like it, comprised under the heading, "Trust and mortgage estates on death." The 30th section treats of real estate. It provides that on the death of the sole trustee of real estate it shall devolve to and become vested in his personal representatives or representative. It therefore takes away the power of devising trust estates and provides a new method of devolution. It is argued, and there is much force in the argument, that if a testator-trustee were allowed to appoint one set of executors of his own estate, and another of estates vested in him as trustee, he really would be devising his trust estates to that second set to the exclusion of those who are for all other purposes his personal representatives. But, in any event, I think that the term personal representative ought to receive the same construction under both sections, and that what has been remarked before respecting the language of the 31st equally applies to that of the 30th section. What would have happened if there had been one grant only I forbear to consider. Perhaps if there had been one grant only, it would have been in a form which would have solved or avoided the question. My opinion is, that the two general executors were, at any rate until the grants to the

special executors, the personal representatives of John Bartholomew Parker within the meaning of the Act, and that therefore they were competent to appoint new trustees of Cornelius Parker's will, notwithstanding that John Bartholomew Parker had also appointed special executors, who might have applied, as in fact they afterwards did apply, for special grants. There is no occasion for me to say that the case bristles with difficulties, and that I have arrived at the above conclusion after considerable hesitation. It is not often convenient to say that, but it follows from the course of events here. I propose to make the same order which I made on the conclusion of the first hearing, namely, the Court being of opinion that the appointment of trustees by the deed of the 17th April was good, and the petitioners undertaking to execute any transfer that may be required in order to vest the stock in the names of the two petitioners appointed by the deed, direct the respondent to execute a transfer of the stock into the names of such two petitioners to be held by them upon the trusts of the will of Cornelius Parker.

Solicitors: *Faithfull and Owen; Collyer-Bristow and Co., for Bell, Ingoldby, and Sharpley, Louth.*

Jan. 18 and 19.

(Before ROMER, J.)

FEAST v. ROBINSON AND FISHER. (a)

Bill of sale—Description of grantor—Bills of Sale Act 1878 (41 & 42 Vict. c. 31), s. 10.

A person leading the ordinary life of a country gentleman, but being a "sleeping" or inactive partner in several businesses, in some only of which his name appeared, and in none of which he took any active part whatever, granted a bill of sale on furniture and other effects, forming part of his separate estate. He was described in the affidavit to be filed with the registrar (under sect. 10 of the Bills of Sale Act 1878) as "of Kingsdown House, Sittingbourne, in the county of Kent, a gentleman of no occupation."

Held, that under the circumstances mentioned the description of the grantor was correct, and the bill of sale good.

THIS was an action brought by a trustee in bankruptcy against a firm of auctioneers, claiming a declaration that they were not entitled to retain, out of the proceeds of some of the bankrupt's furniture and effects sold by them, the amount they had expended in paying off a bill of sale on such furniture, &c., which bill of sale the plaintiff alleged to have been void by reason of the grantor's description in the affidavit accompanying it being inaccurate.

The circumstances were as follows:

In 1889 Wells was interested in the following businesses: Croft and he were the only partners in a glue manufacturing business, established and managed by the former, and carried on at Belvedere, Kent, and at 5, Water-lane, in the city of London, under the style of the "Belvedere Company." The nature of the business was subsequently changed, and the style altered to the "Pure Beef Company."

(a) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Secondly, they were both partners, with others, in a firm which carried on business at Bombay as general merchants, under the style of Croft, Wells, and Co. They were also both partners, with others, in a firm which carried on business at Calcutta as general merchants, under the style of Croft, Wells, and Co. The last two firms were stated to be partners with the firm of Sigismund Baerlein, Max Baerlein, and Otto Baerlein, of Manchester, as merchants in cotton yarn, and general merchandise. Wells was also a partner with Dudley Myers and Mrs. Tatam in a firm carrying on business as florists in King-street, St. James-street, as "Reid and Co." Mr. Wells took no active part whatever in any of these businesses, and in some of them his name did not even appear. He was living the ordinary life of a country gentleman, near Sittingbourne, in the county of Kent, shooting, and occupying himself in the ordinary avocations of country life.

On the 25th March 1892 Mr. Wells executed a bill of sale of certain of his furniture and effects in favour of Furber, Price, and Furber, by way of security for the repayment of money, interest being reserved at the rate of 15 per cent. per annum. The grantor was described in the bill of sale, and in the affidavit to be filed with it, under sect. 10 of the Bills of Sale Act 1878, as "of Kingsdown House, Sittingbourne, in the county of Kent, a gentleman of no occupation."

Channell, Q.C. and Ribton for the plaintiff.—The bill of sale is bad, because the grantor's description as a "gentleman of no occupation" is inaccurate and erroneous, he being really engaged in trade. There is no case exactly in point, but *Sharpe v. McHenry* (57 L. T. Rep. N.S. 606; 38 Ch. Div. 427) shows that the object of sect. 10, sub-sect. 2, of the Bills of Sale Act 1878, in requiring that the occupation of the grantor, as well as his residence, shall be described, is simply to identify him for the information and protection of his creditors. A misdescription in the affidavit invalidates a bill of sale:

Brodrick v. Scalé, 23 L. T. Rep. N. S. 861; L. Rep. 6 C. P. 98.

[*Neville, Q.C.*—In the circumstances of this case, it was not a misdescription.] Wells was not merely a sleeping partner in all these businesses. In some his name appeared. In this transaction the official receiver really acted in the interest of Wells, and not for the benefit of the creditors.

Neville, Q.C. and *Hansell* for the defendants.—In *Greenham v. Child* (61 L. T. Rep. N. S. 563; 24 Q. B. Div. 29) it was held a sufficient description of the grantor's residence to mention the place of business at which he resided, though he also carried on business at two other places. In *Blount v. Harris* (39 L. T. Rep. N. S. 465; 4 Q. B. Div. 603) a solicitor, residing at Acton, and carrying on business in the city of London, had erroneously described himself in the affidavit as residing at Acton, in the city of London, and this was held sufficient, rejecting the latter part.

Sir C. Russell (A.-G.), *Ingle Joyce*, and *Muir Mackenzie* for the official receiver.

Channell, Q.C. in reply.—The description of a clerk in the accountant's department of a railway

company as an accountant, has been held insufficient:

Larchin v. North-Western Deposit Bank, 33 L. T. Rep. N. S. 124; L. Rep. 10 Ex. 64.

In the present case, persons who relied on the grantor's name in the business would not recognise him by the description in the affidavit. In the Calcutta and Bombay firms his name actually appeared. The petition in bankruptcy was filed against him in his capacity of a trader in the Belvedere firm. Can a man say that what is his business is not his occupation, just because he chooses to neglect it? Here the grantor had a business in which he chose not to occupy himself. Is he, on that account, not to be described by his business? It was his occupation within the meaning of sect. 10, and as long as he remained in it he ought to have been described accordingly. "Gentleman" has been held an insufficient description of one who, though formerly an attorney, was, at the date of attestation, practising as an attorney's clerk:

Tuion v. Sansoni, or Sanoner, 31 L. T. Rep. O. S. 118; 3 Hurlst. & Norm. 280.

ROMER, J.—The first point that arises in this case is, whether the bill of sale given by Mr. Wells was void. The only ground on which it is alleged that is void, is by reason of the description of Mr. Wells's occupation in the statutory affidavit accompanying the bill of sale. It is said that in that respect the affidavit did not comply with the statutory requirement. Now the requirement is merely this, that Mr. Wells shall give a description of his residence and occupation. The provision is contained in the Bills of Sale Act of 1878, sect. 10. Now the proviso referred to in that section has nothing technical about it. The words in which it is expressed are not technical words, but are to be interpreted according to their ordinary popular meaning. I think the statute did not require that the bill of sale giver should, in his description of his occupation, enter into details of every way in which he is accustomed, at the date of the bill of sale, to occupy himself, nor do I think it requires him to state every undertaking he might at the time be interested in, which throws liability upon him. I think what the statute intended and required was, that he should describe himself in a concise and compendious way, and the one by which he would be recognised, and would be generally described by those acquainted with him or his pursuits. Now, applying that test to the present case, I have to consider how Mr. Wells did describe himself in his affidavit in this case. He described himself as of "Kingsdown House, Sittingbourne, in the county of Kent, gentleman, of no occupation." Now, after all the evidence in this case, and after all that has been said, I can only say it still appears to me that that was an accurate description of him, both as to his residence and his occupation, and I cannot, after knowing all the facts myself, think of any description which so accurately describes what his real occupation was at the time. I still think, with all the knowledge of the facts, that that was a perfectly accurate description, and a full compliance with the requirements of the statute. I see no deception of any kind. Now, let me consider the facts that are said to render the description I have mentioned untrue or insufficient. Mr. Wells left India, where he had been a broker, and came

back to England, about the year 1886. He came into a large fortune, and from that time until he executed the bill of sale he appears to have devoted himself to the life of a country gentleman, so far as his occupation was concerned—to the ordinary pursuits of a country gentleman, living in the country, and amusing himself by shooting and so forth. Apart from his interest in certain businesses which I will mention, he never followed any business pursuit at all. He never occupied himself in any business, but undoubtedly, at the time of the bill of sale and of the affidavit, he had rendered himself liable as a partner in certain businesses. [His Lordship then in detail referred to the several businesses, and proceeded:] Now a great deal was said, and properly said no doubt, by Mr. Channell, who argued this case, if I may say so, with great ability, as to the creditors of those businesses. But if any creditor of the business carried on at Belvedere did know that Mr. Wells was a partner, I do not see how he could have been misled by the description in this bill of sale. If he knew Mr. Wells, he would certainly have known who Mr. Wells was, and he would have known that Mr. Wells was a gentleman of Sittingbourne, and a person of no occupation, but just simply a country gentleman, who had taken a share as sleeping partner in the business. And as to those persons dealing with the Belvedere business, who did not know Mr. Wells was a partner, I could understand the reliance placed by the plaintiffs on their existence, if a sleeping partner was by the law of England bound to disclose his position. But he is not so bound, and I do not think the Bills of Sale Act was intended, even indirectly, to alter the law in that respect. It appears to me that those creditors of any one of the above businesses, who did not know Mr. Wells was a partner, would certainly not have been led by seeing that a man of that name had executed a bill of sale into inquiring whether he was a partner in those businesses. It is to be remembered that Mr. Wells was not bound, even according to the plaintiff's contention, to set forth the details of the businesses in which he was interested, or the names under which those businesses were carried on. The Bills of Sale Act certainly did not prescribe that. Then how would it have availed the creditors if Mr. Wells had added to his description only that which the plaintiff contended for, namely, words like "florist," or "bone merchant," or "glue merchant," or "beef merchant," or "general merchant"? I think not at all for the purposes which the Legislature may be said to have had in mind when they made the statutory provisions I have referred to. To conclude, I adopt in this case what Martin, B. said in *Luckin v. Hamlyn* (21 L. T. Rep. N. S. 366), and I will repeat it, only altering the details so as to exactly fit this case. "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is that such a description shall be given that if inquiry be made in the place where the person resides, he may be easily identified. I am quite sure that if "Mr. Wells "had been inquired for in "his "place of residence as a "merchant or a florist, "it would only have tended to mislead." Mr. Wells himself said in his evidence that he did not carry on any business, except in the way I have mentioned. I am quite satisfied on the

Q.B. Div.]

SMITH (app.) v. MULLER (resp.).

[Q.B. Div.]

evidence that Mr. Wells was no more (so far as his occupation was concerned) a merchant or a florist, within the meaning of this Act, than I am. This substantially ends the case, and renders it unnecessary for me to consider whether the plaintiff could have succeeded if he could have got over this first point. I must dismiss this action, and I think I ought to dismiss it, as I do, with costs, as between the plaintiffs and the defendants.

Solicitors for the plaintiff, *Keene, Marsland, and Bryden*.

Solicitors for the defendants, *Hasties*.

Solicitor for the official receiver, *The Solicitor to the Board of Trade*.

QUEEN'S BENCH DIVISION.

Wednesday, Nov. 1, 1893.

(Before CHARLES and WRIGHT, JJ.)

SMITH (app.) v. MULLER (resp.). (a)

Explosion—Boiler for domestic purposes—Boiler Explosions Act 1882 (45 & 46 Vict. c. 22), ss. 4 and 5—Boiler Explosions Act 1890 (53 & 54 Vict. c. 35), s. 2—Notice.

By sect. 5 of the Boiler Explosions Act 1882, when any explosion occurs from any boiler to which the Act applies, notice shall be sent within twenty-four hours to the Board of Trade. Sect. 4 exempts all boilers used exclusively for domestic purposes. This exemption comes within sect. 2 of the Boiler Explosions Act 1890.

The respondent was a merchant upon whose premises was a boiler used for the purpose of putting hot water through a range of pipes to heat the clerks' offices, and it was used by the office caretaker and his family who lived upon the premises. An explosion occurred. An information was laid under sect. 5 of the Act of 1882, a notice of the explosion not having been given to the Board of Trade. The magistrate dismissed the information, holding that the boiler was "used exclusively for domestic purposes," within the meaning of sect. 4 of the Act of 1882. Conviction affirmed.

THIS was an appeal upon a special case stated by the learned stipendiary magistrate for Birmingham.

The following facts were admitted by the appellant and respondent:—

The appellant was the complainant on behalf of the Board of Trade. The respondent carried on business as a merchant.

An explosion occurred to a boiler on his premises, but little damage and no injury to anyone was done. The boiler was used for circulating hot water through a range of piping which warmed the clerks' office only. This office was used by the clerks of the respondent for the purposes of his business of a merchant. The respondent did not reside upon the premises, which were used as his place of business, and was the only place where his business was carried on.

There was also a tap fixed in the boiler itself by which warm water was drawn off for cleaning the offices, and for the household purposes of the caretaker and his family, who resided upon the

premises, the boiler and apparatus being under the control of the caretaker.

The magistrate was of opinion that the boiler came within the exception contained in sect. 4 of the Act of 1882, as one "used exclusively for domestic purposes," and he dismissed the information.

The Boiler Explosions Act 1890 (53 & 54 Vict. c. 35), s. 2, while extending the Act of 1882, continues the exemption in favour of boilers used for domestic purposes.

The *Attorney-General* (Sir Charles Russell, Q.C.) and *Sutton* for the appellant (the complainant on behalf of the Board of Trade).

Wills for the respondent.

CHARLES, J.—This was an information laid before the stipendiary magistrate at Birmingham, arising out of a boiler explosion. The Boiler Explosions Act 1882 (45 & 46 Vict. c. 22) has made it a statutable offence if, when a boiler explosion takes place, a notice is not given within twenty-four hours to the Board of Trade; but sect. 4 of the statute says that the Act shall not apply to boilers used exclusively for domestic purposes. The question before us is, whether the learned magistrate was right in holding that the boiler in question came within that section of the Act, and in dismissing the information against the respondent. The *Attorney-General* says that this boiler cannot be said to have been exclusively used for domestic purposes, because the place where this explosion took place was not used by the respondent for residential purposes; that the test of residence is the test that should apply. No doubt it is difficult to draw the line; but a line must be drawn somewhere, and it appears to me that the learned magistrate was a long way on the right side of the line. I am of opinion the learned magistrate was right in dismissing the information, and judgment must be for the respondent with costs.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed. Judgment for the respondent.

Solicitor for the appellant, *The Solicitor to the Board of Trade*.

Solicitors for the respondent, *Burton, Yeates, and Hart*, agents for *Johnson, Barclay, Johnson, and Rogers*, Birmingham.

Jan. 22, 23, and 29.

(Before WRIGHT, J.)

ECCLESIASTICAL COMMISSIONERS OF ENGLAND
v. PARR AND OTHERS. (a)

Copyhold—Admittance of tenants not required—Lapse of time—Seizure quousque—Implied admittance—Statute of Limitations (3 & 4 Will. 4, c. 27).

The lords of a manor received the quit rents due in respect of certain copyhold lands and premises from the heir of the last tenant upon the court-rolls, and other quit rents from the devisees of other lands forming part of the manor, for more than twenty years. It could not be shown that the heir or devisees of the lands had been admitted as tenants. Upon their refusal to be now

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. DIV.] ECCLESIASTICAL COMMISSIONERS OF ENGLAND v. PARR AND OTHERS. [Q.B. DIV.]

admitted, and to pay the fines demanded, the lords of the manor seized *quousque*.

Held, that the right of the lords of the manor to seize *quousque* was barred, because in the circumstances an admittance of the heir and devisees of the lands ought to be implied; and further, that such a right was barred by the Statute of Limitations.

In this action the plaintiffs, as lords of the manor of Mucking and Westlee, in the county of Essex, claimed possession of certain copyhold lands and premises, part of the said manor, in the occupation of the defendants Parr and Cox, who were in possession thereof as tenants of the defendants Saunders and Hicks.

The possession which the plaintiffs claimed was possession *quousque*; that is to say, possession until the defendants Saunders and Hicks took admittance to the said land and premises as the tenants of the plaintiffs on the court-rolls of the manor.

Bosanquet, Q.C. and Archibald Brown appeared for the plaintiffs.

Channell, Q.C. and Godefroi for the defendants.

The facts and arguments appear fully from the judgment of the court.

Jan. 29.—WRIGHT, J. delivered the following written judgment.—This action is a step in proceedings taken by the plaintiffs as lords of the manor of Mucking, which formerly belonged to the Dean and Chapter of St. Paul's, and is now vested in the plaintiffs, for the purpose of compelling the defendants Saunders and Hicks to take admittance to certain copyhold tenements comprised in Mucking Hall farm and Sutton's farm, and to pay fines upon such admittance. The facts are as follows: In 1821 the father of the defendant Hicks was admitted on the court-rolls to the Sutton's farm copyholds, as trustee for the father of one Cox. In 1836 Cox was admitted on the court-rolls to one part of the Mucking Hall farm copyhold as heir to his father, and in 1844 he was admitted to the other part as a purchaser. In 1868 the father of the defendant Hicks died, and thereupon the defendant Hicks, as trustee for Cox, succeeded to the tenancy of the Sutton's farm copyholds. In 1870 Cox died, having devised to the defendants Saunders and Hicks and another trustee now deceased all his estate and interest in both the Sutton's farm and the Mucking Hall farm copyhold. Neither the defendant Hicks, as heir to his father of Sutton's farm copyholds, nor the trustees as devisees of the Mucking Hall farm copyholds, can be shown to have been actually admitted. From 1875 the quit rents have been regularly collected by the plaintiffs' collector from Cox's trustee in respect both of Mucking Hall farm and of Sutton's farm. The collector gave receipts to Cox's trustees in forms prescribed by the plaintiffs' agent, and paid over the rents to the plaintiffs' agents, first to Messrs. Lee, Bolton, and Lee, and since about 1877 to Messrs. Cluttons. Messrs. Cluttons had notice by the accounts, at any rate from 1880, that the rents were paid by Cox's trustees. The plaintiffs themselves have produced accounts entitled "London Chapter Manor Accounts," which appear to show that they had notice from 1877 that the rents were paid in respect of the estate of the late Mr. Cox. In 1889 a new steward of the manor was appointed, and he

raised the question which has now to be determined. He took steps by proclamation and notice dated Jan. 1893 which resulted in a seizure *quousque* on the 15th April 1893, and the defendants' tenants refusing attornment this action was commenced on the 3rd May 1893. The question is whether, under the circumstances, an admittance of the defendant Hicks in respect of Sutton's farm, and of Saunders and Hicks in respect of Mucking Hall farm, or of both farms, ought to be implied. The effect of the authorities appears to me to be that acceptance of rent by the lord from a person paying it as heir or as surrenderee, if the lord knows that the rent is paid by him as heir or surrenderee, amounts to or implies an admittance of him as tenant: (Gilbert Ten. p. 282; Calthrop, (1650) Cop., p. 47; Watkin's Cop., 4th edit., p. 248; Com. Dig. Cop. G.) And I think that, when the lord intrusts the general financial management of his property to an agent, and by the lord's authority a collector of the rents of a manor is appointed who accounts to that agent and informs him of the rents paid and of the persons who pay them, the knowledge of the collector or agent must be regarded as the knowledge of the lord. And here the case is stronger, for the London Chapter Manor accounts show that the plaintiffs themselves had notice that the rents were paid on behalf of the estate of Cox. Indeed, the very case made by the statement of claim is, that the rents have always been paid and accepted on the footing of copyhold tenancy by Cox's trustees. In the case of the Mucking Hall copyholds no actual surrender to the use of Cox's will was necessary, and presentment could always be waived, so that nothing was wanting to put them in possession as tenants but admittance; and, on the other hand, until admittance, they were not legally in possession as tenants, nor liable as tenants for the rents. The acceptance of the rent, with knowledge that they were in the position of devisees, and therefore of surrenderees, and liable only if admitted, implies assent to the surrender, and is an admittance. In the case of the Sutton's farm copyholds it may be doubtful whether the legal position is quite the same, because the defendant Hicks, on the death of his father, succeeded to possession of the copyholds as heir without admittance, and was under no obligation to come in for admittance until required by the lord, and no presentment or express notice of his father's death is proved. Still I think that, as the quit rents of his copyholds were accepted from him and Saunders as Cox's trustees, that involves sufficient notice that there had been a change in the tenancy, and that the rents were paid on that footing. And even if that is not the correct view, I think the plaintiffs are barred by the Statute of Limitations. In *Re Lidiard and Jackson and Broadley's Contract* (61 L. T. Rep. N. S. 322; 42 Ch. Div. 254) Kay, J. expressed an opinion that the statute may apply to prevent a seizure *quousque*, and notwithstanding Mr. Bosanquet's forcible argument I incline to think that the time begins to run against the lord, not from the date at which he has actually perfected his right to seize, that is to say, from the completion of proclamations or the service of notice, but from the time when he could have perfected his right had he known of the death of the father. A different view would make the statute almost inoperative in cases of this kind. Even if the

Q.B. Div.] SINGER MANUFACTURING CO. v. LONDON & SOUTH-WESTERN RAIL. CO. [Q.B. Div.]

commencement of the time is to depend on knowledge, I think that from 1877 the plaintiffs must be considered as having notice that the rents were no longer paid by the father, and that a change in the tenancy had taken place. But ignorance that an event has happened which has given a right of entry or action does not in general prevent the commencement of a limitation, and in this case the event happened in 1868 or 1869, or, if proclamation were necessary at three several courts, then in 1871.

Judgment for the defendants.

Solicitor for the plaintiffs, *F. A. Manley.*

Solicitors for the defendants, *Hicks and Son.*

Monday, Feb. 5.

(Before MATHEW and COLLINS, JJ.)

SINGER MANUFACTURING COMPANY v. LONDON AND SOUTH - WESTERN RAILWAY COMPANY. (a)

Railway company—Goods on hire-and-purchase system—Goods deposited in cloak-room by hirer—Goods claimed by owner—Lien of railway company for charges—Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), ss. 1, 2—"Reasonable facilities"—Cloak-room.

A person, having obtained a machine from the plaintiffs upon the hire-and-purchase system, deposited the same at the cloak-room of one of the stations of the defendants. The machine was left at the cloak-room for several months, when the hirer gave the ticket, which he had received at the cloak-room, to the plaintiffs, who thereupon demanded that the defendants should deliver up the machine to them. The defendants declined to give up the machine until their charges for warehousing it had been paid.

The Railway and Canal Traffic Act 1854 requires railway companies to afford reasonable facilities for receiving and forwarding passengers' luggage. Held, that as the defendants were required to afford reasonable facilities for receiving passengers' luggage, and a cloak-room at a railway station was such a reasonable facility, the defendants were entitled to a lien upon the machine for their charges.

THIS was an appeal from the decision of the judge of the County Court of Surrey, holden at Southwark, on the ground that the judge was wrong in law in deciding that the defendants were entitled as against the plaintiffs to retain the plaintiffs' goods until a lien for warehousing charges claimed by the defendants in respect of a deposit of the said goods with them by a third party had been satisfied by payment of the same, and also on the ground that there was no evidence of any contract or obligation on the part of the plaintiffs to pay and satisfy the said lien in respect of which judgment was entered for the defendants on the counterclaim.

By an agreement, dated the 17th Oct. 1892, the plaintiffs agreed to let to Thomas Woodman a sewing-machine upon the terms that he should pay to them a rent of one shilling and sixpence per week, that he should keep the machine in good order, that he should keep it in his own custody at his therein-mentioned address, and

should not remove it without the owners' previous consent in writing, that the plaintiffs might terminate the agreement if the hirer did not perform his part of the agreement, that the hirer might at any time during the hire become the purchaser of the machine by payment in cash of the sum of 8*l.*, and that if such purchase should be effected credit should be given for all payments previously made under the agreement.

Woodman paid rent to the plaintiffs to the amount of 1*l.* 17*s.* and no more. In May 1892 he deposited the machine at the cloak-room of the defendants' Waterloo Station, and there received a ticket, upon which appeared the following notice:

Personal baggage and other articles left by passengers at the stations will be at their own risk, unless the same be deposited in the cloak-rooms, for which a charge of twopence per article will be made; and no article will be delivered up without the production of this ticket. Articles deposited in the cloak-rooms for more than forty-eight hours will be charged one penny extra for each package per diem for the first calendar month, and twopence per week or part of a week for the second and third calendar months.

It did not appear from the evidence whether there were any instalments of the rent due at the time when the machine was left at the cloak-room. In Oct. 1892 Woodman sent the above-mentioned ticket to the plaintiffs, who demanded that the machine should be given up to them by the defendants. The defendants refused to deliver up the machine unless their charge of four shillings for keeping the same in the cloak-room was paid. The plaintiffs declined to pay the sum so claimed.

The plaintiffs then sued the defendants for the return of the machine or its value, and the defendants counter-claimed for four shillings the cloak-room charges.

The learned County Court judge held that the defendants were entitled to recover the amount of the cloak-room charges, and that upon the payment thereof the machine should be delivered up to the plaintiffs.

The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) enacts:

Sec. 1. The word "traffic" shall include not only passengers, and their luggage and goods.

Sec. 2. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding, and delivering of traffic upon and from the several railways and canals belonging to, or worked by, such companies respectively.

Cluer and W. Russell for the plaintiffs.—It is submitted that the County Court judge was wrong in holding that the defendants had a lien upon this machine for their charges as against the plaintiffs, who are the true owners thereof. The defendants are not in the position of innkeepers or carriers, who would by common law have a lien, but are only warehousemen in this case. It has been held that a wharfinger is entitled to his charges as against the true owner of goods which have been deposited with him by a third party, but in that case the true owner would have had to pay the charges under any circumstances:

De Rothschild Frères v. Morrison, Kekewich, and Co., 63 L. T. Rep. N. S. 46; 24 Q. B. Div. 750.

Unless there is a contract under the terms of which the goods come into the possession of the person claiming a lien on them, and that contract

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. DIV.] SINGER MANUFACTURING CO. v. LONDON & SOUTH-WESTERN RAIL. CO. [Q.B. DIV.]

is made by the owner of the goods, the person holding the goods cannot claim a lien on them for his charges against the owner :

Hiscox v. Greenwood, 4 Esp. 174;
Hollis v. Claridge, 4 Taunt. 807;
Castellain v. Thompson, 13 C. B. N. S. 105.

If the hirer of the machine had broken it and sent it to a third person to be repaired, that person would not have had a lien upon it for his charges against the plaintiffs. The hirer might warehouse the machine, but that would not give the warehouseman the right to detain it from the plaintiffs.

Aland for the defendants.—It is admitted by the plaintiffs that the hirer was within his rights under the agreement between him and the plaintiffs in depositing the machine in the cloak-room; the defendants are entitled therefore to a lien on the machine for their charges against the plaintiffs. Innkeepers and carriers are bound to take the goods that are brought to them, and so they have a lien upon them for their charges. The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) requires by sect. 2 that railway companies shall afford all reasonable facilities for the receiving of traffic upon their lines; and by sect. 1 "traffic" is defined to include passengers and their luggage and goods. It is submitted that a cloak-room is a "reasonable facility" which a railway company is bound to provide at its stations, and that a company is bound to receive passengers' luggage at a cloak-room :

The South-Eastern Railway Company v. Railway Commissioners, 44 L. T. Rep. N. S. 203; 6 Q. B. Div. 586.

Therefore the railway company is entitled to a lien for the charges upon the goods deposited at the cloak-room.

MATHEW, J.—I think that this appeal must be dismissed. The material facts are these: One Woodman, the hirer of a sewing-machine, deposited it at the cloak-room belonging to the defendants, the London and South-Western Railway Company, and certain charges were incurred in respect of the deposit of the article there. The hirer, it would appear, after a time made up his mind not to release the article, and he gave notice to the plaintiffs, from whom he had hired the machine, where the article was. At the time when he gave this notice to the plaintiffs Woodman owed a considerable sum for instalments that were unpaid under the hiring-and-purchase agreement under which he had obtained the machine from the plaintiffs. Thereupon the plaintiffs demanded the possession of the sewing-machine from the defendants, and the defendants claimed a lien upon it for their charges for the time during which the article remained in the cloak-room. Now it could not be disputed that the hirer was entitled while he was in possession of the machine to carry it by train, and to incur such charges in respect of it as a passenger by train would incur. Whatever the origin of the rule may be it is not necessary to discuss it now, for it is clear law that a carrier would have a lien for his charges on the articles carried. The sole question is whether the same principle applies to charges incurred in respect of a cloak-room. It is enacted by the Railway and Canal Traffic Act 1854 that railway companies shall afford all reasonable facilities for receiving and forwarding

passengers and their luggage, and it seems to me that one of the most reasonable facilities is a cloak-room. It is said that the principle which applies to the contract of carriage applies also to a cloak-room which is provided by a railway company as part of the reasonable facilities for carriage by their line. It seems to me that that argument is sound, and that the defendants are entitled to have the payment of their charges made before they can be required to deliver up the article deposited in the cloak-room. That was the opinion of the County Court judge, and, as I see no reason to differ from it, this appeal must be dismissed.

COLLINS, J.—I am of the same opinion. I think the sewing-machine in this case must be taken to have been deposited in the cloak-room in the same way and subject to the same rights as it might have been deposited with the carrier for the purpose of carriage. I think that, having regard to modern decisions, and the rising standard of convenience to which railway companies are obliged to conform, a cloak-room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their luggage. The railway company are common carriers of passengers' luggage, and when they carried this machine they were common carriers of it, and in respect of the cost of carrying it they had their lien good against all the world. I do not see why they should not have equally a lien for receiving and warehousing it in the cloak-room. The same principle lies at the root of both. The railway company are under an obligation to give reasonable facilities for the receipt and safe custody of baggage, and it was in performance of that obligation that they received this sewing machine. Therefore, on that ground, it seems to me, the lien upon the machine is good, not only as against the person depositing it, but as against the owner. I think in this case that the lien may also be rested upon another ground, namely, that the person who deposited this machine was, as between himself and the owner of it entitled to the possession of it at the time when he deposited it. He was entitled to possession of it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract; and among them, I take it, he acquired the right to take the machine with him if he travelled, and, in taking it with him, to deposit it in a cloak-room. If, in the course of that reasonable user of the machine, the hirer of it gave rights to the railway company in respect of the custody of it, I think that those rights must be good against the person letting out the machine, who had not determined the contract at the time when those rights were acquired by the railway company, and if he determines the contract now he must do so subject to those rights, that is, subject to the lien. I think that on both these grounds the judgment is right, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, G. D. Wansbrough.
 Solicitors for the defendants, Bircham and Co.

PRIV. CO.]

JONES v. STONE.

[PRIV. CO.]

Judicial Committee of the Privy Council.*Thursday, Jan. 18.*

(Present: The Right Hons. Lords WATSON, HALSBURY, MACNAGHTEN, and MORRIS, Sir R. COUCH, and DAVEY, L.J.)

JONES v. STONE. (a)

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

*Practice—Rules of Supreme Court—Order XIV.—Action of ejectment—Estoppel.**An action of ejectment, brought by a landlord against a tenant, in which the circumstances under which the tenant came into possession are in dispute, is not a case in which the plaintiff should be allowed to sign judgment under Order XIV. of the Rules of the Supreme Court, which is identical with the English order.**Judgment of the court below reversed.**A plaintiff in ejectment cannot rely upon an alleged estoppel on the part of the defendant to relieve him from the necessity of proving his own title, when the facts out of which such estoppel arises are in dispute in the case.*

THIS was an appeal from a judgment of the Supreme Court of Western Australia (Stone, J., Onslow, C.J. dissenting), affirming an order of Sir H. Wrenfordale, acting C.J.

It appeared that the appellant had been in occupation of a house and land situate at Perth, in Western Australia, since the year 1856, having been let into possession of it by Mrs. Stone as weekly tenant at the rent of 1s. a week. It was contended, on the part of the appellant, that he was let into possession of the house and land by Mrs. Stone as agent for a person named Atkinson, since deceased. The appellant paid the rent to Mrs. Stone down to the time of her death in 1872, and it was contended by the appellant that the rent was received by her as agent for Atkinson. Mr. A. H. Stone, her husband, died in 1873. The appellant had for many years paid the rates in respect of the house and land. On the 30th July 1884 the respondent, who was the son of Mr. and Mrs. Stone, served on the appellant a notice to quit. In August of the same year the respondent, who denied that he was the agent for the owner of the house and land and asserted that he was absolutely entitled to the property, commenced proceedings in ejectment against the appellant. The Crown Solicitor appeared on behalf of the Curator of Intestate Estates, and those proceedings were stopped. On the 9th March 1891 the respondent issued a writ of summons against the appellant in the Supreme Court of Western Australia, and by the statement of claim specially indorsed upon it, he claimed to be entitled to the house and land in question, which had been let to the appellant as weekly tenant, which tenancy had been determined by notice to quit. The appellant entered an appearance in the action on the 10th March 1891. A summons was subsequently taken out by the respondent on the 8th April 1891, under Order XIV. of the Rules of the Supreme Court of Western Australia, which is identical in terms with Order XIV. of the Rules of the Supreme Court of Judicature in England, requiring the parties interested to attend the judge in

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

chambers at the Supreme Court, Perth, on the hearing of an application by the respondent that he might be allowed to sign final judgment in the action for possession of the house and land in question and costs. Affidavits were filed by the appellant in opposition to and by the respondent in support of the application. The application came on for hearing before Wrenfordale, J. in chambers, on the 20th April 1891, and he made an order giving the respondent leave to sign final judgment for possession of the house and land in question. The respondent, on the 23rd April 1891, accordingly signed judgment against the appellant for possession and costs. The appellant appealed from the order of the 20th April 1891, to the full court, and asked that the order might be reversed or rescinded, and that he might be at liberty to defend the action. On the hearing of the appeal before the full court (consisting of Onslow, C.J. and Stone, J.) on the 20th Oct. 1891, the Chief Justice was of opinion that the appeal should be allowed. Stone, J., however, concurred with the opinion of Wrenfordale, J. in chambers, and the appeal was consequently dismissed with costs. The appellant then brought this appeal to the Judicial Committee, submitting that the order of Wrenfordale, J. in chambers of the 20th April 1891, and the order of the full court of the 20th Oct. 1891, ought to be reversed.

W. E. Vernon, for the appellant, relied on the observations of Lord Selborne, L.C. in *Wallingford v. Mutual Society* (43 L. T. Rep. N. S. 258; 5 App. Cas. 685) and of the Court of Appeal in *Ray v. Baker* (41 L. T. Rep. N. S. 265; 4 Ex. Div. 279), as showing the principles upon which the procedure under Order XIV. should be applied. A case of ejectment under such circumstances as the present is not a case falling under the order (*Casey v. Hellyer*, 54 L. T. Rep. N. S. 103; 17 Q.B. Div. 97), for here the defendant is not estopped from disputing the plaintiff's title.

Lewis Thomas and Herbert, for the respondent, argued that the order of the court below was right, the defendant being estopped by his conduct from disputing the title. See

Doe d. Knight v. Smythe, 4 M. & S. 347.

At the conclusion of the arguments their Lordships' judgment was delivered by

Lord HALSBURY.—The sole question at issue here is whether, on certain facts disclosed in affidavits filed by the parties in an action of ejectment commenced by the respondent against the appellant in the Supreme Court, it was a case proper for the application of Order XIV. of the Rules of the Supreme Court of Western Australia, which is in terms identical with Order XIV. of the Rules of the Supreme Court in England, under which the judge may in certain circumstances make an order empowering a plaintiff to sign judgment on a writ specially indorsed. The affidavits appear to disclose that the plaintiff in this case, who asserts his title to certain property, has this connection with the property, that his mother for some time received rents in respect of it and that he has also himself received them. The question which is debated on the face of the affidavits is, in what character those rents were received. On the one hand it is said on behalf of the plaintiff, that the defendant, who was let into possession of the property, not by the present

plaintiff, but by the present plaintiff's mother, was let into possession by her, she claiming the property in her own right. The affidavits in support of this view are anything but clear; but their Lordships will assume for the purpose of this appeal that it is to be inferred from them that the plaintiff's mother did purport to exercise her right over the property in the manner above stated. On the other hand the defendant, whilst allowing that he did in fact so pay rent for the property for some years, contended that the ground upon which he did so was that the person to whom he paid it purported to act as collector on behalf of a person of the name of Atkinson, who was rated for it, and was its real owner. Nothing is distinctly alleged in support of the plaintiff's title to the property. The learned counsel, who very strenuously argued the appeal on the plaintiff's behalf, urged upon their Lordships the view that the plaintiff was not called upon to set out his title, because his claim against the defendant was that he had let him into possession of the property as his tenant; that he had given the notice to quit; that the defendant was no longer his tenant; and, therefore, that he was entitled to turn him out of the property by an action of ejectment, the defendant being estopped by his conduct in paying rent from denying the plaintiff's title. The fact that a plaintiff in ejectment must establish his own title is clear, but the plaintiff in this case argues that he is relieved from the necessity of proving his title by reason of the alleged estoppel. This might be a very legitimate argument if the facts were sufficient to establish such a proposition. But it is enough to say, for the purpose of this case, that these facts are the very facts in dispute. The Chief Justice of the Supreme Court, who dissented from the order of the court giving the plaintiff liberty to sign judgment, remarked in his judgment that the case seemed to him to be "eminently one which required the fullest investigation before a jury, as the conduct of the plaintiff in his dealings with the defendant in connection with the land in question was of a most suspicious character." Whether that is so or not, it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order XIV. The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. The present case is not one of that kind; and their Lordships cannot do otherwise than regret that the action was not allowed to be defended on its merits in the ordinary course, in which event the expense and delay of the present appeal to the Privy Council would have been avoided. Their Lordships will humbly advise Her Majesty to reverse the order for judgment of the 20th April 1891, the judgment of the 23rd April 1891, the order of the full court of the 20th Oct. 1891, and all other orders and judgments of the court which are in the way of the trial of the case. The respondent must pay the costs in both the courts below and the costs of this appeal.

Solicitors: for the appellant, *J. Vernon, Son, and Co.*; for the respondent, *W. H. Herbert.*

Jan. 23 and 24.

(Present: The Right Hons. Lord WATSON MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

HILL v. BROWN. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Estate for life or in fee—Words of reference.

A testator, by his will made in 1821, after making various bequests of realty and personality, proceeded, "I do give and bequeath unto my daughter A. fifty acres of land, being part of one hundred acres situated on the P. road, known by the name of T. Farm, and to my daughter E. fifty acres of land, being the remainder of the above-named hundred." After the specific bequests followed the words, "and whose names are in the schedule named, and property specifically mentioned to each of their respective names." There was a schedule to the will which contained the names of the various devisees named in the will, but did not contain the particulars of any property given to them.

Held, that the words mentioning the schedule were words of reference, not of gift, and that the daughters only took a life interest in the real estate.

Judgment of the court below affirmed.

THIS was an appeal from a judgment or order, dated the 23rd March 1892, of the Supreme Court of the Colony of New South Wales, discharging with costs a rule nisi obtained by the appellants, calling on the original respondent, William Miller Thorley, to show cause why a verdict entered by consent for him should not be set aside and a verdict entered for the appellants.

The action was an action of ejectment for the recovery of 103 acres 2 roods and 18 perches or thereabouts of land situate in the parish of Liberty Plains, in the county of Cumberland, in the colony of New South Wales, and was commenced on the 30th May 1891, by William Miller Thorley, as the administrator of the real estate, goods, chattels, credits, and effects of William Thorley, deceased, against the appellant, William Charles Hill, and one William Clark, since deceased, who were in possession of the land. The appellant Fitzwilliam Wentworth was subsequently, namely, by an order of Innes, J. dated the 18th June 1891, added as a defendant to the action as being the landlord of the appellant William Charles Hill and of the said William Clark.

The action came on to be heard before Sir F. Darley, C.J. on the 1st Dec. 1891, when an arrangement was entered into between the parties, which was embodied in the following note of the Chief Justice: "The verdict is to be entered by consent for the plaintiff subject to be turned into a verdict for the defendants. The plaintiff's title is admitted subject to the following point of law: That the grantee from the Crown, Samuel Thorley, by his will dated the 27th May 1821, as the defendants allege, vested the fee simple of the said lands in the testator's daughters, Agnes and Elizabeth Thorley, whereas, on the other hand, the plaintiff insists that upon the proper construction of this will the daughters took life estates only, the will being prior to the Wills Act. If the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law

[PRIV. CO.]

HILL v. BROWN.

[PRIV. CO.]

court be of opinion that the testator's daughters took in fee under the will, then the defendants' title is to be deemed a good title, as against the plaintiffs and the verdict is to be entered for the defendants."

On a suggestion, dated the 13th Feb. 1892, of the death of William Clark, it was ordered that no further proceedings should be had in the action against the said William Clark, and that the action should proceed against the appellants William Charles Hill and Fitzwilliam Wentworth according to the form of the statute in that behalf.

On the 15th Feb. 1892, the appellants obtained a rule *nisi* calling on William Miller Thorley to show cause why the verdict should not be set aside and a verdict entered for the appellants upon the following ground, that is to say: That the daughters of Samuel Thorley, under whom the appellants claim, took an estate in fee simple under the said Samuel Thorley's will, and not an estate for life only as contended by the plaintiff, the said William Miller Thorley.

The rule *nisi* came on for argument on the 25th Feb. and the 2nd March 1892, before a court consisting of Darley, C.J., Innes and Stephen, J.J., with the result that, on the 23rd March 1892, the court by a majority of two to one discharged the rule with costs. Innes, J. delivered a dissenting judgment in favour of the appellants.

Subsequently to the order or judgment of the 23rd March 1892 the appellants obtained leave to appeal therefrom to Her Majesty in Council, upon the usual terms.

At the time of all the aforesaid proceedings it was believed by the appellants that William Thorley had died intestate. Letters of administration of the estate of William Thorley had been granted to William Miller Thorley upon the allegation of the latter to that effect. And it was upon this footing that the arrangement was made between the parties to the action which is set out above. Subsequently, however, the respondent, Elizabeth Brown, took proceedings to establish a will of William Thorley, whereby he devised his real estate to persons other than those who would have become entitled thereto in case he had died intestate, and on the 1st Sept. 1892 the letters of administration granted to William Miller Thorley were revoked, and on the 15th Sept. 1892 letters of administration with the will annexed of the estate and effects of William Thorley were granted to the respondent, Elizabeth Brown.

On the 13th May 1893, on the application of William Miller Thorley and the respondent Elizabeth Brown, by petition to Her Majesty in Council, it was ordered that the respondent Elizabeth Brown, as administratrix with the will annexed of the estate and effects of William Thorley, should be and she was thereby substituted for William Miller Thorley as respondent in this present appeal, she undertaking the responsibility of the said William Miller Thorley in the matter of the costs, both of the action and of the appeal.

E. W. Byrne, Q.C. and Sargant, for the appellants, argued that on the true construction of the will the daughters took an estate in fee simple, and not a life estate only, in the hereditaments devised to them respectively. In such a case the court will try to give effect to the real intention of the

testator: (per Lord Blackburn in *Clifford v. Koe*, 43 L. T. Rep. N. S. 322; 5 App. Cas. 447.) *Randall v. Tuchin* (6 Taunt. 410) shows that the word "estate" in a will, however used, conveys the fee simple; so also *Uthwatt v. Bryant* (6 Taunt. 317). It is only necessary that it should be in the operative part of the will, as we say the word "property" is here: (*Doe d. Burton v. White*, 1 Ex. 526; affirmed on appeal, 2 Ex. 797.) In *Doe d. Pottow v. Fricker* (6 Ex. 510) the words were "my estate that I now live in;" in *Ibbetson v. Beckwith* (Cases temp. Talbot, 157) they were "estate at such a place," and were held to convey the fee. The whole will must be considered. Here the same clause which conveyed the realty also conveyed personalty in which the legatees took an absolute interest; the heir-at-law also is one of the devisees, and the gift to him is in the same form as that to the daughters.

The Solicitor-General (Sir J. Rigby, Q.C.), Crackanthorpe, Q.C., and Badcock, for the respondent, maintained that the devisees only took a life estate under the will. The words relied on to extend the gift must be in the operative part: (*Doe v. Clayton*, 8 East, 141.) In *Pettibard v. Prescott* (7 Ves. 541) a bequest of "my copyhold estate at P." was held only to pass a life interest. So in *Doe d. Lean v. Lean* (1 Q. B. 238) "an estate called L. in the parish of B.," and in *Doe d. Clarke v. Clarke* (1 Cr. & M. 39) "all that dwelling-house . . . the said property being in the township of W." were held only to convey life interests. See also

Harding v. Roberts, 10 Ex. 819;

Bowen v. Scowcroft, 2 Y. & Coll. Exch. 640.

Byrne, Q.C. was heard in reply.

At the conclusion of the arguments the judgment of their Lordships was delivered by

LORD MACNAGHTEN.—It is common ground that the testator's will must be construed as an English will in the same terms would have to be construed in this country under the old law. As the law stood before the present Wills Act (1 Vict. c. 26), which was adopted in the colony in 1840, a testamentary gift of so much land by an absolute proprietor as a general rule carried only a life estate, unless the devise contained words of limitation. To this rule, which probably in almost every case must have disappointed the wishes of the testator, there were certain exceptions. One was that the fee would pass if the testator used the word "estate," or any equivalent expression capable of describing the extent and sum of the testator's interest, as well as the substance of the gift. But this exception was subject to the qualification that the expression must be found in the operative part of the devise in order to have the effect of enlarging the gift. These propositions, in regard to which it is only necessary for the purpose of this case to refer to *Doe v. Clayton* (8 East, 141), and *Burton v. White* (1 Ex. 526 and 2 Ex. 797), were not disputed at the bar. The real contest was whether in the present case the operative part of the devise could properly be construed so as to include the expression upon which the appellants relied as enlarging a gift which it was admitted *prima facie* carried only a life estate. The testator's will seems to have been written into a skeleton form, intended to be made applicable either to a will in short general terms, referring to a schedule for the names of the

beneficiaries and the particulars of the property given to each, or to a will complete in itself, the reference to a schedule in that case being struck out. The testator appears to have attempted to combine the two forms. After a preamble to which it is not necessary to refer, the will begins with the words "I do give and bequeath." Those words occur once and once only. They are carried on and applied to all the devisees, which are seven in number, and all in the same form—gifts of so many acres of land to such and such a person without more. At the end of these devisees occur the following words: "and whose names are in the schedule named and property specifically mentioned to each of their respective names." The left-hand margin of the paper on which the will is written is headed "schedule," and under the word "schedule" are written the names of the devisees. But the schedule does not contain the particulars of any property given to the devisees named in the will. The question then is—do the words which have been read, properly speaking, belong to the operative part of the devise or not? They are evidently not intended of themselves to pass anything. They refer to gifts already made. They refer to the schedule as containing or recapitulating the names of the beneficiaries, and they refer either to the schedule as recapitulating the particulars of the property left to each beneficiary, or to the previous part of the will which contains those particulars. In either case it seems to their Lordships that the words in question, though they occur before the testator comes to a full stop, are, properly speaking, words of reference and not words of gift. If they are taken to refer to the schedule for the particulars of the devisees, the schedule in this respect is a blank, and it is impossible to guess what the testator would have written in it. If they refer to the previous part of the will, which is perhaps the view most favourable to the appellants, it is difficult to see how apt words of reference, the office of which is to carry the reader's mind to gifts to be found somewhere else, can have the operation of enlarging those gifts; and it is admitted that upon the authorities the word "estate" or the word "property," used as a word of reference, cannot be treated as explaining a previous gift which *prima facie* carries only a life estate. The other points referred to in the argument—the fact that one of the devisees was the heir-at-law, and the fact that each devisee took an absolute interest in some personal property—are not of themselves sufficiently substantial to affect the question. Their Lordships therefore will humbly advise Her Majesty to affirm the judgment of the Supreme Court discharging the rule *nisi*; to direct the verdict entered by consent for William Miller Thorley to be entered for the respondent, Elizabeth Brown; and to order the appellants to pay to William Miller Thorley his costs of this appeal incurred in the Supreme Court, and to pay to Elizabeth Brown her costs of this appeal incurred in England.

Solicitor for the appellants, *G. P. Slade*.
Solicitors for the respondent, *Hunters and Haynes*.

Jan. 19 and Feb. 3.

(Present: The Right Hons. Lords WATSON, HALSBURY, MACNAGHTEN, and MORRIS, Sir R. COUCH, and DAVEY, L.J.)

UNION STEAMSHIP COMPANY v. CLARIDGE. (a)
ON APPEAL FROM THE COURT OF APPEAL OF
NEW ZEALAND.

Injury to workman—Common employment—Negligence of seaman employed to assist in unloading ship—Liability of owner.

The appellants contracted with a stevedore to unload their ship, and the contract provided that the owners should "provide for each hatch being discharged, one winch-driver, and one hatchman." The respondent, who was one of the stevedore's labourers, was injured during the unloading by the negligence of one of the winchmen, who was one of the crew of the ship. Held (affirming the judgment of the court below), that the winchman and the respondent were not in a common employment, and that the appellants were liable for the negligence of the winchman.

THIS was an appeal from a judgment of the Court of Appeal of New Zealand (Richmond, Williams, and Connolly, J.J.), who had reversed a judgment of Denniston, J. in an action brought by the respondent against the appellants to recover damages for injuries sustained by the negligence of one of their servants.

The facts appear sufficiently from the judgment of their Lordships.

Lawson Walton, Q.C. and *Brooke Little* appeared for the appellants, and argued that the case could not be distinguished from *Rourke v. White Moss Colliery Company* (36 L. T. Rep. N. S. 49; 2 C. P. Div. 205), where the contract was precisely the same, and was held to create a common employment. That case followed *Murray v. Currie* (23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24), which followed the earlier case of *Murphy v. Caralli* (3 H. & C. 462); and it has been followed lately in *Donovan v. Laing and Co.* (68 L. T. Rep. N. S. 512; (1893) 1 Q. B. 629). The case of *Johnson v. Lindsay* (65 L. T. Rep. N. S. 97; (1891) A. C. 371) lays down the same principle, but is distinguishable. They also referred to

Quarman v. Burnett, 6 M. & W. 499;

Manning v. Adams, 32 W. R. 430;

Moore v. Palmer, 2 Times L. Rep. 781.

Finlay, Q.C. and *Corner*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships took time to consider their judgment.

Feb. 3.—Their Lordships' judgment was delivered by

LORD WATSON.—The appellant company are owners of the steamship *Orowaiti*, which arrived at Lyttleton Harbour, in Aug. 1891, with a cargo of coal. They contracted with the Canterbury Stevedoring Association Limited for the discharge of the cargo into a hulk; and, in the course of that operation, the respondent, whilst working as a lumper in the employment of the association, was severely injured by the fall of a basket of coal. He thereupon instituted this suit for damages against the company, upon the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

WANT v. MOSS AND WIFE.

[PRIV. CO.]

allegation that his injuries were occasioned by the negligence of one or more of the crew of the *Orowaiti*. The case went to trial before Denniston, J. and a special jury of twelve. It appears from the evidence then led, that the *Orowaiti* had four hatches, at all of which the process of unloading was carried on simultaneously, and in the same way. There were, at each hatch, four labourers, servants of the stevedores, in the hold, their duty being simply to fill the coal baskets and hook them on to the rope by which they were lifted, and to unhook the empty baskets as they were let down. The lifting tackle was actuated by steam from the ship's boilers, and was attended to by two men, who were members of her crew, and received their wages from the appellants. One of these men worked the winch. The other was stationed beside the hatch; and it was his business to give the winchman notice whenever a loaded basket was ready for raising, and also to steady and guide the basket in its ascent by means of a rope called a bullrope. A man named John Eames acted as foreman or ganger on board the *Orowaiti*, in the interests of the stevedores. By the witnesses for the respondent his injuries were attributed to the negligent conduct of the winchman in first raising a loaded basket without notice from the bullrope man, and before the latter was ready, and in then letting go the winch, and allowing the load to fall back into the hold, where it struck the respondent. At the close of the evidence, the jury were asked to determine the quantum of damage, which they assessed at 1600*l*. With the exception of that point the case was withdrawn from the jury, under an arrangement, which was thus noted by the presiding judge, "Negligence admitted. Agreed to leave question of common employment to court." It must therefore be taken against the appellants that the mishap which befell the respondent was due to the winchman, for whose negligence they are responsible if, at the time when it occurred, he was employed by them, and was acting within the scope of his employment. They maintain, however, that the winchman, and the bullrope man also, in assisting to unload the vessel, were not employed in their behalf, but were engaged in doing work which the stevedores had contracted for, subject to the orders and control of the foreman appointed by the contractors. Whether that was the case or not is a question of fact, upon which the parties prefer the verdict of the court to that of a jury. That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions. Their Lordships do not find it necessary, for the purposes of this appeal, to examine these authorities. It is possible that, in some cases, questions of nicety might arise in the application of the rule to the facts, and that the opinions expressed by learned judges in these authorities might aid in their solution. But no such questions appear to their Lordships to arise upon the evidence in this case. The contract under which the cargo of the *Orowaiti* was discharged did not provide that the whole work was to be done by the stevedore. On the contrary, whilst the contractor was bound "to supply all labour for filling buckets or baskets, working tramways, &c," the company expressly undertook

to provide one winch-driver and one hatchman for each hatch being discharged, the hatchman to attend yard-arm tackle, bullrope, or tramway, according to the method of working adopted by the contractor. There is nothing to suggest that the contractor was to have any control over the men discharging the duties of winchman and bullrope man. The inference which their Lordships would naturally derive from the terms of the contract is, that, as they admittedly did in the case of their engineer who supplied the motive power, the shipowners desired to retain control over those members of their crew who worked the tackle of the ship used for the purpose of discharging her cargo. That inference is certainly not displaced by the evidence led before the jury, which shows that, in point of fact, the stevedores and their foreman never gave any orders to the men at the winch or the bullrope men, or attempted to exercise any control over them. In these circumstances, their Lordships have had no hesitation in preferring the view taken by the Court of Appeal to that which commended itself to the learned judge who presided at the trial; and they will therefore humbly advise Her Majesty to affirm the judgment appealed from. The costs of this appeal must be paid by the appellants.

Solicitors for the appellants, *A. R. and H. Steele*.

Solicitors for the respondent, *Wilkins, Blyth, Dutton, and Hartley*.

Thursday, Feb. 22.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

WANT v. MOSS AND WIFE. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Judgment-roll erroneously made up—Estoppel in subsequent proceedings—Court of equity—Injunction.

Where the judgment-roll in an action, as made up, does not accurately represent that which really was found at the trial, a court of equity ought not, in a subsequent proceeding between the same parties, to grant the plaintiff an injunction to enforce a right which was not established by any finding of the jury in the former proceedings, notwithstanding what appears on the face of the judgment-roll.

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Innes, Stephen, and Manning, JJ.), affirming a judgment of the primary judge in equity (Owen, J.) refusing to grant to the appellant an injunction against alleged continued trespasses by the respondents on and exclusion of the appellant from a certain box in the Theatre Royal, Sydney, during the unexpired term of a lease of the theatre, which lease was admitted to be still subsisting.

The facts appear fully from the judgment of their Lordships.

Cozens-Hardy, Q.C. and Vaughan Hawkins appeared for the appellant.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.] ADMINISTRATOR-GENERAL OF JAMAICA v. LASCELLES, &C., AND CO. [PRIV. CO.]

Bigham, Q.C. and *C. C. Scott*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell).—In this case an action was brought in the year 1886 by the appellant against the respondents. The declaration in the action contained three counts. The first count alleged a sole right in the plaintiff of occupying a certain box in the Theatre Royal, Sydney, during theatrical performances, for the term of a lease of the theatre by the proprietor to one Samuel Lazar. The second count alleged a sole right in the plaintiff of occupying the box during theatrical performances on Tuesday, Thursday, and Saturday evenings in each week. Both these counts alleged that the female defendant had obstructed the plaintiff's enjoyment of the right alleged. The third count stated that the female defendant became possessed under the will of Samuel Lazar of all his interest in the lease of the theatre; that before Lazar's death he granted to the plaintiff the sole right of occupying the box as alleged in the first count; that the female defendant disputed that right, and it was then agreed between the plaintiff and the female defendant, then Victoria Lazar, that the plaintiff should give up to her his right of occupying the box, and all rights attached thereto, on Monday, Wednesday, and Friday evenings, and that he should be allowed the sole right on Tuesday, Thursday, and Saturday evenings. The action went to trial, and a verdict was returned for the plaintiff for 100*l.* damages. The plaintiff afterwards brought the present suit in equity against the defendants, to restrain them from interfering with his right of enjoying the box, which he alleged to exist, on every night in the week. In support of this alleged right the only evidence tendered by him was the record in the former action. It appears that the judgment-roll, as is frequently the case, had not been formally made up at the time of the trial, and was not in fact made up until after the suit in equity had been commenced, when it was required for the purposes of the case which the plaintiff was then setting up. The *postea* was accordingly drawn up by the plaintiff's attorney, and it was therein stated that the jury had found the issues on the first and second counts for the plaintiff, and the issues on the third count for the defendants. The plaintiff thereupon contended that he had made out by the findings on the first count that he was entitled to the box on every night of the week, and that this of itself entitled him to claim from the court of equity an injunction to prevent any interference with that right. At the trial evidence was given to show that the jury in fact found a general verdict for the plaintiff for 100*l.*, and that they handed to the judge, who put certain questions to them, findings in writing in these terms: "We find the plaintiff had a lease, given by Samuel Lazar, for the balance of Lazar's lease from Wilshire, for which valuable consideration was given by Want to Lazar, but that plaintiff subsequently arranged to allow defendants the use of the box on three nights a week, viz., Monday, Wednesday, and Friday, and

was consequently only entitled to it on the other three nights per week, Tuesday, Thursday, and Saturday. Defendants did interfere with plaintiff's rights, for which we assess the damages at 100*l.*" Their Lordships cannot understand this special finding of the jury as meaning anything else but this, that the plaintiff's rights did not extend to the whole of the six nights; that they extended to three only, and that as to the other three the defendants were entitled. It seems, therefore, clear that the judgment-roll as made up by the plaintiff did not accurately represent that which really had been found at the trial. It is said that the defendants are estopped by the judgment-roll from denying the exclusive right of the plaintiff to occupy the box on all six nights of the week. It may be doubted whether in reality, looking at the whole of the judgment-roll, any such estoppel can be said to be established, but admitting for the purposes of argument that the judgment-roll as it stands would establish the estoppel, it is perfectly clear to their Lordships, upon the true construction of the findings of the jury, that they did not intend to find any such exclusive right in the plaintiff; and their Lordships do not think that they can go behind the terms of the findings, which seem to them perfectly capable of interpretation without any explanation. In these circumstances a court of equity was not, in their Lordships' opinion, bound to grant the plaintiff the injunction which he sought, but was perfectly justified, and indeed bound, to refuse him assistance such as he claimed, when upon the facts which had been proved, and were then before the court, it appeared that he had not obtained any finding of the jury establishing the right which he was asking the assistance of the court to enforce. Their Lordships will therefore humbly advise Her Majesty that the judgment of the court below was right, and should be affirmed. The appellant must pay the costs of this appeal.

Solicitors for the appellant, *Want and Co.*

Solicitors for the respondents, *Snow, Snow, and Fox.*

Dec. 8, 1893, and Feb. 3, 1894.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, and MACNAGHTEN, and Sir R. COUCH.)

ADMINISTRATOR-GENERAL OF JAMAICA v. LASCELLES, DE MERCADO, AND CO. (a)
ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA.

Bankruptcy—Act of bankruptcy—Bill of sale—Fraudulent assignment—Bankruptcy Law of Jamaica (No. 33 of 1879), s. 151—Jurisdiction of court.

A bill of sale, including the whole of a trader's property, given as security for an advance, with a promise of further assistance, made in good faith, to enable him to carry on his business, and in the reasonable belief that he will thereby be enabled to do so, is not a fraudulent assignment and an act of bankruptcy, though the trader was in fact, at the time of giving it, insolvent.

Ex parte King (34 *L. T. Rep. N. S.* 466; 2 *Ch. Div.* 256);

Ex parte Ellis (34 *L. T. Rep. N. S.* 705; 2 *Ch. Div.* 797);

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.] ADMINISTRATOR-GENERAL OF JAMAICA v. LASCELLES, &C., AND CO. [PRIV. CO.]

Ex parte Johnson (50 L. T. Rep. N. S. 214; 26 Ch. Div. 338), approved and followed.

The Court of Bankruptcy in Jamaica has power to revoke a provisional order, or to annul an adjudication under sect. 151 of the Bankruptcy Law 1879, without going to the Court of Appeal. Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Supreme Court of Jamaica (Ellis, C.J. and Northcote, J., Nathan, J. dissenting), who had reversed a decision of the judge in bankruptcy (Nathan, J.), upholding a provisional order made by Curran, J. in the bankruptcy of one G. H. Rees.

The facts appear fully from the judgment of their Lordships.

The *Solicitor-General* (Sir J. Rigby, Q.C.) and *Yate Lee*, for the appellant, argued that the application to revoke the provisional order made by the judge in bankruptcy should have been made to the full court, under Law 17 of 1877, and not to the Bankruptcy Court. On the merits, the bill of sale of the 2nd Dec. 1891 was an act of bankruptcy, for it was not given for any sufficient present equivalent, and included substantially all the debtor's property. The case is distinguishable on the facts from *Hutton v. Crutwell* (1 E. & B. 15; 22 L. J. 78, Q.B.) and *Bittlestone v. Cooke* (6 E. & B. 296; 25 L. J. 281, Q.B.), and the later authorities, *Ex parte King* (34 L. T. Rep. N. S. 466; 2 Ch. Div. 256), *Ex parte Ellis* (34 L. T. Rep. N. S. 705; 2 Ch. Div. 797), and *Ex parte Johnson* (50 L. T. Rep. N. S. 214; 26 Ch. Div. 338). The bill was substantially given to secure an antecedent debt. See also *Re Colemere* (13 L. T. Rep. N. S. 621; L. Rep. 1 Ch. 128), and *Lindon v. Sharp* (6 M. & G. 895).

The *Attorney-General* (Sir C. Russell, Q.C.), *Cooper Willis*, Q.C., and *Kent*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships took time to consider their judgment.

FEB. 3.—Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—This is an appeal from an order of the Supreme Court of Jamaica, dated the 1st Aug. 1892, discharging an adjudication in bankruptcy against one Rees, a logwood dealer and storekeeper. A provisional order in bankruptcy was made against Rees on the 31st Dec. 1891, followed by an absolute order on the 22nd March 1892. The act of bankruptcy upon which these orders were founded was the execution of a bill of sale in favour of the respondents Lascelles, De Mercado, and Co., on the 2nd Dec. 1891, which was held by the judge in bankruptcy to be a fraudulent assignment. On the 12th Jan. 1892 the respondents gave notice of motion to set aside the provisional order. After several adjournments the application was dismissed by Nathan, J., sitting in bankruptcy on the 22nd March 1892, the day on which the order absolute was made. On appeal, the order of Nathan, J. was reversed, and it was held by a majority of the full court, consisting of Sir A. Gib Ellis, C.J. and Northcote, J. (Nathan, J., dissenting), that the bill of sale was not fraudulent. And the orders in

bankruptcy were consequently discharged. It was objected before their Lordships that the application of the respondents ought to have been made in the first instance to the full court under sect. 10 of the Bankruptcy Jurisdiction Amendment Law No. 17 of 1877. This objection was taken before Nathan, J., and disallowed by him. The point does not seem to have been raised in the Court of Appeal when the error in procedure, if it was an error, might easily have been set right. At any rate it is not noticed in the judgments delivered on the appeal. Their Lordships would be slow to give effect to any objection not affecting the merits of the case, unless it were reasonably clear that it had been pressed in the court below. But they think it right to add that they see no ground for limiting the power of the court exercising jurisdiction in bankruptcy to revoke a provisional order or annul an adjudication under sect. 151 of the Bankruptcy Law 1879. Happily there is no conflict of evidence in this case. Nor can there be any doubt as to the law to be applied. The decisions of the Court of Appeal in England in *Ex parte King* (34 L. T. Rep. N. S. 466; 2 Ch. Div. 256), *Ex parte Ellis* (34 L. T. Rep. N. S. 705; 2 Ch. Div. 797), and *Ex parte Johnson* (50 L. T. Rep. N. S. 214; 26 Ch. Div. 338) are in point. And notwithstanding the criticism of the learned counsel for the appellant their Lordships think those decisions good sense and good law. The facts of the case may be stated very shortly. By an agreement, dated the 4th June 1891, Rees agreed to sell and the respondents agreed to buy a minimum quantity of 3000 tons of logwood and logwood roots deliverable on an average of 500 tons a month. It was further agreed that all logwood and logwood roots over and above the 3000 tons which Rees might buy, or which he might cut or dig during the term of the agreement, should be supplied by Rees to the respondents, save and except such quantities as he might require for his existing contracts with other parties. The prices of roots and straight wood were fixed on the basis of the prices then ruling in the United States. It was, however, provided that if the market should decline the price should be reduced correspondingly, so as to secure the respondents a net profit of 5s. per ton, and that if the market should advance, or if the respondents should make sales by which the net profit should exceed 5s. per ton, half of such extra profit should be paid to Rees. The wood and roots were to be consigned to the respondents, and they agreed to pay Rees such money as he might require from time to time, but their advances were not to exceed a total sum of 2000*l.* uncovered. The agreement was to expire on the 31st Dec. 1891, when Rees was to square any balance that might be at his debit in the respondents' books. It seems that Mr. Charles De Mercado was the member of the firm of Lascelles, De Mercado, and Co., who negotiated the contract of the 4th June and managed the business. Shortly afterwards he went to the United States. On his return in August he found that Rees had drawn upon his firm in excess of the limit specified in the agreement. The respondents, however, continued to make advances to Rees during the month of September. The advances stipulated for in the agreement were intended to enable Rees to purchase logwood for the purposes of the contract. When Rees was taxed with making

short deliveries he declared that he had any quantity of logwood, but that the rains prevented it being sent down. His contract, he said, would be kept at the end of December. Later on, however, he admitted that some of the respondents' money had gone to buy drays, harness, and mules, and that some had gone to pay for an ironmonger's business which he had bought. Then Mr. De Mercado insisted on security being given and on more rapid deliveries. All the time Rees assured Mr. De Mercado that he had practically no other creditors, and that he was perfectly solvent. In October Rees produced a memorandum purporting to show his assets and liabilities. His assets were put down at 11,600*l.* in all. His total liabilities were represented to be 7700*l.*, of which the sum of 6200*l.* was owing to the respondents. He was closely questioned, both by Mr. De Mercado himself and by his solicitor, Mr. Farquharson, as to the items in this memorandum, and as to his position generally. He satisfied them both that the memorandum was a true and honest account, and that, although his money was locked up, the value of his assets exceeded his liabilities by nearly 4000*l.* Then Mr. De Mercado advanced him 600*l.* more to pay off an overdraft with his bankers, and on the same day, the 2nd Nov., he executed a bill of sale of his drays, harness, and mules, and his stock-in-trade in the ironmongery business, to cover his indebtedness to the respondents. During the month of November the deliveries of logwood were rather more satisfactory. On the 30th of that month Rees applied for another advance to pay off an overdraft of 500*l.* with the Colonial Bank. Rees was again questioned by Mr. De Mercado and his solicitor as to his position, and again he succeeded in satisfying them both that he was perfectly solvent. Mr. De Mercado then consented to pay 500*l.* to Rees' account with the bank, and promised to make him further advances if the business worked satisfactorily, on Rees undertaking to execute a fresh bill of sale, which he did on the 2nd Dec. This bill of sale included some cattle and mules not included in the former bill of sale, and it is not disputed that it comprised substantially the whole of Rees' available property. In view of the execution of the second bill of sale, the bill of sale of the 2nd Nov. was not registered. On the 14th Dec. the respondents, in accordance with Mr. De Mercado's promise, advanced a further sum of 400*l.* Towards the end of December they came to hear that Rees owed a Mr. Boettcher 1600*l.*, which had been concealed from them. They then took possession under the bill of sale of the 2nd Dec., which they duly registered. Rees' credit was destroyed, and shortly afterwards proceedings in bankruptcy were taken against him by an unsecured creditor. It was then discovered that Rees' statements were not true, and that he was hopelessly embarrassed at the time when he entered into the contract of the 4th June. There is no question as to the good faith of the respondents. Nathan, J., who tried the case in the first instance, and saw the witnesses, including Mr. De Mercado and Mr. Farquharson, found as a fact that "the assignment was taken, and the payment of 500*l.*, and the conditional promise to pay further sums from time to time, were made by Mr. De Mercado in good faith and in the belief that Rees was solvent." If this finding be correct, as it un-

doubtedly is, it is difficult to see upon what ground the bill of sale of the 2nd Dec. can be impeached. It is obvious, as the learned Chief Justice points out in his very able and exhaustive judgment, that the contemporaneous advance was made and the promise of further assistance was given "in order to enable Rees to carry on his business, and in the reasonable belief that he would thereby be enabled to do so." It was objected indeed that Rees was not carrying on a business properly so called, and that the advances which the respondents made to him were not, properly speaking, advances at all. In the court of first instance, Nathan, J. relied on both these objections. In the full court, in deference to the view expressed by the Chief Justice, he forbore to press the former, though he still insisted on the latter. It is not very easy to understand either objection. A man who trafficks in logwood carries on a business, whether he buys the logwood in which he deals or digs it up or cuts it, and the occupation in which he is engaged is not the less a business because he finds it for a time more profitable to consign all his produce to one customer than to offer his wares to the public generally. Nathan, J. came to the conclusion that the payment of the 500*l.* and the further payment to Rees were not, properly speaking, advances, but were repayments of part of the value of logwood previously delivered by him under the agreement of the 4th June. But, as the Chief Justice observes, the respondents were under no obligation to make any repayments at all to Rees. The moneys they paid him—the 500*l.* and the 400*l.*—were their own moneys, and came out of their own pocket. Their Lordships cannot help thinking that the fallacy in the judgment of Nathan, J. is in some measure due to his having taken an erroneous view of the agreement of the 4th June. He deals with that agreement as bearing on the questions whether there was a business and whether these were advances, and he considers its effect to be that "the whole of the future production of Mr. Rees' logwood trade was validly prospectively assigned." He uses those words, he says, "advisedly, having reference to the decision of the House of Lords in *Holroyd v. Marshall* (7 L. T. Rep. N. S. 172; 10 H. L. 191); the result being that as each parcel of logwood reached Rees' hands it became the property of Mr. De Mercado." Their Lordships are unable to agree with this view, nor do they think that the case of *Holroyd v. Marshall* has any application to the agreement in question. In the result their Lordships will humbly advise Her Majesty that the appeal must be dismissed. The appellant will pay the costs of the appeal, including the costs of the application for leave to add certain documents to the record.

Solicitors for the appellant, *Cookson, Wainwright, and Pennington.*

Solicitor for the respondents, *John Hands.*

[CT. OF APP.]

EDWARDS v. MARCUS; TOWNEND AND OTHERS, Claimants.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 5 and 6.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

EDWARDS v. MARCUS; TOWNEND AND OTHERS, Claimants. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of sale—"Defeasance or condition" not contained in bill of sale—Collateral security—Bills of Sale Act 1878 (41 & 42 Vict. c. 31), s. 10, subsect. 3—Bills of Sale Act (1878) Amendment Act 1882 (45 & 46 Vict. c. 43), s. 8.

On the 5th Jan. 1892 A. and his wife, being in possession of certain goods, assigned the same to B. by way of security for the payment of a sum of 300l. with simple interest at the rate and in the manner therein stated. On the same day, and as part of the same transaction, A's wife assigned to B. by way of mortgage, to secure the payment of the same sum of 300l. with compound interest, certain reversionary interests to which she was entitled in certain estates.

Held, that the mortgage operated as a defeasance, within the meaning of sect. 10 (3) of the Bills of Sale Act 1878, of the bill of sale, and not being incorporated therein rendered the bill of sale void.

Counsell v. The London and Westminster Loan and Discount Company (19 Q. B. Div. 512) explained and followed.

Ex parte Collins; Re Lees (32 L. T. Rep. N. S. 108; L. Rep. 10 Ch. App. 367) questioned.

Decision of the Divisional Court (Lawrance and Wright, JJ.) affirmed.

By an indenture dated the 5th Jan. 1892, and made between Lewis Marcus, of No. 10, Clyde-road, St. Leonards-on-Sea, Sussex, and his wife Francis Adelaide Marcus (thereinafter called the mortgagors) of the one part, and James Frederick Townend (thereinafter called the mortgagee) of the other part, it was witnessed that, in consideration of the sum of 300l. then paid to the mortgagors by the mortgagee, they the mortgagors thereby assigned unto the mortgagee, his executors, administrators, and assigns,

All and singular the several chattels and things specifically described in the schedule hereto annexed, and now being in, about, and upon the dwelling-house and premises known as 10, Clyde-road aforesaid, by way of security for the payment of the said sum of 300l. and interest thereon at the rate of 75l. per centum per annum. And the mortgagors and every of them doth further agree and declare that they will duly pay to the said mortgagee the principal sum aforesaid together with the interest then due by instalments, as follows: 56l. 5s. on the fifth day of every third month, the first of such instalments being due on the 5th day of April 1892, and the balance owing on the 6th day of Jan. 1893. And it is hereby agreed and declared that, in case the said mortgagors shall make default in payment of the said sum or sums of money hereinbefore secured at the time hereinbefore provided for payment, or if they shall become bankrupt or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes, or if they shall fraudulently either remove, or suffer the said goods or any of them to be removed from the premises, or if they shall not without reasonable excuse, upon demand in writing by the

said mortgagee, produce to the said mortgagee their last receipts for rent, rates, and taxes or if execution shall have been levied against the goods of the said mortgagors under any judgment at law, then and in every such case it shall be lawful for the said mortgagee, his servants or agents, to enter into and upon the premises on which the chattels and things, or any of them, are or shall be, and to seize and take possession of the whole or any part thereof, and after the expiration of five clear days from the day of so seizing and taking possession, to remove, sell, and dispose of the same, or any of them, for such price or prices as can reasonably be obtained, and out of the sale moneys to retain the said sum, or so much thereof as for the time being remains unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred, made, or sustained by the said mortgagee in and about entering upon the said premises, and in discharging any distress, execution, or other incumbrance upon the said chattels and things, or any of them, and seizing, taking, retaining, and keeping possession of the said chattels and things, or any part thereof, and in and about the carriage, removal, valuation, warehousing, or sale (including the costs of inventory, catalogues, and advertising) of the said chattels and things or any part thereof, and to pay the surplus, if any, to the said mortgagors. And it is hereby agreed and declared that this assignment shall be void if the said sum or sums, together with the interest then due, shall be paid to the said mortgagee, his executors, administrators, and assigns, at the time and in manner aforesaid; provided always, that the chattels hereby assigned shall until the happening of some default as aforesaid remain in the possession and enjoyment of the said mortgagors, and shall not be liable to seizure or to be taken possession of by the said mortgagee for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act 1882. In witness, &c.

By an indenture of even date, made between Francis Adelaide Marcus (thereinafter called the mortgagor) of the one part, and James Frederick Townend (thereinafter called the mortgagee) of the other part, after reciting that under the wills of certain specified persons deceased the mortgagor was entitled to a reversionary interest of and in their respective residuary real and personal estates, it was witnessed that, in consideration of the sum of 300l. then paid by the mortgagee to the mortgagor,

She, the mortgagor, hereby covenants with the mortgagee to pay to him the sum of 300l., together with interest at the rate of 75l. per centum per annum, by the following instalments: Fifty-six pounds five shillings on the fifth day of every third month, the first of such instalments being due on the 5th day of April 1892, the balance owing being payable on the 6th day of January 1893, such instalments and payments in the first place to be appropriated by the mortgagee in and towards satisfaction of the amount agreed upon for interest as aforesaid. And also that, in case any one or more of the said instalments shall not be paid on the day or days respectively appointed for payment of the same, then she, the mortgagor, will so long as such instalment or instalments shall remain unpaid pay interest thereon at the rate of 75 per cent. per annum. And this indenture also witnesseth that, for the consideration aforesaid, she, the mortgagor, as beneficial owner, hereby assigns unto the mortgagee all that the share and interest of her, the mortgagee, under or by virtue of the said wills of and in the estates of the said testators, and the proceeds thereof, and of and in the stocks, funds, and securities in or upon, or of which the same or any part thereof may be invested or consist, or by which the same may be represented, and the income and accumulations thereof respectively, and all other part, shares, and interest of and in the said estate and premises to which the said mortgagor may at any time hereafter be entitled, to hold the same part, shares, and premises unto the mortgagee; provided always, that if and so soon as all money hereinbefore or hereinafter covenanted to be paid is duly paid accordingly the mortgagee, his executors, administrators, or assigns shall at the request of the mortgagor,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

CT. OF APP.]

EDWARDS v. MARCUS; TOWNEND AND OTHERS, Claimants.

[CT. OF APP.]

his executors, administrators, or assigns, indorse on these presents an acknowledgment of such payment, whereupon the foregoing assignment shall (without prejudice to anything done hereunder) become void. And this indenture further witnesseth that, for the considerations aforesaid, the mortgagor doth hereby, for himself, his heirs, executors, and administrators, covenant with the mortgagees that she, the mortgagor, will forthwith proceed to take out a policy of assurance on her own life, with some good assurance society to be approved of by the mortgagees, for payment of the sum of 300l. at least on the death of the mortgagor, and will forthwith on demand duly assign such policy by way of mortgage to the mortgagees as collateral security to these presents, which assignment shall contain the usual powers as are inserted in such mortgages and similar powers *mutatis mutandis* as are herein contained. And also that the term "mortgagor" shall include the plural as well as singular, and the heirs, executors, administrators, and assigns of the mortgagor or mortgagors, and each of them, or the survivor of them, wherever the context so admits or requires. In witness, &c.

The bill of sale and mortgage were given on the same day, and to secure one and the same debt, and were both given as part of the same transaction.

On the 22nd July 1892 the landlord of No. 10, Clyde-road, levied a distress for rent upon certain of the goods and chattels upon the premises, being part of the goods and chattels comprised in the bill of sale; and the same were subsequently bought by Chadwick and Sons from the landlord.

On the 13th Oct. 1892 an action was commenced by John Edwards (trading as the Union Deposit Bank) against Lewis Marcus and his wife, claiming 200l. and interest due upon a dishonoured joint and several promissory note, dated the 1st July 1892, drawn by them in his favour.

After obtaining judgment Edwards issued execution; and on the 2nd Nov. 1892 the sheriff of Sussex, acting under a writ of *fi. fa.*, seized the goods and chattels assigned by the bill of sale, including therein the goods and chattels purchased by Chadwick and Sons, the same then being upon the premises, No. 10, Clyde-road. Townend then claimed such of the goods and chattels comprised in the bill of sale as had not been sold to Chadwick and Sons, and Chadwick and Sons claimed the goods and chattels so sold to them as aforesaid; whereupon the sheriff interpleaded.

By an order dated the 11th Nov. 1892, it was ordered that a special case should be stated for the opinion of the court. A special case was stated accordingly, raising the question, whether the goods and chattels seized by the sheriff of Sussex were the property of the claimants or either of them as against the execution creditor, with power to find distributively.

On the 21st. Nov. 1893 the special case came on to be heard before the Divisional Court (Lawrance and Wright, JJ.), when their Lordships gave judgment in favour of Edwards, being of opinion that the bill of sale was void, as the mortgage operated as a defeasance of the bill of sale within the meaning of sub-sect. 3 of sect. 10 of the Bills of Sale Act 1878.

From that decision Townend now appealed.

Jelf, Q.C. (E. U. Bullen and Bonner with him) for the appellant.—This case was decided against the appellant by the Divisional Court, on the ground that it was governed by the decision of the Court of Appeal in *Counsell v. The London and Westminster Loan and Discount Company*

(19 Q. B. Div. 512). But I submit that that authority is distinguishable, inasmuch as the mortgage which was given in the present case as collateral security, was not a negotiable security as in that case. Moreover, there were two parties to the bill of sale as grantors, and only one to the mortgage as mortgagor, and the terms of both instruments were very similar. There was no condition in the mortgage that was not practically embodied by the Bills of Sale Acts in the bill of sale. This case, therefore, does not fall within sect. 10, sub-sect. 3, of the Bills of Sale Act 1878. To hold that it does is to extend the principle established in *Counsell's* case, which was a case of a very special nature, and this I ask the court not to do. [*LINDLEY, L.J.*—There have been several decisions which show that there can be a collateral security given, that does not come within the sub-section, and the question is whether the present is a collateral security of that kind.] If there is a collateral security which is good at common law, it cannot be necessary to have all the stipulations therein precisely the same as in the principal contract—the bill of sale. In *Carpenter v. Deen* (61 L. T. Rep. N. S. 860; 23 Q. B. Div. 566) it was held that the deposit by the grantor of a bill of sale of a policy of insurance at the time of executing the bill of sale, by way of collateral security for the same debt, did not operate as a defeasance. I submit that the present case is in principle exactly similar to *Carpenter v. Deen*. [*KAY, L.J.*—In that case there was no inconsistency at all between the two instruments. In the present case there is the most marked inconsistency.] The bill of sale holder might resort to the mortgage to obtain repayment of the loan. A debt is not defeated by being paid, so that if the grantee should first resort to the collateral security there would be no defeasance:

Heseltine v. Simmons, 67 L. T. Rep. N. S. 611; (1892) 2 Q. B. 547.

Channell, Q.C. (Henry Kisch with him) for the respondent.—The collateral security given in this case was for the same debt as that secured by the bill of sale, and was given at the same time, and not being incorporated in the bill of sale renders it void, as provided by the Bills of Sale Act 1878, s. 10, sub-sect. 3. The case of *Counsell v. The London, &c. Company (ubi sup.)* is exactly in point. [*KAY, L.J.* referred to *Thomas v. Searles*, 65 L. T. Rep. N. S. 39; (1891) 2 Q. B. 408.]

Jelf, Q.C. in reply.—The observations of James, L.J., in *Ex parte Collins*; *Re Lees* (32 L. T. Rep. N. S. 108; L. Rep. 10 Ch. App. 367), show that a collateral security of the kind given in the present case does not affect the validity of the bill of sale. That case was not cited in *Counsell v. The London &c. Company (ubi sup.)*.

LINDLEY, L.J.—This case is not free from difficulty, and that difficulty arises from the form in which the transaction, to which I will allude presently, has taken place. In Jan. 1892 a Mr. Marcus and his wife gave a bill of sale to a Mr. Townend to secure 300l. with simple interest at the rate specified. That bill of sale was duly registered. On the same day Mrs. Marcus gave a mortgage to Mr. Townend for the same debt, but it was a mortgage relating to some reversionary interests of hers, and that mortgage was to secure the same sum with interest at the same rate, but

CT. OF APP.]

EDWARDS v. MARCUS; TOWNEND AND OTHERS, Claimants.

[CT. OF APP.]

compound interest instead of simple interest. There has been a great fight between the parties about the facts relating to the giving of these instruments, but that contest is put an end to by the referee who has stated for our opinion a special case. He has stated the result of the evidence before him in this way: "The bill of sale and mortgage were given on the same day and to secure one and the same debt, and the bill of sale and mortgage were both given as part of the same transaction;" that is to say, one bargain, one debt, two instruments. One instrument, as I have already said, made the property mortgaged redeemable on the payment of 300*l.* with interest, and the other made the property of the wife redeemable on the payment of the same sum. There has been a judgment obtained against both husband and wife, and the sheriff under a *f. fa.* has seized the chattels comprised in the bill of sale. They are now claimed by Mr. Townend, and the question is whether his bill of sale is good as against the execution creditor. We have nothing to do with the mortgage except so far as the mortgage is one part of the transaction of which the bill of sale is the other. But the question is, whether Mr. Townend is entitled to the chattels comprised in the bill of sale. The case has been before the Divisional Court, and they have decided it adversely to Mr. Townend, holding that the bill of sale is bad, and from that decision there is an appeal to us. Having heard the case, the arguments, and the different authorities which have been cited, it does appear to me that this bill of sale is bad. It is impossible not to be guided by the findings of the referee to which I have alluded, that the bill of sale and the mortgage were given on the same day to secure the same debt and interest. What does that mean? It means this, that, notwithstanding what is said in the bill of sale, the bill of sale does not contain conditions on which the borrowers of the money were to discharge their indebtedness. According to the bill of sale, they would get rid of their indebtedness by paying the 300*l.* and interest, whereas, by the true bargain between them, they could do nothing of the kind. Certainly the wife could not, because she is made liable to pay compound interest, and therefore her interest is not truly stated in the bill of sale, but is stated in another document which is not referred to in the bill of sale. How does that affect her right? In the face of this finding of the referee that the bill of sale and mortgage were given for the same debt which could not be got rid of except by the payment of the 300*l.* and interest, it seems to me to follow that Mrs. Marcus could not get possession of the chattels except upon payment of the principal money, and, at all events, simple interest. I do not say whether the husband could not; he is no party to the mortgage. The real effect of the finding of the referee is plain enough, and it seems to me that this case is exactly hit by the 10th section of the Bills of Sale Act 1878. It has been argued with very great force and skill by Mr. Jelf that the construction which we are putting upon this section is erroneous. Sub-sect. 3 of the 10th section of the Bills of Sale Act 1878 runs thus: "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same

paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void." The effect of making the registration void is not to avoid the whole bill of sale, but simply to make it void with respect to the goods comprised in it. The effect of that is plain enough. Mr. Jelf, in his reply, has pressed us with a great deal of force with the decision of the Court of Appeal in the case of *Ex parte Collins; Re Lees* (*ubi sup.*), and he has expressly called our attention to the illustration put by James, L.J. on a similar clause in the Act of 1854. The Lord Justice certainly expressed his opinion that a condition must be a condition prejudicially affecting the interest of the donee. When you come to look at that clause it is obvious that the document in that case was not a condition at all; and I do not doubt that that decision was perfectly correct. The controversy there was this: The view taken by Bacon, V.C. in the court below was that, as the loan was made subject to a condition, that was a condition within the meaning of the section. In the Court of Appeal James and Mellish, L.J.J. said that that was not a condition at all. And, when you come to look at it, you see that it was not a condition at all. If you look at the end of the judgment in that case it will be seen that that is plain enough. James, L.J. says: "I am, therefore, of opinion that the title of the appellant"—the donee—"does not depend upon the memorandum, and that his rights are not affected by its being unregistered." On the question whether the condition must be something prejudicially affecting the position of the donee, I confess that that is putting words into the section. That is not the true meaning of it. Anything, whether it is prejudicial to one party or to the other, seems to be within the mischief hit at. And that was the view taken by the court in *Counsell's* case (*ubi sup.*). *Collins's* case (*ubi sup.*) was not cited in *Counsell's* case (*ubi sup.*), but when you see that the document was not a condition and would not affect the title of the donee, that case does not conflict in any way with *Counsell's* case. Here, if I am right, the title of the grantor is most prejudicially affected by this mortgage, because the grantee can hold these chattels until he is paid principal and compound interest. Therefore, I think the case is brought within sect. 10. When we look at the matter as men of business we see what the result is. The result is, that you could not have a split in the bill of sale, and say they thought they were splitting their bargain, and putting so much into the bill of sale and so much into the mortgage. I think, therefore, that the appeal must be dismissed with costs.

KAY, L.J.—I am of the same opinion, and I have only to add a very few words. It was decided in the case of *Heseltine v. Simmons* (*ubi sup.*) in the Court of Appeal that sect. 9 of the Bills of Sale Act (1878) Amendment Act 1882 does not contain anything which requires accuracy of statement of the consideration for which a bill of sale was given, nor a statement of the whole bargain in the body of the bill of sale. Those two matters are provided for by different sections in the Acts of 1878 and 1882. The section which does hit this particular case is the one which Lindley, L.J. has referred to, namely, the 10th section of the Act of 1878, which provides as follows: [His

Lordship read the section and continued:] Now, as to bills of sale given by way of security for money, the effect of the registration being void is the subject of sect. 8 of the Bills of Sale Act 1882. It is not a provision that the bill of sale shall be void in respect of the personal chattels comprised therein. So that, if this bill of sale was made or given subject to a condition which is not written on the same paper or parchment, the effect of it is void so far as the chattels comprised in it are concerned. What is the meaning of the phrase in this sub-section—made or given subject to any defeasance or condition which must be written on the same paper or parchment? Suppose the defeasance written on the same paper were less in favour of the grantee than the actual defeasance agreed on so that it was not the actual defeasance. Sub-sect. 3 appears to me to apply at once. So that upon the word “defeasance” I would say it shows that, if the defeasance is not written on the bill of sale, although the true defeasance was more in favour of the grantee than the actual defeasance written on the bill of sale, the bill of sale is to be void. If that is so with regard to the word “defeasance,” what is the case with regard to the word “condition”? Condition generally means something entirely in favour of the grantee, and against the grantor. I think I am right in that. Why should it create a condition in favour of either party? The admitted defeasance may be a defeasance in favour of either of the parties. The actual defeasance on the bill of sale may be less in favour of the one or the other than the written defeasance. So in the same way as to a condition, the condition may be a condition in favour of the grantor or the grantee. Therefore, I confess I think the language attributed to James, L.J. in his judgment in the case of *Ex parte Collins* (*ubi sup.*) is too narrow a construction of the Bills of Sale Act. The real object was, as I take it, intended to be this: If the bill of sale is given subject to a condition which is not expressed on the face of it, it does not matter in whose favour that condition is, whether in favour of the grantor or grantee. The bill of sale does not express the true contract between the parties, and it does not follow the terms on which the chattels were to be redeemable, and therefore the bill of sale is hit by this section, and is void as to the chattels comprised in it. Now, that is exactly in conformity with the later decision in *Counsell's case* (*ubi sup.*), in which it is said the case of *Ex parte Collins* (*ubi sup.*) was not cited. If you look at *Ex parte Collins* (*ubi sup.*) you will find that what was omitted was not a condition at all. The bill of sale was for 130*l.*, repayable by certain instalments without interest. Of that sum of 130*l.* the whole was not advanced; in fact only 100*l.*, and the 30*l.* was left by way of bonus and interest, and it was included in the instalments that had to be made. It was afterwards feared that, if the money was to be paid at once, the grantor of the bill of sale might be able to say, “I will only pay you 100*l.* because no interest is due.” Therefore a memorandum was subsequently entered into between the parties making the 130*l.* payable, although the sum might be payable before any interest became due. That was no part of the consideration. Under the bill of sale the 30*l.* was payable just as much as the 100*l.*, and was to be paid as much as any part of the whole amount. It was the precautionary

memorandum which had to be looked at in order to see that the 30*l.* had to be paid, although no interest became due. Therefore the language of the learned judge in dealing with that particular case must be treated as an *obiter dictum*, because it was not essential to the decision of the case, as it proceeded on the ground that the memorandum was not a memorandum embodying any condition which ought to be excluded in any case. In *Counsell's case* (*ubi sup.*) the facts were different. In that case the bill of sale had been given, and it was drawn in accordance with the form in the schedule to the Bills of Sale Act 1882, and duly registered, and by it certain chattels were assigned in order to secure principal and interest at 30 per cent. The principal sum was to be paid, together with the interest then due, by equal monthly payments of 5*l.* 6*s.* on specified days until the whole sum and interest should be fully paid. At the same time the grantor gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees the sum of 95*l.* 12*s.* by equal monthly instalments of 5*l.* 6*s.*, payable on the same days as the monthly payments in the bill of sale, until the whole sum of 95*l.* 12*s.* should be fully paid; and the note contained a stipulation that in the event of default being made in the payment of any instalment the whole amount should become due and payable. So that, if default was made in the payment of any of the amounts, the whole sum secured by the promissory note became due at once. That would include the whole debt due under the bill of sale. Thereupon the whole bill of sale would become inoperative, and the effect of the promissory note might be to bring about a defeasance of the bill of sale. But the promissory note did not interfere with the proviso for redemption contained in the bill of sale itself. Therefore it seems to me that the correct mode of treating *Counsell's case* (*ubi sup.*) is to treat that provision in the promissory note, namely, that if any of the instalments due under the promissory note should not be paid at the time stipulated for, then payment of the whole sum should thereupon become due, was not in any sense a defeasance of the bill of sale, but was a condition of the payment of the debt secured by the bill of sale which ought to have been included in the bill of sale. That was entirely in favour of the grantees of the bill of sale. If the grantor made default in any one of the instalments, he at once became liable for the whole debt. Therefore it was a condition which ought to have been on the face of the bill of sale, and not being there the bill of sale was void. I see no difference in principle between this case and *Counsell's case* (*ubi sup.*). Here you have a condition. I think it is a condition properly so-called, a condition that the debt which is one and the same debt shall not be repaid in certain events without payment of compound interest. That is a condition for the discharge of the debt. It is one contract, one transaction, and two documents have been prepared. In the one document that condition appears. The document in which the mortgagor mortgages certain property of her own contains one condition, and that condition would not be performed if the other one was performed. But the other instrument—the bill of sale—prepared the same day, to which the wife and the husband were both parties, mortgaging the chattels belonging to the

CT. OF APP.] *Re* TRADE MARK APPLICATION OF FARBENFABRIKEN, &C., AND CO. [CT. OF APP.]

husband and the wife, does not contain that condition at all. The bill of sale does not contain any notice of that condition, and that condition is a part of the terms on which the debt which was one and the same debt was to be repaid. I think, therefore, that this case comes exactly within the terms of sect. 10, sub-sect. 3, of the Bills of Sale Act 1878, and that the bill of sale ought to have contained that condition. The effect of its not containing that condition is, that the registration of that bill of sale, as it was a security for money, is void under sect. 8 of the Bills of Sale Act (1878) Amendment Act 1882. And the consequence follows which is stated in the last few words of that section, namely, that "such bill of sale shall be void in respect of the personal chattels comprised therein." I think, therefore, that the decision of the court below is right, and that the appeal should be dismissed with costs.

SMITH, L.J.—If it was not for that judgment of James, L.J., in *Ex parte Collins* (*ubi sup.*), I should have had no difficulty about this case, notwithstanding the able argument of Mr. Jelf. The question, as it appears to me, arises on this special case, as between two money-lenders, and therefore the balance of equity is about even. I see that Edwards trades as the Union Deposit Bank, and he appears to have got a judgment for money lent. He puts the sheriff into the premises of the debtors and the other money-lender, Townend, comes forward and says "Those goods are mine, because I have got them under a bill of sale." If he had got those goods only under the document of the 5th Jan. 1892, he would have been all right. But the plaintiff protested when he came forward to claim the goods: "Your title is not entirely, or solely, under that document, because there was another agreement made contemporaneously therewith, which vitiates what you would otherwise have under it, and that is in another document." Those matters coming before the judge at chambers, a special case was stated between the parties, and it appears to me obvious that the real contest between those parties was this: What was the effect of those two documents, the bill of sale and the mortgage, executed as they were *de facto*, and, as has been found, to secure one and the same debt and as part of the same transaction? Does that vitiate the bill of sale, or not? Now, Mr. Jelf argued that the bill of sale on the face of it was all right. It was a document in writing, and therefore no evidence could be given *aliunde*. I wish to point out that, as regards the bill of sale, that point, although it would apply to all other documents, was not applicable to a question arising under the Bills of Sale Acts. That being the law, the question arose as to what was the true contract between Mr. Townend on the one side, and Mr. and Mrs. Marcus on the other. Evidence having been given, what does the referee who drew the special case find? He finds that the mortgage and the bill of sale were executed on the same day, and that they were made to secure the same debt. He finds that they were both given as part of the same transaction. The way in which I read that transaction is, that what Mr. Townend has got is one contract in two documents. That is how I read it, and if that be the finding it comes within exactly what was said by this court in *Counsell's case* (*ubi sup.*), that if you have one contract in two documents and those against the

Bills of Sale Acts, that contract in two documents will not stand, and the bill of sale must be set aside. That is how I read the finding. Having found that, the matter seems plain. A great struggle was made by Mr. Jelf that this was not a proper or true finding, but I think otherwise. If there was one true finding, is there anything against that? It seems to me that James, L.J., in the case of *Ex parte Collins* (*ubi sup.*), says that it does sin against the Bills of Sale Acts, because, when you read that one contract in two documents, there is a condition in the contract which does not appear in the bill of sale. The bill of sale is given on condition that upon payment of the interest the remaining portion of the principal secured by the bill of sale may be paid off. It seems to me that this case has been plain down to this point. Mr. Jelf said that that was not the meaning of the condition, and he said that the statutory provision as to the condition only applied when the condition was in favour of the donee. It is true that James, L.J.'s decision in *Ex parte Collins* (*ubi sup.*) was not cited in *Counsell's case* (*ubi sup.*). But in *Counsell's case* (*ubi sup.*) this court—or a court of co-ordinate jurisdiction—held the collateral security to be a defeasance. I think that that case cannot be distinguished from the present. And I may say that I think this is a condition not to be limited as suggested by Mr. Jelf, and as was held by James, L.J. in *Ex parte Collins* (*ubi sup.*). I think, therefore, that this appeal fails, and that it should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *Victor Thomasset*, agent for *Joseph Sims*, Manchester.

Solicitors for the respondent, *Holdsworth and Payne*.

Jan. 22 and Feb. 8.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re THE TRADE MARK APPLICATION OF FARBENFABRIKEN, VORMALS FRIEDE, BAYER, AND CO. (a)

APPEAL FROM THE CHANCERY DIVISION.

Trade mark—Registration—"Somatose"—Invented word—Word having no reference to the character or quality of the goods—Refusal to register—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64, sub-sect. 1 (c)—Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 10.

An application was made for registration of a trade mark consisting of the word "Somatose." The article for which the mark was intended to be used was called a "pharmaceutical production," coming within Class 3. The article was made from meat, and was described as "a yellow, tasteless, and odourless product." Its principal constituents were said to be "primary albumoses," and its object was nourishment of the human body. The Comptroller objected to register the word on the ground that "Somatose" was not an "invented word" within the meaning of sub-sect. (d) of sect. 10 of the Patents, &c., Act 1888; and further, that it had reference to the character or quality of the goods in respect of which registra-

(a) Reported by J. B. BROOKE and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

tion was sought, and so was excluded by subsect. (e). It was admitted by the applicants that the word was derived from the Greek word "Soma" (body); but it was contended that it was "an invented word," and that it was in no way descriptive of the article to which it was to be applied.

Held (dissentiente Lindley, L.J.), that "Somatose" was not within either of the sub-sections, and was not capable of being registered.

Re Meyerstein and Co.'s Trade Mark "Satinine" (62 L. T. Rep. N. S. 526; 43 Ch. Div. 604) considered.

Decision of North, J. affirmed.

THIS was an appeal by the applicants, a company carrying on business in Germany, against a decision of North, J., affirming the refusal of the Comptroller of Trade Marks to register the word "Somatose" as a trade mark for goods in Class 3.

On the 16th March 1893 the applicants had applied for the registration of the word "Somatose" as a trade mark for a pharmaceutical product described as a yellow, tasteless, and odourless powder easily soluble in water, and which does not coagulate when being heated. It was intended to be taken in cases where nourishment was required and meat or albuminous bodies would be prescribed, but could not be taken in their ordinary form from the patient's weakness of digestion.

The Comptroller had refused to register the mark on the ground that "Somatose" had reference to the character or quality of the goods in respect of which registration was sought, and also that it was not an invented word. (a)

In answer to this objection the applicants' agent in England filed an affidavit setting out a letter from their firm which contained the following passage:

The supposition that the word Somatose is descriptive is absolutely incorrect. Somatose is a preparation made out of meat, which solely contains ingredients of the same, and which can easily be absorbed and taken up into the human body. These are principally primary albumoses. The object of the Somatose is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in the ordinary solid form, and further that it can be taken in such cases where particular nourishment is required through the addition of soluble albuminous nourishment."

The Comptroller persisted in his objection, and the applicants appealed to the Board of Trade, who referred the matter to the court.

The applicants accordingly moved that the Comptroller might be directed to proceed with the registration.

On the 24th Nov. 1893 the motion came on to be heard before North, J.

A. R. Kirby for the motion.—"Somatose" is an invented word. Assuming that it is founded on the Greek word *σῶμα*, it is permissible to take a Greek word and so alter it that it is not a word in Greek or any other language. The word is not descriptive, for it could not possibly describe anything. The phrase "invented word" is new in the

present Act. The phrase in the old Act was "fancy word." It had been held that no word which could by any possibility be descriptive came within the definition "fancy word":

Re Van Duzer's Trade Mark, 55 L. T. Rep. N. S. 184; 56 L. T. Rep. N. S. 286; 34 Ch. Div. 623.

And the subsequent decisions had made the meaning of the phrase very narrow. The expression in the present Act, "invented word," having no reference to character or quality, was intended to be wider. In *Re Burgoyne's Trade Mark* (61 L. T. Rep. N. S. 39) "Oomoo" was held not to be a descriptive word, though it was said to mean choice in the language of Australian aborigines.

Ingle Joyce for the Comptroller.—It has always been held from the very first that no one can have a monopoly of any word which is in any way descriptive. Any word is descriptive which refers to the adaptability of the thing to which it is applied for any particular purpose. "Somatose" appears to mean applicable to or useful for the human body. We find in the dictionary somatology and somatic. "Valvoline" (*Re Leonard and Ellis's Trade Mark*, 51 L. T. Rep. N. S. 35; 26 Ch. Div. 288); "Electric," as applied to velvet (*Re Van Duzer's Trade Mark* (*ubi sup.*)); "Reversi" (*Re Waterman's Trade Mark*, 59 L. T. Rep. N. S. 17; 39 Ch. Div. 29); "Emollio" (*Re Grossmith's Trade Mark*, 60 L. T. Rep. N. S. 612); "Satinine" (*Re Meyerstein's Trade Mark*, 62 L. T. Rep. N. S. 526; 43 Ch. Div. 604), have been held descriptive. The applicant's own affidavit shows that the word has some reference to the character or quality of the goods.

Kirby in reply.—In *Re Leonard and Ellis's Trade Mark* (*ubi sup.*) the court held that "Valvoline" was not in itself a descriptive word, but registration was refused because the applicants had so used it as to make it the common name for a particular kind of oil, which they had no exclusive right to manufacture. All the cases referred to, except "Satinine," which is obviously descriptive, were decided under the Act of 1883.

NORTH, J.—I do not think this can be called an invented word. As to the second point which has been argued, I do not know that the word "Somatose" alone would have suggested to my mind any reference to the quality of this preparation, or in fact, to anything at all. But the applicants have themselves removed the difficulty, and have shown that it has such a reference, and was selected for that reason. The word is described as being derived from *σῶμα*, a body, and the substance is described thus: [His Lordship read the description and the part of the extract from the applicant's letter above set out.] Upon that evidence I must hold that the word is meant to express applicability to the human body, and, therefore, is descriptive and cannot be registered.

From that decision the applicants now appealed.

A. R. Kirby (*Moulton*, Q.C. with him) for the appellants.

The *Solicitor-General* (Sir John Rigby, Q.C.) and *Ingle Joyce* for the Comptroller.

The arguments adduced in the court below were substantially repeated, and the authorities there cited were again referred to.

Cur. adv. vult.

(a) Sect. 64 of the Patents, Designs, and Trade Marks Act 1883 (as amended by sect. 10 of the Patents, &c., Act 1888) provides that: "For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars (*inter alia*):—(d) An invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Feb. 8.—The following written judgments were delivered:—

LINDLEY, L.J.—By sect. 10 of the Patents, Designs, and Trade Marks Act 1888, it is enacted that for sect. 64 of the principal Act the following section shall be substituted: “64 (1). For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars.” [His Lordship then read clauses (a), (b), (c), (d), and (e), and continued:] It does not follow that every trade mark which does contain one at least of those particulars is a trade mark for the purposes of the Act, *i.e.*, a trade mark which the Comptroller ought to register. It is therefore necessary to ascertain what kind of trade mark which does contain one of the statutory essentials is not a trade mark for the purposes of the Act, *i.e.*, is one which ought not to be registered. Clause (e) by its negative form excludes certain words; and, if a trade mark consists of one word only, and that word is such as is described by clause (e), that word cannot be properly registered as a trade mark. I will return to clause (e) presently. But in addition to this clause, sects. 70, 72, and 73 of the Act of 1883 exclude certain words from registration as trade marks. These sections, and the discretion given by sect. 62 (4) of the Act of 1883 to the Comptroller to refuse to register a trade mark, would clearly justify the rejection of any trade mark, even if it contains one of the statutory requisites, if such mark be of an indecent or libellous character, or if it infringes the right of some other person, or if it is identical with or so similar to one already registered as to be calculated to deceive. But I can find no other restriction, and if a person seeks to register a trade mark which is open to none of these objections, and which does contain one of the essentials mentioned in sect. 10 of the Act of 1888, I am aware of no legal principle which would justify the court in refusing to direct its registration. The discretion given to the Comptroller is subject to appeal to the Board of Trade (sect. 62 (4) of the Act of 1883), and, the Board of Trade having remitted the appeal to the court under sect. 62 (5) of the same Act, the court must decide the question in accordance with legal principles, and cannot properly decline to review the decision of the Comptroller. The word sought to be registered is “Somatose,” and it is sought to be registered in respect of a substance falling within Class 3, the substance being a preparation from meat and alleged to be nutritious and very digestible. The word is not objected to on any of the grounds mentioned in sects. 70, 72, 73 of the Act of 1883, but it is said not to fall within sect. 10 of the Act of 1888. Two reasons are given for this contention. First, it is said that “Somatose” is not an invented word within the meaning of (d). Secondly, it is said to have some reference to the character or quality of the goods, and so to be excluded by (e). Each of these reasons must be examined in turn. There is no statutory definition or description of an invented word, and I cannot myself see any legitimate ground for limiting its ordinary meaning. Any word which is in fact new and not what may be called a colourable imitation of an existing word is, in my opinion, an invented word within the meaning of the statute under consideration. It is true that several persons may independently hit upon the same word, but a word already in-

vented and known would hardly be called an invented word because somebody afterwards happened to hit upon it himself. Novelty is, I think, an ingredient in a lawyer's idea of invention. Again, I do not think that a word can fairly be called an invented word if it is so nearly like a known word in spelling or sound as to be an obvious imitation of it and is in substance that word though spelt or sounded a little differently. But I am unable myself to see that any other restriction can properly be put on the expression “invented word” in this Act of Parliament. Why in 1888 Parliament substituted the expression “invented word or words” for the expression “fancy word or words not in common use,” which was the expression used in the Act of 1883, I cannot ascertain from the statute itself. I can, therefore, only infer that the former expression, as construed by the courts, was considered unsatisfactory, and that one object, at all events, was to change the expression so as to render the previous decisions on the old expression inapplicable in future. In my opinion “Somatose” is an invented word within the meaning of the new enactment. It is proved to be new, and to have been invented for the purpose of being used as a trade mark. It is true that the syllables of which it is compounded are well known and are even in common use among chemists and medical men. But a new word of more than one syllable may be an invented word, although all the syllables composing it are known and are in use. The only doubt which I have on this part of the case is that “somatos” is the genitive case of “soma,” and is as well known as “soma” itself, and “Somatose” is very like “somatos.” It is, in fact, composed of the same letters with the addition of an “e.” But the words are after all different, and the evidence shows that “Somatose” was not in fact arrived at by adding “e” to “somatos,” but by adding the English or Anglicised termination “ose” to “somat.” Under these circumstances, “Somatose” may be fairly considered as an invented word. We were pressed by the Solicitor-General to put a more restricted construction on the expression “invented word or words” on the ground of inconvenience. He urged that, if “Somatose” were registered, the Comptroller would have to register such words as “breadose,” “butterose,” &c., which showed no inventive ingenuity, and the register would be crowded with ridiculous words, which would be intolerable. This, however, is a matter for the Legislature to consider, and not for this or any other court. Inventive ingenuity appears to me not to enter into consideration. Trade marks are not like patents, intended as rewards to inventors. Their main object is wholly different, and is to prevent one person from passing off his goods as those of somebody else. The Legislature, in passing the Trade Marks Acts, has also had for one of its objects the exclusion of inconvenient monopolies in words which are already, as it were, common property. If a person selects as a trade mark for his goods a word which no one has ever heard of before, no injury is done to anyone simply because he is prevented from taking the same word to designate his goods. The inconvenience, moreover, is not so great as represented. No one would care to register as a trade mark a new word which would not be likely to attract customers and be remembered. A good catch-word is what

is wanted, and this practically limits the choice of new words for trade marks. The choice is still further very materially limited by the prohibition contained in sect. 10 (e). This leads me to the second objection, viz., that "Somatose" has reference to the character or quality of the goods. I cannot myself, however, see that this is so. What character or quality of the goods does the word refer to? I am wholly unable to answer this question. The utmost that can be said is that "Somatose" refers in some way to some kind of body. Moreover, I do not believe that this objection would have occurred to anyone if it had not been suggested by some statements made by the applicants themselves and laid before the Comptroller. But the document containing these statements does not, in my opinion, support the objection. It in fact contains a protest against the inference now sought to be drawn from it. I, however, agree with the contention of the Solicitor-General that, according to the true construction of sect. 10 of the Act of 1888, if a trade mark consists of only one word, and this is an invented word, so as to come within sect. 10 (a), but it is also a word having reference to the character or quality of goods, so as to come within sect. 10 (e), the word cannot be properly registered as a trade mark. The case supposed would stand thus: A trade mark must consist of or contain an invented word or something else; but it must not consist of a word which has reference to the character or quality of the goods. If, therefore, an invented word has such reference it falls within the prohibition. This point has already been decided in *Re Meyerstein's Trade Mark* (*ubi sup.*), and on this point I think that decision right, although I should myself have said that "Satinine," the word there, was an invented word. I am of opinion that "Somatose" is an invented word not having reference to the character or quality of the goods, and is free from objection and ought to be registered.

KAY, L.J.—A German trading concern called *Farbenfabriken* applied to register the word "Somatose" in Class 3 in respect of a pharmaceutical product. The Comptroller objected "that somatose has reference to the character or quality of the goods in respect of which registration is sought." This is denied; and secondly, it is argued that, even if it were so, the word is an invented word to which such an objection does not apply. North, J. sustained the objection, and this is an appeal from his decision. "Somatose" is a name given to a yellowish powder which is described by the applicants as "a preparation made out of meat which solely contains ingredients of the same and which can easily be absorbed and taken up into the human body. The object of the somatose is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed but which cannot be given in the ordinary solid form; and further, that it can be taken in such cases where particular nourishment is required through the addition of soluble albuminous nourishment." The words "soma" and "somatic" occur in some English dictionaries. They are words derived from the Greek "soma," which means the body, or, applied to animals, the carcase of an animal, and the English words mean the body or carcase and relate to the body or carcase respectively. The Greek word makes somatos in the genitive. "Somatose," then, is

Vol. LXX., N. S. 1795*.

body or carcase with the addition "ose." This suffix is common, as in the words comatose, glucose, cellulose, and many others. Comatose is the condition of coma; glucose and cellulose are certain preparations derived from the substances indicated in the earlier part of the words. Following this analogy somatose would mean a preparation of meat or of the carcase of an animal. Sect. 64 of the Trade Marks Act of 1883 allowed the registration of "a fancy word or words not in common use." The constant attempts to register words as fancy words which were not really so led to a great deal of litigation, in which various views were adopted; some judges considering that a fanciful use of a known word might bring it within the description; some judges inclining to the view that a fancy word must be a word having no meaning, all concurring that a descriptive word ought not to be registered. The Act of 1888 substituted a new definition. Instead of "fancy word or words not in common use" the new Act has "(d) an invented word or invented words, or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name." This last provision certainly restricts still further the right of registration. "Having no reference to the character or quality of the goods" is more restrictive than the words "descriptive of the goods," which the course of decision had prohibited. But it is argued that this only applies to known words, and being coupled with the former sentence by the disjunctive "or" an invented word may be descriptive though a known word may not. To this I think there are two answers, either of which is conclusive. If the word is descriptive it cannot be an invented word within the meaning of clause (d); and, secondly, the collocation of these two clauses proves to my mind that invented words mean words that have no meaning. I agree with the argument of the Solicitor-General that, when the statutes of 1883 and 1888 are compared, the alteration of sect. 64 was by no means intended to give persons desiring to register a larger right to monopolise words than they had under the former Act and the decisions upon it, but rather, if anything, to restrict that right still further, and to render the duty of the Comptroller more simple and easy. The point came before me in *Re Meyerstein's Trade Mark* (*ubi sup.*), where I refused to allow registration of the word "Satinine" for starch, saying, "This is a word which describes the quality of the goods, and there is extremely little invention in the matter, for the only invention is putting at the end of a common word 'satin'—which brings to every man's mind in a moment the notion of a glossy surface—the common conclusion 'ine,' which one finds in 'saline,' 'saccharine,' and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitations which the decisions have put on the former Act—that you cannot possibly use any word, fancy word or otherwise, if it is a descriptive word." During the argument in the present case I put the question whether that last sentence did not go too far. Upon consideration I do not think it does. It cannot be the meaning of the Act of 1888 that, although by sub-sect. (e) there is a prohibition against registering words having any reference

[CT. OF APP.]

STROUD v. WANDSWORTH DISTRICT BOARD OF WORKS.

[CT. OF APP.]

to the character or quality of the goods, that may be evaded by compounding a word descriptive of the goods and treating it as an invented word under sub-sect. (d). In my opinion, North, J. rightly refused to allow this word to be registered, and I think this appeal should be dismissed.

SMITH, L.J.—By the Patents, Designs, and Trade Marks Act 1883, s. 64, so far as is material to the present case, it was enacted that for the purposes of the Act a trade mark might consist of “a fancy word or words not in common use.” This enactment gave rise to considerable litigation, as can be seen upon reference to the Law Reports, and the Legislature, for the purpose of terminating the controversies which had been going on for some five years over the phrase, by the Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 10, enacted as follows: [His Lordship read the section and continued:] The question is what is the true interpretation of subdivisions (d) and (e) of this new 1st sub-section of sect. 64. It will be seen that the phrase “a fancy word or words not in common use” is discarded. It appears to me that one thing is clear, viz., that the Legislature intended that whatever words were thereafter to be registered, whether they fell within (d) or (e), they should be words which had no reference to the character or quality of the goods of the trader. It is impossible, I think, to hold that the Legislature intended that an invented word might be a word having reference to the character or quality of the goods, whereas a non-invented word might not. There would be no sense in so holding, and it would not be the true construction of the Act. Now, to constitute an invented word within the meaning of the section, in my judgment it must be a word coined for the first time. Such a word of necessity is incapable of having reference to the character or quality of goods, because *ex hypothesi* it is an entirely new unknown word incapable of conveying anything. This, in my opinion, is why it became unnecessary to repeat the limitation about reference to goods in (d), whereas it was necessary to insert it in (e). Now, suppose a trader to go to a dictionary and to find a word wholly unused, and to propose to register the word, would that be an “invented word” within the section? I say it would not, because the word so found would not be a word coined for the first time, and it therefore might be capable of having reference to the character or quality of goods. Suppose the trader therein to find two words equally unused, and to join them together, would that suffice? I think not, and for the same reason, viz., that the two which were joined together, not being words coined for the first time, might when joined have reference to the character or quality of goods; whereas I think that the essence of an invented word within the meaning of the section is that it is a word which of necessity is incapable of having any reference to goods, inasmuch as it is incapable of conveying anything. Now, what is the word “Somatose” which is sought to be registered by the applicants? I find in Webster’s dictionary the word “soma” from Greek *soma*, *somatos*—the body. Also the word “somatic,” of or pertaining to the body as a whole. In Johnson’s dictionary there is the word “somatic” from Greek *soma*, *somatos*—the body. In Todd’s dictionary will be found the word

“somatic,” corporal—belonging to the body. And in the Imperial Dictionary there are the words “somatic,” “somatical,” corporal—pertaining to the body. Now, apparently what the applicants have done is to take the well-known word “soma” and add thereto the not unknown adjective “tose,” for instance, as in coma, “comatose;” or they have taken the word “soma,” and added the letter “e,” and it is said on their behalf that they have invented a word within the meaning of the section. In my opinion they have not, for the word “Somatose” cannot be said to be a word coined for the first time, and consequently it is not a word which is of necessity incapable of having reference to the character or quality of goods. The meaning conveyed by the words *soma*, *somatos*, was well known before, and in my judgment “Somatose,” for the reasons above, is not an invented word within the section. I now come to the next point, arising under subsection (e), which is this: [His Lordship read the sub-section and continued:] Has the word “Somatose” no reference to the character or quality of the applicants’ goods? I find in a copy of remarks made by the applicants, which was forwarded by their solicitor to the Comptroller-General, that the applicants describe the object to be obtained by the use of somatose, which is a powder, and the ingredients out of which it is made. They say: “The object of the somatose is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in ordinary solid form, &c.” They describe its ingredients in this way: “‘Somatose’ is a preparation made out of meat, which solely contains ingredients of the same, and which can easily be absorbed and taken up into the human body.” To state it shortly, they describe their goods, which they call “Somatose,” as being made out of meat, which can be easily absorbed into the human body. In these circumstances, I cannot bring myself to hold that the word “Somatose” mainly composed of the words “soma” or “somatos,” which means the body or of the body, has no reference to the character or quality of the applicants’ goods, which are made of meat, and can be easily absorbed into the body. This was the conclusion North, J. arrived at, and I think he was right. Lindley, L.J. not agreeing with me, of necessity makes me doubt the accuracy of my judgment, and I am glad that Kay, L.J. has arrived at a like conclusion as I have. I think that this appeal, for the reasons above, should be dismissed, but that, being a test case, without costs.

Solicitors for the appellants, *Ashurst, Morris, Crisp, and Co.*

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

Monday, Jan. 29.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

STROUD v. THE WANDSWORTH DISTRICT BOARD OF WORKS. (a)

APPEAL FROM THE QUEEN’S BENCH DIVISION.

Local government—Metropolis Management Acts—Repair of carriage-road—Expenditure by district board on “necessary works of repair”—

(a) Reported by T. R. BRIDGWATER and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

Apportionment and recovery of expenses—Power of local authority to decide as to necessity of works—Metropolis Management Amendment Act 1890 (53 & 54 Vict. c. 66), s. 3.

Under sect. 3 of the Metropolis Management Amendment Act 1890 (which empowers any vestry or district board to execute any necessary works of repair upon any carriage-road within their parish or district, and to apportion and recover the expenses from the owners of the houses and land abutting on such road) it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses.

Reg. v. Marsham (65 L. T. Rep. N. S. 778; (1892) 1 Q. B. 371) distinguished.

Decision of the Divisional Court (Charles and Wright, JJ.) affirmed.

THIS was a special case stated by one of the police magistrates of the police-courts of the metropolis, at the request of the appellant, who was dissatisfied with the magistrate's determination as being erroneous in point of law upon the hearing of a summons wherein the respondents were the complainants and the appellant was the defendant.

Upon the hearing of the summons the following facts were either admitted or proved in evidence:

1. The respondents are the board of works for the Wandsworth District. The appellant is the owner of a house and land situate and abutting upon a road in Wandsworth.

2. The said road is within the respondents' district, and had at the time of the works hereafter mentioned been used for more than six months for public traffic, and had not been repairable by them.

3. A resolution was passed by the respondent board to execute certain works of repairs upon the said road under the powers given to them by sect. 3 of the Metropolis Management Amendment Act 1890 (53 & 54 Vict. c. 66), and which were deemed by them to be necessary.

4. In pursuance of the said resolution the said works were done by the respondents' surveyor, and by an order subsequently made by them, the sum of 31l. 10s. 7d. was apportioned upon the appellant in respect of such works, which was afterwards reduced to 26l. 0s. 9d.

5. On behalf of the respondents it was contended that, under sect. 3 of the Metropolis Management Amendment Act 1890, it was for them to decide whether any works were necessary; that they had decided that the works were necessary; and that they had done the said works, and had duly apportioned the expenses thereof upon the owners of the houses and land abutting on the said road, and that the appellant was liable to pay the amount apportioned on him.

6. On behalf of the appellant it was contended that the question whether any works of repair were necessary or not was a question to be decided by the magistrate, and that part of such works, namely, on that portion of the road bounding his premises, and in respect of which apportionment had been made upon him, was not in fact necessary to be done.

The learned magistrate was of opinion that it was for the respondents and not for him to decide whether the works of repair were necessary or

not, and he ordered the appellant to pay the amount claimed.

The learned magistrate left the question as to whether his determination was right in point of law for the determination of the High Court. If it was, the order would stand. If not, the case would be remitted back to the magistrate to say whether all or any part of such works of repair in respect of which the apportionment was made upon the appellant was necessary or not, or to be dealt with in such manner as the court might direct.

On the 3rd Nov. 1893 the case was argued before the Divisional Court (Charles and Wright, JJ.).

The appellant in person.—The question whether any of the works of repair were necessary or not was a question to be decided by the magistrate, and not by the vestry or district board of works. The vestry or district must prove that the works are necessary to a tribunal before which they seek to recover the expenses. When the Legislature intends to vest a discretion in a vestry or board of works, they do so by words expressly committing it to them, such as "if they shall deem it necessary." Similar provisions are contained in other Acts relating to the metropolis and in the Public Health Acts. Under the section in question the magistrate alone has jurisdiction to inquire into the fact of the necessity of the works, or it would have been expressly provided that he had not. In sect. 105 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120) it is expressly provided that, if a "vestry or board deem it necessary or expedient" that a carriageway should be paved, then such board or vestry shall pave it, but in sect. 3 of the present Act of 1890 there is no such provision, so that where the Legislature means the local authorities to have such power it says so. He cited the following cases:

Ex parte Richards; Re Jones, 39 L. T. Rep. N. S. 684; 3 Q. B. Div. 368; 47 L. J. 498, Q. B.;
Swanston v. The Twickenham Local Board of Health, 40 L. T. Rep. N. S. 208 and 734; 48 L. J. 623, Ch.;
Ex parte Whitchurch, 45 L. T. Rep. N. S. 379; 6 Q. B. Div. 545; 50 L. J. 99, M. C.;
Vestry of St. Giles, Camberwell, v. Board of Works for Greenwich District, 19 Q. B. Div. 502;
Reg. v. Marsham, 65 L. T. Rep. N. S. 778; (1892) 1 Q. B. 371.

Earle for the respondent board.—The district board of works are the surveyors of highways. The district board have no power to go before making repairs to a magistrate and ask him to decide whether the proposed repair to any carriageway is necessary or not. If the magistrate determined after the repairs have been executed whether they were necessary or not, and if he decided against the board, no board would venture to execute any works, however necessary. The expenses for repairing a carriageway are recoverable under the Act of 1890, in the same way as the expenses are recoverable after paving a new street under sect. 105 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120). In that section there is no doubt whatever as to the powers of the district board to decide whether the expense to be incurred is necessary or not. That section says that the street shall be paved "if such vestry or district board deem it necessary or expedient that the same should be paved." It is clear that the Legislature has committed the

[CT. OF APP.]

STROUD v. WANDSWORTH DISTRICT BOARD OF WORKS.

[CT. OF APP.]

determination of the fact of the proposed repair under both the statutes to the public authority, i.e., the vestry or district board.

Cur. adv. vult.

Nov. 10, 1893. — CHARLES, J. — In this case the respondents are the Board of Works for the Wandsworth district; the appellant is the owner of a house and land within that district abutting on a road called Avenue-road, which at the time of the execution of the works hereafter mentioned, had been used for more than six months for public traffic, and had not become repairable by the respondents. On the 23rd March 1892 the respondents resolved to execute some repairs to the road, under the powers given them by the Metropolis Management Act 1890 (53 & 54 Vict. c. 66), s. 3. The repairs were deemed by them to be necessary. The works were done in pursuance of the resolution, and the expenses were apportioned among the adjoining owners. On the hearing of a summons claiming from the appellant the amount of his share of the apportionment, he proposed to contest the necessity of the repairs, but the magistrate was of opinion that it was not for him to decide whether the repairs were necessary or not, and that he was bound by the decision of the respondents upon the point. He accordingly ordered the appellant to pay the amount. The question we now have to determine is, whether his ruling was correct. The section of the statute is as follows: "Any vestry or district board may from time to time execute any necessary works of repairs upon any or any part of any carriage road within their parish or district which shall have been used for not less than six months for public traffic, and which may not at the time of such repair have become repairable by them, and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under the Metropolis Management Acts." It is then provided that the expenses of "such repairs" may in the first instance be paid by the local authority in the same manner as the expenses of repairing other streets repairable by them, and afterwards be apportioned and recovered from the owners of adjoining lands "in the same manner" as if such expenses were expenses of paving such road as a new street under the provisions of the Metropolis Management Acts relative thereto, or in a court of competent jurisdiction. Railway companies whose premises do not directly communicate with the road are, by a proviso, exempt from contribution; but in the event of a direct communication being made by any railway company with the road before the road is taken over by the local authority, "a just share of the said expenses" is to be paid by such company. It was urged on us by the appellant that the works must appear to the tribunal before which the question is raised to be "necessary"; that is to say, in this case, to the magistrate who heard the summons. It is obvious that, if this be the true view, it will render it very difficult, if not impossible, for a local authority to use the powers conferred by the section, for in many cases this decision as to the necessity would certainly be challenged by adjoining landowners, and protracted legislation might

ensue. On the other hand, it is hard that a landowner should be bound to pay for repairs done without his consent on his own private land, which he believes to be unnecessary until the decision of a judicial tribunal on the question of necessity has been obtained. At the same time it must be remembered that the Legislature was dealing in this section with a public body, charged with the performance of important public duties, and that there is no manifest injustice or absurdity involved in holding that to them is committed an absolute discretion in the matter, provided, of course, that they act *bona fide* and from no sinister and collateral motive; and after some hesitation, and an examination of cases in which similar questions have been raised in other Acts of Parliament, I have come to the conclusion that this section does constitute the local authority the sole judge of the necessity of repairs. It is true that the words differ from those in 18 & 19 Vict. c. 120, s. 105, which authorises the local authority to do paving works in any case where they may deem it to be necessary or expedient; but I do not think that this difference in language is sufficient to justify the contention of the appellant. The principle which governs the construction of such enactments was thus stated by Lord Cranworth in *Stockton and Darlington Railway Company v. Brown* (3 L. T. Rep. N. S. 131; 6 Jur. N. S. 1167, Ch.; 9 H. of L. Cas. 246, at p. 256; and in 3 L. T. Rep. p. 134), where he is dealing with the proper interpretation of Acts of Parliament, authorising railway companies to take land "for the purposes of their undertaking." "I think it clear," he says, "that when the Legislature authorises railway directors to take for the purpose of their undertaking any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided only that they take them *bona fide*. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or expedient to be taken, or simply, that the company may take lands for the purposes of the undertaking." This principle, it is pointed out by Stirling, J. in *Lewis v. Weston-super-Mare Board of Health* (59 L. T. Rep. N. S. 769; 40 Ch. Div. 55; 58 L. J. 39, Ch.) may be the more readily applied where the powers are vested in a public corporation charged with performance of important public duties, and acting for the benefit of the whole community. In the last-mentioned case the court had to construe the 16th section of the Public Health Act 1875, which empowers a local authority to carry a sewer through private lands "if on the report of the surveyor it appears necessary." The learned judge considered on these words that the person to judge of the necessity was the surveyor, but he adds (at p. 772 L. T. Rep.): "Even if the words were simply 'if it appears necessary,' I should be of opinion that the persons to judge of the necessity were the local authority, or competent persons employed to advise them on the question." In the section under discussion the words are "necessary works;" but I cannot see any substantial difference between these words and the words which "appear necessary," and the observation of the learned judge therefore seems to me to be applicable to the

present case, and to support the conclusion at which I have arrived. The appeal must be dismissed with costs.

WRIGHT, J.—I am of the same opinion, but I entertain great doubt, for it is not easy to distinguish the present case from the case cited by Mr. Stroud, *Reg. v. Marsham* (65 L. T. Rep. N. S. 778; (1892) 1 Q. B. 371), where it was held by the Court of Appeal that the apportionment by a district board of works of expenses incurred in paving a new street was not binding and conclusive for all purposes, and that, upon the hearing of a summons to enforce payment of an apportioned share of the expenses, evidence might be given to show that the amount alleged to have been expended had not been actually expended, or included expenses other than paving expenses. It is no doubt, as a question of construction, difficult to see why the magistrate should not be bound to inquire into the question whether the works were necessary before making an order for payment of the apportioned expenses. The point is not raised as to whether he ought to have inquired whether the works were works of repair. If it had been, possibly something more might have been made of it than can be made of this point which has been raised. The question for our determination is, whether, assuming the works to be works of repair, the necessity of them is for the local authority or for the magistrate to determine. In considering this question we do not get much assistance from the railway cases, or from the cases decided under sect. 16 of the Public Health Act 1875 (38 & 39 Vict. c. 55), because in those Acts there are provisions for making compensation, which is not the case here. We should rather look at the cases under sect. 150 of the Public Health Act 1875, and under the Metropolitan Management Acts. Mr. Stroud's argument is, that in all those cases the local authority is expressly given a discretion to determine as to the necessity of the works. Still I think we cannot infer, in the present case, from the use of the word "necessary" alone, without any express words giving discretion to the local authority to determine what is necessary, that they possess no such discretion. From the nature of the case it is apparent that the question as to the necessity of the works must be a matter of opinion, and can hardly be satisfactorily determined, except by the local authority with reference to their general standard of repairs and their view of the requirements of the locality. There would be considerable inconvenience and difficulty in trying the question of the necessity judicially. Surveyors of more or less eminence would no doubt be called on both sides, and would very probably differ in opinion, and it would be difficult to decide on the conflicting testimony. The most sensible view of the question is, that a discretion is given to the local authority to determine as to the necessity of the works. I agree, therefore, that our judgment ought to be for the respondents with costs.

From that decision Stroud now appealed to the Court of Appeal.

Mattinson (*Jelf*, Q.C. with him) for the appellant.—The magistrate had power to inquire into the necessity of the works of repair, and was wrong in holding that it was for the respondents, the district board, to decide whether the works were necessary or not. If it had been the inten-

tion of the Legislature to confer such a power upon vestries and district boards it would have been so provided by express enactment. The words of the section are "necessary works," not works which "they deem to be necessary." Where the Legislature intends that the board's decision shall be final apt words are used, as appears from sect. 1 of 53 & 54 Vict. c. 54, which was passed on the same day as the Act now under discussion. The words there are "shall deem it necessary or expedient"; and similar provisions are contained in the other Acts relating to the Metropolis, and in the Public Health Acts. Such an arbitrary power on the part of a public body is not to be implied. To bring the case within sect. 3 of the Metropolitan Management Amendment Act 1890 the board must show that the expenses are necessary, and therefore, before they can recover, they must prove the necessity to the satisfaction of the tribunal which has to decide as to the liability. Thus, an apportionment under the Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 102), s. 105, and the Metropolitan Local Management Act 1862 (25 & 26 Vict. c. 102), s. 77, is not conclusive, and a magistrate is bound to inquire whether the total amount apportioned includes any unauthorised expenses:

Reg. v. Marsham, 65 L. T. Rep. N. S. 778; (1892) 1 Q. B. 371.

The decision in that case was a decision of the Court of Appeal, and I submit it governs the present case. So also, where any dispute arises on an apportionment by the surveyor under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55), whatever be the ground of it, such dispute must be settled by arbitration:

The Sandgate District Local Board of Health v. Keene, 66 L. T. Rep. N. S. 741; (1892) 1 Q. B. 831.

In the case of a public body charged with the performance of public duties, the word "necessary" means necessary for the efficient discharge of the duty in the way most for the benefit of the public:

Leeds v. Weston-super-Mare Local Board of Health, 59 L. T. Rep. N. S. 769; 40 Ch. Div. 55.

He referred also to

Ex parte Whitchurch, 45 L. T. Rep. N. S. 379; 6 Q. B. Div. 545; 50 L. J. 99, M. C.

Channell, Q.C. (*J. C. Earle* with him) for the respondents.—The cases cited have no application to the present case. If the appellant's contention is right it practically makes the Act a nullity. The district board could not, according to his view, go before the magistrate to recover the expenses until after the works were executed. The result would be that in every case they would have to do the works and run the risk of afterwards having the expenses of works disallowed, notwithstanding that they *bona fide* believed, acting on the advice of their surveyor, that the works were necessary.

Mattinson replied.

LINDLEY, L.J.—This case raises a question of some little difficulty, and it can be shortly stated. The simple question is, who is to be the judge of the necessity of the repairs, to which I will allude presently. The language of the Act of Parliament which we have to construe is to be found in the 3rd section of the 53 & 54 Vict. c. 66, which is an Act to amend the Metropolitan Manage-

CT. OF APP.]

STROUD v. WANDSWORTH DISTRICT BOARD OF WORKS.

[CT. OF APP.]

ment Act of 1862. The 1st and 2nd sections show the object generally of the amending Act. Then the 3rd section empowers any vestry or district board from time to time to execute "any necessary works of repair" upon any or any part of any carriage-road within their parish or district which shall have been used for not less than six months for public traffic, and which may not at the time of such repair have become repairable by them, and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under power to repair roads which had not yet become repairable by the local authority. Then there were words put in to supplement that defect. Now, when we read the legislation relating to paving, the language of the earlier Acts, which are amended by this, viz., 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, they are clear enough that the judges of the necessity of paving and so on are to be the local authority. It is said so in so many words. Now, in this section we have under consideration, it is not said in so many words who are to be the judges of that necessity; but if we look at it as one of the group of sections, I cannot help thinking that the true construction of that section is, that the persons who are to be the judges of the necessity for doing these repairs are the same as those who are to be the judges of the necessity under the Metropolis Management Acts. Sect. 3 of the Act of 1890 further provides that the expenses of and incident to such repair may in the first instance be paid by the vestry or district board in the same manner as the expenses of repairing other streets repairable by them, and shall as soon as may be thereafter be apportioned upon and recovered from the owners of the houses and land bounding or abutting on such road or part thereof. Then there comes a proviso about railways which I do not think I need refer to. As I have already said, the question is, who is to be the judge of the necessity of these works of repair? That is a point which is not free from difficulty. But I think the solution of the difficulty is to be found in considering the object of this section, and for what reason it was put in. It is, in substance, an addition to a group of sections relating to the paving of streets. Under the earlier Acts there was power to pave streets, but not for doing paving and other works referred to in the former Acts. I can see no reason for coming to the conclusion that Parliament intended that there should be two different judges of similar necessities. And I should think it would not be unlikely that, if Parliament did intend to introduce such a curious anomaly or such complicated machinery, it would have said so in language about which there could be no misunderstanding. It is urged in opposition to this that Parliament by changing its language did really mean to change the judges of the necessity; and reference has been made to this fact that, in the same session another Act, the Metropolis Management Act 1862 Amendment Act 1890 (53 & 54 Vict. c. 54), was passed repealing and amending the Act of 1862. There you do find express words showing who are to be the judges of the necessity. That is true, but I think the history of that is tolerably obvious quite apart from any statements we have heard,

and to which I do not attach much importance. The real history of it is this, that 53 & 54 Vict. c. 54 contains a repealing section and re-enacts it in the words in which it finds it, altering it as it now appears. It is a repetition of the section *plus* some alterations; and this entirely new section is intended to be worked into the previous section. I cannot draw therefrom the inference *expressio unius est exclusio alterius*. Now, it is said that this view is contrary to the decision of this court in the case of *Reg. v. Marsham (ubi sup.)*, which relates to paving expenses. I do not so consider it. On the contrary, I think it is quite consistent with that case. What that case decided was that, in order to recover the expenses of repairs, the local authority must show that there were repairs and that the money was expended in those repairs. But the court in deciding that expressly stated that the local authority is to be the judge of that. It is quite consistent with that case that there should be here thrown upon the local authority the burden of proof that those repairs were necessary. The question still remains, in whose judgment? And my answer is, in their judgment. The money has been expended in such repairs. I think that not only shows that this case is not concluded by the case of *Reg. v. Marsham (ubi sup.)*, but that the reasons I have given appear to give the true solution. Otherwise we should put upon this Act of Parliament a construction which I think would lead to the wildest confusion, and I do not think we ought to do that. I think this appeal must be dismissed with costs.

KAY, L.J.—I have come to the same conclusion. I think the question in this case is one of no easy solution, because this appeal seems to me to be an attempt to carry the decision in the case of *Reg. v. Marsham (ubi sup.)* very much beyond what that decision intended to lay down, and beyond what the learned judges who decided that case themselves expressed as the limit of their decision. In that case the section to be construed was sect. 195 of 18 & 19 Vict. c. 120, which enacts as follows: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved . . . or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same." Then by the subsequent Act (25 & 26 Vict. c. 102) the expenses so incurred by the vestry or board are to be apportioned among the owners of the adjoining houses, and they are to be compelled to pay their proportionate part. The application in that case was to the magistrate to compel one of the adjoining owners to pay his proportionate part, and what Lord Halsbury, then Lord Chancellor, said, in giving judgment, was this (1892) 1 Q. B. at p. 376: "It is clear that it is part of the duty of a board of works seeking to recover these payments from adjacent owners to establish two things: first, that the subject-matter in respect of which money is claimed is a subject-matter within the jurisdiction, or, in plain terms, that it is paving in respect of which they are seeking to recover; secondly, that the expenses have been actually incurred." But then, a little further on in his judgment,

the Lord Chancellor says: "The board were in my opinion bound to show that these expenses were paving expenses incurred within the statute, though, if they had once proved that fact, I do not in any way say that the magistrate had jurisdiction to inquire into the propriety or extravagance of the expenditure; that might be to embark upon an idle inquiry." Therefore, I take that case to have decided this, that, in order to recover the apportioned part from an adjoining house-owner, it is necessary to show that the paving had been done. Of course, it was also necessary to show that the expenses, the share of which it was sought to recover, were expenses in regard to that paving. But it was not necessary to go further, and show that the paving was proper and not extravagant or anything of that kind. That meant that the local board who did the paving were the body to judge, and had complete discretion vested in them to judge, what was proper to be done in making the pavement. Now, there are no words in the Act giving them that discretion in terms. But the learned judge seems to have inferred that it was the intention of the Legislature to vest a certain amount of judgment or discretion in them to the extent of determining what was proper paving to be done, and that discretion was left in the board who had to do that work. I have to apply that decision to this particular Act of Parliament. We are now construing 53 & 54 Vict. c. 66. Here we have words which are somewhat different. The words are, "Any vestry or district board shall from time to time execute any necessary works of repair upon any or any part of any carriage-road within their parish or district, which shall have been used for not less than six months for public traffic," and so on. I quite agree that the case of *Reg. v. Marsham (ubi sup.)* decided that, when these expenses had been apportioned, and the local board were seeking to recover a proportionate part for the work which had been done by them, they would be bound to show that the repairs had been done and certain moneys had been expended in those repairs. Having shown that, it seems to me that the decision in *Reg. v. Marsham (ubi sup.)* is satisfied. The case of *Reg. v. Marsham (ubi sup.)* does not go on to decide—nor was it necessary for the decision of that case to hold—that the word "necessary" in this Act which I have just referred to is also a matter which is to be brought for the decision of a magistrate when payment of the apportioned part is sought to be enforced. Then there remains the question, what did the Legislature mean by that word "necessary?" It must be necessary in the judgment of someone. Was it or was it not necessary in the judgment of the board who did the work? *Prima facie* one would think that a public body like a local board, who had authority vested in them to repair highways which they have not yet determined to pave, must have some discretion vested in them. The case of *Reg. v. Marsham (ubi sup.)* clearly shows that the judges in that case considered that a certain amount of discretion was to be vested in the board. And I think it is fair to say that this word "necessary," though it is used in the Act of Parliament and without any additional words, such as "which they shall deem necessary," or "which shall appear to be necessary," may yet be fairly construed to mean "necessary" in the

opinion of the local board who have to take upon themselves to do the work, pay for it in the first instance, and then apportion the expenses amongst the householders, and then recover it from them. I agree with what Lindley, L.J. says that this is really a condition to that legislative provision which enables the local board at their own discretion to pave a street of this kind, and that this is a sort of preparatory work which they are enabled to do before they take a particular street completely over and pave it. It would seem a very strange thing indeed if we were to construe this Act of Parliament as having this peculiar effect, that the extent of paving when they do pave is to be a thing entirely within the discretion of the local board, but that what are "necessary" repairs before the paving is a matter which is not to be in their discretion. That would make the Acts of Parliament strangely anomalous. Notwithstanding, therefore, the criticism which has been very fairly and very properly made on this Act of Parliament by comparing it with other enactments in which express discretion is given, I cannot bring myself to think that the learned judges in the court below were wrong in their decision. I do not think that they were wrong in holding that such a discretion as is involved in the word "necessary" must be a discretion confined to the local board, which has to do the work of repairs, and not to be exercised afterwards by the magistrate before whom the case may be brought a long time after the work has been done, and when proof that it was necessary may be more or less difficult to adduce. Certainly it would be a very expensive and troublesome litigation, because, whenever a householder was called upon to pay a proportionate share of the repairs, he would be able to say that they were not necessary. I think that would be a most inconvenient construction of the Act of Parliament, and one that is not, to my mind, sanctioned by the case of *Reg. v. Marsham (ubi sup.)* upon which reliance has been placed.

SMITH, L.J.—I also think that this appeal must be dismissed. The question that this court has to decide is, what is the true meaning of sect. 3 of the Act of 1890 (53 & 54 Vict. c. 66). The section gives power to any vestry or district board from time to time to execute any necessary works of repair upon any or any part of any carriage-road. Does that mean that a district board may from time to time execute any works of repair which the board deem necessary; or does it mean that they may from time to time execute any works of repairs which a magistrate thereafter shall adjudge to be necessary? Those are the two views of the section which the respective parties have put before us. Now, the two arguments which have been addressed to us, and very properly so, were these: One by Mr. Mattinson was as to the injustice of holding that the section means any works or repairs which the board deem necessary, because an owner of a house or land abutting on the road would have no opportunity of discussing or showing that the works were not necessary which were contemplated or being carried out. On the other side an argument has been put before us which was referred to by Charles, J. in his judgment. Certainly that argument has been answered, but I wish to say a word about the other argument as to its being an injustice to a householder who has a house or land abutting or opening on the road. It

[CT. OF APP.]

Re GASQUOINE; GASQUOINE v. GASQUOINE.

[CT. OF APP.]

is most remarkable if it is an injustice to him. If ever this road gets into the category of a street, there cannot be a doubt that the paving of that can be done if the vestry think it necessary and the landowner does not. That is perfectly clear and free from doubt, for it has been so decided. Indeed it is in the very words of the Act, so that there is no controversy about it. Then I come to the other Act which was passed in the year 1890, viz., 53 & 54 Vict. c. 54. It is quite clear that under that Act the footway running along land can be flagged by a local board without the assent of the landlord or his having anything to say in the matter. Then I come to the question about the carriage-way. Under the Act of 53 & 54 Vict. c. 66, a local board have power to repair, and I cannot see any hardship in that. If flagging can be done, why should not the other be done by them without consent? Now I want to make another remark about sect. 3. At the end of sect. 3, which we have discussed, it is expressly directed that the local board in repairing all roads shall not derogate from their rights which they then possessed of apportioning the cost of paving a road when it became necessary. Then a further portion of that section says that the expenses of repairing the road shall be recovered in the same way as if it had been paved. Taking all those circumstances into consideration, I ask myself how is this section to be read? It seems to me it must be read *pari passu* with the other section which I have already touched upon—that any vestry or district board may from time to time execute any works of repair which it may deem necessary. Now I come to the case of *Reg. v. Marsham* (*ubi sup.*). I think that case does not touch this point. That case decides that, when a thing is to be done by a local authority, which it may deem necessary, and that local authority seeks to get an apportionment from the frontager, it must prove that the paving *de facto* has been done, and that the money has been expended on that paving, and that the paving was that which the board deemed necessary; and it must be further proved that the expenses have been incurred upon that, and that the apportionment is proper. Now it is proved here that the repairs which the local board deemed necessary have been done, and that the money has been spent on these repairs. Under those circumstances my view is that the apportionment is recoverable. On these grounds I think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant. *Rexworthy* and *Stroud*.

Solicitors for the respondents, *W. W. Young* and *Son*.

Jan. 23 and 24.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re GASQUOINE; GASQUOINE v. GASQUOINE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Executor—Liability of, for default of co-executor—Bonds placed under sole control of defaulting executor—"Necessary" act.

Part of the estate of a testator consisted of

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

American railway bonds, of which he was the registered holder. The bonds were issued payable to bearer, but the holder had power to register them, after which they could only be transferred by entry in the books of the company. The owner could nevertheless unregister them so as to make them again payable to bearer.

The executors and trustees of the testator were his wife and two stockbrokers, J. and C., and the will of the testator empowered J. and C. to charge for business done by them as stockbrokers for his estate. J. had been employed by the testator in his lifetime as his stockbroker. The bonds not being securities authorised as an investment by the will, the executors had to take steps to convert them, and for that purpose two courses were open to them: either to sell and transfer the bonds as registered bonds, or to unregister them and then sell. The former course being extremely unusual, the executors unregistered the bonds and placed them in the hands of J. to sell. J. sold them, and from time to time paid various sums into a bank to the account of the testator's estate. But within eleven months after the testator's death J. absconded, having misappropriated a considerable part of the proceeds of the converted bonds.

Held, that an act was not "unnecessary" if it was done by executors in the ordinary course of business in administering their testator's estate; that the unregistering the bonds and handing them to J. to sell were therefore not "unnecessary;" and that the co-executors were not liable for J.'s misappropriation.

Held also, that, as J. was trusted by the testator, and his co-executors had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make them liable.

Clough v. Bond (3 My. & Cr. 490); and *Barber v. Townsend* (1 Dick. 356) considered.

Decision of Kekewich, J. (69 L. T. Rep. N. S. 822) affirmed.

ROBERT GASQUOINE, by his will, dated the 6th Dec. 1889, appointed his wife Mary Elizabeth Gasquoine and George James and George Croft Chamberlain executors and trustees, and, after bequeathing certain pecuniary and specific legacies, he bequeathed to his trustees the sum of 8000*l.* upon trust to invest the same and to pay the income thereof to his wife for life, and after her death to divide the corpus among his three children in equal shares. He devised and bequeathed all his real and personal estate not thereby otherwise disposed of, subject to the payment of his funeral and testamentary expenses, debts, and legacies, to his trustees upon trust for his three children in equal shares, each share to vest at his death. In the event of any child of his dying in his lifetime he gave the share of each such child to his or her children. He declared that it should be lawful for his trustees from time to time to arrange with any one or more of his children or grandchildren entitled to any share of his estate that, as regarded any specific part of his property for the time being remaining unsold or not consisting of money, the same instead of being sold and converted into money should be taken by such children or grandchildren in satisfaction or part satisfaction of their shares at a price to be agreed upon by the trustees and the person or persons taking the same. He empowered

his trustees to invest in Government securities, Bank stock, debentures, debenture stock, guaranteed or preference stock or shares of railway companies, real or leasehold securities in England or Wales, or upon corporation or dock bonds. He declared that James and Chamberlain, or any future trustee who might be a stock and share broker, should be entitled to charge for all business done by him in relation to the estate in the same manner as he would have been entitled to charge the executors and trustees for the same if he had not been himself an executor or trustee, but had been employed by the executors and trustees to do such business as their stock and share broker.

The testator died on the 28th June 1890, and his will was shortly afterwards proved by all three executors.

Both James and Chamberlain were stock and share brokers, and were friends of the testator. James had been employed by the testator in his lifetime as his stockbroker.

Among the property left by the testator at his decease were numerous bonds of the Grand Trunk Junction Railway Company, the Erie Railway Company, and other American railway companies.

The bonds of the Grand Trunk Junction Railway Company contained the following provisions:

This bond and all the rights and benefits arising therefrom shall pass by delivery, and at the option of the holder thereof may be registered for the time being in the company's books at its office in the City of London, England, such registry being noted on the bond by the company's transfer agent or officer. After such registry no transfer shall be valid unless made in the company's books by the person registered for the time being as the said owner thereof, which transfer shall also be noted in the bond.

After registration as herein provided, and before the coupons shall be detached, the holder may transfer this bond in the company's books to the bearer, and thereafter it shall pass by delivery, but shall continue subject to successive registrations and transfer to bearer as aforesaid at the option of each holder.

The bonds of the other companies contained similar provisions.

The London agent of the Erie Railway Company gave evidence to the effect that he had under his control the registration and unregistration of bonds of that company. The bonds were payable to bearer. If a holder wished to register a bond, he could do so. If he wished to register he had to execute a transfer to himself from bearer, and then the registrar entered on the back of the bond the date of the transaction and the name of the holder. If he then wished to sell the bond he might adopt either of two courses: he might transfer it as a registered bond, in which case it would remain a registered bond, but registered in a new name; or he might execute a transfer to bearer, in which case the registrar would mark the bond as payable to bearer. The witness deposed that the former course was very unusual, and that he did not remember an instance of its having been taken, though he knew cases of bonds registered in the name of a testator being transferred to his executors as registered holders.

The bonds of the other companies appeared to be governed by the same rules.

On the 26th July 1890 James wrote thus to Mrs. Gasquoine:

Will you kindly sign the inclosed slip over my signature, and I shall be glad if you will post it in the inclosed envelope to-morrow. The slip is to enable the company to unregister the bonds out of Mr. Gasquoine's name so that we can sell the bonds. Everything is proceeding satisfactorily with the estate.

The slip was as follows:

We hereby request you to convert the bonds numbered as under [number of the bonds] now registered in the books of the company in our names to bearer bonds, and deliver them to Messrs. Hirst, Daniell, and Co., of 11, Copthall-court, E.C.

Hirst, Daniell, and Co. were the London agents of James, who was acting as stockbroker in the sale of the bonds.

The slip was duly signed by the three executors, and other slips of a similar character were signed by them at different times down to the early part of Nov. 1890, so that all of them were placed under the sole control of James.

The bonds were all disposed of before the end of Nov. 1890.

Down to the early part of that month James paid into the account of the testator's estate sums arising from sale of the bonds to the amount of more than 12,000*l.* But he retained and applied to his own use sums amounting to between 8000*l.* or 9000*l.*

In April 1891 Chamberlain applied to James for information about the sales, and was told that James hoped to get the matter closed before the end of June 1891.

In May 1891 James absconded. Up to that time he was in good repute and carried on a large business as a stockbroker, but he had for some time been in fact insolvent.

This action was brought by the testator's children against the trustees and executors seeking to make the co-trustees liable for the loss occasioned by James's defalcations.

On the 17th Nov. 1893 the action came on for trial before Kekewich, J., when his Lordship decided that the co-trustees were not liable (69 L. T. Rep. N. S. 822).

From that decision the plaintiffs now appealed.

Renshaw, Q.C. and *Yate Lee* for the appellants.

— Whether the defendants are regarded as executors or as trustees they were guilty of negligence in allowing James to convert the bonds into bonds to bearer in the way they did. There was a safe way as well as an unsafe way of converting the bonds, and their adopting the unsafe plan of unregistering the bonds was a wholly unnecessary act, by which they placed the bonds in the sole control of James. Consequently they are liable for his dealings with them:

Candler v. Tillett, 22 Beav. 257.

[*KAY, L.J.*—The doctrine there laid down must be qualified by introducing the word "unnecessarily," as in *Townsend v. Barber* (1 Dick. 356). See also *Clough v. Bond*, 3 My. & Cr. 490.] The act here was an unnecessary act, as there was a safer, if not perhaps so convenient, mode of converting the bonds. It does not appear that it is the practice to unregister bonds until they are sold. The bonds ought not in common prudence to have been sent to the broker until they were sold. According to *Speight v. Gaunt* (50 L. T. Rep. N. S. 330; 9 App. Cas. 1) the defendants

CT. OF APP.]

Re GASQUOINE; GASQUOINE v. GASQUOINE.

[CT. OF APP.]

could have employed a broker in the ordinary course of business. The co-executors knew that the bonds were in the sole control of James from Nov. 1890, and from that time till his absconding in May 1891 they did nothing more than make an occasional inquiry how the sales were going on. It is no answer to say that it would have been of no use to press James, as the money had been already misapplied before the end of 1890:

Mendes v. Guedalla, 2 J. & H. 259.

The result of the authorities on this subject is correctly stated in Lewin on Trusts, 8th edit. p. 265.

Warmington, Q.C. and *R. N. Arkle*, for the respondents, were not called upon to argue.

LINDLEY, L.J.—This case is one of those unfortunate cases in which it is sought to make several executors and trustees answerable for a fraud committed by one of their number. His co-trustees have not been guilty of any fraud. That they were honest there is no doubt. Whether they were or were not careless is another matter. The court is naturally loth to make innocent persons liable for loss occasioned by another. The testator appointed three persons to be executors and trustees, namely, his widow and two men of business, stockbrokers. By his will he enables them to charge for business done by them as stockbrokers in regard to his estate, which shows that he treated them as proper persons to act as such for his estate. It is not necessary for me to read the will. It is sufficient to say that it authorised a realisation of the estate, so that it could not be considered improper for the executors to sell the bonds in question, which were not securities authorised as an investment by the will. To show that they were persons entitled to deal with the bonds they had to send in the probate to the company's office. The bonds were American railway bonds registered in the testator's name and payable "to bearer." There are more ways than one of transferring securities such as these. One was, for the executors to have transferred the registered bonds to a purchaser; and the other was, to have made the bonds payable to bearer by unregistering them, and then to have sold them. The course taken in this particular case was the latter one I have mentioned. James, who had been the testator's own stockbroker, wrote to Mrs. Gasquoine on the 26th July 1890 requesting her to sign the inclosed slip over his signature. The slip he said was to enable the company to unregister the bonds out of Mr. Gasquoine's name so that the executors could sell the bonds. Mrs. Gasquoine accordingly signed the slip, and so also did Chamberlain. A similar process was gone through afterwards in respect to the bonds in other companies. The result was, that the bonds were converted into bonds "to bearer." How the bonds were got out of the safe and turned into "bearer" bonds is a little uncertain, but that they were got out somehow is evident. They were sent to Hirst and Co., the London agents of James. Hirst and Co. sold them and remitted the money to James. He has misapplied a considerable part of it. It is said that the co-trustees are responsible for all the misappropriated bonds, because they placed the bonds unnecessarily under James's sole control, and trusted him with the power to misappropriate them. The whole question which we have to

determine turns on what is the meaning of "unnecessary." I take the statement of the law from the case of *Clough v. Bond* (3 My. & Cr. 490), where all the principal authorities are collected and dealt with, and are also referred to in Williams on Executors (9th edit. vol. 2, p. 1709). Lord Cottenham, in that case (at p. 496), says: "It will be found to be the result of all the best authorities upon the subject that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*Phillips v. Phillips*, Freem. Ch. Ca. 11); or if he leave money due upon personal security, which, though good at the time, afterwards fails: (*Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290.) And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorised fund. Thus he is not liable upon a proper investment in the 3 per cents. for loss occasioned by the fluctuations of that fund (*Peat v. Crane*, 2 Dick. 499, note); but he is for the fluctuations of any unauthorised fund: (*Hancom v. Allen*, 2 Dick. 498; *Howe v. Lord Dartmouth*, 7 Ves. 137, see page 150.) So when the loss arises from the dishonesty or failure of anyone to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property he will be liable, although the person possessing it be a co-executor or co-administrator: (*Langford v. Gascoyne*, 11 Ves. 333; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ib. 477; *Underwood v. Stevens*, 1 Mer. 712; and see *Hanbury v. Kirkland*, 3 Sim. 265.) The question we have to ask ourselves, taking that as good law—and I believe it is as good law now as it was in the days of Lord Cottenham—is, did these co-executors convert these bonds into bonds "to bearer" in the ordinary course of business, and did they in the ordinary course of business allow James to have sole control over the bonds? It seems to me that they did. So far as I can see there was no negligence in that part of the transaction. It is true that, if they had been suspicious of James, they might have exercised greater caution; but it does not appear that there was anything to excite suspicion, and it cannot be said that they were not justified in acting as they did, as they appear to have followed the regular course of business in administering the estate. But it is

[CT. OF APP.]

Re GASQUOINE; GASQUOINE v. GASQUOINE.

[CT. OF APP.]

urged that the co-executors were guilty of negligence in not looking more closely into James's proceedings. But I do not agree with that contention. Perhaps, if they had suspected him and watched him more closely, the loss might have been avoided. But considering that James was a person trusted by the testator, and whom they had, as I have already said, no reason to suspect, and that the whole of these transactions took place well within a twelvemonth after the testator's death, I do not think that they were guilty of any such negligence as can make them liable for the loss. I think, therefore, that the decision arrived at by Kekewich, J. was correct, and that we cannot make these defendants responsible for the fraud of their co-executor. The appeal must therefore be dismissed with costs.

KAY, L.J.—I agree. The will in this case is simple. [His Lordship read the material portions of it, and continued:] At the death of the testator part of his property consisted of securities which were not authorised by the terms of the will. What was the duty of the executors in such a case? Their duty was clear. Within one year of the testator's death they should have paid the testator's debts, set apart the sum of 8000*l.* which must have been invested in authorised securities, and finally handed over the residue to the residuary legatees. Until all this was done their duties as executors were not fully discharged. I think accordingly that the learned judge in the court below was wrong in treating these persons as trustees rather than as executors. What, then, is the law as to the liability of executors for the default of a co-executor in whose sole power they have placed assets? It is stated by Lord Cottenham in the passage in *Clough v. Bond* (*ubi sup.*) read in the judgment of Lindley, L.J. Besides that case I would refer to the case of *Townsend v. Barber* (1 Dick. 356), where the general rule is stated by Sir Thomas Clarke, M.R. thus: "Where one executor receives the whole or part of his testator's estate, and pays it over voluntarily and unnecessarily to his co-executor, and the same is embezzled; if embezzled or lost he who so paid it over is answerable." Observe that the emphatic words there are "voluntarily and unnecessarily." Lord Romilly, in *Candler v. Tylett* (22 Beav. 257), states the rule thus (p. 263): "If one executor does any act which enables his co-executor to obtain sole possession of money belonging to the testator's estate which but for that act he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money is liable to make good the loss." There is no exception to be taken to that statement of the rule if you introduce the word "unnecessarily." The co-trustees are liable if the act is an unnecessary one, but the act must be unnecessary. In the present case it is important to observe that two of the executors were stockbrokers, and that the will contains a clause enabling an executor and trustee who is a stockbroker to charge for stockbroking business done by him for the estate as if he were not an executor or trustee. This shows that the testator contemplated their acting as stockbrokers in respect of his estate. So far, therefore, there was nothing wrong in allowing a stockbroker who was one of the trustees to have the possession of these bonds for the purpose of converting them into money.

It might be the best course for raising the 8000*l.*, and might be the course most beneficial for the residuary legatees, that these foreign bonds should be realised. What was done was this: The bonds were registered in the name of the testator. The trustees might have taken one of two courses. They might have sold and transferred the bonds as registered bonds; or they might have converted them into unregistered bonds payable to bearer, and then have sold them. What they did was to unregister the bonds and turn them into bonds "to bearer." That latter course is so much the more usual course that the registrar of one of the railway companies who gave evidence says that he has never met with an instance in which the other course had been taken. Here comes in the meaning of the word "necessary." As to what is "necessary" or "unnecessary," I find in *Clough v. Bond* (*ubi sup.*) the following passage in the judgment of Lord Cottenham, that if an act is one which is required by the regular course of business it is not an unnecessary act. The same principle is stated in *Speight v. Gaunt* (50 L. T. Rep. N.S. 330; 9 App. Cas. 1), where it was held that a trustee was justified in employing a broker if he followed the usual and regular course of business adopted by ordinary prudent men. I therefore come to the conclusion, after careful consideration, that these executors—and I prefer to treat them as executors rather than as trustees—in acting in the way they did, in putting the conversion of these bonds into the hands of James as stockbroker, were not acting in an unnecessary way within the meaning of the rules as to unnecessary acts, and consequently I consider they are not liable for James's misapplication of the proceeds. But then it is said that still the co-executors ought to be held liable because they allowed James to retain the money too long a time without calling him to account, and that they ought to have looked into the case more sharply, for if they had they would have found that James was not acting rightly, and that, although Chamberlain made some inquiries, he was too readily satisfied with the answer given him by James. In the first place, I cannot see that the co-executors were guilty of any unreasonable delay, because James was selling the bonds from time to time, and from time to time he paid money into the bank to the account of the executors, so that there was no reason to suspect him or to suppose that he was dealing in any other way with the bonds which remained unsold. It would be pressing the rule against executors very harshly indeed if we said otherwise. I think, therefore, that it was not unreasonable for Chamberlain to be satisfied with James's answer. A year had not expired, for James became bankrupt and absconded within a year of the testator's death. Up to that time there was no reason for suspecting him. It was then discovered that he had misappropriated the bonds. I do not think that under these circumstances it would be fair treatment of honest trustees to make them liable in a case like the present. I think the appeal fails, and must be dismissed with costs.

SMITH, L.J.—I entirely agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *Flux, Leadbitter, and Paterson*, agents for *Thomas Drake*, Huddersfield.

CT. OF APP.]

COX v. COX.

[CT. OF APP.]

Solicitors for the respondents, *Pritchard, Englefield, and Co.*, agents for *Arthur S. Mather*, Liverpool.

Wednesday, Nov. 29, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

COX v. COX. (a)

APPEAL FROM THE DIVORCE DIVISION.

Divorce — Pleadings — Wife's answer — Undue familiarities alleged against petitioner — Motion to strike out — Refusal — Matrimonial Causes Act 1857, s. 31.

A husband petitioned for a divorce upon the ground of his wife's adultery. The wife, in her answer, denied the adultery, pleaded condonation, and alleged as follows: "That in and since the year 1887 the petitioner has paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house, and corresponded with her notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has absented himself from the respondent's society in order to enjoy the society of the said lady; and has frequently told the respondent that he has been fascinated by the said lady, and that he would have run away with her if she had consented; that in and since the year 1890, the petitioner has paid marked attention to another lady, and has refused to give up his intimacy with her, notwithstanding the respondent's objections and remonstrances, and that he has been guilty of acts of undue familiarity with the said lady;" and that the petitioner, by such wilful neglect and misconduct, had conduced to the adultery (if any) of the respondent. The following particulars were subsequently filed in respect of the statements: "The name of the unmarried lady was Miss A., and the flirtation extended from the year 1887 to the filing of the petition. The name of the unmarried lady was Miss B., and the flirtation extended from the 12th Nov. 1892 to the filing of the petition; and the act of familiarity spoken of, the petitioner putting his arm round her waist, and she sitting on his knee at . . . in the month of Dec. 1892, and his arm round her waist on the 2nd Jan."

Held, that, if the facts alleged were proved, it was not impossible that the judge might come to the conclusion that the husband had by his neglect conduced to the wife's adultery, and therefore the Court would not order them to be struck out.

Decision of the President (Sir F. H. Jeune) affirmed.

In this case the husband petitioned for a divorce. The wife denied the adultery charged against her, alleged condonation of the adultery (if any), and further pleaded, in addition to several counter-charges of adultery which she made against her husband,

3. That in and since the year 1887 the petitioner has

(a) Reported by H. DURLEY GRAZEBROOK and W. C. BISS, Esqrs., Barristers-at-Law.

paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him, he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house and corresponded with her, notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has absented himself from the respondent's society in order to enjoy the society of the said lady, and he frequently told the respondent that he has been fascinated by the said lady, and that he would have run away with her if she had consented.

4. That in and since the year 1890 the petitioner has paid marked attention to another lady, and has refused to give up his intimacy with her, notwithstanding the respondent's objections and remonstrances, and that he has been guilty of acts of undue familiarity with the said lady.

5. That the petitioner, by his wilful neglect and misconduct, as set forth in paragraphs 3 and 4 of this answer, has conduced to the adultery (if any) of the respondent

Particulars of paragraphs 3 and 4 respectively were given, as follows:—

The name of the unmarried lady was Miss A., and the flirtation extended from the year 1887 to the filing of the petition.

The name of the unmarried lady was Miss B., and the flirtation extended from the 12th Nov. 1892 to the filing of the petition, and the act of familiarity spoken of consisted of the petitioner putting his arm round her waist, and she sitting on his knee, at . . . in the month of Dec. 1892, and his arm round her waist on the 2nd Jan.

The registrar struck out the paragraphs, but, upon appeal to the judge in chambers, they were ordered to be restored.

On the 13th Nov. 1893 the petitioner moved before the President by way of appeal from the order made in chambers.

Sir E. Clarke, Q.C. and Kisch, for the petitioner, moved the court.

Lockwood, Q.C. and Searle for the respondent.

The PRESIDENT.—I find great difficulty in striking out these paragraphs, though I quite agree that they do not constitute a strong charge. All the allegations they contain are matters of discretion, but unless I can say, as I am asked to do, that they are so immaterial or frivolous that they could not, if proved, constitute, under the Divorce Act, a ground for the exercise of my discretion, I ought not to strike them out at this stage of the proceedings. I agree with the suggestion that the misconduct mentioned in the statute must be misconduct of a matrimonial kind—misconduct that conduces in some way to the adultery of the wife, and which induces it directly. It is not sufficient that the adultery may be the indirect outcome of it, as in the case of *Cunnington v. Cunningham* (1 Sw. & Tr. 475). Agreeing, as I do, with that suggestion, can I accept the hypothesis that no marital misconduct of the husband, short of adultery, can conduce to the adultery of the wife? It appears to me to be impossible to say that the misconduct specified in these paragraphs, if true, cannot possibly have conduced to the respondent's adultery. It was conceded that, if a husband were to show indecent books and photographs to his wife, that might constitute such misconduct. Indecent familiarities with another woman, mentioned by the husband himself to his wife, must have at least as great an effect upon her as showing her indecent books and photographs. Can one say that undue

familiarities of any kind with another woman may not so conduce? Whether they do so, or not, must depend on a vast variety of circumstances. It is impossible for me to say that no such misconduct could, in law, possibly conduce to the adultery of the wife. The matter may be put upon another ground. The Act clearly provides that wilful neglect conducing to adultery may bar relief. What is wilful neglect? If it should be shown that the husband, without leaving the house, and while still living under the same roof with his wife, leaves his wife to herself and neglects her society for that of another woman, I am not at all sure that that would not be wilful neglect within the meaning of the statute. In *Duplany v. Duplany* (66 L. T. Rep. N. S. 267; (1892) P. 53) I held that, under all the circumstances of that case, the conduct of the wife did not conduce to the adultery of the husband. But there were a number of circumstances before me in that case. I do not say what the result may be here. That will depend on the circumstances of this case, when the whole of the evidence has been laid before the court. But I cannot bring myself to say that the statements contained in these paragraphs are either so clearly wrong in law, or so frivolous, that they ought to be struck out. I therefore uphold the order which I made in chambers, restoring these paragraphs, and I dismiss this appeal, with costs.

From this decision the petitioner appealed.

Sir Edward Clarke, Q.C. and Kisch for the appellant.—The facts alleged are immaterial and frivolous, and at the most amount to a charge of flirtation. If proved they do not amount to such "wilful neglect or misconduct as has conduced to the adultery" sufficient to justify the court under sect. 31 of the Matrimonial Causes Act 1857 in refusing to grant the divorce. The misconduct there referred to must be misconduct of a matrimonial character which directly conduced to the adultery. The refusal to give up the friendship of a particular woman is not sufficient. There is no allegation that any acts of undue familiarity were known to the wife before her misconduct. The allegations do not amount to desertion or wilful neglect. If this decision is affirmed, every guilty wife will make similar vague allegations. They ought to be struck out as being oppressive to the ladies mentioned. They are vague allegations against various unmarried ladies, whose names are introduced into the pleadings, and if proved they amount to nothing. If their names are not on the record they would not be mentioned by counsel unless there were some good reason. They are not charged with misconduct, and cannot intervene. The cases show that only such wilful neglect is sufficient as puts the wife in such a position that it is probable or natural that she should misconduct herself:

Cunnington v. Cunningham, 1 Sw. & Tr. 475;

Baylis v. Baylis, 16 L. T. Rep. N. S. 613; L. Rep. 1 P. & D. 395;

Barnes v. Barnes, 17 L. T. Rep. N. S. 268; L. Rep. 1 P. & D. 505;

Dering v. Dering, 19 L. T. Rep. N. S. 48; L. Rep. 1 P. & D. 531;

St. Paul v. St. Paul, 21 L. T. Rep. N. S. 108; L. Rep. 1 P. & D. 739;

Duplany v. Duplany, 66 L. T. Rep. N. S. 267; (1892) P. 53.

Lockwood, Q.C. and Searle, for the respondent, were not called on.

LINDLEY, L.J.—This is an application to strike out certain paragraphs from a wife's defence, and from the particulars given at the instigation or request of the husband, and the question is whether we can go, or ought to go to the length of ordering the passages to be summarily struck out. Now, the question is a curious one, because sect. 31 of the Matrimonial Causes Act 1857 not only states certain grounds of defence to petitions for divorce, but it states that, although there may be no defence, circumstances may exist which, in the discretion of the judge who tries the case, may induce him not to grant a divorce. Therefore we have not to consider ordinary pleadings with which we are all familiar, both at common law and equity, pleading facts which do not admit questions of degree or discretion; but we have to consider a case in which degree is everything, and in which the discretion turns upon the degree, and we are asked to strike out passages which state in a concise form that which the wife alleges against her husband. In proof of these very concise statements evidence may be given clothing the skeleton with flesh and blood, and produce a picture which may justify a judge in declining to grant relief. If that is so, it is impossible to say that we ought to strike them out. To do that now would be, to my mind, to adjudicate the case upon a wrong standard. It would be to adjudicate upon a question of degree, not upon the facts proved, but upon the short concise statement of them. I think it would be wrong; and without expressing any further opinion upon the case I think that the view of the learned President was right, who said in effect: "I shall not strike these paragraphs out. Let me see the picture complete, then I will exercise my discretion." I think that was quite right.

SMITH, L.J.—As to these three paragraphs in this defence, if we could see that in no conceivable view they could serve any purpose, then I should agree they ought to be struck out. But I have read and re-read the paragraphs, and I cannot bring myself to that conclusion. I agree with the law stated by Sir Edward Clarke and with the authorities he produced, beginning with *Cunnington v. Cunningham*, and finishing up with the case before Lord Penzance which I will call attention to in a moment. I take it to be settled that wilful neglect which has conduced to the adultery is neglect towards the other party which has conduced to the adultery. That is the meaning of *Cunnington v. Cunningham*, which was a case in which a man involuntarily got ten years' penal servitude, which was said to have conduced to the adultery, but it was held that would not do. Without referring to the intermediate cases, I will simply refer to the judgment of Lord Penzance in *St. Paul v. St. Paul*, in which case, in my judgment, he lays down the law very concisely: "Further it is only fair to the wife herself to permit her to come to the court and say, 'Notwithstanding that I have sinned, my sins really have been brought about, or very much helped forward, by the carelessness, neglect, and indifference of my husband.' That is a matter which clearly ought to be taken into consideration in favour even of a guilty wife." Further on he lays it down that wilful neglect or default must mean wilful neglect or default conducing to the adultery. I ask myself on reading these paragraphs, "Is there no case which can be

CT. OF APP.]

MARTIN v. PRICE.

[CT. OF APP.]

made of neglect by the husband of the wife which conducted or might have conducted to the adultery?" I cannot say "No." Mr. Kisch has tried to fritter it away, and talked as if this was only a flirtation, and that a statement made by a husband to a wife that he would run away with a lady is made in the nature of a joke. I do not read this paragraph in such light. It begins: "That in and since the year 1887," and when I add that to the particulars it must read, "In and since the year 1887 down to the date of the petition," which was the 13th Jan. 1893, that is five or six years, "the petitioner has paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him he has told her that he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house and corresponded with her, notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has absented himself"—I read that as meaning during that period—"from the respondent's society in order to enjoy the society of the said lady; and he frequently told the respondent that he was fascinated by the said lady, and that he would have run away with her if she had consented." Now, I ask myself, if all these facts are proved, and if this skeleton, as Lindley, L.J. called it, were filled up with flesh and blood, is it absolutely impossible that those facts could have conducted to the adultery? I do not say whether they might or not, but it seems to me it is a case which the respondent is entitled to make against the petitioner. It may come to nothing, for all I know, but it ought not to be struck out at this period of the inquiry.

DAVEY, L.J.—I agree.

Solicitors for the petitioner, *Greenwood and Greenwood*.

Solicitors for the respondent, *Wontner and Sons*.

Dec. 7, 8, 9, and 19, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

MARTIN v. PRICE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Light—Future injury—Injunction or damages—Jurisdiction—Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2.

The plaintiff, a lessee with about thirty years of his term unexpired, brought an action to restrain the defendant from interfering with his ancient lights by rebuilding a house higher than the house which he had pulled down, and he also claimed damages. The judge found that the plaintiff had sustained, and when the intended building was completed would further sustain, material injury entitling him to substantial damages, but refused to grant the injunction and awarded damages only.

Held, that the plaintiff's legal right and its infringement, and threatened further infringement to a material extent being established, and there being no circumstances on which he ought to be deprived of his prima facie right, he was entitled to an injunction restraining the defendant from continuing to build higher than the

old building, and to an inquiry as to the damages sustained by reason of the building already erected beyond that height.

Decision of Kekewich, J. (69 L. T. Rep. N. S. 712) reversed.

Whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed but only threatened and intended, quære.

THIS was an appeal by the plaintiff from a judgment of Kekewich, J. (reported 69 L. T. Rep. N. S. 712) refusing an injunction but awarding damages instead in respect of injury to ancient lights.

The facts as stated by Lindley, L.J. were as follows: The plaintiff is the lessee of a house in Temple-street, Birmingham. His lease will expire thirty years hence or thereabouts. He does not occupy the house himself, but has sublet it to various persons. Part is an hotel held on a sublease which will expire in 1901. Part is let to an auction and estate agent on a lease which will expire in Dec. 1894. Other parts are let to other people from year to year. Some of the windows in the plaintiff's house are ancient lights. Temple-street runs north and south and is from 35ft. to 37ft. wide. Opposite to the plaintiff's house, which has a considerable frontage, was a large house having a frontage of 77ft. and an elevation of 37ft. or thereabouts above the level of the street. This house was the property of the plaintiff's lessor, and was let to the defendant and was pulled down by him. He proposed to erect in its place a handsome building some 25ft. higher than before, and when the writ was issued part of the front wall of the new building having a frontage of 27ft. had been erected to a height of 24½ ft. higher than the old building, but no other part of the new building had been carried up higher than 37ft.

On the 10th Oct. 1893 the plaintiff commenced this action for an injunction to restrain the defendant from building higher than the old house, and to compel him to pull down so much as was higher already. The writ also claimed damages. An interim injunction was granted on the 11th Oct., and a motion for an injunction was made on the 27th, and the hearing of it was treated by consent as the trial of the action. Evidence was taken by the learned judge, and on the 18th Nov. 1893 he gave judgment for the plaintiff for 120l. for liquidated damages and compensation for actual and possible interference with the ancient lights of the plaintiff according to the present building plans of the defendant, and he ordered the defendant to pay the costs.

From this decision the plaintiff appealed.

Warmington, Q.C. and Renshaw, Q.C. for the appellant.—The judge found that the interference with the plaintiff's ancient lights was already substantial, and would be greater when the intended buildings were completed. Therefore, in the absence of any equity against him, he is entitled to a mandatory injunction, and the judge had no jurisdiction to refuse it and give damages in lieu thereof:

Yates v. Jack, 14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. App. 295;

Scott v. Pape, 54 L. T. Rep. N. S. 399; 31 Ch. Div. 554;

Aynsley v. Glover, 31 L. T. Rep. N. S. 219; L. Rep. 18 Eq. 544;

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Krehl v. Burrell, 40 L. T. Rep. N. S. 637; 11 Ch. Div. 146;
Hackett v. Baiss, L. Rep. 20 Eq. 494;
Moore v. Hall, 38 L. T. Rep. N. S. 419; 3 Q. B. Div. 178.

The amount of damages given by Kekewich, J. is substantial, and before Lord Cairns' Act was passed an injunction would have been granted. That Act must be considered with reference to the difficulty it was passed to meet, namely, that if the Court of Chancery did not consider that a plaintiff was entitled to an injunction, it could only dismiss his bill, and leave him to obtain damages in a common law court. It was not intended to take away any right which a plaintiff had, but to extend the jurisdiction of the Court of Chancery. In *Smith v. Smith* (32 L. T. Rep. N. S. 787; L. Rep. 20 Eq. 500) Jessel, M.R. said the discretion given by that Act to substitute damages for an injunction "must be a judicial discretion, exercised according to something like a settled rule." Lord Cairns' Act has no reference to anticipated injury, and Kekewich, J. had no jurisdiction to award damages in lieu of an injunction and direct an inquiry as to the damage which would be caused by the building of that part of the house which it was intended to build higher than the old house:

Dreyfus v. Peruvian Guano Company, 62 L. T. Rep. N. S. 518; 43 Ch. Div. 316.

In *Lady Stanley of Alderley v. Earl of Shrewsbury* (32 L. T. Rep. N. S. 248; L. Rep. 19 Eq. 616) and *National Provincial Plate Glass Insurance Company v. Prudential Assurance Company* (37 L. T. Rep. N. S. 91; 6 Ch. Div. 757) damages were given in place of an injunction in consequence of the conduct of the plaintiff. Here no objection can be taken to anything the plaintiff has done or omitted to do. In *City of London Brewery Company v. Tennant* (29 L. T. Rep. N. S. 755; L. Rep. 9 Ch. App. 212) the plaintiffs failed to make out that they had suffered any substantial damage. The case of *Holland v. Worley* (50 L. T. Rep. N. S. 526; 26 Ch. Div. 578) has never been followed, and cannot be reconciled with the practice of the court. It was not followed by Bacon, V.C. in *Greenwood v. Hornsey* (55 L. T. Rep. N. S. 135; 33 Ch. Div. 471), and was explained by Kekewich, J. in *Dicker v. Popham, Radford, and Co.* (63 L. T. Rep. N. S. 379). In *National Telephone Company v. Baker* (68 L. T. Rep. N. S. 283; 1893) 2 Ch. 186 Kekewich, J. said (1893) 2 Ch. 196, referring to *Holland v. Worley*: "That case has not commanded the approbation of the profession." Therefore the plaintiff is entitled to an injunction protecting his ancient lights in the state in which they were at the date of the writ. But at any rate there ought to be an inquiry as to the damages. There was not sufficient evidence on the subject before Kekewich, J., and the plaintiff is entitled to more than he awarded. They also referred to

Goodson v. Richardson, 30 L. T. Rep. N. S. 142; L. Rep. 9 Ch. App. 221, 225;
Sayers v. Collyer, 51 L. T. Rep. N. S. 723; 23 Ch. Div. 103;

Dent v. Auction Mart Company, 14 L. T. Rep. N. S. 827; L. Rep. 2 Eq. 238.

[DAVEY, L.J. referred to *Rochdale Canal Company v. King*, 2 Sim. N. S. 78.]

Jelf, Q.C. and *Inghen* for the defendant.—The matter was one for the judicial discretion of the judge in the court below. After hearing the

evidence, he exercised his discretion by giving damages instead of an injunction, and this court will not interfere. There was plenty of evidence on which he could form an opinion. If this defendant were prevented from completing the building, the value of that part which has been built would be seriously lessened. In *National Provincial Plate Glass Insurance Company v. Prudential Assurance Company* (*ubi sup.*), on the interlocutory application for an injunction, Jessel, M.R. said: "In the first place, there was an absolute power given to the court by 21 & 22 Vict. c. 27, s. 2, in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to or in substitution for such injunction." And at the trial Fry, J. awarded damages in lieu of the injunction, and his reasons for doing so apply to this case. In *Smith v. Smith* (*ubi sup.*) an injunction was granted, but the principles on which the court will act are stated, and show that in this case damages were correctly given in lieu of an injunction. There is no injury here which cannot be fully and properly compensated by damages. The words of Lord Cairns' Act are quite general; it provides that in "all cases" the judge may give damages in lieu of an injunction. This was done in *Holland v. Worley* (*ubi sup.*), and also in *Lady Stanley of Alderley v. Earl of Shrewsbury* (*ubi sup.*).

Renshaw in reply.—In *Lawrence v. Horton* (62 L. T. Rep. N. S. 749) a mandatory injunction was granted, although the building was completed. In *Aynsley v. Glover* (*ubi sup.*) Jessel, M.R. referred to a case in which he had granted damages instead of an injunction, although the injury was sufficient perhaps to maintain an injunction, but was very trifling, comparing it with the injury which would be inflicted on the defendant by an injunction; and in his judgment in *Dicker v. Popham, Radford, and Co.* (*ubi sup.*), Kekewich, J. said that was a case of *Batt v. The Earl of Derby*, and that the defendants (the Peabody trustees) had already erected the building complained of, which was a very large one, and the plaintiff was the owner of a small public-house, in which the light of two rooms was interfered with.

Cur. adv. vult.

Dec. 19.—LINDLEY, L.J. delivered the judgment of the court, and after stating the facts set out above, continued as follows:—The plaintiff has appealed on the ground that he is entitled to an injunction, and that the learned judge had no jurisdiction to award damages in lieu of an injunction in respect to that part of the house which was not yet higher than the old building which the defendant had pulled down. The plaintiff also complains that the learned judge had no sufficient materials for estimating the amount of damages, no evidence having been adduced by him on that point, he wanting an injunction and not damages. The defendant has given no cross-notice of appeal, but he has contended that the learned judge had jurisdiction to do what he did; that whether an injunction should be granted or damages awarded was a matter for the discretion of the judge, and that, even if an appeal from the exercise of such discretion will lie, there are no grounds which will justify the Court of Appeal in interfering with its exercise in this per-

CT. OF APP.] *Re BRIDGER; BROMPTON HOSPITAL FOR CONSUMPTION v. LEWIS.* [CT. OF APP.]

ticular case. The defendant, moreover, contended that the interference with the plaintiff's lights was and would be so small that the damages awarded were extremely liberal, if not extravagant. The question whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand, this court, in *Dreyfus v. Peruvian Guano Company* (*ubi sup.*), expressed a clear opinion against the existence of such jurisdiction. On the other hand, it has been very commonly assumed, and there are several observations by eminent judges favouring the view, that there is such a jurisdiction; and in *Holland v. Worley* (*ubi sup.*) the late Pearson, J. did award damages in lieu of an injunction which, if granted, would have been simply preventive and in no sense mandatory. The question is one of very great importance, but we do not think it right to keep the parties waiting while we make up our minds upon it. If there is no such jurisdiction the order appealed from will be wrong. But, assuming the jurisdiction to exist, we are of opinion, upon the facts of this case, that the plaintiff was entitled to an injunction to restrain the defendant from continuing to build higher than the old house to the detriment of the plaintiff. The learned judge found as facts that some of the plaintiff's lights were ancient, and they were already obstructed to a substantial extent, and would be still further obstructed. He found the plaintiff had sustained, and would sustain, material injury entitling him to substantial damages. We see no reason to differ from him on these matters of fact. The plaintiff's legal right and its infringement already and threatened further infringement to a material extent being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right, but we can discover none in this case. The order appealed from, therefore, must be discharged so far as it awards damages only to the plaintiff, and in lieu thereof the order will be for an injunction in the ordinary form to restrain the defendant from continuing to build higher than the old building above the level of the street to the injury of the plaintiff, and an inquiry as to the damages already sustained by the plaintiff by reason of the building already erected beyond that height; the inquiry to be conducted before an official referee. There will be an order on the defendant to pay the damages so found, but the costs of the inquiry will be reserved in order that they may be dealt with by the judge. The plaintiff having succeeded in his appeal, the defendant must pay the costs of the appeal.

Solicitors: *Sharpe, Parker, and Co.*, agents for *Ryland, Martineau, and Co.*, Birmingham; *Burton, Yeates, and Hart*, agents for *Edge and Ellison*, Birmingham.

Nov. 3, 4, Dec. 5 and 11, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re BRIDGER; BROMPTON HOSPITAL FOR CONSUMPTION v. LEWIS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Gift of such part of residue "as may by law be given for charitable purposes"—Alteration of law—Will made before passing of Act—Death of testator after passing of Act—Mortmain and Charitable Uses Act 1891 (54 & 55 Vict. c. 73), s. 9.

B., by will dated the 29th June 1891, gave all his residuary estate to trustees upon trust to pay the income to his wife for life, and after her death to pay such part of his residuary trust estate as might by law be given for charitable purposes to the B. Hospital, and as to the remainder upon trust for W. absolutely. The Mortmain and Charitable Uses Act 1891 was passed on the 5th Aug. 1891. The testator died on the 20th Feb. 1892.

Held, that the Act of 1891 applied; and, in the absence of any indication in the will of an intention to the contrary, the hospital was entitled to all the residue which the testator had power to give to it by virtue of that Act.

Decision of North, J. (67 L. T. Rep. N. S. 549) affirmed.

WALTER BRIDGER, by his will dated the 29th June 1891, after certain specific and pecuniary legacies, gave all his residuary real and personal estate to Alfred Rees Lewis and his wife Anne Bridger, upon trust to sell and convert the same, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and to invest the residue and stand possessed thereof, in trust to pay the income to his wife for life, and after her decease,

In trust to pay such part of my said residuary trust estate, which may by law be given for charitable purposes, unto the Brompton Hospital for Consumption; and as to the rest and remainder of the said residuary trust estate, upon trust for my wife's niece Elizabeth Williams, spinster, absolutely.

The testator died on the 20th Feb. 1892. His estate consisted of a number of freehold and leasehold houses, 150*l.* secured upon mortgage, and a little over 400*l.* pure personal estate.

On the 5th Aug. 1891 the Mortmain and Charitable Uses Act 1891 received the Royal assent. It contains the following sections:

Sect. 5. Land may be assured by will to or for the benefit of any charitable use, but except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold in one year from the death of the testator, or such extended period as may be determined by the High Court or any judge thereof sitting at chambers, or by the Charity Commissioners.

Sect. 9. This Act shall only apply to the will of a testator dying after the passing of this Act.

The will contained a power for the trustees to postpone the sale of the real and leasehold estate for such time as they should think fit. An originating summons was taken out by the president and governors of the Brompton Hospital, to which the trustees of the will and Miss Williams were defendants, for the determination of the question whether the hospital was entitled to the

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

CT. OF APP.] *Re BRIDGER; BROMPTON HOSPITAL FOR CONSUMPTION v. LEWIS.* [CT. OF APP.]

whole of the testator's residuary estate subject to the life interest of his widow; or whether the defendant Elizabeth Williams was entitled to any and what part of it.

The summons was heard by North, J., who held (67 L. T. Rep. N. S. 549), that the Mortmain and Charitable Uses Act 1891 applied, and that the hospital was entitled to the whole of the residue.

From this decision Miss Williams appealed.

S. Hall, Q.C. and *H. Terrell* for the appellant.—If the Mortmain and Charitable Uses Act 1891 had not been passed the hospital could only have taken the testator's pure personalty. If that Act applies to this will, the hospital will take all the residue and Miss Williams will take nothing. That cannot have been the testator's intention, or he would not have given her the residue of his estate. His real intention was to give his pure personalty to the hospital and the residue to Miss Williams. Whether she takes anything or not depends on the proper construction of the will; and for the purposes of construction it must be presumed that this will was framed with reference to the Mortmain and Charitable Uses Act 1888, which was in force when it was made. The Act of 1891 cannot have a retrospective effect so as to alter the construction which ought to be put upon the words of a will made before it was passed:

Jones v. Ogle, 27 L. T. Rep. N. S. 367; L. Rep. 3 Ch. App. 192;

Re March; Mander v. Harris, 51 L. T. Rep. N. S. 380; 27 Ch. Div. 166.

A will is not to be construed in all respects as if written on the day of the testator's death. The principle on which sect. 24 of the Wills Act (1 Vict. c. 26) is to be applied appears from

Re Portal and Lamb, 53 L. T. Rep. N. S. 650; 30 Ch. Div. 50.

Sir Arthur Watson, Q.C. and *J. T. Prior* for the hospital.—The intention of the testator was to give all he could to the hospital, and he only gave the residue to Miss Williams because he was apprehensive that some part of his estate could not be given to charities. The gift to the hospital is not limited by the word "now," nor is there any reference to the law as it then stood, and the will must be construed according to the law at the death of the testator, and will pass any property which comes within the gift at that date:

Re Portal and Lamb (ubi sup.);

Lady Langdale v. Briggs, 8 De G. M. & G. 391, 435;

Bothamley v. Sherson, 33 L. T. Rep. N. S. 150; L. Rep. 20 Eq. 304.

Ingle Joyce for the trustees of the will.

Hall, Q.C. in reply.

Cur. adv. vult.

Dec. 11.—*LINDLEY, L.J.* (after stating the provisions of the will and the facts and referring to sects. 5 and 9 of the Act of 1891) said:—Sect. 24 of the Wills Act of 1837 requires that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section has been the subject of many decisions, and from it and them it may be taken as now settled that, if a will contains a description of any kind of property,

such a description must be held to include and apply to whatever property the testator has at his death which answers the description, unless a contrary intention appears by the will. In *Re Portal and Lamb (ubi sup.)* the description in the specific devise did not apply to the after-acquired property without stretching the words of the specific devise and defeating the intention of the testator. But, as pointed out in that case, if a testator devises or bequeaths all his property in a particular county, or all his consols to A., and the rest of his estate to B., A. will take whatever property in the county named or whatever consols the testator has at his death, and will not be confined to the property or consols which the testator had when he made his will. This section, however, does not by itself quite cover this case, for, although it enables a testator to dispose of property which he has not got when he makes his will, the section does not of itself enlarge his power of disposing of what he then has. This power, however, is, I think, conferred by sect. 9 of the Mortmain and Charitable Uses Act 1891. That section is so worded as to show that the Legislature intended that the Act should apply to wills made before its date, provided they came into operation afterwards. Combining this section with sect. 24 of the Wills Act, the result appears to me to be that, if a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death, and not only that which answered the description when he made his will. Such a devise or bequest would, I apprehend, clearly include property which a testator acquired a right to dispose of under a general power conferred upon him after he had made his will. An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to. This is quite consistent with *Jones v. Ogle (ubi sup.)* and *Re March (ubi sup.)*. The foregoing reasoning appears to me to decide this case in favour of the Brompton Hospital. We were asked to read the gift to the hospital as a gift of pure personal estate. But it is not right to substitute one expression for another, and to treat the two as synonymous when their legal effects are, or may be, very different. For the same reason it is not right to insert the word "now," for that might make all the difference, by showing an intention to exclude the operation of sect. 24 of the Wills Act: (see *Cole v. Scott* 1 Mac. & G. 518 and other decisions of that class.) We were further asked to say that the testator evidently intended to give his wife's niece something, and that it would be contrary to his intention that she should have nothing. This argument is, in my opinion, by far the strongest in her favour; but, upon reflection, I think it ought not to prevail. I have no doubt that the testator thought that she would get something, but I see no indication of any intention to prefer her to the Brompton Hospital. His intention was precisely the contrary; he intended to give all he could to the hospital, and to give her only what he could not give to it. We must find an intention to deprive the hospital of something

APP.] OLIVER v. HORSHAM LOCAL BOARD; THOMPSON v. MAYOR, &C., OF BRIGHTON. [APP.]

which by law he could give it. Nothing short of that satisfies the words in sect. 24, or amounts to a contrary intention appearing by the will. For these reasons I think the appeal must be dismissed with costs.

SMITH, L.J.—I concur in the judgment of Lindley, L.J. and also in the judgment which Davey, L.J. is about to deliver.

DAVEY, L.J.—The Mortmain and Charitable Uses Act 1891 was passed on the 5th Aug. 1891. It made a material and substantial alteration in the law relating to charitable gifts, because it enabled impure personality and land, subject to certain restrictions, to be given to charitable purposes. It altered the definition of "land" in the Mortmain and Charitable Uses Act 1888; but it was not an Act dealing with the construction of wills, or the meaning of words used in wills, but it was intended to make, and did make, a substantial alteration in the law, which would affect the operation of wills coming within its provisions. By the ninth section it is enacted that the Act shall only apply to the will of a testator dying after the passing of the Act. The testator in the case before us made his will on the 29th June 1891, and therefore before the passing of the Act, containing the gift which I need not read again. The testator died on the 20th Feb. 1892. In my opinion the Act of 1891 does not affect or alter the meaning of the words used by the testator. What would have been the construction of the gift if the testator had used the word "now," and said "which may now by law," &c., I do not pause to inquire. But, having regard to sect. 24 of the Wills Act, I am of opinion that the true meaning and effect of the words used is to pass all property of the testator at the time of his death which could by law be given for charitable purposes. This is in accordance with the decisions on specific gifts. If the words describe a particular property which the testator had at the date of his will, that and that alone will pass. This was the decision of this court in *Re Portal and Lamb (ubi sup.)*, where the court differed from Kay, L.J. in the court below, not on the law, but on the construction of the language. But where the specific gift is generic, as "all my lands in the parish of Dale," it will, by the force of the Wills Act, pass all the testator's lands in that parish at the time of his death: (*Doe v. Walker*, 12 M. & W. 591.) What difference has the Act of 1891 made as regards the gift before us? I adopt the language of Sir G. Jessel, M.R. in *Hasluck v. Pedley* (L. Rep. 19 Eq. 271, 274), cited by Fry, J. in *Constable v. Constable* (40 L. T. Rep. N. S. 516, 518; 11 Ch. Div. 681, 686). Speaking of the Apportionment Act, Sir G. Jessel said: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre before the Act carried the accruing rents; now it does not; not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different." So here, it appears to me that the bequest of everything which could by law be given to charitable purposes operates upon something which, but for the Act of 1891, it could not have operated upon. I am therefore of opinion that the judgment of North, J. must be affirmed.

Solicitors for Miss Williams, *Leathley and Willis*.

Solicitors for the Hospital, *Norton, Rose, and Co.*

Solicitor for the trustees, *Stanley Evans*.

Nov. 16, 17, and 24, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

OLIVER v. HORSHAM LOCAL BOARD.

THOMPSON v. MAYOR AND CORPORATION OF BRIGHTON. (a)

APPEALS FROM THE QUEEN'S BENCH DIVISION.

Highway—Nuisance—Sewer gratings—Projection by reason of wearing away of road—Negligence as to road only—Injury—Highways and sewers both vested in local authority—Liability—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 13, 19, 144, 149.

In consequence of a defect in a highway a sewer grating projected above it, and caused damage to the plaintiff's horse. The grating was in good repair and properly inserted in the road. Both the highways and sewers of the district were vested in the local authority under the Public Health Act 1875.

Held, that, the damage being caused by the defect in the highway, for which no action for damages could be maintained against the local authority, as they were in the same position as surveyors of the highway, the fact that they had control both of the highways and sewers did not render them liable.

Kent v. Worthing Local Board (48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118) overruled.

In *Oliver v. Horsham Local Board*, the plaintiff's daughter was riding her father's horse along a public road in Horsham. The horse struck its foot against a sewer grating in the road, tripped, and fell and was injured. The grating had been inserted by the local board as the sewer authority. It had been properly inserted, and was in good repair, but the road around the grating in course of time had worn away, and in consequence the grating projected above the road.

In *Thompson v. The Mayor and Corporation of Brighton* the plaintiff's pony stumbled over the cover of a manhole in the middle of the road, and fell and cut its knees badly. The cover projected an inch and a half above the level of the road, also in consequence of the road having worn away.

The defendants were the urban sanitary authority of their respective districts, and as such had control and management of the sewers, and also of the public roads in each district. It was their duty as the road authority to make up the road from time to time as it wore away.

The respective plaintiffs having commenced these actions in the Brighton County Court, the judge held that he was bound by the decision of the Divisional Court in *Kent v. Worthing Local Board* (48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118) to hold that the defendants were, by reason of their holding the double capacity of sewer authority and road authority, liable for damages in each case, although they could not have been sued for damages if they had been the road authority only.

The Divisional Court (Day and Wright, JJ.) affirmed the decision of the County Court judge

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

APP.] OLIVER v. HORSHAM LOCAL BOARD; THOMPSON v. MAYOR, &C., OF BRIGHTON. [APP.]

for the same reason, but gave the plaintiffs leave to appeal.

The appeals now came on for hearing.

Moulton, Q.C. and W. P. Bozall for the Corporation of Brighton.—The case of *Kent v. Worthing Local Board* (*ubi sup.*) is inconsistent with *Moore v. The Lambeth Waterworks Company* (55 L. T. Rep. N. S. 309; 17 Q. B. Div. 462), and should be overruled. The accident was caused by the default of the defendants in their capacity of surveyors of highways, and therefore they are not liable in damages:

Gibson v. Mayor of Preston, 22 L. T. Rep. N. S. 293; L. Rep. 5 Q. B. 218;

Cowley v. Newmarket Local Board, 67 L. T. Rep. N. S. 486; (1892) A. C. 345.

If they had been negligent in their capacity of sewer authority they might be liable, but the fact that they are both the surveyors of highways and the sewer authority does not render them liable. They are entitled to the protection given to surveyors of highways:

Graham v. Mayor, &c., of Newcastle-upon-Tyne, 69 L. T. Rep. N. S. 6; (1893) 1 Q. B. 643.

Burleigh Muir, for the Horsham Local Board, further referred to *Municipality of Pictou v. Geldert* (69 L. T. Rep. N. S. 510; (1893) A. C. 524), where *The Borough of Bathurst v. Macpherson* (41 L. T. Rep. N. S. 778; 4 App. Cas. 256), in which the borough of Bathurst was held liable for damages under somewhat similar circumstances to this case, was distinguished, and *Sanitary Commissioners of Gibraltar v. Orfila* (63 L. T. Rep. N. S. 58; 15 App. Cas. 400) was followed.

W. Graham for the plaintiff Oliver.—It is inaccurate to speak of the defendants as acting as the sewer authority and also as the road authority. They are the local authority constituted by the Public Health Act 1875, and both sewers and roads are vested in them (sects. 13, 16, 19, 144, 149). They can therefore do what they like with the roads, irrespective of their being the surveyors of highways. They were bound to exercise their powers so as to prevent the grating becoming a nuisance. That was the principle acted on in *Kent v. Worthing Local Board* (*ubi sup.*). They could have altered the grating if they did not choose to alter the road. They did neither one nor the other, and were therefore guilty of negligence, and are liable to the plaintiff in damages for the injury thereby caused. The observations of Lord Blackburn in *Geddis v. Proprietors of the Bann Reservoir* (3 App. Cas. 430, 455) are to the same effect.

B. M. Bray for the plaintiff Thompson.—By sects. 5, 6, and 7 of the Public Health Act 1875 the defendants are constituted an urban sanitary authority, and as such have powers over both sewers and roads. They have, therefore, a duty cast upon them to exercise their statutory powers in a reasonable way, and to prevent their sewer gratings becoming a nuisance:

Geddis v. Proprietors of the Bann Reservoir (*ubi sup.*).

Therefore, if they had no power over the roads, as soon as they make these sewer traps, they are bound to use reasonable care to prevent any injury to the public from the gratings. This case differs from *Moore v. The Lambeth Waterworks*

Company (*ubi sup.*), as here the defendants had power not only over the road, but also over the grating, and could have prevented the grating doing harm by altering it. The defendants here are liable under the clauses of the Public Health Act 1875 which vest the sewers in them apart from those which vest the roads in them. Is that liability to be taken away because they are also surveyors of highways? They have omitted to use their statutory powers so as to prevent this nuisance arising. No doubt, the easiest way of doing that would be by repairing the road, but that is a mere accident. Repairing the road was not the only way of preventing this accident. A right of action follows if there is negligence:

Blackmore v. Vestry of Mile End Old Town, 46 L. T. Rep. N. S. 869; 9 Q. B. Div. 451.

Burleigh Muir in reply.

Cur. adv. vult.

Nov. 24.—*LINDLEY, L.J.*—I have had an opportunity of reading the judgment of *Smith, L.J.*, in which I concur, and the following observations are to be read as a rider to that judgment. The House of Lords, in *Cowley v. Newmarket Local Board* (*ubi sup.*), affirmed *Gibson v. Mayor of Preston* (*ubi sup.*), and declined to apply the principles laid down in *Couch v. Steel* (3 E. & B. 402), and acted upon in *Hartnall v. Ryde Commissioners* (4 B. & S. 361), to local authorities governed by the Public Health Act 1875. Having regard to this decision, it is, in my opinion, impossible to follow *Kent v. Worthing Local Board* (*ubi sup.*). The injury to the plaintiffs was caused by a breach of duty on the part of the defendants, but that breach of duty was omitting to keep the road in such a state as to be safe for traffic, having regard to the sewer grating which was lawfully in the road and was not itself out of repair. Apart from the state of the road no breach of duty can be imputed to the defendants, and consequently no cause of action has accrued to the plaintiffs. But for the only breach of duty which can be imputed to the defendants I am now compelled to say that no action lies. The law on this subject is, in my opinion, very unsatisfactory, but I cannot on that account declare it to be different from what it is. The appeal in the *Horsham* case must be allowed and judgment given for the defendants, but without costs, either here or below, for, although the plaintiff fails, the defendants' breach of duty is clear, and so long as *Kent v. Worthing Local Board* stood unreversed, the plaintiff was reasonably guided by it. The same judgment must be given in the *Brighton* case.

SMITH, L.J.—The question in these appeals is, whether a local authority who by statute have vested in them the highways in their district, together with their control, and are also in like manner empowered to lay down sewers in such highways, with the necessary manholes and gratings, can keep the two in combination (*i.e.*, the highways and gratings) in such a condition as to cause injury to persons lawfully using the highways, and yet not be liable to an action for damages at the suit of the persons injured. I take it that the answer off hand would be "No." But when the facts of these cases are applied to principles long since established, the answer must be "Yes." The learned County Court judge found

APP.] OLIVER v. HORSHAM LOCAL BOARD; THOMPSON v. MAYOR, &C., OF BRIGHTON. [APP.]

for the plaintiffs on the authority of the case of *Kent v. Worthing Local Board* (*ubi sup.*), and the Divisional Court gave a *pro forma* judgment affirming the County Court judge, leaving it to this court to say whether that case was still law. The material facts as found by the County Court judge are as follows:—"That the gratings over the manholes in the highways over which the plaintiffs' horses fell had been properly inserted by the defendants as sewer authority, and were in good repair, order, and condition, but that the road around the gratings in course of time had worn away, and in consequence the gratings projected above the roads and formed a stumbling-block; that it was the duty of the local board, as the road authority, to have made up the roads from time to time as they wore away; that this they had omitted to do, and so the accidents happened, and that they were attributable solely to the neglect of the local board as road authority to maintain the roads in proper order and not to any default on their part as sewer authority." It has been held for, at any rate, over 100 years, dating from the case of *Russell v. Men of Devon* (2 Term Rep. 667), that no action for damages will lie against a surveyor of highways for injuries received by reason of a highway being out of repair. It is now beyond doubt the law that, where a person though lawfully using a highway is damaged, either as regards himself, his horse or his carriage, merely by reason of the non-repair of a highway, he has no action at law for damages against anyone. His sole remedy is by indictment against the parish which has made default, or he may proceed against the surveyor under sect. 94 of the Highway Act for penalties. Damages he can recover against no one if his injury be caused by reason of mere non-repair. It is not denied by the plaintiffs that the present defendants are surveyors of the highways in their district, and acted as such over the highways in question. In the year 1870 it had been held by the Court of Queen's Bench in *Gibson v. Mayor of Preston* (*ubi sup.*) that a local authority who were constituted surveyors of highways by the Public Health Act of 1848 had the same immunity from actions for damages as a surveyor of highways, and last year the House of Lords, in *Cowley v. Newmarket Local Board* (*ubi sup.*), affirmed *Gibson v. Mayor of Preston* and conclusively settled that no action for damages will lie against any local board for merely allowing their highways to get out of repair. After the decision of *Gibson v. Mayor of Preston*, and before the decision of *Cowley v. Newmarket Local Board*, the case of *Kent v. Worthing Local Board* (*ubi sup.*) came up for determination in 1882. In that case the local board were what I will for brevity call the water authority, and also the highway authority. The valve cover in that case had been lawfully placed by them in the highway; it was proper in itself, was originally properly fixed, and at the time of the accident was in proper order, but the local board had omitted to repair the road adjacent to the valve cover, so that it projected up into the highway and hence the accident. Field and Stephen, JJ. held the defendants liable, relying upon the principle stated by the Privy Council in *Borough of Bathurst v. Macpherson* (*ubi sup.*)—viz. "That the duty was cast upon them (the Borough of Bathurst) of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the

highway, which but for such artificial construction would not have existed, or at the least of protecting the public against the danger, when it arose, either by filling up the hole or fencing it." If the case of *Kent v. Worthing Local Board* had remained unchallenged, there can be no doubt that the judgments of the County Court judge are correct. It was, however, to say the least, most seriously impeached in this court in the case of *Moore v. The Lambeth Waterworks Company* (*ubi sup.*). It was there pointed out that, in the case of *Borough of Bathurst v. Macpherson* (*ubi sup.*), as also in the case of *White v. Hindley Local Board* (32 L. T. Rep. N. S. 460; L. Rep. 10 Q. B. 219), both of which were relied on by Stephen, J. in delivering the judgment of the court in *Kent v. Worthing Local Board*, the accident had happened by reason of a defect in the thing complained of; and it is not disputed that, if the gratings over the manholes in the present cases had been out of order, whereby the accidents had occurred, the defendants would be liable. It appears, upon reading the judgments in *Moore v. The Lambeth Waterworks Company*, that this court expressly held that, as the fire-plug in that case was in perfect order at the time of the accident, which was caused, not by reason of any infirmity in the fire-plug, but by reason of the non-repair of the highway over which the defendants had no control, no action was maintainable against them, and so far overruled the decision in *Kent v. Worthing Local Board* (*ubi sup.*), which had held that, although the valve was in perfect order when the accident happened, it was the duty of the local board if necessary to cut it down or otherwise alter it if it came to project up into the highway, and that for breach of this duty an action was maintainable. The court, however, threw out the point which had not been suggested before, that perhaps *Kent v. Worthing Local Board* might be upheld upon the ground that the defendants occupied the dual capacity of owners of the valve and owners of the highway, Lord Esher stating that, if *Kent v. Worthing Local Board* could not be supported upon the ground of the defendants being masters of both situations, he respectfully differed from it, and that it was wrongly decided. Lindley, L.J., referring to *Gibson v. Mayor of Preston* (*ubi sup.*), said: "It may be that the principle of that case does not apply to a road authority, where they have a control, not only over the road, but over the thing which creates the nuisance. . . . If *Kent v. Worthing Local Board* is not to be distinguished from this case upon that ground, then in my opinion it is erroneous;" and Lopes, L.J. was of opinion that by the judgment they were then giving they were overruling *Kent v. Worthing Local Board*. The point suggested by this court in *Moore v. The Lambeth Waterworks Company* now comes up for decision. But it was first argued for the plaintiffs that there was no such thing as a highway authority as distinct from a sewer authority; that a local authority is represented by the mayor, aldermen, and burgesses acting as an urban sanitary authority, that under sect. 149 of the Public Health Act 1875 the highways are vested in them, and that under that section they can do what they like with their highways, irrespective of being surveyors of highways, and that these actions were therefore maintainable against them wholly apart from their

APP.] OLIVER v. HORSHAM LOCAL BOARD; THOMPSON v. MAYOR, &C., OF BRIGHTON. [APP.]

being surveyors of highways. These arguments are those urged in the Queen's Bench in the case of *Gibson v. Mayor of Preston* (*ubi sup.*), yet the judgment was that, as the local authority were *de facto* surveyors of highways, they were not liable to an action for damages occasioned by reason of non-repair of the highway, and that the Public Health Act of 1848 had not imposed upon a local authority any further liability as to this than attached to a surveyor of highways. That this judgment was correct is now settled by *Cowley v. Newmarket Local Board* (*ubi sup.*) in the House of Lords last year. It was sought in that case to overrule *Gibson v. Mayor of Preston*, but without success. The same arguments were again produced, and with like results. In my opinion the invalidity of these arguments has been judicially determined by the Queen's Bench and by the House of Lords. The plaintiffs next sought to rely upon a passage in Lord Blackburn's judgment in *Geddis v. Proprietors of the Bann Reservoir* (*ubi sup.*), where that learned judge said: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised if it be done negligently. And I think that, if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers." I do not doubt this as a general proposition, but I must point out that Lord Blackburn was not dealing with the case of the liability or non-liability of surveyors of highways, which is in itself peculiar. If this general proposition be applied to the case of a surveyor of highways, it appears to me that his immunity from being sued for non-feasance would be gone. By a reasonable exercise of his powers he could always repair a highway, and according to that proposition he would be guilty of negligence and liable to be sued if he did not do so; but this is not the law. Moreover, this same argument was addressed to the House of Lords in *Cowley v. Newmarket Local Board* (*ubi sup.*), and, though the case of *Geddis v. Proprietors of the Bann Reservoir* (*ubi sup.*) was not cited, others to the like effect were. They were dealt with by Lord Herschell in his judgment, and held not to apply. Lord Herschell, in quoting Lord Cairns, states "that much must depend on the purview of the Legislature in the particular statute and the language which they have there employed." When examined, it will be seen that in the present cases the defendants have been guilty of no neglect of duty as regards the gratings; what they have been guilty of is a non-feasance as regards their highways, to which, as the County Court judge has found, the accidents which occurred to the plaintiffs were solely attributable. For this non-feasance, as above pointed out, no action can be maintained. If the gratings had been out of order in themselves it would have been the duty of the defendants, irrespective of being surveyors of highways, to have put them in order, or to have fenced round them till put in order, and if by neglect of such duty a passer-by had been injured he could have sued the defendants for damages; but, as long as the

gratings lawfully and properly put down remained in perfect order, *Moore v. The Lambeth Waterworks Company* (*ubi sup.*), in this court, has decided there is no breach of duty in the defendants in leaving the gratings alone. If the defendants were to be held liable in these actions they would have to be held liable for the non-repair of their highways, and this cannot be done. In my judgment, for the reasons above, the defendants are not liable, and upon the facts of these cases it matters not whether the defendants were "masters of both situations" or not, and that the case of *Kent v. Worthing Local Board* (*ubi sup.*) was in reality overruled by *Moore v. The Lambeth Waterworks Company*, as stated by Lopes, L.J. in his judgment in the latter case. The case of *Moore v. Lambeth Waterworks* standing, in my judgment *Kent v. Worthing Local Board* cannot, and these appeals must therefore be allowed.

DAVEY, L.J.—In the case of *Thompson v. The Mayor, &c., of Brighton* the Corporation of Brighton are the urban sanitary authority, and as such have the control and management of the sewers, and also the control and management of the streets. The County Court judge finds that the manhole or grid on which the plaintiff's pony stumbled had a proper cover; that there was no fault of construction on the part of the corporation; that at the time of the accident it was in good repair, order, and condition, and that the accident was caused by reason of the road having worn away so that the manhole projected at least 1½ inches above the road; or, in other words, the imperfection or want of repair was in the road and not in the manhole. The question is whether upon these facts the plaintiff is entitled to recover damages from the corporation of Brighton. The first question I ask myself is, what was the cause of the accident? It appears to me, notwithstanding the ingenious and able arguments of Mr. Graham and Mr. Bray, that there can only be one answer; it was the default of the corporation to keep the road in repair. But for this breach of duty no action will lie, *Cowley v. Newmarket Local Board* (*ubi sup.*) It is equally clear that, if the Corporation of Brighton had been the sewer authority only and not the road authority, no action would have lain against them, *Moore v. The Lambeth Waterworks Company* (*ubi sup.*), a decision which is binding upon us and in which I entirely concur. I confess I am unable to see how the fact of the corporation being both the sewer authority and the road authority can impose a liability upon them which, if there were separate authorities, neither authority would in law be subject to. I therefore regard the case of *Kent v. Worthing Local Board* (*ubi sup.*) as inconsistent with and impliedly overruled by the subsequent decision of this court in *Moore v. The Lambeth Waterworks Company* (*ubi sup.*), and independently of that, that decision cannot be supported. The ratio decidendi in *Kent v. Worthing Local Board* (*ubi sup.*) is stated in the following passage: "We are, however, of opinion that the facts of this particular case do not bring it within the principle of *Gibson v. Mayor of Preston* (*ubi sup.*), but do bring it within a different class of cases, of which *White v. Hindley Local Board* (*ubi sup.*) and *Borough of Bathurst v. Macpherson* (*ubi sup.*) are the most important. These cases appear to us to establish the principle that the water authority is under a legal obligation to make such arrange-

APP.] ROBERTS AND SON v. OCEAN MARINE INSURANCE CO.; THE NORTH BRITAIN. [APP.]

ments that the works of whatever nature under their care shall not become a nuisance to the highway, and that, if they happen to unite in themselves (as is the case with the Worthing Local Board) the double character of highway authority and water authority, their duty to do so is clearer than it would otherwise be," and some expressions in the judgment in the *Borough of Bathurst v. Macpherson* (*ubi sup.*), which have been cited at the bar in this case, are there quoted. In that case the accident was caused by the defective state of a barrel drain, which at once distinguishes it, and I am of opinion that the authorities cited in *Kent v. Worthing Local Board* (*ubi sup.*) did not support the conclusion drawn from them: (see per Lord Hobhouse in *Municipality of Pictou v. Geldert* (*ubi sup.*)). It may be conceded that the corporation is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance. But the question remains, in what respect have the corporation failed to discharge this legal obligation, and is there any right of action in respect of such default? Turn the case any way you will, it seems to me that you come back to the proposition that the breach of duty was in not repairing the highway, and for that no action will lie. In the case of *Oliver v. The Horsham Local Board* the facts and findings of the judge are substantially the same, and our decision in the first case will apply to that case also. Whether this is a satisfactory state of the law I express no opinion. We have only to administer the law as it is. I agree with what has been said as to costs.

Solicitors: *Cobbold and Woolley; Field, Roscoe, and Co.*, agents for *Medwin, Davis, and Sadler*, Horsham; *T. A. Goodman*, Brighton; *Bozall and Bozall*, agents for *H. Talbot*, deputy town clerk, Brighton.

Monday, Nov. 27, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

ROBERTS AND SON v. OCEAN MARINE INSURANCE COMPANY.

THE NORTH BRITAIN. (a)

ON APPEAL FROM BARNES, J.

Marine insurance—Policy—Collision clause—Proviso—Removal of obstructions under statutory powers—Expenses of removing wreck—Both ships to blame—Liability of insurers.

At the time of a collision in foreign waters, between the ships N. and P., the plaintiffs, the owners of the N., were insured in the defendant company by a policy of insurance which contained a collision clause, to which the following proviso was attached: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." In consequence of the collision the P. sank, and was ultimately removed by the local authorities acting under statutory powers. The expenses of such removal

were directed to be paid by the P. to the local authority, and were so paid. In cross-actions for damages in respect of the said collision both ships admitted liability, and, on the damages being referred to the registrar and merchants for assessment, the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the P. the sum so paid by the owners of the P. whereby the owners of the N. became liable to pay as part of the damages, to the owners of the P., a moiety of such sum. In an action by the owners of the N., against the underwriters of the N., to recover moneys alleged to be due under the said policy, in respect of the removal of the P.:

Held (reversing Barnes, J.), that the assured could not recover, as the underwriters were exempted from liability by the terms of the proviso to the collision clause.

THIS was an appeal from the decision of Barnes, J. on a question submitted for the opinion of the court on a joint admission of facts.

It appeared that on the 10th Feb. 1891 the plaintiffs' steamship *North Britain* came into collision in the river Scheldt, in the kingdom of Belgium, with the British steamship *Paraguay*, in consequence whereof the *Paraguay* sank in the said river. The Governor of the province of West Flanders, acting in the exercise of the powers conferred on him by a royal decree of the 6th Dec. 1858, issued, and on the 21st Feb. 1891 caused the master of the *Paraguay* to be notified of, an order directing him to commence the work of the removal of the vessel within six days from the date of notification, and to proceed with the work expeditiously. The order further provided that, in the event of non-execution by the interested party, the raising or the destruction of the wreck would be proceeded with by the official authorities at his expense. The owners and master of the *Paraguay* not having raised and removed the vessel within the specified period, she was thereupon raised and removed by the authorities in virtue of the order and decree aforementioned. The Government of the province of West Flanders subsequently served on the agents at Antwerp of the owners of the *Paraguay* an order, dated the 26th Sept. 1891, directing them to pay to the cashier of the State within fifteen days the sum of 26,390 francs, the expenditure incurred by the Government in dealing with the wreck. The owners of the *Paraguay* paid the said sum—equivalent to 1047l. 4s. 6d.—as directed.

On the 13th March 1891 the owners of the *North Britain* commenced an action in the Admiralty Division of the High Court against the owners of the *Paraguay* for damages in respect of the collision and the defendants in the action admitted liability. On the 1st April 1891 the owners of the *Paraguay* commenced an action in the same Division, against the owners of the *North Britain* for damages in respect of the collision, and the defendants admitted liability. The damages in both actions were referred to the assessment of the registrar and merchants. At the assessment the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the *Paraguay* the sum of 950l. 19s. 6d. (being the sum of 1047l. 4s. 6d., paid by the owners of the *Paraguay* to the Belgian State authorities, less 96l. 5s.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

APP.] ROBERTS AND SON v. OCEAN MARINE INSURANCE CO.; THE NORTH BRITAIN. [APP.]

proceeds of wreck), whereby the owners of the *North Britain* became liable to pay, as part of the damages to the owners of the *Paraguay*, the sum of 475*l.* 9*s.* 9*d.*, being a moiety of the aforesaid sum.

At the time of the collision the owners of the *North Britain* were, by a policy of insurance dated the 12th Feb. 1890, insured by the defendants for a certain sum upon the said ship. The policy contained (*inter alia*) the following clause:

And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages, to any other person or persons, any sum or sums not exceeding in respect of any such collision the value of the ship hereby insured, we will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured.

In cases in which the liability of the ship has been contested, with the consent, in writing, of two-thirds of the subscribers to this policy in amount, we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

At the trial, upon the joint admission of facts, BARNES, J., after stating the facts, continued:—The plaintiffs now claim to recover from the defendants their proper proportion of three-fourths of the said sum of 475*l.* 9*s.* 9*d.* The defendants dispute their liability, on the ground that they were exempted from responsibility for the claim in question under the proviso at the end of the collision clause. It was not contended before me that the words "statutory powers" did not cover the powers acted upon in Belgium, or that the plaintiffs were not liable to the owners of the *Paraguay* for the said sum of 475*l.* 9*s.* 9*d.* The point raised by the defendants was, that the plaintiffs were claiming to recover for a sum which they had become liable to pay, and had paid, for removal of obstructions under statutory powers, but to which the defendants allege that the collision clause does not extend. The argument for the plaintiffs was, that the proviso was not intended to cut down the defendants' liability for the damages recoverable by the owners of the *Paraguay* against the owners of the *North Britain*, but was intended as a definition or explanation introduced to guard against the clause being construed to include claims not within its real scope, which they contended was, according to the case of *Taylor v. Dewar* (33 L. J. 141, Q. B.; 5 B. & S. 58), to provide for an indemnity for damages paid to those interested in the vessel collided with, her freight and cargo. In the case referred to, an attempt was made to extend a somewhat similar clause to damages recovered for personal injuries sustained by

persons on board the ship with which the insured ship had come into collision. This attempt failed for the reasons given in Mellor, J.'s judgment, though, in the Scotch case of *Coey v. Smith* (22 Court of Sess. Cas. N. S. 955), referred to in his judgment, a similar attempt made under a slightly different clause was successful. In the present case the first part of the clause is somewhat similar to the clauses in the said two cases, its precise language being as I have already stated it. The second part of the clause deals with the costs of cases disputed with the underwriters' consent, and with the liability of the underwriters being settled as if an adjustment had been made between the two colliding vessels on the principle of cross liabilities, instead of on the principle of a judgment for a balance only. Then comes the proviso. The clause forms part of a policy upon ship, and is inserted in order to protect the owners of the insured ship for damage done by her in a collision which, according to the decision in *De Vaux v. Salvador* (4 Ad. & Ell. 420), is not recoverable from the underwriters on the insured ship under the ordinary terms of the policy which insure the owners against loss or damage to the ship insured. I think the clause in this case should be construed in the same manner as that in *Taylor v. Dewar*, and, though it is slightly different from the clause in that case, the greater part of the reasoning in Mellor, J.'s judgment applies. The second part of the clause is a further ground for adopting this construction. These considerations seem to me to show that the proviso is not to be construed strictly as an exception, but, as its terms show, the object is to make it clear that the clause is not to extend to the claims mentioned in the proviso. It does not clearly express that the damage properly paid by the assured to the owners of a vessel with which the insured vessel has come into collision are in any way to be limited, and it seems to me to be intended to exclude the possibility of claiming against the underwriters in respect of losses arising from claims which might be made directly against the assured by persons other than those interested in the other vessel, her cargo and freight. Claims against the underwriters for expenses of removal which the assured became liable to pay by the enforcement against them of statutory powers of removal of an obstruction caused by them appear to be what the proviso deals with, under that part which affects this question. In my opinion, the plaintiffs are entitled to recover in this action; and my judgment must be for them, for a sum which has not been exactly furnished to me, such proportion of three-fourths of the sum of 475*l.* 9*s.* 9*d.* as the defendants' subscription bore to the value of the ship, with costs.

From this decision the defendants appealed.

Nov. 27.—*Joseph Walton*, Q.C., for the defendants, in support of the appeal.—By the proviso the defendants are exempted from liability on the ground that the proviso applies to money paid for the removal of obstructions under statutory powers, whether such sums are paid directly by the assured ship to the authorities, or indirectly by way of damages to the sunk ship:

Taylor v. Dewar, 33 L. J. 141, Q. B.; 5 B. & S. 58;
Coey v. Smith, 22 Court Sess. Cas. N. S. 955;
De Vaux v. Salvador, 4 Ad. & Ell. 420.

APP.] ROBERTS AND SON v. OCEAN MARINE INSURANCE CO.; THE NORTH BRITAIN. [APP.]

Robson, Q.C. and R. Temperley for the respondents.—The proviso does not protect the defendants in this cause; it is only explanatory of the collision clause. The money claimed is damages paid to the owners of the *Paraguay*. The proviso only applies to sums paid directly by the assured for removal of obstructions.

LINDLEY, L.J.—This is an appeal from the decision of Barnes, J., and the question raised by the appeal turns upon the construction of an addition made to an ordinary Lloyd's policy on ship. The policy itself contains nothing which requires comment, but in the margin of it we find printed certain special clauses, and one relating to collision which I will read. Before I read it, I will state that there was a collision between the *North Britain*, the ship assured, and a ship called the *Paraguay* in the Scheldt, and the *Paraguay* sank, and being an obstruction in the river the Belgian authorities removed her, or ordered her to be removed, and that put the owners of the *Paraguay* to considerable expense. Both vessels were to blame. The *Paraguay* sought to recover, and did recover, half the expense of the removal against the *North Britain*, and the *North Britain* seeks to be indemnified for that expense under the policy. The question is, whether the clause I am about to read covers that item of damage. The clause runs thus: "And it is further agreed that, if the ship hereby insured"—that is the *North Britain*—"shall come into collision with any other ship or vessel"—which happened—"and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages, to any person or persons, any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we will severally pay the assured such proportion," and so on. Then there comes a clause for ascertaining the amount. Nothing turns upon that, because in this particular case the amount is not in dispute. Then comes this: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for the removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." Now, upon that two views are presented to the court. One is, that this proviso only applies to sums which the underwriters, or rather which the ship, may become liable to pay directly for removal of obstructions caused by itself. The other is, that it covers whatever the plaintiffs may be called upon to pay, even to the other ship with which the collision has taken place, if that other ship has been ordered to pay for the removal of the obstruction. The case is one of some little difficulty; but when one looks at it and looks at the object of it, it appears to me, I confess, that the construction which is put upon the clause by the underwriters is the correct one. Now what is the clause? The first part of the clause is by no means easy to construe. I am warranted in saying that, because it is construed one way in England and another way in Scotland. There is an ambiguity in the first clause when you come to look at it. The ambiguity arises in respect of the expression "in consequence thereof." The first is a damage clause; it is a clause under which

the ship insured, the *North Britain*, may have to pay damages, and "in consequence thereof," namely, in consequence of the collision, is ambiguous, because it is doubtful what sort of consequences are included in that expression. The proviso which I have read is a proviso to this clause. It begins, "Provided always that this clause." It is impossible to read that proviso as applying to that part of the clause which immediately precedes, and which relates only to the mode of ascertaining the liability. That would not make sense. The proviso is a proviso to the first part of the clause, and that is agreed upon all hands. Now, when we come to read the first part of the clause with the proviso, it appears to me the object of the proviso is to remove the ambiguity to which the general language of the first part of the clause gives rise; and I cannot, for the life of me, see how it is possible to construe, or cut down, this proviso so as to effectuate the intention of the parties, and so as to read it in the very narrow view which has been adopted by Barnes, J. He says the proviso is not, technically speaking, an exception. I do not think it is. He says it is put by way of precaution. I think it is. I regard the proviso as a warning that you are not to read the clause so as to include these things. I think that is most plainly the language. It means, this clause shall in no case extend to any sum which the assured shall have to pay for removal of obstruction consequent on such collision. I know it says in terms "shall pay by way of damages to the other ship;" but I do not think the construction which I am adopting involves the insertion of any words at all. It is, "in no case shall extend to the sum the assured shall become liable to pay," that is, pay on any ship, by way of damages or otherwise. I think the other side seek to restrict the expression, by inserting "by way of damages or otherwise." I say the clause admits of two constructions, but one construction appears to me, with great deference to Barnes, J., to be rather hypercritical, and does not give effect to what appears to me to be the true meaning of this policy. I think, therefore, the appeal must be allowed.

SMITH, L.J.—The question in this case is as to the true construction of a collision clause attached to a marine policy of insurance upon ship. To bring out the point clearly, I will take it that the *North Britain* steamship, which was covered by the policy in question, by reason of the sole negligence of those on board came into collision with and sunk the steamship *Paraguay* in the river Scheldt in Belgium, and that the owners of the *Paraguay*, therefore, brought an action in this country against the owners of the steamship *North Britain*, and recovered 1000*l.* damages, of which 500*l.* were for damages occasioned to the ship run down, and 500*l.* were for expenses the owners of that ship had become liable to pay, and had paid for, the raising of their ship, and which amount they were compelled to pay by reason of statutory powers conferred upon the authorities of the river Scheldt. The question which arises is, are both these amounts covered by the collision clause in the policy sued on, or only the first, as held by Barnes, J.? The first limb of the collision clause has been already read by Lindley, L.J., and so I will not read it again. Now, pausing here (which is at the words "to the value of the ship hereby insured"), I

should have thought that, so far, this clause bound the underwriters to pay the plaintiffs three-fourths of the 1000*l.* which they became liable to pay, and had paid, in this case to the owners of the *Paraguay*. The case of *Taylor v. Dewar*, (33 L. J. 141, Q. B.; 5 B. & S. 58) had held that under a clause very similar to this, the first limb of this clause, the underwriters were not liable for those damages which the assured had had to pay, for personal injuries occasioned to those on board the ship run down, and that the proper construction of it was, that the underwriters had only to pay to the assured such damages as he had to pay in respect of the loss, or damage done to the ship run down, or possibly to her freight or cargo, which for the purpose might be treated as part of herself. The Queen's Bench differed from the Scotch case of *Coey v. Smith*, in 22 Court of Sess. Cas. N. S. 955, which held that the clause covered damage, which the assured had to pay, for personal damages done to those on board the ship run down, as well as the other damage done to the ship itself. This case, in my judgment, instead of assisting the plaintiffs (the assured), as far as it goes, assists the defendants (the underwriters); for it might be argued from it, that the expenses incurred in raising a ship were not expenses incurred in respect of the loss or damage done to the ship run down. But I agree with Barnes, J., that this first limb of the clause, standing alone, does cover both sums of 500*l.*, which the plaintiffs have had to pay to the owners of the *Paraguay*, and if this case had rested here I should have held for the plaintiffs. But this limb of the clause does not stand alone, for, after some intermediate provisions, not material to the present point, it proceeds as follows: "Provided always that this clause" (that is, that this collision clause) "shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." Now, what is the meaning of this proviso? It is said by the plaintiffs that this is only a warning (whatever that may mean) to shipowners about to insure, that the underwriters will not be responsible under this collision clause for what insuring shipowners may have themselves to pay in respect of the enumerated matters, and that it does not cut down the general undertaking contained in the first limb of the clause to pay all damages (perhaps except for personal injuries) which the assured might be called upon to pay. This appears to me to be a novel way of getting rid of one part—and it is an inconvenient part—of a contract which must be read as a whole. By its very first terms the second limb is stated to be a proviso upon the first. It stipulates that this clause (that is, the collision clause, the whole clause) shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions and injury to harbours, &c., consequent upon a collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury. I ask this question: Have or have not the plaintiffs, when they paid the 500*l.* to the owners of the *Paraguay* for raising their

vessel, paid the sum for removal of obstructions under statutory powers consequent upon the collision? The words are, "that the assured may become liable to pay or shall pay"—that is, however paid; they are not limited as contended for by the plaintiffs—"shall pay otherwise than in the shape of damages." I can only give one answer to this question, and that is to say that they have. With great respect I cannot agree with Barnes, J. when he held "that the proviso was not to be construed strictly as an exception" to the first limb, but was only inserted "to make it clear that the collision clause was not to extend to the claims mentioned in the proviso." But this I am unable to follow. Barnes, J. also held that this proviso did not extend to damages the plaintiffs might have to pay, but only to what liabilities they might incur themselves, in respect of the matters enumerated therein. But I would point out that this proviso deals with three different classes of matters. The first includes payments made in respect of the removal of obstructions consequent upon collision. I can find nothing in this part of the proviso to limit it to payments made in respect of removal of obstructions otherwise than by way of damage. The second class refers to losses sustained in respect of cargo and engagements of the insured vessel, which necessarily do not include payments by way of damages, for, as regards this, no damages could be recovered against the plaintiffs. And the third class refers to claims in respect of loss of life or personal injury, which appears to me to include not only loss of life and personal injuries upon the vessel in default, but also upon the vessel insured. There are no words limiting these classes to loss of life, or personal injuries upon the defaulting vessel. This last clause might well have been inserted, because of the existing conflict between the law of this country and the law of Scotland. In my judgment, it is inaccurate to say that these three classes refer to payments otherwise than to payments made by way of damages, for, in my judgment, the first class clearly does not. Moreover, this remarkable result would follow if the plaintiffs' contention be correct: If the ship of an insured is sunk consequent upon the negligence of those on board, and the assured has to pay for its removal, he cannot recover under the policy; whereas if consequent upon the same negligence the other colliding ship is sunk, and the assured has to pay by process of law for its removal, he can. This cannot, in my view, be the true construction of this clause. In my judgment the proviso exempts the underwriters from the payment in dispute, and therefore I think that this appeal must be allowed.

DAVEY, L.J.—I should feel extreme diffidence in differing from a judgment of a judge of great experience in these matters, were it not that my learned brethren think that the learned judge's construction is erroneous. If I am to decide the construction of this clause exclusively upon technical grounds, which appeal to a lawyer's mind, I observe, in the first place, that the *North Britain* is not, strictly speaking, seeking payment from the underwriters of any sum paid by them for the removal of obstructions as such; but what they are seeking is the reimbursement of damages paid, or payable, by the *North Britain* to the *Paraguay*. On the other hand, I observe that the whole clause deals only with the question

of damages and the proviso is a proviso upon a clause which provides for the payment of damages, and it must, in my opinion, receive a meaning bearing some relation to the principal clause. No lawyer would say that the payment of expenses for the removal of an obstruction by the underwriters would be a payment of damages to the *North Britain*. Upon this point of view the considerations in favour of either construction seem to me to be very evenly balanced; but I am told that this is a clause in a business document, prepared by men of business for their own use, and to be construed as men of business would understand it. Endeavouring to the best of my ability to read the proviso in this mental attitude, and with a due sense of humility, I am of opinion that any layman of business would understand this clause to mean something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay to the injured vessel for damages; but, mind, I am not to be called upon to pay directly or indirectly for the removal of obstructions under statutory powers." It would be, in my opinion, a strange result, and one that would startle most business people, if we were to hold that the underwriters of the *Paraguay*, for example, could not be called upon to pay the *Paraguay* for the expenses that the owners of that ship were put to for the removal of obstructions by the Antwerp authorities; but that they might be called upon, as underwriters of the *North Britain*, to pay indirectly exactly the same expenses through the medium of the liability of the *North Britain* to reimburse the *Paraguay*. I think, with Smith, L.J., that the case which was referred to in the Queen's Bench is rather in favour of the appellants than against them, and I agree that the judgment appealed from should be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Botterell and Roche*, agents for *Botterell, Roche, and Temperley*, Newcastle-on-Tyne.

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whatton*.

Dec. 19, 1893. and Jan. 17, 1894.

(Before LOPES and KAY, L. JJ.)

SEED v. BRADLEY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of sale—Covenant to replace articles damaged or worn out—Term "for the maintenance of the security"—*Bills of Sale Act 1882* (45 & 46 Vict. c. 43), ss. 4, 5, 6, 9, and *Schedule*.

A bill of sale given over the furniture of a dwelling-house mentioned in the schedule thereto contained a covenant by the grantor that, so long as any money remained due on the security of the bill, he would not remove any of the chattels in the said schedule mentioned without the previous consent of the grantee except for necessary repairs, and would "replace any articles damaged or worn out with any others of equal value to be included in the security."

Held (affirming the decision of Day, J.), that this covenant was one which might properly be inserted in the bill as a term for the maintenance of the security, and the bill was therefore in

accordance with the form given in the schedule to the Bills of Sale Act 1882.

THIS was an appeal from a judgment of Day, J. at the trial of an interpleader issue without a jury at Manchester.

The plaintiff was the grantee of certain household furniture under a bill of sale given by Alfred Grimes, and he therefore claimed to be entitled to the goods in question as against the defendant, who was an execution creditor of the grantor of the bill.

By the bill of sale, dated 4th Feb. 1893, Alfred Grimes, in consideration of a sum of 200*l.*, assigned to the plaintiff all the chattels and things contained in the schedule annexed as security for the repayment of 200*l.* These chattels and things were in fact the furniture of the grantor's dwelling-house. The bill contained the following covenant by the grantor: "That so long as any money shall remain owing on the security of these presents he the said Alfred Grimes will not remove any of the said chattels and things from the said dwelling-house in the said schedule mentioned without the previous consent of the said William Seed (except for necessary repairs) and will replace any articles damaged or worn out with any others of equal value to be included in this security."

The defendant, a judgment creditor of Alfred Grimes, seized the goods in execution, and upon the plaintiff claiming them under the bill of sale an interpleader issue was ordered to be tried.

At the trial before Day, J. without a jury, the learned judge held that the bill of sale was a good one, and he accordingly gave judgment for the plaintiff.

The defendant, the execution creditor, appealed.

C. C. Scott (Gully, Q.C. with him) for the defendant.—The covenant to replace goods damaged or worn out gives the grantee the benefit of after-acquired property. The bill, it is submitted, is therefore void:

Thomas v. Kelly, 60 L. T. Rep. N. S. 114; 13 App. Cas. 506; affirming the decision of the Court of Appeal, reported *sub nom. Kelly v. Kellond*, 58 L. T. Rep. N. S. 263; 20 Q. B. Div. 569.

Sect. 6, sub-sect. 2, of the Bills of Sale Act 1882 (45 & 46 Vict. c. 43) specially provides for the validity of a bill which includes "fixtures" brought in "in substitution for any of the like fixtures" specifically described in the schedule to the bill. That is the only instance in which the Act provides for the inclusion in a bill of after-acquired property, and these special provisions being made for the benefit of the grantee as to "fixtures," imply that he shall not have the benefit of a similar agreement as to "chattels." In *Thomas v. Kelly* Lord Halsbury, L.C. draws a distinction between the description of the goods in the body of the bill and in the schedule to it. According to the form in the schedule to the Act the goods may not be mentioned in the body of the bill, they must be specifically described in the schedule, and after-acquired property which can be included in the schedule is strictly limited by sect. 6, sub-sect. 2. The object of sect. 6 is to extend the description of property which by previous sections might be included in the bill. Day, J. held that *Thomas v. Kelly* was distinguishable from the present case, and that this covenant was merely a term "for the maintenance of the security," such as the scheduled form in the Act of Parliament

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

allows to be inserted, and did not in any way alter or add to the bill. It is submitted that on this point *Thomas v. Kelly* overrules what has been laid down in the earlier cases, viz.:

The Consolidated Credit and Mortgage Corporation v. Gosney, 54 L. T. Rep. N. S. 21; 16 Q. B. Div. 24;

Hadden, Best, and Co. v. Oppenheim, 60 L. T. Rep. N. S. 962;

Furber v. Cobb, 56 L. T. Rep. N. S. 689; 18 Q. B. Div. 494.

If such a covenant as this is permissible as being "for the maintenance of the security," then the provisions of sect. 6, sub-sect. 2, are unnecessary. The meaning of "the maintenance" of the security is not clear. The word by itself might mean either replacing or repairing, painting, &c., the goods in the bill. The latter meaning is, I submit, the correct one. It would be impossible in many cases to decide whether new articles are "of equal value" with the old one. A covenant to replace with goods of equal value would only lead to litigation. "Maintenance" cannot be construed in its widest sense; it must be understood subject to the provisions of the Act, and if it is understood in its narrow meaning it explains the decision in *Thomas v. Kelly*.

Smyly, Q.C. and *Langdon* for the plaintiff.—A bill of sale which does not comply with sect. 9 of the Act of 1882 is void as against the whole world; but a bill which does not comply with the requirements of sect. 4 is inoperative against everyone except the grantor. There was no allegation at the trial that any of the goods seized were not in fact those described in the schedule to the bill. The covenant complained of was one for the maintenance of the security, and was properly inserted in the bill. In *Thomas v. Kelly* it was not suggested that the covenant then in question was one for the maintenance of the security. That covenant referred to additions to the goods already included in the bill. The decision in *Thomas v. Kelly* did not deal generally with all covenants under which property bought subsequently to the bill can be included in the bill. The present case is within the decision in *Furber v. Cobb* (*ubi sup.*). That case was cited in *Thomas v. Kelly*, but the House of Lords did not expressly overrule it, as they would have done if they had thought it wrongly decided. There is no sign of any disagreement with *Furber v. Cobb*. Sect. 6, sub-sect. 2, authorises additions to the goods mentioned in the bill. Under that section, articles entirely different from, and much more valuable than articles mentioned in the bill, may be afterwards brought into it, though they are not necessary for the maintenance of the security. The form in the schedule to the Act allows the insertion of a covenant for insurance. The object of that must be that goods purchased with the insurance money may be substituted in place of the goods destroyed. This shows that, under a covenant for the maintenance of the security, after-acquired property may be included in the bill.

Scott replied.

Cur. adv. vult.

Jan. 17, 1894.—*LOPES, L.J.* read the following written judgment:—I agree with *Day, J.*, and think the bill of sale good. Several objections were taken to its validity. One only was relied upon, which was, that the bill of sale assigns

certain articles specifically set out in the schedule, and then contains a covenant that, "so long as any money shall remain owing on the security of these presents, he, the said Alfred Grimes (the mortgagor), will not remove any of the said chattels and things from the said dwelling-house in the said schedule mentioned without the previous consent of the said William Seed (the mortgagee) except for necessary repairs, and will replace any articles damaged or worn out with any others of equal value to be included in this security." It was candidly admitted by *Mr. Scott*, who most ably argued the case for the appellant, that but for the case of *Thomas v. Kelly* (*ubi sup.*) in the House of Lords the present case would fall within the authority of *The Consolidated Credit and Mortgage Corporation v. Gosney* (*ubi sup.*) and *Furber v. Cobb* (*ubi sup.*). I am clearly of opinion that the case is within the authority of those cases, and is outside and easily distinguishable from *Thomas v. Kelly*. The law as it stood before that case may be thus stated: The scheduled form of a bill of sale annexed to the Act of 1882 permits the introduction into the body of the bill of sale of "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." Clauses, therefore, for the maintenance or defeasance of the security are unobjectionable, and do not vitiate the bill of sale. In *The Consolidated Credit and Mortgage Corporation v. Gosney* (*ubi sup.*) a bill of sale was supported containing an agreement that the grantor should replace any chattels or things which should be worn out with others of equal value; and in *Furber v. Cobb* (*ubi sup.*) an agreement by the grantor not to permit or suffer the chattels to be destroyed or injured, or to deteriorate in a greater degree than by reasonable wear and tear, and forthwith to replace, repair, and make good the same, was said to be in accordance with the form, *Sir James Hannen* saying at the end of his judgment, when speaking of the covenant, which he thought (contrary to the opinion of *Bowen, L.J.* in the court below) was good, that he thought the question "of great practical importance, for such a covenant is very likely to be introduced into bills of sale." This bill of sale, therefore, does not sin against the statutory form, unless the cases which I have referred to are altered or qualified by *Thomas v. Kelly* (*ubi sup.*) in the House of Lords. *The Consolidated Credit and Mortgage Corporation v. Gosney* (*ubi sup.*) is not cited in *Thomas v. Kelly*. If the bill of sale in *Thomas v. Kelly* is looked at it will be found to be altogether different from the bill of sale in *The Consolidated Credit and Mortgage Corporation v. Gosney*. It grants to the holder of the bill of sale the chattels specifically described in the schedule, together with the other chattels and things, the property of the mortgagor, now in or about the premises, and also the chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things, or any part thereof, may have been removed), whether brought there in substitution for, or renewal of, or addition to, the chattels and things hereby assigned. Such terms go far beyond any terms necessary for the maintenance or defeasance of the security. The words are so wide and so comprehensive that they

[CT. OF APP.]

SEED v. BRADLEY.

[CT. OF APP.]

would enable the lender to sweep up all future property of the borrower, and would defeat the chief object the Legislature had in view when the Act of 1882 was passed. We were in argument much pressed with sub-sect. 2 of sect. 6 of the Act of 1882, and it was said that the only things which need not be specifically described were those mentioned in sect. 6. Sects. 4, 5, and 6 relate only to the schedule containing an inventory of personal chattels to be annexed to the bill of sale, and, in my judgment, in no way control the terms that may be inserted in favour of the maintenance or defeasance of the security as provided in the scheduled form. I believe the Legislature intended by sub-sect. 2 of sect. 6 to relax the stringency of the previous rules in favour of business and trade by permitting a substitution of one thing for another in the cases named, although the object was not to maintain or defeat the security. I will give an illustration—a substitution of steam-power for horse-power, or of electricity for gas, although the security was in no way affected thereby, and the substitution was in no way necessary for its maintenance. The bill of sale in *Thomas v. Kelly* (*ubi sup.*) dealt with chattels which could not be said to be within the exception contained in sub-sect. 2 of sect. 6, nor could be brought within any term for the maintenance of the security. *Thomas v. Kelly* (*ubi sup.*) is clearly distinguishable from the present case, and I find nothing inconsistent in saying that the bill of sale in that case was bad, and in this good. I cannot think that the House of Lords, in *Thomas v. Kelly* (*ubi sup.*), intended to ignore that portion of the scheduled bill of sale which permits terms for the maintenance of the security (such as exist in this bill of sale) to be introduced. The appeal must be dismissed with costs.

KAY, L.J. read the following written judgment:—The execution creditor claims on the ground that the bill of sale is void under sect. 9 of the Bills of Sale Act 1882, as not in accordance with the scheduled form. It contains a covenant by the grantor that, "so long as any money shall remain owing on the security of these presents," the grantor "will replace any articles damaged or worn out with any others of equal value to be included in this security." The scheduled form contemplates a covenant by the grantor for insurance, and also for maintenance or defeasance of the security. Insurance is commonly against fire. A covenant to insure, and in case of fire to expend the money received in replacing the chattels destroyed or injured by others which shall be included in the security, seems to be the very thing intended. Then, when in addition the form contemplates a covenant for maintenance, it seems clear that means to repair chattels damaged and to replace those worn out or destroyed by accident other than fire. It is argued that repair of the actual chattels assigned was alone intended. But this would not satisfy the words. They are to maintain, not the chattels, but the "security," and that the meaning of "security" is larger than the subject of the security is shown by the collocation of the word "defeasance." "Defeasance of the chattels" would be nonsense. "Defeasance of the security" means of the "mortgage security." So "maintenance" must mean "maintenance of the mortgage security;" and this is literally and strictly carried out by such a covenant as we have now to consider. Then

it is argued that this conclusion is inconsistent with *Thomas v. Kelly* (*ubi sup.*). But that was not a decision upon a covenant for maintenance of the security. The bill of sale in that case contained an assignment of chattels specifically described in the schedule in or about certain premises there mentioned, and also of "all chattels or things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for or renewal of or in addition to" the scheduled chattels. Those words "in addition to" made it impossible to treat the assignment as though it were a covenant to maintain the security. No such suggestion appears in the argument as reported. But in the speech of Lord Halsbury he says that the 2nd sub-section of sect. 6 of the Act of 1882 "undoubtedly seems to indicate that goods not capable of specific description and to be afterwards supplied may, nevertheless, be so included in the security as yet not to make the bill of sale void. But, if one supposes the assignment to be of all such goods as are the subject of the proviso in question, and that in the schedule they were properly described, but added thereto were the words which gave rise to the argument, namely, such goods as should be in substitution thereof, the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles." Sect. 4 avoids a bill of sale except as against the grantor, in respect of any personal chattels not specifically described in the schedule. Sect. 6, sub-sect. 2, provides that nothing contained in the previous sections shall avoid a bill of sale in respect of (*inter alia*) any fixtures, plant, or trade machinery brought upon the premises "in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule." Therefore an assignment of such substituted articles—which would only have the effect of a covenant to assign—is permitted by sub-sect. 2 of sect. 6. But then this substitution is confined to "fixtures, plant, or trade machinery," and does not include other chattels such as furniture in a dwelling-house; and it may be argued that a covenant to assign any substituted chattels which were not "fixtures, plant, or trade machinery" would not be sanctioned by sect. 6, sub-sect. 2. That is so. But the form in the schedule contemplates a covenant for maintenance of the security, whatever may be the nature of the chattels mortgaged. This is not inconsistent with sect. 6, sub-sect. 2. That section allows certain trade chattels which may be afterwards acquired to be included, not merely for the purpose of maintaining the security, but for the obvious reason that, unless this could be done, a manufacturer who had given a bill of sale could not make any alteration or improvement in his plant, fixtures, or machinery without lessening the security—that is, practically, without the consent of the mortgagee. In the interest of trade he is to be allowed to do this on the terms that the security is to cover the substituted articles. But, in addition to this, the scheduled form shows that a covenant for maintenance of the security is to be allowed in every case, whether the mortgaged chattels are plant, fixtures, or trade machinery, or mere furniture

of a dwelling-house, or other chattels not coming within the description in sect. 6, sub-sect. 2. I have only to add that this construction of the Act has already been adopted by the Court of Appeal in the case of *Furber v. Cobb* (*ubi sup.*), where Sir James Hannen says of a similar covenant that it was "essentially necessary for maintaining the security agreed on, and, if I had been required to give an example of the words under consideration, I should have selected this as the most obvious." *Furber v. Cobb* (*ubi sup.*) was cited in the argument in *Thomas v. Kelly* (*ubi sup.*) in the House of Lords; and I do not find any intimation of dissent from it by any member of that tribunal. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Pritchard, Englefield, and Co.*, agents for *Butcher and Barlow*, Bury.

Solicitors for the defendant, *Norris, Allens, and Chapman*, agents for *Diggles and Ogden*, Manchester.

Wednesday, Jan. 31.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

CHAMBERLAYNE v. COLLINS AND ANOTHER. (a)
APPLICATION FOR A NEW TRIAL.

Covenant—Fixtures—Chattels—Operative machinery—Switchback railway.

The defendant was bound by the restrictive covenants of a building estate that no "operative machinery" should be fixed or fastened on the land held by him, and also that "no hut, tent, shed, caravan, house on wheels, or other chattel," should be "erected, made, placed, or be allowed to remain upon any lot."

Held, that a switchback railway erected upon piles driven into the ground was "operative machinery," and was also a "chattel" within the meaning of the covenant.

THIS was a motion by the defendants for judgment or a new trial.

The plaintiff was the owner of several houses at Clacton-on-Sea, near to which the defendants erected a switchback railway upon piles driven into the ground.

The action was brought for a nuisance and for a breach of covenant through the erection of the railway.

At the trial of the action before Mathew, J. with a jury at Chelmsford, the jury found that the railway was a nuisance, and the defendant gave an undertaking not to use it.

The question of breach of covenant was reserved by the learned judge for further consideration, and upon such further consideration he held that there had been a breach, and he granted a mandatory injunction for the removal of the railway.

The plaintiff's and the defendants' properties formerly belonged to a building company, who sold its estate in lots to various purchasers, and in the conveyances were restrictive covenants limiting the use of the ground by the various purchasers.

The defendants admitted that they were bound by the following covenants, and that the plaintiff was entitled to the benefit of them, so that the only question was whether the erection of the

switchback railway was or was not a breach of these covenants. The covenants in question were as follows:

No house to be erected on the said premises shall be used for any other purpose than as a private dwelling-house, and the trade of an innkeeper, victualler, or retailer of wines, spirits, or beer, shall not be carried on on the said premises, nor shall any operative machinery be fixed or fastened thereon. No hut, tent, shed, caravan, house on wheels, or other chattel shall be erected, made, placed, or be allowed to remain upon any lot, and the company or the owner or owners of any of the other lots, or any part thereof, may remove and dispose of any such erection or any such other thing, and for that purpose may break or remove fences and forcibly enter upon any lot upon which a breach of this stipulation shall occur, and shall not be responsible for the safe keeping of anything so removed or for the loss thereof or any damage thereto.

Channell, Q.C. (Winch, Q.C. and Brooke Little with him) for the defendants.—The switchback railway is not covered in, and to be brought within the terms of the covenant it must come either within the words "operative machinery" or the words "other chattel." It is submitted that it comes within neither expression. The railway, apart from the carriages which run upon it, and which are no part of the railway, is not machinery, and there is nothing in it which moves or works. The lines of a tramway could not be said to be machinery, and still less could they be said to be operative machinery. The switchback railway is in just the same position as the lines of a tramway. Neither can it be a chattel, because it is a fixture. A fixture cannot be a chattel; the two words are exclusive of one another. Further, though it were a chattel, it cannot be said to be within the words "other chattel" of the covenant. "Other" implies a chattel of the same nature as the chattels previously mentioned, and "other chattel" means some movable structure.

Kemp, Q.C. and Boydell Houghton for the plaintiff.—The railway cannot be considered separately from the carriages which run upon it. Whatever be the cause of the motion of the carriages, a railway is a machine, and when the carriages are used it is an operative machine. Whether the carriages are moved by steam, or by horse-power, or by gravitation, which is the result of the form of the railway, is an immaterial matter. Secondly, the railway being fixed to the ground merely for the purpose of more conveniently using it, and not for the improvement of the land, is a "chattel," and not a fixture:

Hellawell v. Eastwood, 6 Ex. 295;

Turner v. Cameron, 22 L. T. Rep. N. S. 525; L. Rep. 5 Q. B. 306.

Lord ESHER, M.R.—It seems clear to me that this switchback railway comes within the words of these covenants both as being "operative machinery" and as being a "chattel" within the meaning of the covenant. That the railway is "machinery" I have no doubt at all. It is something made to have a given effect by means of power applied to it. It is built solely for the purpose of operating upon something, namely, on certain carriages, in a particular way. Being built on purpose to perform a particular operation, I think that, if it carries out the operation as it is intended to, it is operative machinery. I am therefore of opinion that this railway, even if it were a fixture, comes within the covenant as being "operative machinery." But it is also a "chattel"

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

within the covenant. It is erected, made, and placed on the land, and it could be removed to-morrow without causing any material injury to the soil. It is erected on the soil, not for the purpose of increasing the value of the land, but only for the purpose of its more convenient use as machinery. On both grounds I think that it comes within the covenant, and this appeal must be dismissed.

LOPES, L.J.—I entirely agree, and in my opinion this railway is both “operative machinery” and a “chattel” within the covenant. A railway impelled by steam must be admitted to be machinery, and on this point I think no distinction can be drawn between the cases of the motive power being steam and being gravitation. Then it was argued that the railway is not “operative.” Operative means no more than active, and this railway acts by conveying people. I also think that it is a chattel, and it is not the less so because it is fixed, to the ground; because, though it is fixed, it comes within the explanation of such fixtures given in *Hellawell v. Eastwood* (*ubi sup.*). I agree that the appeal fails and must be dismissed.

DAVEY, L.J.—I am of the same opinion. This railway is “operative machinery” and also a “chattel” within the meaning of the covenant. There is always great danger in giving definitions, but I think I may say that “machinery” implies the application of mechanical means to the attainment of some particular end by the help of natural forces, and the addition of the word “operative” means “with the potentiality of operating or doing work.” It is clear to my mind that a switchback railway comes within that definition, because it is a thing skilfully built with curves of a particular shape which by their peculiar form supply the motive power which actuates the carriages which run up and down the railway. But besides being “operative machinery,” it is also, in my opinion, a chattel within the meaning of the covenant. I agree that all goods are chattels, whether they be movable or immovable, if they are not part of the freehold. Adopting the criterion of Parke, B. in *Hellawell v. Eastwood* (*ubi sup.*) cited in *Turner v. Cameron* (*ubi sup.*), I think that we cannot say that this switchback railway was made for the purpose of improving the land, but was secured to the soil merely for its more convenient use as a chattel. For this reason I agree that the railway in question is a “chattel” within the covenant, and on both grounds the appeal must be dismissed.

Appeal dismissed.

Solicitors: for the plaintiff, *Chamberlayne and Short*; for the defendants, *Harman, Ward, and Collier*, for *Young and Harman*, Clacton-on-Sea.

Thursday, Feb. 1.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

BROTHERTON v. THE METROPOLITAN DISTRICT RAILWAY JOINT COMMITTEE. (a)

APPLICATION FOR A NEW TRIAL.

Practice—Costs—New trial—Costs of former trial to abide the result of new trial—Meaning of “result.”

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The Court of Appeal having made an order for the new trial of an action, “costs of former trial to abide the result of new trial”:

Held, that “the result” in this order meant “the result as to costs.”

THIS was a motion for a new trial.

The action was for false imprisonment, and the learned judge at the trial of the action with a jury, without calling on the defendants, directed the jury to find for the defendants, and gave judgment for the defendants accordingly.

The plaintiff moved for a new trial.

The Court of Appeal ordered the judgment to be set aside and “a new trial to be had between the parties; costs of former trial to abide the result of new trial.”

At the new trial the plaintiff obtained a verdict for one farthing damages, and the judge thereupon deprived him of his costs.

The plaintiff moved for another new trial on the ground of insufficiency of damages.

Crispe (Candy, Q.C. with him) for the plaintiff.

F. H. Mellor for the defendants.

The COURT refused the application.

The question then arose as to the costs of the first trial.

Crispe.—The “result” of the second trial was a verdict for the plaintiff. The plaintiff is therefore entitled to the costs of the first trial.

Mellor.—The “result” in the order of the court means the result as to costs. The plaintiff was deprived of his costs in the second trial, and he is therefore not entitled to the costs of the first trial:

Ferguson v. Davison, 46 L. T. Rep. N. S. 191; 8 Q. B. Div. 470, was referred to.

Lord ESHER, M.R.—In the order of the court the “result” meant the “result as to costs.” The order was, that as regards costs the result of the first trial should be the same as the result of the second trial. As the plaintiff has not got the costs of the second trial, he will not have them in the first.

LOPES and DAVEY, L.JJ. concurred.

Solicitor for the plaintiff, *Edward Clarke*.

Solicitors for the defendants, *Fowler, Perks, and Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov. 21 and Dec. 21, 1893.

(Before LAWRENCE and WRIGHT, JJ.)

SHAW v. THE GREAT WESTERN RAILWAY COMPANY. (a)

Railway company—Valuables not declared—Theft by company's servant—No negligence on part of company—Liability of company—Carriers Act 1830 (1 Will. 4, c. 68), ss. 1, 6, 8—Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), s. 7.

By the Railway and Canal Traffic Act 1854, s. 7, “the company are to be liable for loss or injury to goods in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants.”

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Q.B. Div.]

SHAW v. THE GREAT WESTERN RAILWAY COMPANY.

[Q.B. Div.]

Held, that this section does not include loss by the theft of the company's servants without negligence, and therefore that, by a contract or notice brought home to the consignor, the company can exempt itself from liability for such loss, notwithstanding sect. 8 of the Carriers Act 1830.

CASE stated by consent of the parties for the opinion of the Court.

The action was brought to recover the sum of 250*l.*, the agreed value of jewellery and trinkets contained in a portmanteau belonging to the plaintiff, which the plaintiff had delivered to the defendants at their station at Woburn Green, to be carried by them to the plaintiff's house at Bishops Stortford. The jewellery having been stolen from the portmanteau during the transit by a servant of the defendants, without any negligence on the part of the defendants, the question now was whether the defendants were liable for the loss.

The further facts, the nature of the arguments, and the cases cited appear fully in the judgment.

Lawson Walton, Q.C. and *Frankau* for the plaintiff.

Jelf, Q.C. and *A. T. Lawrance* for the defendants.

Cur. adv. vult.

Dec. 21.—The judgment of the Court was read by

WRIGHT, J.—The plaintiff delivered to the defendants a portmanteau, to be carried by them as common carriers of goods, and he paid their charge and signed a consignment note, on which was printed the common condition to the effect that the company hold themselves entirely relieved from loss or damage to goods of the kind described in the Carriers Act of 1830, unless the articles are declared, and an assurance paid as compensation for the risk incurred. The portmanteau contained things of the kind mentioned in the condition to the value of more than 10*l.* The plaintiff did not declare them, or pay or tender any increase of charge in respect of them. The things were stolen in transit by a servant of the defendants, without any negligence on their part, and the question is whether the defendants are liable for the loss so caused. It seems strange that such a case can at this day be open to discussion, but upon examination it is found to involve a question of difficulty which is not covered by authority. The Railway and Canal Traffic Act 1854, sect. 7, as interpreted by the case of *Peck v. The North Staffordshire Railway Company* (8 L. T. Rep. N. S. 768; 10 H. of L. Cas. 473), enacts, in substance, that, in the absence of a signed and reasonable contract for exemption, the railway company is to be liable for loss or injury to goods in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants. We are bound in this court by *Ashenden v. London, Brighton, and South Coast Railway Company* (42 L. T. Rep. N. S. 586; 5 Ex. Div. 190) to hold that the signed contract in this case does not avail the defendants under sect. 7 of the Act of 1854, on the ground that it purports to relieve them from liability for every kind of negligence or default, however gross, and however completely the loss may be unconnected with the fact of the goods being valuables, and does so without any equivalent or beneficial alternative, and is therefore un-

reasonable. But sect. 7 of the Act of 1854 concludes with the proviso "that nothing herein contained shall alter or affect the rights, privileges, or liabilities" of a company, under the Carriers Act 1830, "with respect to articles of the descriptions mentioned in the said Act." The Act of 1830, sects. 6 and 8, is as follows: Sect. 6, "Provided always, that nothing in this Act contained shall extend or be construed to annul, or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises." Sect. 8: "Provided also, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any . . . servant in his or their employ, nor to protect any such . . . servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." And it is argued that the contract in this case is a special contract under sect. 6 of the Act of 1830, and is saved by the proviso to sect. 7 of the Act of 1854, and so not subject to the proviso of sect. 8 of the Act of 1830. We are, however, bound by the decision of the Exchequer Chamber in *Baxendale v. The Great Eastern Railway Company* (L. Rep., 4 Q. B. 244) to hold that sect. 6 of the Act of 1830 does not give validity to special contracts generally, but refers only to contracts by which the company voluntarily renounces the protection given by sect. 1 of the Act. The rights or liabilities, therefore, of the defendants under their special contract are not rights or liabilities under the Carriers Act at all, and are not saved by the proviso to sect. 7 of the Railway Traffic Act. And even if a different construction could be put upon sect. 6 it would not avail the defendants, for, if the special contract derives its validity from sect. 6, then it is subject to sect. 8 of the same Act, and the defendants are expressly made liable for the theft of their servant. A third point was raised, that the plaintiff is precluded from succeeding because he delivered valuables without declaring them, having notice that the company would not receive them unless declared and insured; and it was argued that this was a fraud, or that in some way the plaintiff was estopped. In the early part of the century this point was raised in many cases, and the decisions were conflicting, but since the case of *Walker v. Jackson* (10 M. & W. 161) it seems to have been regarded as settled law that a carrier cannot succeed on this ground in the absence of positive misrepresentations or other actual fraud, and the older decisions have dropped out of the books. The defendants, therefore, fail on all the grounds on which their case was argued; but this does not dispose of the matter. It was, indeed, assumed in the argument on both sides that sect. 7 of the Act of 1854 applies to the case unless it is excepted by the proviso. It appears to us, however, necessary to consider whether the principal enactment of sect. 7 applies at all to theft by a servant of the carrier, whether that is within the expression "the neglect or default of such company or its servants," as used in that Act, and for that purpose to examine the state of the law with reference to which sect. 7 was

Q.B. Div.]

SHAW v. THE GREAT WESTERN RAILWAY COMPANY.

[Q.B. Div.]

enacted. It is clear law that a common carrier by land is, in the absence of exemptions by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies, and "inherent vice" alone excepted, and he is therefore, in the absence of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants. A dictum, apparently to the contrary effect attributed to Willes, J. in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (4 C. B. N. S. 307), was afterwards disclaimed in a note to *Coggs v. Bernard* (1 Smith L. C., 9th edit., p. 246). During the half-century which preceded the Carriers Act of 1830, it had, however, been established, for example in *Nicholson v. Willan* (5 East. 507) and *Harris v. Packwood* (3 Taunt. 263), "that the carrier could protect himself to some extent from liability for loss or damage" by insisting on a condition relieving him from liability, and for some time before 1830 it had become settled that he could do this by a mere public notice, though not "brought home" to the customer in any way. After the Act of 1830 it was necessary for him to show a special contract for that purpose, but a general notice "brought home" to the customer was held to be a special contract, because the customer who sent his goods after notice of the condition was held to have assented to it: (see per Blackburn, J. in the case of *Peek v. The North Staffordshire Railway Company*, 32 L. J. 241, Q. B.) The extent of the protection obtained by these contracts or notices was limited until about 1850. However general their terms, they were construed as covering only ordinary carriers' risks, or risks of the road, and not as extending to "gross" negligence, and a contract or notice expressly extending to "gross negligence" would have been held bad, to that extent at all events. Loss by theft, by strangers, or by the carriers' servants, in the absence of "gross" negligence, was a "risk of the road," against which the contract or notice at common law protected the carrier, quite apart from the Act of 1830, and notwithstanding sect. 8 of that Act, which merely excepted theft by the servant out of the protection given by the mere force of the statute itself, and not out of the protection obtained by contracts not depending on the statute for their validity: (*Butt v. The Great Western Railway Company*, 11 C. B. 140, explained in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (*ubi sup.*), and in *The Great Western Railway Company v. Rimell*, 18 C. B. 575, and in the notes to *Coggs v. Bernard*, 1 Smith L.C. at p. 246, 9th edit.) By the end of 1852, however, it had become settled by a series of cases [in the Queen's Bench, *Shaw v. The York and North Midland Railway Company* (13 Q. B. 347), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (16 Q. B. 600), *Chippendale's case* (21 L. J., 22 Q. B.); in the Common Pleas, *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (10 C. B. 454); and in the Exchequer, *Carr v. The Lancashire and Yorkshire Railway Company* (7 Ex. 707)] which extended to contracts and notices the construction that had been applied to sect. 1 of the Act of 1830 in *Hinton v. Dibbin* (2 Q. B. 646), that the protection afforded by these

contracts or notices "brought home" might extend to negligence however great, and that it made no difference whether the pleader alleged the negligence to be "gross" or not. After these decisions the carriers' contracts or notices when "brought home" protected them from everything except wilful acts, such as conversion of the goods by the carrier himself or his agents, or wilful misdelivery, amounting to a renunciation of the character of bailee: (*Morritt v. The North-Eastern Railway Company*, 34 L. T. Rep. N. S. 940; 1 Q. B. Div. 302; *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454.) It was to correct this state of the law that the Traffic Act of 1854 was passed. The legal warfare had been waged about negligence only, and there is some presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when the statutes passed: see per Blackburn, J. in *Peek's case* (*ubi sup.*) The language of the Act itself points in the same direction. The enactment is, "that the company are to be liable for loss or injury to goods in the receiving, forwarding, or delivery thereof, occasioned by 'the neglect or default' of the company or its servants." These words are completely apt to describe every form of negligence, including theft by the company's servants, if occasioned or facilitated by negligence, and any default within the scope of the servants' employment; but they are not apt to describe loss by theft without negligence of the company. For many years carriers had been allowed to exempt themselves from liability for all risks of the road not occasioned by negligence, including loss by theft of their servants (*Butt v. The Great Western Railway Company*, 11 C. B. 140), subject only to the express enactments of the Act of 1830, and there is nothing to indicate that the law in this respect was thought to require amendment—in respect of theft or any other of the risks of the road. If it was intended to make the companies liable for theft without their negligence; there is a strong contrast between the inaptitude of the words used in the Act of 1854, and the direct language of sects. 4 and 8 of the Act of 1830. Having, then, regard to the terms of the Railway Traffic Act, and to the history of the law on the subject, and the occasion for the Act, it seems most reasonable to hold that it extends only to negligence or default in the nature of negligence, or within the scope of the servants' employment. The company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least one hundred years in relation to such theft—that is, that, subject (in the case of the valuables specified in the Act of 1830) to the provisions of sect. 8 of that Act, they can, by contract or notice "brought home," exempt themselves from liability for such theft. It may be added that sect. 8 of the Act of 1830 cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to cases of the valuables specified in the Act, and are in strong contrast with the language used in sect. 4, which was intended to be general. This view was plainly the view of the Court in the case of *Butt v. The Great Western Railway Company* (*ubi sup.*), and it must always

have been the view of pleaders, because all the precedents of replications of felony by the carrier's servants are to pleas of the Carriers Act, and not to pleas of contracts at common law.

Judgment for defendants without costs.

Solicitors for the plaintiff, *Yarde and Loader.*
Solicitor for the defendants, *R. R. Nelson.*

ERRATUM.—*Smith v. Muller*, ante, page 170.—In head note, for "Conviction affirmed," read "Dismissal affirmed."

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 30, 1893, and Jan. 17, 1894.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

SYNGE v. SYNGE AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Contract—Agreement in consideration of marriage—Promise by intended husband to leave property to intended wife—Breach during life of husband—Action for damages—Measure of damages.

The defendant wrote a letter to the plaintiff, whom he was then desirous of marrying, saying: "You thoroughly understand the terms, which are, that I leave house and land to you for your lifetime." This referred to the proposed marriage. The plaintiff shortly afterwards married the defendant upon the faith of the above letter. The defendant made a will, leaving the house and land to his wife for her life. He subsequently destroyed that will, and conveyed the house and land to his daughters absolutely.

Held (reversing the decision of Mathew, J.), that there was a binding promise to leave the property to the plaintiff, which could be enforced; that there was a breach of the contract, by the conveying away of the property, which entitled the plaintiff to sue at once for damages; and that the measure of damages was the present value of the possible life estate to which the plaintiff would have been entitled if she had survived her husband.

THIS was an appeal by the plaintiff from the judgment of Matthew, J., upon further consideration in London, after the trial without a jury at Bristol.

The plaintiff brought this action against her husband, Sir R. Syngé, and his two daughters, asking for a declaration that she was entitled to a certain house and land called Ardfield, and in the alternative, for damages for breach of contract.

On the 24th Dec. 1883 the defendant, Sir R. Syngé, wrote a letter to the plaintiff, a lady whom he was then desirous to marry, in which he said:

You thoroughly understand the terms (and I dare say have told Mr. Woodruff) on which we are to put a stop to all this bother by becoming "one another," which are, that I leave house and land to you for your lifetime; but you being otherwise provided for in the "tin" line, I leave what I have to the girls.

The house and land referred to were a house and land called Ardfield, in which Sir R. Syngé

then resided with two daughters by a former marriage. The lady had some property of her own, of which Mr. Woodruff was trustee.

The marriage between the plaintiff and the defendant took place on the 5th Jan. 1884, ten days after the date of the letter.

At the trial the plaintiff said that she answered the letter, but there was no copy, and the original was not produced. When she received the letter she was staying with Mr. Woodruff, and she showed it to him. He advised her to keep the letter, and to have it stamped. She did keep the letter. The lady's property was settled upon herself, but there was no settlement of Sir R. Syngé's property upon her.

Shortly after the marriage the defendant made a will, by which he left Ardfield to the plaintiff for life. This will was subsequently destroyed, and the defendant made other wills.

On the 29th Sept. 1892 the defendant, Sir R. Syngé, conveyed Ardfield to his two daughters, the other defendants, by deed, having, as he said, totally forgotten the letter of the 24th Dec. 1883. The property was leasehold property.

At the trial before Mathew, J. without a jury, the learned judge gave judgment in favour of the defendants, upon the ground that the letter had not been treated by the plaintiff as a contract at all, but as a mere statement of intention by which the intended husband was not to be bound.

The plaintiff appealed.

Bucknill, Q.C. and *Blake Odgers*, Q.C. for the appellant.—The appellant now only asks for a decision that there has been a breach of contract, and for damages; she gives up the claim for a declaration and for specific performance. There was a definite offer contained in the letter which was intended to be, and was accepted as a binding promise by the parties. It was not merely the expression of a revocable intention. The appellant accepted the offer, and married upon the faith of it. There was, therefore, a binding contract made in consideration of marriage, by which the respondent promised that, after his death the appellant should have this property. If such a contract is broken damages can be recovered:

Needham v. Kirkman, 3 B. & Ald. 531;

Goilmere v. Battison, 1 Vernon. 48;

Alderson v. Maddison, 43 L. T. Rep. N. S. 349; 5 Ex. Div. 293.

[KAY, L.J.—In *Goilmere v. Battison* (*ubi sup.*) the contract seems to have been construed as a contract to "give," and not as a contract to "make a will."] Such a contract is not necessarily a contract to make a will; the promise is sufficiently performed if by some means or other the property is given. All the authorities are cases in which the action has been brought after the death of the promisor. In a case of this kind however, there is a complete breach before death, because the promisor has disposed of the property and so put it out of his power to perform his contract:

Hochster v. De la Tour, 2 E. & B. 678;

Short v. Stone, 8 Q. B. 358;

Frost v. Knight, 26 L. T. Rep. N. S. 79; L. Rep. 7 Ex. 111;

Lovelock v. Franklyn, 8 Q. B. 371;

Ford v. Tiley, 6 B. & C. 325.

The last cited case shows that it is no answer to the allegation that the defendant has broken

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

[CT. OF APP.]

SYNGE v. SYNGE AND OTHERS.

[CT. OF APP.]

his contract for the defendant to say that he might be able to get back the property before the time for performance arrives, and so be able to perform his contract. The promise of the defendant was that he would, as far as he could, give this property to his wife after his death, and that he would do nothing to prevent the performance of that contract.

Coleridge, Q.C. and W. Howland Roberts, for the respondent.—The learned judge was right in holding that the letter did not constitute a binding promise. The offer, if any, was not accepted as a binding contract by the other party. There was no acceptance, and, therefore no contract at all. A contract of this kind cannot be broken, and no action can be brought for breach thereof, until the death of the promisor. The defendant might get back the property before his death and perform the contract. In *Needham v. Kirkman* (*ubi sup.*) the question was whether there had been a breach at the time of death. Such a promise as that alleged in this case is conditional upon the wife surviving the husband; if she does not survive him, he is not bound to give her anything; she cannot, therefore, bring any action until after his death. There is no authority to be found for such an action as this, and no case in which damages have been given for a breach of a contract to make a will. [Lord ESHER, M.R.—Does not the case stand thus, as regards such a contract? There is no breach during life, but only at the moment of death. It is not a contract which executors can perform, because they cannot make a will for the deceased.] Such an action as this cannot be maintained during the life of the promisor:

Re Parkin; Hill v. Schwarz, 67 L. T. Rep. N. S. 77; (1892) 3 Ch. 510.

At most the plaintiff can only recover nominal damages while the husband is alive, because if he survives she would be entitled to nothing.

Bucknill, Q.C. in reply.—If the plaintiff is entitled to recover, she is entitled to more than nominal damages. The question is the same as that in *Frost v. Knight* (*ubi sup.*), in which the defendant had promised to marry the plaintiff when his father died, and the defendant absolutely refused to marry the plaintiff, his father being still alive, and the plaintiff recovered substantial damages in an action brought while the father was alive. The proper measure of damages in this case is the saleable interest of the plaintiff's interest expectant upon the death of the defendant.

Cur. adv. vult.

Jan. 17, 1894.—The judgment of the Court was delivered by

KAY, L.J.—The questions which arise in this case are these: (1) Was there a binding contract? (2) Was it such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it? (3) Has the time arrived at which such remedy can be asserted? If the remedy be by way of damages, what amount of damages should be given? The action was tried by a judge without a jury, so that all questions both of fact and law are open on this appeal. It will be convenient to consider the questions in the order in which they are stated. The alleged contract is contained in a letter of the 24th Dec. 1883 by Sir R. Syngé to a lady whom he was

desirous to marry, and is in these words: "You, my love, thoroughly understand the terms (and I daresay have told Mr. Woodruff) on which we are to put a stop to all this bother by becoming 'one another,' which are, that I leave house and land to you for your lifetime, but, you being otherwise provided for in the 'tin' line, I leave what I have to the girls. You know, my darling, most of my income dies with me. You would have enough (at least I suppose so) to keep the pot boiling, whilst they would have nothing. I hope, my darling, you see the thing as I mean it. You know, or ought to know, it is not your 'tin' (for I don't know or care what it is) but yourself, want. True, it is possible, but highly improbable that I might come in for the title and should be much better off. Should such a thing happen, we could see what I ought and would do for you." It is not necessary to quote more of the letter. There seems to be no doubt that the house and land referred to were the house and a small piece of land called Ardfield, in Devonshire, worth, it is said, about 60*l.* or 70*l.* a year, in which the defendant was then residing with two daughters by a former marriage. The defendant was not then Sir R. Syngé. He succeeded to the title afterwards. The lady, who is the plaintiff, had some property of her own, of which Mr. Woodruff was trustee. He was not a solicitor. The construction of the letter is plain. It is a statement of the terms as to property on which the defendant proposed to marry the lady. The marriage took place on the 5th Jan. 1884, ten days after the date of the letter. But it is argued that the plaintiff did not understand it to be a binding promise, and did not so treat it. It appears from her cross-examination that she answered the letter; she added "but have no copy only from memory." That seems to intimate that she had some recollection of the terms of her answer. But she was not asked what those terms were by counsel on either side, nor was the letter produced. The lady was staying with Mr. Woodruff when she received the letter from her intended husband, and she showed it to Mr. Woodruff. She kept the letter, and says in her evidence that she thought it a binding agreement. Mr. Woodruff says that he advised her to have her own property formally settled upon her, and that upon seeing the letter he explained to her that it "was a fair promise of the house or the use of the house during her life," and, he continued, "I considered it constituted a good contract, and I advised her that it ought to take the form of a deed, as, although he might make his will, he could revoke it, and her reply was, that he was such a good religious man he would never go back from his promise. Whenever I pressed my view, that was always her answer. She wished to rely upon his promise." He further says that he advised her to keep the letter and to have it stamped. To this she made no special reply. This witness was not cross-examined. A settlement of the lady's property was made. It is dated the 4th Jan. 1884, and was executed by both the plaintiff and defendant. It gives no benefit whatever to the defendant, nor does it affect any of his property. Except the letter in question he made no settlement upon the lady. The marriage having taken place on the 5th Jan., about the end of February the plaintiff and defendant went to Arcachon, for the sake of one of his daughters, who was out of health. When

there he made a will which has since been destroyed. By that will he certainly gave to his wife an interest in Ardfield after his death, and he communicated the fact to her. It was suggested in cross-examining her that it was not for her life but during widowhood only, and she said in answer to a further question that it did not occur to her to tell him that this was not according to the letter. It is argued from this that she could not have considered the letter binding. But on the other hand, in his answer to interrogatories, and also in a letter dated the 12th March 1892 to her solicitor, Sir R. Synge says it was left to her for her life, and he does not mention the limitation of widowhood, and one of his daughters, Mrs. Gilbert, says he told her he had left Ardfield to his wife for life. An undated letter is produced, from one of his daughters to Sir R. Synge, suggesting that he should leave Ardfield to Lady Synge for her life, and this daughter in her evidence states that she made that suggestion knowing nothing of the letter of the 24th Dec. 1883. Sir R. Synge says in his evidence that he had forgotten this letter, and intended to leave Ardfield to his daughters by the will of 1884, but they suggested he should leave it to his wife. Unhappily dissension arose, and Sir R. Synge destroyed the will of 1884, and made other wills, and on the 29th Sept. 1892 he, by deed, conveyed the property to his daughters, having, as he says, totally forgotten the letter of the 24th Dec. 1883. The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although, by the advice of Mr. Woodruff, she preserved it, because she did not adopt his recommendation to have the terms carried out by deed, nor have the letter stamped. He considers the result of the evidence of what passed between her and Mr. Woodruff to be that the lady "understood that there had been no contract upon the subject, and that she had only had an expression of the intention of her future husband. She declines to have any discussion upon the subject; she declines to have it stamped; and she says she is perfectly willing to rely upon the intention expressed in that letter, because she considered Sir Robert Synge, her intended husband, a religious man and a man of honour, and would keep his word." But what does that amount to? She had a written proposal of terms before the marriage from her intended husband as to the provision he would make for her. She declined to stipulate for a formal deed, which would be an alteration of the terms, because she believed he would keep his word, and leave it to her by his will; and in that belief she married him, and carefully preserved the letter. Although we have not her letter in answer, the inference that she accepted the terms, and married on the faith of this promise in writing, seems to us irresistible. We cannot, with deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the intended husband was not to be bound. The law relating to proposals of this kind before marriage was stated by Lord Lyndhurst, L.C., in *Hammersley v. De Biel* (12 Cl. & Fin. 45, 78): "The principle of law, or at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and

the other party consents, and celebrates the marriage in consequence of them; if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal." We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry; that she consented to the terms and married the defendant on the faith that he would keep his word; and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life. Then secondly, what is the remedy? Marriage is a valuable consideration for such a contract of the highest order, and when, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted: "A court of equity will take care that the party who marries on the faith of such a proposal is not disappointed, and will give effect to the proposal." In *Hammersley v. De Biel* (*ubi sup.*) the proposal was made on behalf of the intended wife's father by his authority, and was reduced into writing, and was to the effect that the father would pay down 10,000*l.* to be settled on the intended husband and wife and their children, the husband to secure a jointure of 500*l.* a year to the wife if she survived him, and then followed the provision on which the question arose, by which the father "proposes for the present to allow his daughter 200*l.* per annum for her private use . . . and also intends to leave a further sum of 10,000*l.* in his will to Miss Thomson to be settled on her and her children." After the father's death, without having made the promised provision by will, the only child of the marriage, her mother having died before her father, instituted a suit in equity against his grandfather's executors to recover 10,000*l.* out of his assets; Lord Langdale, M.R. held that by acceptance the proposal had "ripened into an agreement," and that the plaintiff was entitled to the relief she prayed, i.e., to the sum of 10,000*l.* with interest at 4 per cent. from the end of one year after the father's death, on the footing of a legacy. Lord Cottenham affirmed this decision, saying this (12 Cl. & Fin. 45, 62, n.): "I propose first to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. Thomson, to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind there may not be found in the memorandum or in the other evidence in the cause proof of any such contract, and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to it will be found that no such formal contract is required." This was affirmed in the House of Lords by Lyndhurst, L.C., and Lords Brougham and Campbell, without calling upon the respondents. We have examined the case closely, because it is of the highest authority, not merely as a judgment of the House of Lords, but because it was decided by some of the best equity lawyers of that time. Lord St. Leonards has criticised the decision on the ground that the memorandum in that case might have been construed as a mere expression of an intention, not as

CT. OF APP.]

HOOPER v. HILL.

[CT. OF APP.]

a definite proposal which could by acceptance ripen into a contract: (Sugden's Law of Property, p. 53.) But he does not intimate a doubt that the decision was right if the proposal was not merely of an intention which might be changed. Therefore a definite proposal in writing, so as to satisfy the Statute of Frauds, to leave property by will, made to induce a marriage and accepted, and the marriage made on the faith of it, will be enforced in equity. Then what is the remedy? When the proposal relates to a defined piece of real property, we have no doubt of the power of the court to decree a conveyance of that property, after the death of the person making the proposal, against all who claim under him as volunteers. It is argued that a court of equity cannot compel a man to make a will; but neither can they compel him to execute a deed. They, however, can decree the heir or devisee, in such a case, to convey the land to the widow for life, and, under the Trustee Acts, can make a vesting order and direct that someone shall convey for him if he refuses. And, under like circumstances, the court has power to make a declaration of the lady's rights; but counsel do not press for such relief or ask for a declaration to bind the house and land. The relief they ask is damages for breach of contract. It seems to be proved that the grantees of the property under the deeds executed by Sir R. Synge took without notice of the letter. They acquired, as we understand, the legal estate by the grant. If there was any valuable consideration moving from them, no relief in the nature of specific performance could be given against them, and it is suggested that, the property being partly leasehold, according to the decision in *Price v. Jenkins* (37 L. T. Rep. N. S. 51; 5 Ch. Div. 619), there was such valuable consideration. It is not necessary to examine this argument, as counsel elect to ask for damages only. Sir R. Synge had all his lifetime to perform this contract, but in order to perform it he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime; and as, by the conveyance to his daughters, he put it absolutely out of his power to perform this contract, Lady Synge, according to well-known decisions—*Hochster v. De la Tour* (*ubi sup.*) and *Frost v. Knight* (*ubi sup.*)—had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted. We have not before us the material for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages. Sir R. Synge must pay the costs of the action here and in the court below.

Appeal allowed.

Solicitors for the appellant, *Torr, Janeway, and Co.*, for *Eastley, Jarman, and Eastley*, Paignton.

Solicitors for the respondent, *Wood, Bigg, and Nash*, for *Kitson, Mackenzie, and Hext*, Torquay.

Jan. 11 and Feb. 5.

(Before LOPES and DAVEY, L.JJ.)

HOOPER v. HILL. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

County Court—Registrar—Jurisdiction—Default summons—Notice of defence and counter-claim—Hearing before registrar—Non-appearance of defendant—No proof of debt—Judgment for plaintiff, and counter-claim struck out—Irrregularity—Prohibition—County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 86 and 90.

The plaintiff sued the defendant in the County Court to recover the amount of a bill of costs, and issued a default summons under sect. 86 of the County Courts Act 1888; the defendant gave notice of a defence, and of a counter-claim. The return day of the summons was the 14th Sept., and notice was sent to the plaintiff that the action would be tried on that day. It was known that the judge would not sit upon that day, but the registrar sat to hear undefended cases under sect. 90 of the County Courts Act 1888. This action was called on, and, no one appearing on behalf of the defendant, the registrar gave judgment for the plaintiff on the claim, and struck out the counter-claim. No proof was given "of the debt being due and owing" as required by sect. 90.

Held (affirming the decision of the Queen's Bench Division), that the registrar had jurisdiction to make the order, and that there had been only an irregularity in not requiring proof that the debt was due and owing, which was a matter for appeal and not for prohibition.

APPEAL of the defendant from an order of the Divisional Court (Wills and Wright, JJ.) discharging a rule nisi for a writ of prohibition to the County Court of Birmingham.

The plaintiff sued the defendant in the County Court to recover the amount of a bill of costs, and issued a default summons under sect. 86 of the County Courts Act 1888.

The defendant gave notice of his intention to defend, and claimed a set-off and counter-claim.

On the 29th July notice was duly given to the plaintiff of the defendant's intention to defend, and that the action would be tried on the 14th Sept., which was the return day of the summons.

On the 14th Sept., it then being the vacation, the judge of the County Court did not attend, but the registrar (by leave of the judge) sat to hear undefended cases. This action was called on before him, but nobody appeared on behalf of the defendant. The plaintiff applied for judgment on his claim. The registrar gave judgment for the plaintiff on his claim, and made an order striking out the set-off and counter-claim. No proof was given of the debt being due and owing. The defendant knew that the judge would be absent.

On the following day the defendant applied to the registrar for a rehearing on the ground that the registrar had no power to strike out the set-off and counter-claim. The registrar referred the matter to the judge.

On the 2nd Oct. the defendant applied to the judge that the judgment should be set aside, and the claim and counter-claim be restored to the list for hearing, upon the ground that the registrar

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

[CT. OF APP.]

HOOPER v. HILL.

[CT. OF APP.]

had no jurisdiction, having no power to sit in the absence of the judge. This application was dismissed.

It appeared that the registrar was in the habit of holding courts and disposing of cases in the vacation during the absence of the judge.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

Sect. 86. (1) Subject to any rules and orders under this Act, in any action in a court for a debt or liquidated money demand, the plaintiff may, at his option, cause to be issued a summons in the ordinary form, or (upon filing an affidavit to the effect set forth in the prescribed form) a default summons in the prescribed form or to the prescribed effect, and if such last-mentioned summons be issued, it shall be personally served on the defendant, and if the defendant shall not, within eight days after service of the summons, inclusive of the day of service give notice, by post or otherwise, in writing, signed by himself or his solicitor, to the registrar of the court from which the summons issued, of his intention to defend, the plaintiff may, after eight days and within two months from the day of service, upon proof of service, or of an order for leave to proceed as if personal service had been effected, have judgment entered up against the defendant for the amount of his claim and costs, such costs to be taxed by the registrar.

Sect. 90. If in any action founded on contract a defendant shall not appear at the hearing either in person or by some person duly authorised on his behalf, and no sufficient excuse for the defendant's absence shall be shown, the registrar may, by leave of the judge or in case of the judge's death or unavoidable absence, upon due proof of the service of the summons and of the debt being due and owing, enter up judgment for the plaintiff, and shall have the same power to make an order for payment by instalments, or to enter up judgment of non-suit, or to strike out or adjourn the action, as a judge would have; and such judgment shall be as valid as if both parties had attended the court; but the judgment, and any execution thereon, may be set aside by the judge of the court, and a new trial granted upon such terms, if any, as the judge may think just.

The County Court Rules 1889, provide:

Order XXII., r. 6. Where a default summons has been issued and notice of defence has been given, and neither the plaintiff nor defendant appear when the trial is called on, the action shall be struck out; and where notice of defence has been given, and the defendant appears and the plaintiff does not appear, the action shall be struck out and costs may be ordered against the plaintiff as in the last preceding rule mentioned, and where the plaintiff appears and the defendant does not appear, judgment may be entered for the plaintiff without further proof, the amount to be payable by instalments or otherwise as the court may think fit.

The defendant obtained a rule *nisi* for a prohibition to the County Court, which upon argument was discharged by a divisional court (Wills and Wright, J.J.).

The defendant appealed.

Yeatman and *Poley* for the appellant.—When a plaintiff has issued a default summons and notice of defence has been given, the registrar cannot try the action under sect. 90. No one but the judge can do so. The registrar had no jurisdiction to sit and hear cases at all in the absence of the judge, except in the case of the judge's death or unavoidable absence. No proof of the debt being due and owing was given, and the registrar, therefore, had no jurisdiction under sect. 90 to give judgment for the plaintiff. The registrar clearly had no jurisdiction to strike out the

counter-claim. The registrar having no jurisdiction, the defendant is entitled to a writ of prohibition:

Mayor of London v. Cos, L. Rep. 2 H. of L. 239.

A. T. Lawrence for the respondent.—Under sect. 90 of the County Courts Act 1888, the registrar has jurisdiction in actions founded on contract when the defendant does not appear. A mere notice of defence cannot oust that jurisdiction. Prohibition is a remedy quite inapplicable to this case. The defendant had a full and complete remedy by appeal to the judge, of which he availed himself. The registrar, under sect. 90, has jurisdiction to strike out an action when the plaintiff does not appear, and he must have the same power to strike out a counter-claim. In a case of this kind the grant of a prohibition must be discretionary, and it was properly refused by the Divisional Court:

Broad v. Perkins, 60 L. T. Rep. N. S. 8; 21 Q. B. Div. 533.

Yeatman replied.

Cur. adv. vult.

Feb. 5.—*LOPES, L.J.*—I am of opinion that prohibition should be refused. The registrar, in my opinion, had jurisdiction. The summons in this case was a default summons issued under sect. 86 of the County Courts Act 1888, which permits a plaintiff suing for a debt or liquidated money demand, to issue a default summons in the form prescribed by the Act, which is to be supported by an affidavit, and personally served on the defendant, and provides that, if the defendant shall not within eight days after service of the summons give notice by post or otherwise in writing signed by himself or his solicitor to the registrar of the court from which the summons issued of his intention to defend, the plaintiff may, after eight days and within two months from the date of the service, upon proof of the service or of an order for leave to proceed as if personal service had been effected, have judgment entered up against the defendant for the amount of his claim and costs. The claim of the plaintiff was for a sum of money due in respect of a solicitor's bill of costs. The defendant gave notice of his intention to defend, claiming a set-off and setting up a counter-claim. Notice, dated the 29th July 1893, was duly given to the plaintiff of defendant's intention to defend, and that the cause would be tried on the following 14th Sept. On the 14th Sept., it being the vacation, the judge of the County Court was not in attendance. The registrar, however, on that day sat to hear undefended cases and this case was called on before him. The plaintiff appeared in person, but nobody appeared for the defendant. The case was called on a second time with a similar result, whereupon the plaintiff applied for judgment on his claim; and the registrar gave him judgment, striking out the set-off and counter-claim. No proof was given of the debt being due and owing. Next day an application was made to the registrar for a rehearing on the ground that the registrar had no power to strike out the set-off and counter-claim. The registrar referred the matter to the judge, granting a stay in the meantime. On the 2nd Oct. defendant applied to the judge that the judgment should be set aside and the claim and counter-claim should be reinstated in the list for hearing, upon the grounds that the

[CT. OF APP.]

HOOPER v. HILL.

[CT. OF APP.]

registrar had no jurisdiction to hear the case after notice of set-off and counter-claim, and that the registrar had no power to sit in the absence of the judge; whereupon the judge dismissed the application with costs. I have stated the facts at some length, because it is an important case as affecting the jurisdiction of registrars of County Courts. The jurisdiction of the registrar of a County Court is defined by sect. 90 of the County Courts Act 1888. It says: [Reads it.] It was contended that this section does not apply to default summonses, or to cases where notice of intention to defend had been given, but I can find no such limitation in the section. On the contrary, it appears to me to be of general application. Each one of the requirements mentioned has been satisfied in this case except proof of the debt being due and owing. The defendant did not appear at the hearing either in person or by some person duly authorised on his behalf; no sufficient excuse for the defendant's absence was shown; and due proof of service of the summons was given. It is contended that proof of the debt being due and owing ought to have been given. Order XXII., r. 6, is relied on, and it is said proof of the debt being due and owing was unnecessary. That rule says that where a default summons has been issued and notice of defence given, and when the plaintiff appears and the defendant does not appear, judgment may be entered for the plaintiff without further proof. I am inclined to think that rule only applies when the hearing is before the judge. It may be that the registrar made a mistake in not requiring proof of the debt being due and owing. Such a mistake, however, is not a ground for prohibition; it is a matter for appeal, not for prohibition. The registrar, under sect. 90, had, in the circumstances, jurisdiction to act. It was, in my judgment, the intention of the Legislature to authorise the registrar to try undefended claims in actions founded on contract. This was an action founded on contract, being a claim by a solicitor for his bill of costs. It is true the defendant claimed a set-off, and counter-claimed, but he did not appear to support either. The action was therefore undefended, as undefended as if the notice had not been given, and all the requirements of sect. 90 were complied with except the non-proof of the debt being due and owing, with which I have already dealt. It is said the registrar had no jurisdiction to strike out the set-off and counter-claim. Sect. 90 gives him power to strike out the action, and I should have thought *a fortiori* he might strike out a set-off and counter-claim which the defendant did not appear to support. But, again, if he was wrong in this it would not be ground for prohibition. The defendant, by appearing himself on the 14th Sept. (the day mentioned in his notice of intention to defend), either in person or by somebody duly authorised on his behalf, or by sufficiently excusing his absence, might have obviated the mischief of which he now complains. It is satisfactory, however, to know that, so far as the counter-claim is concerned, Mr. Lawrence is willing, without putting the defendant to the expense of an application to the court, to agree that the counter-claim should be determined in the County Court. I quite agree with what was said in the court below with regard to including in the registrar's list cases where notice of inten-

tion to defend has been given. If the defendant had appeared, or if somebody duly authorised on his behalf had been present, and sufficient excuse for his absence had been given, the registrar could not have tried the case. It seems wanton to bring parties to the court themselves, or by authorised agents, when their cases cannot be tried. In this case, therefore, prohibition must be refused with costs.

DAVEY, L.J.—The difficulty in this case is to draw the line between what is excess of jurisdiction and what is at most an indiscretion. So far as the question challenges the exercise of the registrar's discretion we cannot interfere by prohibition. I think that prohibition should be refused on the same grounds as were taken in the court below, viz., that the order complained of was within the jurisdiction of the court, and the matters alleged by the appellant show, at most, irregularity only in the exercise of jurisdiction, and not excess of it. I agree with Wills, J. that the practice which appears to be followed in the Birmingham County Court of publishing a list of cases (defended and undefended alike) to be tried on a day in vacation when it is known the judge will not be there, and compelling parties to incur trouble and, it may be, costs by coming to say what they have already said by their defence, at the risk of having their defences struck out, is not, at first sight, one to be commended. I should have thought that a defendant, who has put in his defence, knows that his case can be tried only by the judge, and is entitled to assume that it will not be taken on a day when it is known that the judge will not be present in the court. But I cannot say that the practice in itself involves any excess of jurisdiction, and I have no doubt it has been established with a view to the benefit of the suitors. I am of opinion that an action in which a default summons has been issued is an action within the meaning of sect. 90 of the County Courts Act 1888. Under sect. 86 the action is not commenced by the default summons, but there must be an action before the default summons can be issued. As this was an action founded on contract it was within the provisions of sect. 90. The registrar seems to have accepted the plaintiff's affidavit and the non-compliance with the default summons as due proof of the debt being due and owing. I am not prepared to say he was wrong in so doing. The effect of the statutory provisions relating to a default summons (sect. 86), and the rules relating thereto (see Order XXII., r. 6), is to make non-compliance with a default summons duly served and supported by the proper affidavit sufficient proof of the debt for the purpose of entering up judgment if no notice of defence is given. By rule 6, where notice of defence has been given and the defendant does not appear, judgment may be entered without further proof, which seems equivalent to saying that the case may be dealt with as if no notice of defence had been given. The provisions of sect. 164, and the opening words of sect. 86, give the rules statutory effect. I do not, however, think this point necessary for the decision of the case before us, because, even if the registrar gave judgment on insufficient or even inadmissible evidence of the debt, it would be irregularity only and matter for appeal, not for prohibition. I am of opinion that the registrar had no jurisdiction to strike out the counter-claim, and I think that, as

he could not deal with the whole matter, action and counter-claim, he ought not to have given judgment in the action. But if, as I have said, he had jurisdiction to give judgment, this again would be an irregularity only which might have been set right on appeal. We have been informed, however, that the counter-claim has been set down for trial, and will shortly be tried. I therefore agree with the judgment of the court below, that the act of the registrar in striking out the counter-claim is not ground for prohibition in the present case. I am of opinion that the appellant has taken an erroneous course in applying for a prohibition, and the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *F. Kimber Bull*, for *Shorthouse Bowen*, Birmingham.

Solicitor for the respondent, *Hooper*.

Monday, Feb. 12.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

SWYNY v. HARLAND. (a)

ORIGINAL MOTION.

Practice—Stay of execution upon terms—Payment of costs to solicitor upon undertaking to repay if appeal successful—Power of court to enforce undertaking—Appeal successful, but execution stayed.

The Court of Appeal, upon the application of the defendant, granted a stay of execution, pending an appeal to the Divisional Court from the judgment of an official referee, upon the terms that the defendant should pay into court the amount for which judgment had been given against him, and also pay the costs, as soon as taxed, to the plaintiff's solicitor upon his personal undertaking to repay the same if the appeal should be successful. The defendant complied with these terms. The appeal succeeded, but execution was stayed pending an appeal by the plaintiff to the Court of Appeal. The defendant applied to the Court of Appeal for an order that the plaintiff's solicitor should pay the costs.

Held, that the court had power to enforce the undertaking given by the solicitor, and to order him to repay the costs, and that the stay of execution granted by the Divisional Court did not affect that undertaking.

This was an application by the defendant that the plaintiff's solicitor might be ordered to comply with his undertaking for the repayment of costs pursuant to an order of the Court of Appeal.

The action was tried before an official referee, who gave judgment for the plaintiff for a large amount, and for the plaintiff upon the defendant's counter-claim.

The defendant asked for a stay of execution pending an appeal to a Divisional Court, which was refused both by the official referee and by the Divisional Court. The defendant appealed to the Court of Appeal, where an order was made that execution should be stayed pending the appeal to the Divisional Court, upon payment into court of the amount for which judgment had been given, and payment of the costs, as soon as taxed, to the

plaintiff's solicitor upon his personal undertaking to repay the same if the appeal proved successful. The defendant complied with these terms.

Upon the hearing of the appeal in the Divisional Court, the judgment of the official referee in favour of the plaintiff was set aside, and judgment entered for the defendant upon the claim; judgment was also entered for the defendant for a sum of money upon his counter-claim.

Upon the application of the plaintiff, the Divisional Court granted a stay of execution pending an appeal to the Court of Appeal.

The defendant applied to the Court of Appeal for an order upon the plaintiff's solicitor to repay to the defendant the costs which had been paid to him upon the above undertaking.

Joseph Walton, Q.C. for the applicant.—The defendant's appeal was successful and, therefore, by the terms of the undertaking, the plaintiff's solicitor is bound to repay the costs to the defendant. This court has power to make an order upon the solicitor to comply with the terms of his undertaking, because it was part of an order made by this court. The undertaking being given in the face of the court was really an undertaking given to the court. The solicitor elected to give the undertaking by accepting payment of the costs, though he could not have been compelled to give such an undertaking. The court can enforce any undertaking given by an officer of the court in the face of the court. The stay of execution granted to the plaintiff by the Divisional Court does not in any way affect this undertaking; that stay of execution does not make the defendant's appeal any the less successful within the meaning of the undertaking.

Bigham, Q.C. for the respondent.—A stay of execution having been granted by the Divisional Court, the defendant's appeal cannot be said to have succeeded within the terms of the undertaking. The effect of that stay of execution is, that the defendant is not to proceed in any way to enforce his rights until the plaintiff's appeal has been heard.

Lord ESHER, M.R.—I think that the undertaking given by the plaintiff's solicitor in this case was given to the court. The solicitor could not have been obliged to give this undertaking, but he elected to give it for the good reason that by giving it he got the amount of his costs paid over to him by the defendant. The only question then is, what is the effect of this undertaking? The order applied only to the appeal which was then pending before the Divisional Court. In that appeal the defendant was successful. The mere fact that there has been a stay of execution upon the judgment of the Divisional Court upon the appeal before them does not make it an imperfect judgment in favour of the appellant upon that appeal. I think that the order asked for must be made.

LOPES, L.J.—I am of the same opinion. Applications to stay proceedings are frequently made to us in this court, and are often granted upon the terms as to costs that they shall be paid by the appellant to the respondent's solicitor upon his personal undertaking to repay such costs if the appeal is successful. Now the solicitor is not obliged in such a case to give the undertaking; if he does, it is a voluntary act upon his part, and he gives the undertaking in order to obtain pay-

CHAN. DIV.] J. & P. COATS LIMITED v. J. CHADWICK AND BROTHER LIMITED. [CHAN. DIV.]

ment of the costs. If he does give the undertaking, he is an officer of the court who voluntarily gives an undertaking, and on the faith of that undertaking execution is stayed upon those terms, and the application is granted. That undertaking is given in the face of the court, and is equivalent to an undertaking given to the court. What then are the consequences? If the undertaking is given to the court, the party in whose favour it is given may, if he has succeeded in his appeal, apply to the court to commit or attach the solicitor if he does not comply with the terms of his undertaking. In this case the application is not to commit or attach, but that the solicitor may be ordered to repay these costs. The appeal to the Divisional Court was successful. It is true that a stay of execution was granted by the Divisional Court, but the appeal was none the less successful. Therefore the event has happened which makes this undertaking enforceable. The solicitor must repay these costs.

DAVEY, L.J.—I have no doubt whatever that, when a solicitor in a cause gives an undertaking in his character as a solicitor, the court will enforce such an undertaking by committal or attachment. There is no distinction between an undertaking as to damages, and an undertaking to repay money paid over to him. The court has, in my opinion, jurisdiction to enforce such an undertaking in a summary way. It is so stated in Chitty's Archbold's Practice, p. 119, 14th. edit.: "Where a solicitor in an action gives an undertaking in his character of a solicitor, the court or a judge will enforce such undertaking or punish the breach of it in a summary way." The case of *Re Hilliard* (2 D. & L. 919) is an authority for that statement, and so also is *Re Woodfin and Wray* (51 L. J. 427, Ch.), in which an undertaking by solicitors to pay an agreed sum for costs as a condition of obtaining the release of their client from prison, was enforced by the court in a summary way, and an order made upon the solicitors to pay the costs which they had undertaken to pay. I am of opinion, therefore, that this application must be granted.

Application granted.

Solicitors for the applicant, *Downing, Holman, and Co.*

Solicitors for the respondent, *Day and Russell.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 25 and 27.

(Before CHITTY, J.),

J. AND P. COATS LIMITED v. J. CHADWICK AND BROTHER LIMITED. (a)

Contempt of court—Ex parte statement on merits of case—Deterring witnesses—Injunction.

A firm of manufacturers of sewing cotton issued a writ against a rival firm claiming an injunction restraining the defendants from infringing their registered trade mark, and also from representing by means of wrappers, labels, tickets, or otherwise, that the defendants' goods were those of the plaintiffs. On the same day the plaintiffs sent out a circular to the trade stating that the defen-

dants had attempted to injure the plaintiffs trade by adopting a label which so clearly resembled that of the plaintiffs as to produce the result of their goods being passed off as the goods of the plaintiffs, and that there could not be any doubt that this was intended, as the defendants had previously and for some years sold their goods with a label of their own which in no way resembled the plaintiffs'; that being apparently unsuccessful in selling their goods with their own label, the defendants had now adopted the device of imitating the plaintiffs' in order more readily to find purchasers for their thread; and stating also that they had commenced proceedings against the defendants, and also against retail dealers, selling the defendants' goods bearing the imitation label. On a motion by the defendants to restrain the plaintiffs from issuing the circular:

Held, that it was calculated to prejudice the defendants in their defence, and was therefore a contempt as interfering with the course of justice; and injunction granted.

THE plaintiffs and defendants were manufacturers of sewing-cotton in a very large way of business.

On the 28th Dec. 1893 the plaintiffs issued the writ in this action, claiming an injunction restraining the defendants from infringing the plaintiffs' registered trade mark No. 4618, and an injunction restraining the defendants from representing by means of wrappers, labels, tickets, or otherwise, that the goods made and sold, or offered for sale by the defendants, were the goods of the plaintiffs, and on the same day the plaintiffs sent out the following circular to the trade:

Dear Sir,—We regret to have to draw your attention to the fact that Messrs. James Chadwick and Brother Limited have recently attempted to injure our trade by adopting a blue label for 400 yards six-cord, which so closely resembles ours as to produce the result of their goods being passed off as ours, nor can there be any doubt that this is intended, as Messrs. Chadwick have previously and for a number of years sold their 400 yards six-cord with a label of their own, which in no way resembles ours.

Being apparently unsuccessful in selling this class of goods with their own label, they have now adopted the device of imitating ours, in order more readily to find purchasers for their thread.

We are determined to use every means in our power to put a stop to unfair competition of this sort; and have therefore commenced proceedings against Messrs. Chadwick. We have also been compelled to take proceedings against retail dealers selling goods manufactured by Messrs. Chadwick, and bearing the blue label which is an imitation of ours.

We think it right to warn the trade in general of the course we are pursuing, and for your information we beg to give you at foot an extract from a recent judgment given in the Chancery Division of the High Court of Justice. Yours truly, J. and P. COATS Limited.

(Extract from Judgment.)

"All I can say in conclusion as to these labels is this, that though the defendant may, if he pleases, use such labels or wrappers as are to his liking, he must take very good care that in doing it he does not adopt any which may have the effect, or be calculated to produce the result of passing off his goods as those of the plaintiff."

The defendants moved for an injunction restraining the plaintiffs from issuing the circular, or any other circular intended or calculated to prejudice or impede the fair trial of the action, or in the alternative that a writ of sequestration

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

might be issued against the property of the plaintiffs for contempt.

Sir B. Webster, Q.C., Bousfield, Q.C., John Cutler and Sebastian, for the defendants, in support of the motion.

Sir E. Clarke, Q.C., Moulton, Q.C., and Bramwell Davis, for the plaintiffs.

CHITTY, J.—The defendants' motion is founded on alleged contempt. It is competent for the court, where a contempt is threatened or has been committed, to take the more lenient course of granting an injunction in preference to making an order for committal or sequestration: (see *Plumpton v. Spiller*, 4 Ch. Div. 286.) The circular complained of is dated the same day as the writ in the action, and is signed by the plaintiffs. This circular has been widely distributed by the plaintiffs among retail dealers in the sewing-cotton trade and others. The special ground of complaint is, that the class of persons to whom the circular is addressed is the very class to whom the defendants will have to look for evidence in support of their defence, and that it is calculated to create a bias against the defendants in the minds of those who receive it, and to deter them from coming forward as witnesses for the defendants. It appears to me that it is calculated to prejudice the defendants in their defence, and that it thus falls under the well-established head of contempt by interfering with the course of justice. It is a strong one-sided statement by one of the parties to the action on the merits of the case which is pending before the court. It unhesitatingly imputes fraud and dishonesty to the defendants. It charges them not merely with imitating the plaintiffs' goods, but with the deliberate intention of imitating. The fact that the plaintiffs hold a high position in the trade, being as their counsel stated, at the very head of the trade, gives additional force to their statements, and renders it the more probable that the traders, and particularly the smaller retail traders, will be thereby affected adversely to the defendants. The plaintiffs' counsel not only admitted, but boldly asserted, and made it part of their argument, that the circular was libellous, and that they could justify the libel; and they referred to some of the evidence which apparently had been adduced for the purpose of sustaining the justification. But the evidence and the argument founded on it are irrelevant on this motion. Interference with the course of justice by the publication of *ex parte* statements by a party to an action is not the less a contempt of court because the statements are libellous, or because the party is prepared to justify the libel, or because the libel deals with the merits of the action. The considerations applicable to the granting or refusing an injunction on interlocutory motion in a libel action have no application to the present case. On such a motion as the present the court declines to go into the merits of the action. The circumstance that the moving parties press for the less severe remedy by injunction rather than the more stringent remedy by committal or sequestration, makes no difference. I grant the injunction as asked, adding that I should not have intervened if the circular had amounted to a mere warning to the trade against infringement or imitation. The plaintiffs are at liberty to warn the trade as much as they like notwithstanding the pendency

of this action, but they are bound to refrain during its pendency from public discussion on the merits or demerits of the case. The defendants are entitled to an injunction restraining the plaintiffs from issuing the circular complained of, or any similar circular. Costs follow the event.

Solicitors: Busk and Mellor; Linklaters and Co.

Nov. 21 and 22, 1893.

(Before CHITTY, J.)

Re BAGOT'S SETTLEMENT; BAGOT v. KITTOE. (a)

Settled land—Equitable tenant for life—Married woman—Trust for sale—Possession—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 63—Settled Land Act 1884 (47 & 48 Vict. c. 18), s. 7, sub-sect. (ii.)

Summons by Mrs. B., who was twenty-four, and her husband thirty, to be let into possession or receipt of the rents and profits of a settled estate, vested in trustees in trust for sale, with power to postpone; the income of the proceeds of sale, or the rents and profits of the estate till sale, being held in trust for Mrs. B. for her separate use, without power of anticipation, and the trustees having extensive powers of management under the settlement; and also to be allowed to exercise all the statutory powers of a tenant for life, except those of sale and exchange.

Held, that, in the exercise of the judicial discretion of the court, the plaintiff was entitled, upon paying the costs of the application, and upon giving proper undertakings for the protection of the estate and the trustees, to be let into possession, and to exercise all the statutory powers asked for.

The Settled Land Acts afford an additional ground for the court's exercising its discretion favourably to the tenant for life under those Acts.

Conclusion of Kekewich, J. in Re Wythes; West v. Wythes (68 L. T. Rep. N. S. 520; (1893) 2 Ch. 369) not followed.

ADJOURNED SUMMONS.

This was an application by the plaintiff, Frances Anna Mary Bagot, a married woman, under the following circumstances:

By a settlement of the 3rd Feb. 1890, made on the marriage of the plaintiff, certain real estates were conveyed unto and to the use of trustees (the defendants), subject to a legal rentcharge for 1500*l.* in favour of the plaintiff's mother, upon trust for sale, with full power to postpone, and to pay the income arising from the investments of such proceeds of sale, or the rents and profits until sale, to the plaintiff for her life, for her separate use, without power of anticipation, and after her decease upon further trusts for the benefit of her husband for life, and the issue of the marriage, or certain other persons in default of issue. Very extensive powers of management, amongst others, to cut timber, open and work mines, and grant mining leases for ninety-nine years, were vested in the trustees, who had exercised them, and managed the estates up to the present time, the costs of management amounting to 4 or 5 per cent. on the gross rental of about 5000*l.*

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re BAGOT'S SETTLEMENT; BAGOT v. KITTOE.

[CHAN. DIV.]

The trustees did not contemplate exercising the trust for sale for some time to come, though they declined to bind themselves to postpone the sale for any definite period.

The plaintiff now applied by originating summons that the defendants might be ordered to let her into possession, or receipt of the rents, issues, and profits, of all and sundry the lands comprised in the settlement; and that leave might be given her to exercise all the powers conferred on her, as tenant for life under the settlement, by sect. 63 of the Settled Land Act 1882, or by that section in combination with any other enactment contained in the Settled Land Acts 1882 to 1890, except the powers of sale and exchange.

Levett, Q.C. and *W. C. Druce* for the plaintiff.—An equitable tenant for life is entitled to be put in possession. See *Re Wythes*; *West v. Wythes* (68 L. T. Rep. N. S. 520; (1893) 2 Ch. 369), where *Kekewich, J.* says the old authorities may be treated as largely, if not wholly, abrogated by the Settled Land Acts. The expenses of management will be largely reduced. The plaintiff asks to be authorised to exercise all the statutory powers conferred on a tenant for life under sect. 7, sub-sect. (ii.), of the Settled Land Act 1884, except the power of sale and exchange.

Byrne, Q.C. and *W. D. Rawlins* for the defendants.—The annuitant under the rentcharge ought to have been made a party. The possession of the equitable life tenant is not as of right, but depends upon the discretion of the court:

Tidd v. Lister, 5 Madd. 429;

Taylor v. Taylor, 33 L. T. Rep. N. S. 89; L. Rep. 20 Eq. 297;

and these authorities have not been abrogated as stated. The applicant is a married woman, without power of anticipation, and she is only twenty-four years old, so that it is simply giving possession to the husband. It will be most inconvenient for the trustees to apply to have possession restored to them whenever they propose to exercise their trust for sale.

Levett, Q.C. replied.

CHITTY, J. stated the facts already mentioned, and continued:—Not one word is to be said against the trustees. One is a solicitor at Birmingham, another is a vicar at Sutton Coldfield, and the third is the head master of a school at Highgate, residing, therefore, in different parts of the country as between themselves, and not residing so as to be, as to all of them, within easy reach of the property itself. Now the application is addressed to the judicial discretion of the court; and this discretion has to be exercised on reasonable grounds, the court looking to the convenience of the parties; to the question of expense, which falls, of course, on the tenant for life; and to other circumstances of a like kind. It is clear that the applicant, *Mrs. Bagot*, has no absolute right to be let into possession, and she can only ask to be let into possession, through the exercise of the judicial discretion. In saying this, I found the proposition upon a well-known series of authorities. In addition to those that were referred to at the bar, there is a decision which I perfectly well remember of the late Master of the Rolls (*Sir George Jessel*) where a lady, somewhat advanced in years, married a clergyman much younger than herself, and with

a view to afford the lady complete protection a stringent settlement was prepared and executed, under which extensive powers of management were conferred upon the trustees, against whom, as in the present case, nothing was to be said. One was a solicitor, and I think he was entitled, as the solicitor is in this case, by the instrument itself to charge for professional services. In that case nothing, however, turned upon that point, nor does anything turn upon the similar point in the case before me. The case is identical with the present, with one exception, and that is that there was no trust for sale. There were the usual powers of sale and exchange, but no trust; and that case occurred before the passing of the Settled Land Acts. The trustees were not willing to give up possession to the tenant for life, for such in substance the lady was, although she had no right to possession on the principle I have already explained; and the Master of the Rolls, after considering the authorities on the subject, let the lady into possession. It was pointed out that that was in substance, in all probability, letting the husband into possession; but that argument did not avail. The order was guarded by the proper undertakings, which the husband was willing to give. Now, though, in the exercise of the judicial discretion, the circumstances of one case and the decision in a particular case do not preclude, of course, the judge from exercising his discretion in another case, it is always of some assistance to see how the judicial discretion has been previously exercised by other judges. I have mentioned the case, because it is, with the one exception to which I have referred, identical with the present. Now, with regard to the trust for sale, there would unquestionably have been a material difference if the trustees desired now to exercise that trust; but, coupling the trust for sale with the power to postpone, and the fact that that power is being duly exercised by the trustees at present according to their discretion, the result is, that the trust for sale makes no material difference in the cases, because any order letting the applicant into possession will be, not final for her life, but until further order; so that possession can be recalled at any time when it may become proper to restore the possession to the trustees. Counsel for the trustees put forward an argument as to the inconvenience of frequently changing the possession, an argument which would be worthy of consideration, and would be entitled to some weight, if it had special application to the circumstances of the case. It would be, in my opinion, an idle thing to let the applicant into possession now, if, for reasons which I could judicially notice, there were a probability that within a very short time it would be right to restore the possession to the trustees. But, on the facts of the case, I am unable to discover any particular circumstance which would show that it would be necessary to restore the possession to the trustees at any particular time. Now, unquestionably, on the point of convenience, it is convenient that the lady and her husband, to the extent to which she may desire to obtain his assistance, should have the management of the property, the income of which she is entitled to receive, and that she should get that income with as little expense in the way of commission for collecting rents, employment of agents, and the like, as is practicable under the circumstances. The balance

of convenience is in her favour. She has a direct interest in reducing the expenses to the lowest practicable limit. Therefore, if I were dealing with this case quite apart from the Settled Land Acts, I should consider it a proper exercise of my discretion to let the lady into possession. I am not disposed myself to say that the Settled Land Acts have abrogated the old cases. It really appears to me that the proper expression with regard to the Settled Land Acts, with reference to the doctrine which I am considering, is that they afford an additional ground for exercising the discretion favourably to the person who has conferred upon her or him, by virtue of these acts, the extensive powers which are therein contained—powers which are expressly conferred upon a married woman, though she is restrained from anticipation. Taking, then, the Settled Land Acts into consideration, I think that the lady's case is the stronger. The trustees in this case have done their duty. I have asked for any suggestion from them with regard to undertakings to be given by the lady or her husband as to the keeping down of the outgoings, and any charges on the estate, or the like; but they have not suggested anything to me on that head. If there should be any undertaking particularly asked for, I will take care to insert what is proper for the protection of those interested in the estate in the order which I make. The only ground that I think I need notice, upon which the application is resisted by the trustees is, that the lady was only twenty-four years of age, and her husband was thirty; but I cannot find in the ages of the lady and her husband any sufficient ground for refusing to permit the possession or receipt of the rents. A point was made, but really not pressed, that a person entitled to a rentcharge was not a party, and I mention this circumstance to avoid any misconception. The trustees, as it appears, are not trustees for that absent person. She has a rentcharge of, I think, 1500*l.* a year; but it is a legal rentcharge, with a power of distress, and it is paramount to the trust estate of the trustees—in other words, the trustees are not trustees for her. No order that I am now making will affect her position in any way. It is very unlikely that she will have any reason to complain of what is done by the applicant, as it appears that the surplus income from the estate, after keeping down that charge, amounts to several thousands—3000*l.* a year probably. But I am not at liberty to consider the legal rights of this lady, who is entitled to the rentcharge. All her rights will remain intact. I think I have dealt now with the whole of the points of importance on this head; and the result is, that I will make the proper order under which the applicant will be entitled to possession or receipt of the rents until further order, with any proper undertakings that may be suggested. The only other point is on the Settled Land Act of 1884. The applicant asks to exercise the powers of the tenant for life; and it is necessary, having regard to sect. 63, as there is a trust for sale, that the court should give permission either to her or to the trustees. It seems to me that it is convenient and proper under the circumstances of the case to allow her, as I do, to exercise all the powers of the tenant for life, with the exception of the power of sale and exchange which she does not ask for. The plaintiff must pay the costs of this application. To those un-

acquainted with this jurisdiction, it would appear (as it did to the learned counsel in the case I have referred to) that the court is setting aside the will or the instrument which has said that the trustees should have possession and manage the property. A person in the position of this lady, asking the court to exercise a discretion, there being no case against the trustees, cannot throw upon the estate the costs of doing so, and, if necessary, I should make the payment of these costs a condition precedent to obtaining the order. The principle is, that it is for the applicant's convenience, there being no circumstance which should warrant the court's holding otherwise, that she should have the possession which the settlement has not given her; and there being no case against the trustees, she must pay the costs. There will be liberty to apply to the judge in chambers as to any matter arising under this order as to restoring complete or partial possession to the trustees, and generally.

Solicitors: *Spencer Whitehead*, agent for *Hadley and Dain*, Birmingham; *Field, Roscoe, and Co.*, agents for *Smith, Pinsent, and Co.*, Birmingham.

Saturday, Nov. 25, 1893.

(Before CHITTY, J.)

Re BISHOPSGATE FOUNDATION. (a)

Practice—*Lands Clauses Act* (8 & 9 Vict. c. 18)—*Re-investment*—*Costs*—*Apportionment*—*Surveyor's fee*—*Scale fee*.

On a petition by the charities known as the Bishopsgate Foundation, which, by arrangement between the petitioners and the respondents, certain public bodies who had purchased different portions of the charity lands, was treated as one for re-investment in land as far as the costs were concerned, the question arose whether these should be borne rateably or equally as between the respondents.

Held, that, as the general rule laid down in *Ex parte The Bishop of London* (2 L. T. Rep. N. S. 365, and 3 L. T. Rep. N. S. 224; 2 De G. F. & J. 14), that these costs should be borne in equal shares, only applied to such costs as were not readily apportionable, and not to the ad valorem stamp duty and the surveyor's fee, which should be paid rateably, the fact that the scale fee had been adopted on the purchase of the land for re-investment in the present case readily furnished a means of apportionment, and there being a great inequality in the amounts of purchase money, these costs should be apportioned to the extent of the scale fee.

PETITION.

The governing body of the charities, known as the Bishopsgate Foundation, applied by petition for the transfer to the Official Trustees of Charitable Funds of five sums of consols in court, representing the purchase moneys of different portions of lands belonging to the charities, which had been purchased from time to time by four public bodies.

The sums paid in were as follows: (1) 1217*l.* 1*s.* 5*d.* by the Eastern Counties and London and Blackwall Railway Company, now represented by the London, Tilbury, and Southend Railway

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

TAYLOR v. ROE.

[CHAN. DIV.]

Company; (2) and (3) 95l. 16s. 6d. and 2248l. 0s. 5d., paid in by the North London Railway Company; (4) 215l. 6s. 10d., paid in by the Metropolitan Board of Works, now represented by the London County Council; and (5) 176l. 7s. 3d. paid in by the Mayor and Commonalty and Citizens of the city of London.

The petitioners had agreed to purchase certain freehold hereditaments partly out of these sums in court, and by agreement with the public bodies who were made respondents, the present petition was treated as one for re-investment in land, as far as the costs were concerned.

The question arose whether these costs should be borne rateably or equally by the respondents.

E. Ford for the petitioners.

E. A. Geare for the London County Council.—Where there is such an inequality in the amounts, the costs should be borne rateably:

Ex parte The Governors of St. Bartholomew's Hospital, 32 L. T. Rep. N. S. 652; L. Rep. 20 Eq. 369.

This shows that the rule in *Ex parte The Bishop of London* (2 L. T. Rep. N. S. 365, and 3 L. T. Rep. N. S. 224; 2 De G. F. & J. 14) does not apply.

W. Baker, for the Corporation of the City of London, supported this argument.

Carson for the North London Railway Company.—The rule laid down in *Ex parte The Bishop of London* is the right one, and should not lightly be departed from. *Ex parte The Governors of Christ's Hospital* (2 H. & M. 166) shows that the inequality of the sums is not a ground for departing from it. He also referred to

Re Byron's Estate, 8 L. T. Rep. N. S. 562; 1 De G. J. & S. 358;

Re Merton College, 9 L. T. Rep. N. S. 633, and 10 L. T. Rep. N. S. 8; 1 De G. J. & Sm. 361.

[CHITTY, J.—Are not the observations in these earlier cases answered by the fact that, here the scale fee having been adopted, the costs of purchasers are now as easily and readily apportionable as the *ad valorem* stamp duty?]

R. J. Parker, for the London, Tilbury, and Southend Railway Company, adopted this argument.

CHITTY, J.—With regard to the contribution for the costs of re-investment in land to be made by public bodies, as between themselves, the ordinary rule is that laid down in *Ex parte The Bishop of London* (*ubi sup.*), that they ought to be borne in equal shares; but within the authority of that case there lies the further principle, as appears from the order, that the *ad valorem* stamp duty ought to be paid rateably, according to the amounts contributed; this being so easily and readily apportionable between them, as would be also the case with a surveyor's fee. Knight Bruce, L.J. says in his judgment in that case: "I do not see any such necessary connection between the amount of purchase money and the amount of costs as would incline me to lay down any general rule for apportioning costs rateably, according to the amounts of the sums forming the purchase money." Then again Sir W. Page Wood, V.C., in *Ex parte The Governors of Christ's Hospital* (*ubi sup.*), referring to the rule laid down in *Ex parte The Bishop of London*, made the observation: "That rule was fixed expressly to

meet the case of inequality of price; and also it determines how far the price is to be an element in the apportionment, viz., to the extent of the stamp duty; and beyond that the court acts on the principle that the purchase of a small estate may be just as expensive as that of a large one." In the present case the scale fee has been adopted on the purchase of the land made for this re-investment, and that again readily furnishes a method of apportionment; and consequently the observations from the cases I have just cited are no longer applicable to purchasers at the present day, since the passing of the Solicitors' Remuneration Act 1881, in cases where the scale fee has been adopted. In the present case there is a very considerable variation in the amounts of purchase money contributed by these public bodies; and there is also the decision of Malins, V.C., in *Ex parte The Governors of St. Bartholomew's Hospital* (*ubi sup.*) that the rule in *Ex parte The Bishop of London* (*ubi sup.*) is not intended to apply in cases when there is a great inequality in the amounts of the different funds. I think, therefore, I am justified in this case in apportioning the costs of the purchase of the land to the extent of the scale fee.

Solicitors: Clapham, Fitch, and Co.; W. A. Blaxland; H. H. Crawford; Paine and Co.; F. C. Mathews and Browne.

Dec. 5 and 13, 1893.

(Before STIRLING, J.)

TAYLOR v. ROE. (a)

Practice—Costs—Taxation—Interlocutory order—Interest on taxed costs—Date from which interest is to be calculated—1 & 2 Vict. c. 110, ss. 17, 18, 20—R. S. C. 1883, Order XLII., rr. 14, 16.

Sect. 18 of 1 & 2 Vict. c. 110 applies to an interlocutory order of the Chancery Division, by which costs are ordered to be paid by one party to another, and such costs when taxed carry interest from the date of the order.

SUMMONS to review taxation.

Under an order of the 22nd Aug. 1884, a writ of attachment was, upon motion by the plaintiff, ordered to issue against the defendant for non-compliance with a previous order (not the judgment in the action) directing further and better accounts, and the defendant was ordered to pay to the plaintiff his costs of the motion and attachment. These costs were taxed and certified on the 23rd Dec. 1884 at 35l.

Under another order, dated the 18th Dec. 1884, upon motion by the plaintiff, a receiver was appointed of certain paintings, &c., and the defendant was ordered to pay to the plaintiff his costs of the motion. These costs were taxed and certified on the 24th April 1885, at 29l. 12s. 8d. A writ of *fi. fa.* was issued at the instance of the plaintiff to obtain payment of these costs, but without success.

Under orders of the 21st May 1885, and the 3rd June 1885, certain other costs were payable by the defendant to the plaintiff, but they had only recently been brought in for taxation.

Under an order of the 20th Jan. 1893 the plaintiff had to pay to the defendant the costs of another, but unsuccessful, motion, and by an

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

order dated the 27th Jan. 1893 it was ordered that in taxing the costs of the defendant under the order of the 20th Jan. 1893, directed to be paid by the plaintiff to the defendant, the taxing master should have regard to the 35*l.* taxed costs certified in his certificate of taxation, dated the 23rd Dec. 1884, and to the 29*l.* 12*s.* 8*d.* taxed costs, certified in his certificate, dated the 24th April 1885, and to the costs to be taxed under the orders dated the 21st May 1885, and the 3rd June 1885 (all which costs were directed to be paid by the defendant to the plaintiff), and any interest properly payable in respect thereof, and should set off the same, and certify the balance due from the plaintiff to the defendant, or from the defendant to the plaintiff as the case might be, and in case such balance was certified to be due to the plaintiff, then the plaintiff was to be at liberty to issue a writ or writs of sequestration against the defendant for the same.

The plaintiff claimed interest on the 35*l.* and 29*l.* 12*s.* 8*d.* certified costs, as from the dates of the orders under which those costs were taxed. The taxing master disallowed the claim, and the plaintiff carried in objections to his taxation. It was admitted that the orders did not determine the question, but left it to be decided upon taxation.

The taxing master in his answers to the objections gave his reasons for disallowing the claim. After stating the facts as above set forth, he said that the plaintiff relied on 1 & 2 Vict. c. 110, sects. 17 and 18, and Order XLII. of the Rules of the Supreme Court 1883, r. 16; that the Act had been in operation for more than half a century, but that he had not been referred to, nor had been able to find, any authority for the proposition that costs such as these carried interest, nor was there any practice to support the claim to interest. Further that he did not read Order XLII., r. 16, as giving a right to interest where independently of the rule interest could not be claimed; and that in the present case no writ of execution had in fact been executed, and therefore he did not think that the rule helped the plaintiff. Then after referring to, and distinguishing certain cases, which had been cited to him on behalf of the plaintiff, he continued as follows: "In this absence of authority in the plaintiff's favour, upon what must be a question of daily occurrence, and in view of the settled practice to the contrary, I am unable to take upon myself to allow interest on these interlocutory costs, and so I overrule the objections."

The present summons to review the taxing master's decision was thereupon taken out by the plaintiff, and now came on for hearing.

Fossett Lock for the summons.—By 1 & 2 Vict. c. 110, s. 17, "every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment." By sect. 18 of the same Act this provision is extended to "all decrees and orders of courts of equity, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person." Under the present practice interest on costs is payable from the date of the judgment:

Bowwell v. Coaks, 57 L. T. Rep. N. S. 742;

Pyman and Co. v. Burt, 76 L. T. 425; W. N. 1884 p. 100;

R. S. C. 1883, Order XLII., r. 14, and Forms in App. H.

A distinction has, no doubt, in some cases been drawn between a final and an interlocutory order for the purpose of a bankruptcy notice:

Ex parte Moore; *Re Faithfull*, 52 L. T. Rep. N. S. 376; 14 Q. B. Div. 627;

Re Alexander; *Ex parte Alexander*, 66 L. T. Rep. N. S. 133; (1892) 1 Q. B. 216;

Re Riddell; *Ex parte Earl of Strathmore*, 58 L. T. Rep. N. S. 838; 20 Q. B. Div. 318, 512.

But I submit no such distinction is drawn by the Act, 1 & 2 Vict. c. 110, to which the present case is only referable. The practice of calculating the interest on costs from the date of the taxing master's certificate probably arose at a time when the costs of interlocutory orders were taxed immediately upon the orders being pronounced. He also referred to

Re London Wharfing and Warehousing Company, 53 L. T. Rep. N. S. 112;

Re Bird's Estate, W. N. 1889, p. 182;

Eardley v. Knight, 60 L. T. Rep. N. S. 780; 41 Ch. Div. 537;

Attorney-General v. Nethercote, 11 Sim. 529;

Re Lehmann; *Ex parte Hasluck*, 62 L. T. Rep. N. S. 941;

West v. West, 17 L. Rep. Ir. 49;

Tolson v. Dykes, 1 Ph. 439;

Doe d. Harrison v. Hampson, 4 C. B. 745.

Hastings, Q.C. and *Cripps Day* for the defendant.—The judgments contemplated by sect. 17 of 1 & 2 Vict. c. 110 are clearly final judgments, and consequently the decrees of the Courts of Equity referred to in sect. 18, to which sect. 17 is applied, must also be final:

Gibbs v. Pike, 8 M. & W. 223;

Jones v. Williams, 8 M. & W. 349;

Garner v. Briggs, 31 L. T. Rep. O. S. 68;

Re Binstead; *Ex parte Dale*, 68 L. T. Rep. N. S. 31; (1893) 1 Q. B. 199;

Financial Corporation v. Lawrence, L. Rep. 4 C. P. 731.

Here none of the orders are final judgments. No authority has been cited to show that interest on costs on interlocutory orders will be allowed, and further it appears from the taxing master's answers that it has been the uniform practice of the taxing office not to allow such interest. Under such circumstances interest ought not to be allowed.

Fossett Lock replied.

Cur. adv. vult.

Dec. 13.—STIELING, J.—This case comes before me upon the application of the plaintiff, who has carried in before the taxing master certain objections which he has overruled. [His Lordship stated the facts as above set out, and continued:] The question is whether the taxing master has come to the right conclusion. Previously to 1 & 2 Vict. c. 110, a judgment debt did not carry interest. That was expressly decided in *Gaunt v. Taylor* (3 My. & K. 302), where the then state of the law is fully explained. In that state of things the Act 1 & 2 Vict. c. 110 was passed, sect. 17 of which provides that "every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this Act, in cases of judgments then entered up, and not carrying interest until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." By sect. 123 the time for the commencement of the Act was,

CHAN. DIV.]

TAYLOR v. ROE.

[CHAN. DIV.]

except when otherwise provided, the 1st Oct. 1838. Sect. 18 enacts that "all decrees and orders of courts of equity . . . whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act." . . . Sect. 20 provided that "such new or altered writs shall be issued out of the courts of law, equity, and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the case will admit. . . ." Now, looking in the first place simply at the language of the Act, it provides (*inter alia*) that all decrees and orders of courts of equity, and all rules of the common law, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law. Any order, therefore, which comes within that definition has the effect of a judgment, and the debt carries interest at 4 per cent. under sect. 17. It is not, however, every order of a court of equity which has that effect. It must be an order for the payment of money, or costs, or charges and expenses, and it must order payment to some person. The decisions on the Act have followed these lines; for instance, a decree in Chancery which contained a declaration that the defendant was liable to make good to an estate being administered in another suit a specific sum, but did not order payment of that sum by the defendant, was held not to fall within 1 & 2 Vict. c. 110, s. 18: (*Garner v. Briggs* (*ubi sup.*)). Again an order for payment into court, not to a person, does not fall within the section: (*Ward v. Shaft*, 2 L. T. Rep. N. S. 203; 1 Dr. & Sm. 269). Nor does an order for payment of costs out of a fund in court: (*Attorney-General v. Nethercote* (*ubi sup.*)). On the other hand, in *Duke of Beaufort v. Phillips* (9 L. T. Rep. O. S. 352; 1 De G. & Sm. 321), a decree for specific performance, ordering the defendant to pay purchase money, interest, and taxed costs was held to constitute a judgment debt. In *Jones v. Williams* (*ubi sup.*) it was held that the section did not apply to money awarded by an arbitrator, when the agreement for reference had been made a rule of court. Parke, B., in giving judgment, says: "It seems to me that, according to the proper construction of the Act, it does not apply to any costs, charges, or expenses, except those which are ordered by the court to be paid, and that it does not embrace cases in which something is necessary to be done in order to give the party a title to the money, but includes those only in which the obligation to pay the money appears on the face of the judgment, decree, or order. But then it is argued that where the court orders the payment of costs, something must be done in order to ascertain their amount before execution can issue. No doubt that is so; but then costs are not liable to the same observation as money,

as they stand upon a peculiar footing. When the Legislature mentions 'money, costs, charges, and expenses,' it means money decreed or ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officer of the court. That point, indeed, it is unnecessary to decide; but I am of opinion that, with respect to costs, it is enough if they are ascertained by the officer of the court, and that it is not necessary that there should be any order to pay after they are taxed by the officer." And Alderson, B. says: "With regard to the costs, charges, and expenses, it seems to me that they may be ascertained by the officer of the court, though not specifically mentioned in the rule of court. All that is required is, that if the court shall order a sum of money to be paid, and if it also order costs, that means the costs ascertained by the officer of the court. Independently of the words of the Act, which especially refer to costs, charges, and expenses, it seems to me that the court may very well put such a construction upon the Act as to include costs, where there is an order for the payment of a specific sum." That is an express decision that where money and costs are directed to be paid together, it is not necessary that there should be an order to pay the costs after taxation. It was contended that this did not apply where costs alone were ordered to be paid without any money; but the language of the statute is plain. It extends to judgments and orders "whereby any sum of money, or any costs or expenses," shall be payable to any person. It has long been settled that a judgment for costs only carries interest (*Pitcher v. Roberts*, 12 L. J. 178, Q. B.; *Newton v. Lord Conyngham* 11 L. T. Rep. O. S. 294); and it appears to have been the opinion of the Court of Common Pleas in *Hodgson v. Patterson* (5 Scott N. R. 76), that a rule ordering a party to pay the taxed costs of the day was within 1 & 2 Vict. c. 110, s. 18. Upon the construction of the Act, I think that an order directing payment of costs to be taxed by one person to another person is within the section. This view appears to me to have been adopted and acted upon both by those who framed the rules of the old Court of Chancery, and by officers of that court. I have already referred to sect. 20 of the Act, which provides for the issue of new and altered writs for giving effect to the provisions of the statute in such form as the judges of the several courts of law and equity should from time to time think fit to order. The writs framed by the judges are to be found set out in 1 Beav., p. 15 and the following pages. I need not say that the learned judges whom I have mentioned knew the distinction between a decree and an order, and knew that orders were made by courts upon interlocutory proceedings, directing costs to be paid by one person to another. One of the forms (form 5, p. 20) is a form of a writ of *fi. fa.* on a decree or order for payment of costs, and gives interest from the date of the certificate. The form of the writ is as follows: It is addressed to the sheriff, "We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made the sum of £ for certain costs which were lately before us in our High Court of Chancery, in a certain cause . . . or in a certain matter there depending, intituled . . . by a decree or order (as the case may be) of our said court, bearing date

CHAN. DIV.] *Re* STOCK AND SHARE AUCTION AND BANKING COMPANY LIMITED. [CHAN. DIV.]

the day of , decreed or ordered (as the case may be) to be paid by the said C. D. to A. B., and which costs have been taxed and allowed by G. H., Esq., one of the masters of our said court, at the said sum of £, as appears by the certificate of the said master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest on the said sum of £, at the rate of £ per cent. per annum, from the day of . Then there is a note which says: "The date of the master's certificate, or, if that were prior to the 1st Oct. 1838, say 'from the 1st Oct. 1838.'" The writ proceeds, "and that you have that money and interest before us, in our said court, immediately after the execution hereof to be paid to the said A. B., in pursuance of the said decree or order (as the case may be). And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf," &c. Now, it is obvious that a writ of *fi. fa.* which provides for the payment of interest must have been made with reference to the Act. This form was retained in the Consolidated Orders (Morgan's Chancery Orders, 3rd edit., p. 608). I have had the advantage of consulting with Mr. Stringer of the Central Office, a very experienced officer of the court, who was formerly in the office of records and writs of the Court of Chancery. He informs me that, according to the practice of that office, no distinction as regards the issue of writs of *fi. fa.* for costs was drawn between final decrees and interlocutory orders. All that was regarded in that office was whether there was an order for payment of costs by a person to a person. Under the Common Law Procedure Act 1852, writs of *fi. fa.* seem to have been issued upon a rule for payment of costs only, and in this respect the procedure was the same as under the Chancery Rules: (see Rules of Hilary Term 1853, 1 E. & B. App. 1, xxxvi; Day's Com. Law Proc. Acts, 4th edit., pp. 413, 468.) Since the Rules of 1883 interest has run (in the absence of special directions), not from the date of the certificate, but from the date of the order: (see *Pyman and Co. v. Burt* (*ubi sup.*) and *Boswell v. Coaks* (*ubi sup.*). In all other respects the practice as to costs remains the same. The practice of the office of records and writs, and of the central office seems to me to be in favour of the plaintiff. The taxing master, whom I have seen, informs me that there is no practice to the contrary in the taxing office; and that all that he meant to convey by his answer to objections was that neither he nor any of his colleagues was aware of any case in which interest had been allowed in that office on costs awarded by an interlocutory order. The absence of precedent may, as it seems to me, be readily accounted for when it is remembered that costs payable out of a fund do not carry interest, and that in other cases the duties of a taxing master generally come to an end when his certificate is given. The cases of *Ex parte Moore*; *Re Faithfull* (*ubi sup.*), *Re Alexander*; *Ex parte Alexander* (*ubi sup.*), and *Re Riddell*; *Ex parte Earl of Strathmore* (*ubi sup.*) were referred to. These, however, merely relate to the question what is a final judgment within the meaning of the Bankruptcy Act 1883, s. 4, ss. 1 (g); and, regard being had to the decisions it may very

well be that neither of the orders with which I have to deal is a final judgment, such as would support an adjudication in bankruptcy. In sect. 18 of 1 & 2 Vict. c. 110 there is nothing about final judgment. I think that each of the orders being an order for payment of costs by the defendant to the plaintiff falls within sect. 18 of the Act 1 & 2 Vict. c. 110, and entitles the plaintiff to interest on the costs thereby awarded, and consequently the plaintiff's objections to the taxation must be allowed.

Solicitors: *Hurford and Taylor*; *Morse, Hewitt, and Farman*.

Saturday, Feb. 10.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re STOCK AND SHARE AUCTION AND BANKING COMPANY LIMITED.

Re SPIRAL WOODCUTTING COMPANY LIMITED.

Re HULL LAND AND PROPERTY INVESTMENT COMPANY LIMITED. (a)

Company—Winding-up—Voluntary liquidation—Liquidation under supervision—Liquidator—Statement to Registrar of Joint Stock Companies—Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), s. 15.

Sect. 15 of the Companies (Winding-up) Act 1890 applies as well to voluntary liquidations and liquidations under supervision as to compulsory liquidations.

MOTIONS.

The Stock and Share Auction and Banking Company Limited was in voluntary liquidation commenced in Feb. 1891, and subsequently continued under the supervision of the court.

The Spiral Woodcutting Company Limited, and the Hull Land and Property Investment Company Limited, were also in voluntary liquidation. The former liquidation was commenced in Nov. 1890, and the latter in April 1889.

Applications had been made by the Board of Trade under sect. 15 of the Companies (Winding-up) Act 1890, to the liquidators of the respective companies requiring them to furnish to the Board of Trade verified statements of accounts of the liquidations, and in default notices of motion had been served upon them to enforce these applications.

The three motions were heard together by Williams, J. in chambers, when it was contended on behalf of the liquidators that sect. 15 of the Act did not apply to voluntary liquidations, or to voluntary liquidations under the supervision of the court.

Sect. 15 of the Companies (Winding-up) Act 1890 provides (sub-sect. 1) that "if the winding-up of a company is not concluded within one year after its commencement," the liquidator is at certain intervals to send a statement of accounts in a prescribed form to the Registrar of Joint Stock Companies. Sub-sect. 2 imposes a penalty in case of default. Sub-sect. 3 provides for the payment of money disclosed in such statement into the companies liquidation account; and sub-sect. 4 extends to cases under the section the provisions of sect. 162 of the Bankruptcy Act 1883.

(a) Reported by W. IVIMBY COOK, Esq., Barrister-at-Law.

CHAN. DIV.]

Re HERCYNIA COPPER COMPANY; Ex parte RICHARDSON.

[CHAN. DIV.]

Sir Charles Russell (A.-G.), Ingle Joyce, and Reginald Smith, for the Board of Trade.

Boome for the liquidator of the Stock and Share Auction, &c., Company.

The liquidator of the Spiral Woodcutting Company in person.

Bateman Napier for the liquidator of the Hull Land, &c., Company.

WILLIAMS, J. reserved his judgment, and on the 10th Feb. delivered the following written judgment in court:—The question which I have to decide in these cases is whether sect. 15 of the Companies (Winding-up) Act 1890 applies to voluntary liquidations, or to voluntary liquidations continued under the supervision of the court, so as to enable the Board of Trade to enforce the provisions of the section against the voluntary liquidator. I am of opinion that sect. 15 of the Act does so apply both to voluntary liquidations and to voluntary liquidations continued under supervision. So far as the words of sect. 15 are concerned, there is nothing to limit the application of the section to companies which are wound-up under the order of the court. But then it is said that the Act of 1890 has no application to voluntary liquidation—and no doubt generally this is true—and, further, it is said that where the Legislature meant this Act to apply to voluntary liquidation it used express words, as is done in the second sub-section of sect. 10. And it is urged generally that voluntary liquidation, at all events when it is not subject to the supervision of the court, is, by the whole scope of the Act of 1862, a domestic proceeding intentionally left by the Legislature under the control of the contributories, or in the case of supervision the contributories and the creditors, and that the manifest intention of the Act of 1890 is to exclude such liquidation from the operation of the Act and the statutory control of the Board of Trade. I do not think these arguments should prevail. The words of the section contain no such limitation. Section after section of the Act is limited expressly to companies being wound-up by the court. Sect. 15 is not so limited, and I have come to the conclusion that it is intentionally not so limited, and that the omission of the limitation is not *per incuriam*. Some argument was sought to be based upon sect. 31, sub-sect. 2, but that sub-section only seems to me to define what is a winding-up “by order of the court,” and it does not say that the Act shall not apply to any other winding-up.

Solicitors: *Solicitor to the Board of Trade; Leonard H. West, for Iveson and West, Hull; A. Slater.*

Jan. 11, 17, and 24.

(Before WRIGHT, J., sitting as an additional Judge of the Chancery Division.)

Re HERCYNIA COPPER COMPANY LIMITED; Ex parte RICHARDSON. (a)

Company—Winding-up—List of contributories—Director's qualification shares—Implied contract to take shares.

The articles of association of a company which was incorporated in July 1891 provided that the

(a) Reported by W. IVIMY COOK, Esq., Barrister-at-Law.

qualification of a director should be the holding of shares of the nominal amount of 250l.; that the first directors might act before acquiring their qualification, but that, unless within one month from their appointment they acquired such qualification, they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly. R. was one of the persons named as the first directors in the articles. On the 21st July 1891, after the registration, he wrote to the consulting engineer of the company a letter in which he referred to the fact of his having signed the articles and a prospectus, in which his name appeared as a director. On the 8th Sept. 1891 he wrote to the secretary resigning his appointment as director. The directors accepted his resignation, but allotted to him qualification shares to the nominal amount of 250l. R. never attended any of the meetings of the directors, or otherwise acted as a director. In the winding-up of the company the liquidator settled R. on the list of contributories in respect of those shares. On a summons by R. to have his name removed from the list.

Held, that the fact that R. authorised the company by the letter of the 21st July 1891 to hold him out to the world as a director, and that he allowed himself to be named as a first director, was evidence that he had agreed to take the shares; that that conclusion was fortified by the letter of the 8th Sept. 1891, and that his name must therefore remain on the list.

SUMMONS.

The Hercynia Copper Company Limited was incorporated on the 21st July 1891.

Art. 80 of the articles of association provided that six named persons, including A. Richardson, should be the first directors.

Art. 84 provided that the qualification of a director should be the holding of shares of the nominal amount of 250l.; that the first directors might act before acquiring their qualification; but that, unless within one month after their appointment they should acquire such qualification, they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly.

On the 21st July 1891, after the incorporation of the company, Richardson wrote to the consulting engineer of the company a letter in which he referred to the fact of his having signed a prospectus of the company in which his name appeared as one of the directors, and also a print of the articles. He did not, however, attend any of the board meetings, or otherwise act as a director.

On the 8th Sept 1891 he wrote to the secretary of the company as follows:

After careful consideration I find it impossible to attend to the duties of a director of your board. I am fearfully pressed with business, and Swansea being so far from town I cannot give the time. I therefore think it my duty reluctantly to resign, which resignation please place before my co-directors, and take any other proper steps. When I consented to join the board I was much freer, and could then as matters stood have acted, but matters have cropped up since which make it impossible.

The company accepted Richardson's resignation, but allotted him qualification shares to the nominal amount of 250l.

CHAN. DIV.]

Re HERCYNIA COPPER COMPANY; Ex parte RICHARDSON.

[CHAN. DIV.]

In the winding-up of the company the liquidator placed him on the list of contributories in respect of these shares.

This was a summons by Richardson asking that his name might be removed from the list in respect of these shares.

Bingley for the applicant. — The applicant's name was wrongly placed upon the list of contributories and ought to be removed. He never applied for any shares in the company, and no contract to take shares can be implied from the fact of his signing and approving of the articles and prospectus. He neither was present at any of the board meetings nor in any way acted as a director. On the 8th Sept. 1891, less than two months after the incorporation of the company, he wrote the letter resigning his office, and his resignation was accepted by the company. The present case is distinguishable from *Re Anglo-Austrian Printing and Publishing Union; Isaacs' case* (66 L. T. Rep. N. S. 593; (1892) 2 Ch. 158), as there the applicant acted on several occasions as a director. He also referred to

Re Bread Supply Association Limited, 68 L. T. Rep. N. S. 434.

Whinney for the liquidator. — The signature by Richardson to the articles is *prima facie* evidence that he did become a director, and it is for him to show that he did not. Further, his letter of resignation shows that he admitted himself to be a director. He also allowed the prospectus to go out to the world with his name upon it as director, and he also signed the prospectus and articles as approving them. He is therefore estopped from saying that he did not become a director. That being so, he clearly came within art. 84, and the company was right in allotting him the qualification shares. His name, therefore, being rightly on the register at the date of the winding-up, was properly placed by the liquidator upon the list of contributories. He referred to

Re National Insurance and Investment Association; Marquis of Abercorn's case, 7 L. T. Rep. N. S. 225; 4 De G. F. & J. 78;

Re Australian Direct Steam Navigation Company; Müller's case, 3 Ch. Div. 661;

Re Portuguese Consolidated Copper Mines Limited; Lord Inchiquin's case, 64 L. T. Rep. N. S. 841; (1891) 3 Ch. 28;

Re Metropolitan Public Carriage and Repository Company; Brown's case, 29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. 102.

Bingley replied.

[WRIGHT, J. referred to *Re Printing Telegraph and Construction Company of the Agence Havas Limited; Ex parte Cammell*, (1894) 1 Ch. 528; *ante*, p. 74.]

WRIGHT, J. — This is a case of great difficulty, but on the whole I think it is one in which I ought to retain the name of the applicant on the lists of contributories. The case is in several respects peculiar, particularly with regard to the letters written by the applicant and the articles. By art. 80 the applicant was named as one of the first directors of the company. Art. 84 was as follows: [His Lordship read the article, and continued:] These articles, purporting to appoint the applicant a director, and to provide for his qualification, must be considered with reference to the following facts: On the 21st July 1891 the very day when the company was incorporated,

and when a prospectus was to be issued, the applicant wrote to the consulting engineer of the company, who was probably the prime mover in the affair, a letter referring to his having signed the prospectus and the articles; and from certain expressions in the letter it may be inferred that it was written after the company had been incorporated, and that the letter was sent to the recipient as agent for the company, and was in point of fact intended as a letter to the company. The prospectus shows the name of the applicant as a director, and he signed the articles, not as one of the ordinary signatories, but to show his assent to them. He cannot have signed for no purpose whatever, or merely so as to contract with the other persons signing. He must have signed so as to show his assent to a contract with the company, inasmuch as his assent was not otherwise wanted. The directors, other than the applicant, attended board meetings, but the applicant attended no such meetings, and he did not otherwise act as a director. On the 8th Sept. 1891 he wrote to the secretary of the company as follows: [His Lordship read the letter and continued:] I certainly should have been loath to say that a letter in which he says he finds he has made a mistake as to being able to act and resigns his office amounted to an admission that he had agreed to take shares, but the terms of it may show that he had, and the terms of the letter were stronger than a mere resignation. He says, "When I consented to join the board." I think the proper inference to be drawn is that from the 21st July to the 8th Sept. 1891 he held himself out as a director. The answer of the company to that letter was, that they would accept his resignation, but they allotted him his qualification shares, and he has been placed on the list of contributories. It is clear that the mere fact of being a party to the articles as one of the subscribers does not make a contract between the subscriber and the company; but the question here is, was there an acceptance by Richardson of the office of director, or an agreement to accept it upon the terms of the articles? In *Isaacs' case* (*ubi sup.*) Stirling, J. and the Court of Appeal held that when a man has acted as director he must be taken to have acted upon the terms of the articles, and some of the judges indicated that it was their opinion that he must be taken to have done the same, even if he has not acted, provided that he has agreed to act. There was then here an acceptance by Richardson of the office of director, or an agreement by him to accept it upon the terms of the articles. If so, he is bound by art. 84. On the whole I think that he did accept the office of director. I think that the fact that he authorised the company by the letter of the 21st July 1891 to hold him out to the world as a director, and that he allowed himself to be named as a first director, is evidence that he agreed to accept the office upon the terms of the articles, and that he in consequence agreed to take the shares. That conclusion is fortified by his own statement in the letter which he wrote on the 8th Sept. His name, therefore, must remain on the list of contributories.

Solicitors: J. J. G. Pugh, for G. J. L. Morgan, Swansea; Slaughter and May.

Q.B. Div.]

Re R. G. THOMPSON; *Ex parte* BAYLIS.

[Q.B. Div.]

QUEEN'S BENCH DIVISION.

Nov. 9 and 11, 1893.

(Before POLLOCK, B. and CHARLES, J.)

Re R. G. THOMPSON; *Ex parte* BAYLIS. (a)

Solicitor's costs—Agreement in writing between solicitor and client—Agreement signed only by the party to be bound—Money retained with consent of client equivalent to payment—Attorneys and Solicitors Act 1870 (33 & 34 Vict. c. 28), s. 4—6 & 7 Vict. c. 73, s. 41.

A solicitor agreed to conduct certain litigation for his client for a fixed sum of money. In the course of the litigation the client paid the solicitor certain sums amounting in all to more than the sum agreed. The litigation terminated in a settlement favourable to the client, and a fresh arrangement was made that the solicitor should retain the amount he had received from his client, though in excess of the amount originally agreed. This arrangement was embodied in a receipt signed by the client, on payment to her by the solicitor of the amount recovered for her in the action.

Held, that the receipt, though signed only by the client and not by the solicitor, was "an agreement in writing" within sect. 4 of 33 & 34 Vict. c. 28.

Held also, that the money retained by the solicitor was, in view of his client's consent as contained in the receipt, a payment by the client to the solicitor within sect. 41 of 6 & 7 Vict. c. 73.

Dictum in Re Lewis; Ex parte Munro (35 L. T. Rep. N. S. 857; 1 Q. B. Div. 724), disapproved.

THIS was an appeal from an order of Master Archibald for the taxation of a solicitor's bill of costs. The appeal had originally come before Lawrance, J. in chambers, and had by him been referred to the Divisional Court, and on the 20th Dec. 1892 the court had referred the matters in difference to the district registrar of Manchester for inquiry and report. The facts appear from this report, which was in the following terms:

"In pursuance of the directions given me by the order of this honourable court, dated the 20th day of Dec. 1892, whereby it was ordered that the whole of the matters in difference herein should be referred to me, the district registrar at Manchester, for inquiry and report to this honourable court, and that all questions of costs be reserved, I hereby report that the result of the inquiry, which has been made in pursuance of such directions is as follows: The applicant Jane Baylis has attended by her solicitor. The respondent Robert George Thompson has attended by his counsel. The applicant Jane Baylis and her witnesses John William Wood, Ellen Lees, Florence Hill, Jessie Hill, and Frank Thornby Cliffe, have been examined and cross-examined before me on oath. The respondent Robert George Thompson has been examined and cross-examined before me on oath. The costs, the subject-matter of this application, are in respect of an action for negligence brought by the applicant Mrs. Baylis against Messrs. Hall, Son, and Lord, a firm of solicitors, who had acted for her in some Chancery proceedings in the Chancery of the County Palatine of Lancashire. In this action Mr. Thompson acted as the solicitor for Mrs. Baylis. The action was tried at the Manchester winter assizes 1890 before Wills, J., when judgment was on the 2nd Dec. 1890 given

for Mrs. Baylis for 210*l.* damages and costs, 'the costs thrown away by the adjournment from Saturday the 29th Nov. to Monday the 1st Dec., to be the defendants'. Execution stayed on notice of appeal being given within a week, and if notice given within that time, further stay until hearing of appeal."

"On the 1st June 1892 Mrs. Baylis issued a summons against Mr. Thompson for delivery of his bill of costs in all causes and matters wherein he had been concerned for her, and on the 10th June and 29th July 1892 the master made orders for such delivery. The bill of costs was delivered in pursuance of these orders. On the 3rd Nov. 1892 Mrs. Baylis issued a summons for taxation of that bill, 'having regard to the agreement in writing dated the 21st Jan. 1890.' The agreement referred to is contained in a letter of the 21st Jan. 1890, from Mr. Thompson to Mr. Hawken, the then and now solicitor of Baylis, and is in the following words:

You may therefore inform Mrs. Baylis, that as I happen to know a good deal of her troubles in connection with her daughter's marriage to John Hill (a solicitor who some time ago practised in this town), I am disposed to assist her by carrying the case to trial for a sum of 25*l.*, and will not in any event look to her for more.

"On the 16th Nov. 1892 an order was made on the summons which contained the words 'and both parties agreeing (without prejudice to any appeal on this application), that, if the order stands, the taxing officer shall tax subject to any agreement between the parties,' and then proceeded to order a taxation in the usual form, such taxation to be (by consent) by the district registrar at Manchester. From that order for taxation Mr. Thompson appealed by notice dated the 17th Nov. 1892, and by notice dated the 26th Nov. 1892 gave notice that he should on the hearing of that appeal apply to have an appeal heard against the order directing the delivery of the bill of costs. The appeal having been referred by Lawrance, J. to this court, the order of the 20th Dec. referring the matters to me for inquiry and report was made.

"Before the trial at the assizes, Mrs. Baylis paid to Mr. Thompson five sums amounting to 25*l.*, being the amount mentioned in the letter of the 21st Jan. 1890, and on the 25th Nov. 1890 the sum of 2*l.* 10*s.* for one half charge for the notes of the Vice-Chancellor of Lancashire, in the case in which the defendants, Hall, Son, and Lord, had acted for her, and in which she alleged negligence on their part; the other half part Mr. Thompson agreed to and did pay, and on the same date the further sum of 13*l.* 13*s.* for the fees on the brief delivered to Mr. Addison, Q.C., she having insisted on having leading counsel at the trial. When these last-mentioned payments were made, Mr. Thompson gave a receipt as follows:

25th Nov. 1890.—*Baylis v. Hall, Son, and Lord*.—Received of Jane Baylis the sum of 2*l.* 10*s.*, balance of costs agreed to trial in the event of non-success.—Received also 13*l.* 13*s.* for Mr. Addison's fee.—R. G. THOMPSON.

"Mrs. Baylis agreed to bear and pay these two sums of 2*l.* 10*s.* and 13*l.* 13*s.* in case of non-success in the action. The above-mentioned sums amount together to the sum of 41*l.* 3*s.* She also paid to Mr. Thompson the further sum of 3*l.* 3*s.* (on the day before the trial), for payment

(a) Reported by MERVYN LL. PREL, Esq., Barrister-at-Law.

Q.B. Div.]

Re R. G. THOMPSON; *Ex parte* BAYLIS.

[Q.B. Div.]

to a witness, Ashmore, and after the trial the sum of 11. 10s. for the stamp on the associate's certificate, and 10s. for railway fees and expenses to Liverpool to obtain the certificate. Notice of appeal having been given in the action by Messrs. Hall, Son, and Lord, the defendants, on the 9th Dec. 1890, Mrs. Baylis on the following day agreed with Mr. Thompson that the latter should conduct the defence to the defendants' appeal for 25l. in case of non-success. She thereupon paid the sum of 5l. and the receipt, of which the following is a copy, was given to her:

10th Dec. 1890.—*Baylis v. Hall, Son, and Lord.*—Received from Mrs. Baylis the sum of 5l. on account of costs for the appeal in this case, the agreed costs to trial, so far as Mrs. Baylis personally is concerned, having been already paid. Costs of this appeal hereby agreed between Mrs. Baylis and myself, at the sum of 25l.—R. G. THOMPSON.

"She subsequently on the 13th Jan. 1891 paid Mr. Thompson a further sum of 5l. on account of the appeal costs. She had therefore on the 13th Jan. 1891 paid him in all 55l. 16s., and she did not personally pay him any money after that date. The appeal having been entered, Mr. Thompson prepared and delivered briefs to Mr. Addison, Q.C. and Mr. Austin. Subsequently on the 28th, 30th, and 31st Jan. 1891, overtures for the settlement of the action were made to Mr. Thompson, and on the 31st Jan. 1891 Mr. Wood, the managing clerk of Mr. Thompson, saw Mrs. Baylis at her house, and had a long interview with her, and fully explained the position of the action, and the offer by the defendants of 270l. to settle the action. Such sum to include the damages and costs. In answer to her inquiries as to how much money she would receive if she settled for 270l., she was told that, if she settled for that sum, she would receive for herself 150l., out of which she would have to pay her own witnesses, and that she would not receive back the 55l. 16s. she had paid to Mr. Thompson. She then authorised Mr. Wood to settle the action for the 270l., but wished him to obtain a larger sum if he could. Mr. Wood stated in his evidence, that on Sunday the 1st Feb. 1891, being the day after the interview of the 31st Jan. 1891, which was on the Saturday, Mrs. Baylis sent a letter to him, referring to the arrangement of the day before, to the effect that, if she only received the 150l. for herself as mentioned, she could not pay him the whole of a sum of 20l. which she had promised him. He further stated that this letter was sent to and received by him on the Sunday at his private residence, which was near that of Mrs. Baylis, and that he had destroyed it. Mrs. Baylis stated that she had a copy of this letter, but, under the advice of her solicitor, she refused to produce it. On the 2nd Feb. 1891 Mr. Thompson, after negotiations with the defendants Hall, Son, and Lord and their solicitors, settled the action, on the terms that the defendants should pay the damages awarded by the judgment, namely, of 210l. and 120l. for Mr. Thompson's costs as against the defendants, the defendants giving up all claim to costs against Mrs. Baylis in respect of the adjournment of the trial, which costs would have amounted to at least 15l. On the 11th Feb. 1891 Mr. Wood called on Mrs. Baylis at her house and paid her the 210l.; at the same time he fully explained to her the arrange-

ment with the defendants. She thereupon signed the receipt, of which the following is a copy:

18 and 19, Arcade Chambers, St. Mary's Gate, Manchester, Feb. 11th, 1891.—R. G. Thompson, Solicitor.—*Myself v. Hall, Son, and Lord.*—Received from R. G. Thompson the sum of 210l., being the amount of damages received, on my behalf, from Messrs. Hall, Son, and Lord, and having regard to the fact that Mr. Thompson has settled with Messrs. Halls for a sum less than he would have been entitled to for costs, in the event of Messrs. Halls being unsuccessful, I hereby agree to allow the sums paid by me to him on account of costs during the proceedings, to be retained by him as an equivalent for the abatement he has made to Messrs. Hall, Son, and Lord.—JANE BAYLIS.

"A cash account was subsequently delivered to Mrs. Baylis, giving credit for all sums she had paid to Mr. Thompson, amounting to the 55l. 16s. before mentioned, and for the 330l. received from Messrs. Hall, Son, and Lord, and debiting her with the 210l. paid to her, and with 'amount of agreed costs 175l. 16s.' being the two sums of 120l. and 55l. 16s. At both the interviews of Mr. Wood with Mrs. Baylis on the 31st Jan. and the 11th Feb. 1891, a Mr. Sharples, who was a personal friend of Mrs. Baylis, and who had throughout the litigation taken on her behalf an active part therein, was present. Mr. Sharples was not examined before me, neither of the parties having called him. No bill of costs was delivered by Mr. Thompson prior to the bill of costs delivered under the said orders of the master.

"The evidence consists of the summonses and orders hereinbefore referred to, the affidavit of John William Wood sworn the 12th day of Nov. 1892, the affidavit of Harry Ross Giles sworn in November 1892, the affidavit of Jane Baylis sworn the 21st day of Nov. 1892, and the affidavit of John William Wood sworn the 12th day of Dec. 1892, and the oral evidence, by examination and cross-examination, of John William Wood, Jane Baylis, Ellen Lees, Florence Hill, Jessie Hill, and Frank Thornby Cliffe, and Robert George Thompson.

"Dated the 9th day of June 1893.

"W. H. GUEST, District Registrar."

Sect. 4 of the Attorneys and Solicitors Act 1870 (33 & 34 Vict. c. 28) enacts that:

An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or a less rate, as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of the Act contained: Provided always, that when any such agreement shall be made in respect of business done, or to be done, in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined, and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement, or to order the agreement to be cancelled, and the costs, fees, charges, and disbursements in respect of the

Q.B. Div.]

Re R. G. THOMPSON; *Ex parte* BAYLIS.

[Q.B. Div.]

business done to be taxed in the same manner as if no such agreement had been made.

Channell, Q.C. and C. M. Lush for the appellant.—The order appealed against is an order to tax subject to any agreement. It has now been found by the district registrar that there is such an agreement, and the result will be that, if the order stands, there will be nothing to tax. The appeal against the order made should however succeed, as there has already been payment more than twelve months ago within the Attorneys and Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 41. The fact that the form taken by the payment was the retention by the solicitor of moneys of his client with her consent makes no difference:

Hitchcock v. Stretton, 66 L. T. Rep. N. S. 707; (1892) 2 Ch. 343;

Ex parte Hemming, 28 L. T. Rep. O. S. 144.

It will be said that in *Re Frapre*; *Ex parte Perrett* (68 L. T. Rep. N. S. 47, 558; (1893) 2 Ch. 284), taxation was ordered in spite of previous payment. But that case was under the Act of 1881 (44 & 45 Vict. c. 44), which does not apply in the present case, where the charges are in respect of contentious business. Moreover, as the whole reasoning of the judgment of North, J. shows, the reason taxation was ordered was, that it was uncertain in respect of what work the payment had been made. Here there is no such uncertainty, so that, as far as it governs the present case, it is an authority in my favour. [CHARLES, J.—The result of the cases seems to be, that payment can be made before the solicitor's bill is delivered, but that, whether, in any particular case, there has been payment, must depend on whether, when the bill is delivered, the work charged for is the same as that for which payment has been made.] If payment cannot be made in this way, it will often make it impossible to settle an action, as it will make it impossible to include the costs in the settlement. Even if there had not been payment, there is an agreement within sect. 4 of 33 & 34 Vict. c. 28. It is not necessary that it should be signed by both parties. There is a dictum in the case of *Re Lewis*; *Ex parte Munro* (35 L. T. Rep. N. S. 857; 1 Q. B. Div. 724), to the effect that both parties must sign, and not only the party to be charged. But it was not necessary to the decision in that case to hold this; and the judgment of Cave, J. in the recent case of *Re West, King, and Adams*; *Ex parte Clough* (67 L. T. Rep. N. S. 57; (1892) 2 Q. B. 102), and that of Thesiger, L.J. in *Bewley v. Atkinson* (41 L. T. Rep. N. S. 603; 13 Ch. Div. 283), show that that case would not now be followed to the full extent of that dictum. *Re Fernandes* (64 L. T. 310; W. N. 1878, p. 57) is a case in which taxation was refused under circumstances similar to those of the present case. In *Jennings v. Johnson* (L. Rep. 8 C. P. 425) an agreement not to charge anything for costs was held good, though not in writing at all. In the recent case of *Aitken v. Batchelor* (68 L. T. Rep. N. S. 530; 62 L. J. 193, Q. B.) it was decided that a written agreement under sect. 5 of the Arbitration Act 1889 (52 & 53 Vict. c. 49) need not be signed by both parties. The proviso in sect. 4, as to examination of the agreement by a taxing officer of the court, does not apply. It is an agreement as to past costs, and the money was already in the solicitor's hands.

Mattinson for the respondents.—The solicitor can only resist the application for taxation of his bill in one of two ways: he must make out either that his client has paid his bill; or that she has entered into an agreement with him which is good under the Act of 1870. The master's order to tax "subject to any agreement" can only mean "subject to any good agreement." But this is not a good agreement within sect. 4 of the Act. Even if it satisfied sect. 4 in other respects, the proviso would apply, and that has not been complied with. The section says "in respect of business done, or to be done," so that it clearly applies to past costs. Then it is clear, from the cases, that, in order to be a "written agreement" within the section, it must be signed by both parties:

Re Lewis; *Ex parte Munro*, 35 L. T. Rep. N. S. 857; 1 Q. B. Div. 724.

If the dicta in that case go beyond what was necessary to the decision, they are followed in *Re Raven*; *Ex parte Pitt* (45 L. T. Rep. N. S. 742; 30 W. R. 134), which is absolutely in point. [POLLOCK, B.—In that case there was nothing but a letter. I should have come to the same conclusion under the same circumstances.] In this case there is only a receipt. There are other cases which follow *Re Lewis*; *Ex parte Munro* (*ubi sup.*), and show that the judges have felt no difficulty as to the case:

Re Russell, Son, and Scott, 52 L. T. Rep. N. S. 794; 30 Ch. Div. 114;

Re West, King, and Adams; *Ex parte Clough*, 67 L. T. Rep. N. S. 57; (1892) 2 Q. B. 102;

Re Frapre; *Ex parte Perrett*, 68 L. T. Rep. N. S. 47, 558; (1893) 2 Ch. 284.

Against it there is only the dictum of Thesiger, L.J. in *Bewley v. Atkinson* (*ubi sup.*), and the circumstances of that case were entirely different. But if there has been no agreement, neither has there been payment. In *Re West, King, and Adams*; *Ex parte Clough* (*ubi sup.*), Cave, J. lays down the rule, that where there has been no valid agreement between solicitor and client, a mere retainer by the solicitor of money in his hands apart from any settlement of accounts is not payment. *Re Street* (22 L. T. Rep. N. S. 429; L. Rep. 10 Eq. 165), and *Re Stogden* (56 L. T. Rep. N. S. 355; 56 L. J. 420, Ch.), show that there can be no payment before a bill has been delivered, which had not been done in this case at the time the client is alleged to have consented to the solicitor retaining the money in his hands.

POLLOCK, B.—Seeing the importance of this case, I have no doubt that my brother Lawrence was right to refer it into court. [His Lordship discussed the facts and proceeded:] As the matter now comes before us there are two questions for our decision. As to the first of these we say that there ought to be no order for taxation, because the solicitor and his client have made an agreement, which is a good agreement, in writing within the meaning of sect. 4 of the Attorneys and Solicitors Act 1870. The agreement was made under circumstances known to both parties, seeing that they were circumstances which arose out of a case in a court of law, so that there was no doubt as to the identity of the items in respect of which it was made. But it is said that it is not an agreement within the meaning of the section, because it does not contain the signature of the

Q.B. Div.]

Re R. G. THOMPSON; *Ex parte* BAYLIS.

[Q.B. Div.]

solicitor. Now the words of the Act are "an agreement in writing." Is this an agreement in writing? Apart from authority I should say clearly it is. It would be extraordinary if, though it expressed the intention of both parties in writing, it failed to satisfy the section for want of the actual signature of the solicitor. The only authority on the subject is a dictum of Lord Coleridge in *Re Lewis; Ex parte Munro (ubi sup.)*. But, in that case, it was the solicitor only who had signed the agreement by which it was attempted to bind the client. Accordingly Lord Coleridge says: "Otherwise it would always be possible for a solicitor to place a document, signed by himself only, and containing terms favourable to him, before a client, and then to contend that the client was bound by it." This reasoning clearly does not apply to the present case, where the agreement has been signed by the party to be bound. The dictum in *Re Lewis; Ex parte Munro* was unnecessary to the decision. Other cases have been cited as following it, and doubtless it has been quoted with approval, but mostly, perhaps, without careful consideration of the language of the section. At all events in *Bewley v. Atkinson (ubi sup.)* it was carefully considered by Thesiger, L.J., who says: "Although Lord Coleridge no doubt, in delivering the judgment of the court, used expressions which were wider than were actually required for the purpose of deciding the case, I think those expressions must be limited to the facts of the case." There are one or two other cases which are said to follow the dictum of Lord Coleridge, but I do not find that to be really the case. *Re Raven; Ex parte Pitt (ubi sup.)*, is the most important of them. In that case Fry, J. holds that a document, which was a mere letter from a lady to her solicitor, is not within the section. This is pretty obvious, and for a reason which he accurately expresses when he says that an agreement in writing must "show by writing the accession of both parties" to its terms. *Re Russell, Son, and Scott (ubi sup.)* only decides that a mere verbal agreement is not binding on the client. So really there is no authority on the point, and we are bound to say that this is an agreement in writing. Then there is one other matter in connection with this point. It is said that this agreement does not satisfy sect. 4, because the proviso which requires that an agreement between solicitor and client should be approved by an officer of the court has not been complied with. The learned master has, however, ordered taxation subject to any existing agreement. This point is therefore not before us now. Coming now to the other principal point raised in this case, I find that it is a question of more difficulty, as it has been considered by other judges, and we must not disturb what they have laid down. The question is, whether this application should not be dismissed on the second ground, namely, that there has been payment by the client to the solicitor. I will not go into all the cases, but in the case of *Re West, King, and Adams; Ex parte Clough (ubi sup.)*, which came before me in chambers, I held that a sum which had been deposited with a solicitor to meet costs and was applied by him, in accordance with an oral agreement settling the costs at a lump sum, to that purpose was a payment. The court held that that was not so, because payment must be on some distinct charge, so that the client should

have an opportunity for a distinct act of judgment. Now that has really nothing to do with a case of deduction like this. It is clear that here, when the lady signed, she did affirm a distinct act of judgment which she had made. Then there is the case of *Hitchcock v. Stretton (ubi sup.)*. I can only say that I fully agree with what Stirling, J. there says. After carefully considering the authorities he lays it down that, where payments have been made on account, and a bill is afterwards delivered to which the payments are referable, the court will not order taxation in the absence of special circumstances of fraud or pressure or of great overcharge. This precisely applies to the circumstances of the present case. It is said that, because this is an agreement between a solicitor and his client, we are to put some stricter rule in force than we should in other cases. For my part I dissent entirely from this. To take that course would be going out of our way to commit an injustice. If what has taken place would have been payment between a tradesman and his customer, it is so between a solicitor and his client.

CHARLES, J.—I am of the same opinion on both the points taken. I think this document is an agreement in writing within the meaning of sect. 4, and certainly it is within the words of the order to tax subject to any agreement. The summons refers to another agreement, and to that only; the order clearly refers to any agreement. It might therefore be difficult to hear Mrs. Baylis say that this is not an agreement within the meaning of the section; but anyhow I have come to the conclusion that it is so. The only case which has been cited against this view is *Re Lewis; Ex parte Munro (ubi sup.)*, which was decided by Lord Coleridge and Quain, J., but, as Thesiger, L.J. says in *Bewley v. Atkinson (ubi sup.)*, the *ratio decidendi* is that the agreement relied on by the solicitor had not been signed by the client. Therefore the observations of Lord Coleridge are not conclusive, and the case is one proper for our judgment. The other cases have been referred to by Pollock, B. I will only say a word as to *Re Raven; Ex parte Pitt (ubi sup.)*. I have examined both reports of that case and find the terms of the agreement are not set out. So I cannot think that Fry, J. meant more than that the document did not show "accession in writing." I think, however, that, even if the Solicitors Act of 1870 has anything to say to the matter, and if the document in question is not an agreement in writing within sect. 4 of that Act, still Mr. Channell's other point would be fatal to the application. I think that what passed between Mrs. Baylis and her solicitor, in Feb. 1891, did amount to payment within sect. 41 of 6 & 7 Vict. c. 73. *Re Street (ubi sup.)* and *Re Stogden (ubi sup.)* were cited to show that in spite of what then took place the applicant is entitled to an order for taxation. But those cases are considered by Stirling, J. in *Hitchcock v. Stretton (ubi sup.)*, and *Re Frapce; Ex parte Perrett (ubi sup.)*, is also now an authority. Looking at the two above mentioned cases on the one hand, and these last two on the other, and adding to the latter the effect of *Ex parte Hemming (ubi sup.)*, the result seems to be that, if, where a bill of costs is delivered after payment, you cannot identify the items for which payment has been made with the items of the bill of costs, then the *ratio decidendi* of the

Q.B. Div.]

TRAVIS v. UTTLEY.

[Q.B. Div.]

last-named case does not apply. But here you certainly can so identify the items. On both these points, therefore, I agree with my learned brother. The order must be discharged.

Solicitors for the appellant, *Bell, Brodrick, and Gray*.

Solicitors for the respondent, *Johnson and Dowding*.

Nov. 27 and Dec. 4, 1893.

(Before WILLS and WRIGHT, JJ.)

TRAVIS v. UTTLEY. (a)

Sewer—Definition of—Drain to three houses—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 4.

A drain passing under, and receiving the sewage from, three houses is a sewer within the meaning of the Public Health Act 1875.

THIS was a case stated by justices of Halifax in Yorkshire under 21 & 22 Vict. c. 43, for the opinion of the court. The terms in which the case was stated were (as far as material) as follows:

At a petty sessions holden at the Town Hall, Halifax, on the 18th Aug. 1893, an information and complaint preferred by David Travis, of Halifax aforesaid, sanitary inspector (hereinafter called the appellant), against Samuel Uttley, of Halifax aforesaid (hereinafter called the respondent), under sect. 91 of the Act 38 & 39 Vict. c. 55, charging that on the 7th Aug. 1893, at the township of Northowram in the county borough aforesaid, a drain in and upon certain premises, situate at Nos. 105 and 107, Fern-street, was in such a state as to be a nuisance or injurious to health, and that one Samuel Uttley is the owner of the said premises, was heard and determined by us the said justices respectively being then present, and upon such hearing we dismissed the said information and complaint. Upon the hearing of the said information and complaint, it was proved on the part of the appellant, and found by us as a fact, that the respondent was the owner of three cottage houses, being Nos. 105, 107, and 109, Fern-street, Boothtown, Halifax aforesaid, and that in the year 1868 he deposited with the Halifax Corporation a notice as to the erection of the said cottages, together with the block plan of the buildings, and that a drain ran through the centre of the basement of the said three cottage houses for the purpose of carrying off the sewage matter and products of the water-closets in the said houses, and from thence were conducted into the public sewer in the adjoining streets, and that in the cellars of each of the said three cottages there was a slop stone and water-closet, the slop water and refuse from which was conveyed in a pot pipe into the said drain running through the basement of the said houses and thence outside into the sewer in the street.

It was proved that a nuisance existed in the cellars of Nos. 105 and 107, Fern-street aforesaid, caused by reason of the said basement drain under house No. 105, Fern-street, being defective, and that sewage matter, liquid and excreta, had exuded on to the cellar floor of both houses, i.e. Nos. 105 and 107 Fern-street, the smell from which was very offensive and very injurious to health. That the cellar floor at 105, Fern-street

aforesaid, which was connected with the drains from Nos. 107 and 109, had been opened, and the drain was found to be in a defective condition, one of the pipes which should have joined the main drain being practically an open end, and that the obstruction was caused by the connection not being good. That No. 105, Fern-street aforesaid, is the lowest house, the rest of the houses had their drains, which communicated with it, dammed back in consequence of the stoppage at No. 105, and one socket was broken on the top side in No. 105, allowing sewage matter to escape into the soil of the house, and that sewage matter and paper was the cause of the obstruction.

It was also admitted, that notice to abate the nuisance had been duly served on the respondent, and it was proved that the urban sanitary authority (the Halifax Corporation) has passed resolution duly authorising proceedings to be taken.

On behalf of the respondent it was proved that he had paid the said Halifax Corporation the sums demanded for flagging, paving, and channelling Fern-street aforesaid, and that the street was a public one, and on his behalf it was submitted: That the basement drain complained of was "a sewer" as defined by sect. 4 of the Public Health Act, and in accordance with sect. 13 of the same Act vested in the local authority, and by reason of sect. 15 it was their duty to repair the drain and remove the nuisance, and it was not the duty of either the owner or occupier; in support of which contention the following cases were cited, viz., *Acton Local Board v. Batten* (52 L. T. Rep. N. S. 17; 28 Ch. Div. 283) and *Ferrand v. Hallas Land and Building Company* (69 L. T. Rep. N. S. 8; (1893) 2 Q. B. 135). And being guided by the language used by Kay, J. when defining what was a sewer in the case of *Acton Local Board v. Batten* (*ubi sup.*), we were of opinion that the objection was a fatal one, and we dismissed the said information and complaint.

The question of law arising on the above statement for the opinion of this court is: Whether or not the drain that runs through the basement of the houses Nos. 105, 107, and 109, Fern-street aforesaid, into which is conveyed the refuse from more than one house, becomes "a sewer" within the meaning of sect. 4 of the Public Health Act 1875. And the court is humbly solicited, according to the power vested in it by the said statute 20 & 21 Vict. c. 43 to remit the case to us, the said justices, with the opinion of the court thereon, or to make such other order as on the statement of the foregoing facts to the court may seem fit.

Sect. 4 of the Public Health Act 1875 (38 & 39 Vict. c. 55) contains the following definitions:

"Drain" means any drain of, and used for the drainage of one building only, or premises within the same outillage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"Sewer" includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads, and not being a local authority under this Act.

Forbes, Q.C. and *Macmorran* for the appellant.—It is possible that, if the defining section were

(a) Reported by MERVYN LL. PEEL, Esq., Barrister-at-Law.

Q.B. Div.]

TRAVIS v. UTTLEY.

[Q.B. Div.]

construed very strictly in its literal sense, the result might be that this drain would be a sewer within the Act as far as regards the part passing under the two lower houses. But the part draining the first house (No. 109) would still be only a drain; and it is not necessary to construe the section so as to produce this anomalous result, and other parts of the Act show that that is not its true meaning. Sect. 15 requires the local authority to keep sewers in repair, and sect. 18 empowers them to make any necessary alterations in the sewers. If, therefore, this is a sewer, the local authority may enter the house and pull up the floors to get at the drains at any time. The Legislature can never have intended to give such powers by a mere implication. Sects. 19, 21, 25, 26, and 150, dealing with the connection of private drains with sewers and other matters, are all inconsistent with the idea that a drain passing through private ground or under a house can be a sewer:

Meador v. West Cowes Local Board, 67 L. T. Rep. N. S. 454; (1892) 3 Ch. 18;

Acton Local Board v. Batten, 52 L. T. Rep. N. S. 17; 28 Ch. Div. 283;

Ferrand v. Hallas Land and Building Company, 69 L. T. Rep. N. S. 8; (1893) 2 Q. B. 135.

Tindal Atkinson, Q.C. and R. Cunningham Glen for the respondent.—The words of the section are so clear that no other interpretation than the literal one can be put upon them. The inconvenience resulting from this construction is imaginary. Even if it is not, neither party is in a position to complain. It must either be taken that the respondent has, by making a sewer under his houses, given the local authority an implied licence to enter and make necessary repairs; or, if the local authority are liable to make him some compensation for so entering, then they have only themselves to thank, since they passed the plans for this drain and did not call on the owner to make any other sewer. So there is really no hardship on either party, and if there were, it could not affect the construction of the section. In the present case, only three houses are drained in this way, but a hundred might be similarly drained. In that case no one would doubt that the drain was a sewer. The view of the framers of the Act is clear from sect. 19 of the amending Act of 1890 (53 & 54 Vict. c. 59), which gives a remedy. It was considered necessary that the local authority should have control of every drain serving more than one house, otherwise the lower of the two houses might close the drain, leaving the upper one no remedy but the slow one of an action. There may be more difficulty as to the part of this drain under No. 109, the highest house; but if part of the drain is a sewer, it can hardly be that the other part is not.

Forbes, Q.C. in reply.

Cur. adv. vult.

Dec. 4.—*WILLS, J.*—The point raised in this case is of importance. The respondent was the owner of a property in Halifax as long ago as 1868, and at that time he submitted plans to the local board in which he bracketed together every three of the houses he proposed building for purposes of drainage, so that in each of these cases the drain would run under the three houses, receiving first the drainage of one, then that of the two others, then carrying it out to the main system of the town. These plans were approved.

At that time the Public Health Act of 1848 (11 & 12 Vict. c. 63) was in force. The Act of 1875 has since come into operation. Lately the drain of one of these sets of three houses has got out of order, and has caused a nuisance, the local board has ordered it to be put right, and has been met with the answer that it is a sewer, and that it is therefore not the respondent's business to repair it. There is no real difference that I can discern, no difference that touches this case, between the legislation of 1848 and that of 1875. So, if there is any difficulty here, it is due to the predecessors of the local board, who approved the plans in accordance with which these houses were built. All we have to decide is the question whether such a drain is a sewer within the meaning of the Act. Now the definition in the Public Health Act of 1875 is perfectly clear, and is the same as that in the earlier Act. It is, that any drain which drains more than one building is a sewer. Words cannot be plainer. This drain is used for the drainage of more than one building. It is, therefore, a sewer. It is not, I think, possible to draw any distinction between the part of this drain which drains the first of these houses and that which drains the other two. For in that case the part of a drain serving any house at the top of a *cul de sac* would not be a sewer, which seems contrary to common sense. I can find here no inconsistency or inconvenience which would justify us in disregarding the plain meaning of the section. I have always understood that such inconsistency must be something in the section itself or in the rest of the Act. There is no such inconsistency here. The inconvenience is only of importance as showing the true intention of the Legislature. So I cannot see any reason for not adopting the plain meaning of the section, or why we should not say that it is a sewer, and that the local authority must keep it in order. I am thoroughly aware that this may be very inconvenient for the local authority in this borough, but they have, as I have said, only their predecessors to thank for this. The words of the section are plain and must be followed.

WRIGHT, J.—I am of the same opinion. There is an apparent absurdity in holding that this drain, apparently a private drain, is a sewer. It seems to be an absurdity in two directions: first, in that it interferes with private property by giving the local authority the right to come into a private house for the purpose of repairing a drain; in the second place, because it throws the burden of doing repairs on private property on the local authority. But the words of the section are plain, and the result perhaps not really unreasonable. It may have been foreseen that complications would be likely to arise from the use of the same drain by several houses, and the intention may have been to avoid these. At any rate, I have tried to see a way out of holding this to be a sewer, and I cannot. I thought at one time during the argument that the section would not apply to a drain which was part of a house; but a drain might run under many houses belonging to different people. Or again, I thought it might not be a sewer because it ran through private grounds; but many sewers may do this which yet ought clearly to be under public control. I think it is best to adhere to the plain words of the section.

Appeal dismissed.

[IN BANK.]

Re AYLMER; Ex parte AYLMER.

[IN BANK.]

Solicitor for the appellant, *J. R. Hall*, for *K. Walton*, Halifax.

Solicitors for the respondent, *Firth and Co.*, for *Godfrey Rhodes and Evans*, Halifax.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Saturday, Nov. 25, 1893.

(Before WILLIAMS J.)

Re AYLMER; Ex parte AYLMER. (a)

Bankruptcy—Debt proved in former bankruptcy—Revival of, by promissory notes—Proof for, in subsequent bankruptcy.

A debtor to secure a present advance agreed to revive a debt due to the lender which had been proved for in a former bankruptcy, and for this purpose gave promissory notes for the old debt; on the debtor again becoming bankrupt, the lender sought to prove on the notes.

Held, that the promise to revive and pay the old debt was not under the present Bankruptcy Act illegal; and that, as there was nothing in the circumstances of the case to justify the court in supposing that the borrower, when he gave the notes, had no intention of carrying out his promise and paying the old debt, the proof ought to be admitted.

Re Gomersall; Ex parte Gordon (33 L. T. Rep. N. S. 483; 1 Ch. Div. 137), distinguished.

THIS was a motion by Crane to reverse the decision of the trustee in the bankruptcy of Aylmer, who had rejected his proof against the estate of Aylmer for 1331l.

In the year 1887 the debtor Aylmer had been adjudicated a bankrupt, and Crane had proved for a large amount. On the 17th June 1892, the debtor wrote to Crane:

That in consideration of your having discounted my promissory note for 100l., I revive my indebtedness to you as shown by the proof in the bankruptcy proceedings 1887, and I agree to pay the same by three equal annual instalments, the first to be paid on the 1st July 1893, and any dividend you receive is to be given credit for.

In pursuance of this letter, on the 16th Nov. 1892, the debtor gave Crane three promissory notes for the sums of 350l., 350l., and 356l. 4s. to secure the amount due under the previous bankruptcy.

A receiving order was made against the debtor on the 17th June 1893, on a petition filed in March 1893. Crane put in a proof against the debtors estate for 1331l. money lent and interest. The proof was made up as follows: 1056l. 4s. due under the promissory notes, and the balance for advances made subsequent to the old bankruptcy with interest. The trustee rejected the proof as to 1056l. 4s. upon the ground that the bills for this amount represented a transaction dealt with under a former bankruptcy, and were therefore not admissible under the present one, and in justice to the present creditors could not be admitted. This was an application by way of appeal from this rejection.

F. C. Willis for the applicant.—This is a perfectly genuine transaction; value was given by Crane, and the principle of *Re Gomersall* (33 L. T.

Rep. N. S. 483; 1 Ch. Div. 137, 142) does not apply, though probably he can only prove for 5 per cent. interest, and no more, and cannot prove for any higher rate until all the proved debts have been paid in full, as by sect. 23 of the Bankruptcy Act 1890, "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

Yate Lee for the respondent.—The case is governed by the decision in *Re Gomersall*, and the principles there laid down by James, L.J. are the principles which ought to guide the court here.

WILLIAMS, J.—This proof must be admitted. The facts of this case do not come within the principle laid down in *Re Gomersall*; the ground of that decision was, that bills were drawn and accepted on the eve of bankruptcy, and were in fact, to use the words of James, L.J., sham and fictitious bills, drawn and accepted for the express purpose of enabling a proof to be made, and bills which it never was intended should have any efficacy or operation except in the event of bankruptcy, in which case it was intended there should be a proof. There are no facts which could justify me in coming to the conclusion that there never was any intention that Capt. Aylmer should pay these amounts. There was money owing by Capt. Aylmer to Crane, his creditor under a former bankruptcy. Capt. Aylmer wanted more money, accordingly he makes representations to Crane, and eventually gets his loan, but on onerous terms. When he applied for that loan he not unnaturally represented, and I dare say thought as people are apt to do, that he would have plenty of money with which to pay it back presently. The money-lender refuses the loan unless the debtor promises to pay what the money-lender lost by the debtor's previous bankruptcy. Such a promise under the present statute is not illegal, and therefore is one that Capt. Aylmer is quite likely to have made, and probably with the intention of carrying out, which is the basis of the decision in *Re Gomersall*. The bankruptcy did not occur until nine months after the letter was written, and after the advance was made. The question I have to decide is, whether this proof is admissible. I agree with Mr. Willis that in all probability, having regard to sect. 23, the creditor will only be entitled in the first instance to receive his dividend on the loan with interest at 5 per cent., and he will not be entitled to come upon the estate of the bankrupt for any more interest until the terms of sect. 23 have been complied with.

Solicitors for the applicant, *Julius and Thomas*.

Solicitors for the respondent, *Munns and Longden*.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

[PROB.]

In the Goods of CHAPPELL (deceased).

[PROB.]

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Jan. 22.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of CHAPPELL (deceased). (a)

Will—Mistake in Christian name of executor—Ambiguity—Extrinsic evidence—Probate.

The testator devised his real estate "to Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," and to two other persons, upon certain trusts, and gave a certain house and garden "to the said Robert Taylor, of Warmley Hill aforesaid," provided he accepted the executor and trusteeship of the said will; and, in the event of his refusal to act, the testator gave the said house and garden to Henry Arthur Williams, upon the like consideration and condition; and he appointed the said Robert Taylor, and, in default, the said Williams and the two persons previously named as trustees, to be executors of his will.

There was no Robert Taylor living at Warmley Hill, but there was a James Alfred Taylor, a bootmaker, who lived there; and the said James Alfred Taylor had a brother, Robert Britton Taylor, also a bootmaker, who lived at Hanham, which was in the same parish as Warmley Hill.

The Court allowed extrinsic evidence to show that James Alfred Taylor was an intimate friend of the testator, and that Robert Britton Taylor was little acquainted with the testator; and, upon that evidence,

The Court granted probate of the will to James Alfred Taylor, and not to Robert Taylor.

Evidence of declarations by the testator, as to his intentions, held inadmissible.

MOTION for probate.

John Chappell, late of Mount Hill, in the parish of Bitton, in the county of Gloucester, died, leaving a duly executed will bearing date the 8th Sept. 1893.

The testator by his said will devised all his real estate "to Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," and to James Lacey and Samuel Gerrish aforesaid, upon the trusts thereby declared; and he gave his house with garden adjoining, in the occupation of one William Wotton, "to the said Robert Taylor, of Warmley Hill, aforesaid, provided he accepts the executor and trusteeship of this my will;" and in case of his declining to do so, then the testator gave the said house and garden to Henry Arthur Williams, of Kingwood Hill, Bitton, absolutely, upon the like consideration and condition as aforesaid. The concluding direction in the will was as follows:

I appoint the said Robert Taylor if he accepts such appointment, and in default the said Henry Arthur Williams, James Lacey, and Samuel Gerrish, to be executors and trustees of this my will.

Searle, on behalf of James Alfred Taylor, James Lacey, and Samuel Pearman Gerrish, moved that probate of the will be granted to them, or such one of them as should be found to be entitled thereto. Evidence of surrounding circumstances is admissible for the purpose of showing what person the testator really intended to appoint as

his executor and beneficiary; there being, in fact, no person of the name of Taylor with the Christian name of Robert, residing at Warmley Hill, and carrying on business as a bootmaker:

Charter v. Charter, 7 E. & Ir. App. Cas. 364;

In the Goods of Shuttleworth, 1 Curt. 911;

In the Goods of de Rosaz, 36 L. T. Rep. N. S. 263;

2 P. Div. 66;

In the Goods of Brake, 45 L. T. Rep. N. S. 191;

6 P. Div. 217.

If the court is satisfied that the person whom the testator intended to designate is more properly indicated by his description than by his name, it will not feel itself bound by the name put down in the document, but will accept the description therein contained.

Barnard, for Henry Arthur Williams, the substituted executor and devisee named in the will, who had received notice of this application, submitted that the affidavits as to surrounding circumstances were not admissible; and, particularly, the affidavit of Ann Lacey, she being since dead. There is a Robert Taylor, who is a bootmaker, and who lives in the parish of Bitton, though he does not live at Warmley Hill.

Searle in reply.—Evidence of surrounding circumstances stands on quite a different footing to declarations by the testator himself. These latter would be inadmissible.

The Court admitted extrinsic evidence.

The affidavits were those of James William Young, an accountant, of Kingswood Hill, and Ann Lacey, a sister-in-law of the testator. The former stated that he drew the will by direction of the testator, who, in giving the names of his intended executors, mentioned the name of a "Robert Taylor, of Warmley Hill, bootmaker;" and the deponent so wrote it in the will.

Ann Lacey, now dead, had deposed that she was a sister of the testator's deceased wife, and had lived in the same house with him for thirty-two years. In addition to certain references in regard to statements by the testator as to his intentions, which were held to be inadmissible, the deponent stated that she knew of her own knowledge that at the date of the will and at the time of the testator's death, there was no person named Robert Taylor living at Warmley Hill, Bitton, but that James Alfred Taylor, a bootmaker, lived there; that the said James Alfred Taylor had been for many years a friend of the testator and herself, and had formerly been a fellow apprentice with the testator's son. The affidavit also stated that James Alfred Taylor had a brother named Robert, also a bootmaker, who, at the date of the will and of the death, resided at Hanham, which was in the same parish as Warmley Hill.

The PRESIDENT.—I think this case falls within the decision in *Charter v. Charter* (7 E. & Ir. App. Cas. 364), and *In the Goods of Brake* (45 L. T. Rep. N. S. 191; 6 P. Div. 217), because, although the will, on the face of it, appears clear, when one comes to inquire to whom the names and description are to be applied, it is found that there are two persons, one answering to the names, and the other to the address. Upon that ambiguity, evidence as to the surrounding circumstances is admissible to show which of the two it was that the testator meant, or, rather, I should say, who it is that the testator really intended to indicate. We ascertain

(a) Reported by H. DURLY GRAZEBROOK, Esq., Barrister-at-Law.

[PROB.]

In the Goods of MIGAZZO (deceased)—THE MUNROE.

[ADM.]

from that evidence that one person was the intimate friend of the testator, and was a fellow apprentice with his son, while the other person suggested was a comparative stranger. This makes it clear to my mind who was the person really intended. The only suggestion made contrary to that is, that there is not in this will such inaccuracy as lets in extraneous evidence. It is said that the name is correct if applied to one person living in the parish of Bitton; but it seems to me that, in a case like this, inaccuracy or misdescription of address is quite as important as inaccuracy in the name. A testator in making his will might not know the full Christian names of a person whom he is intimately acquainted with, might not know his Christian name at all; but the one thing which, in all probability, he would know, would be the address or the occupation of that person. I think that this case falls within the dictum of Lord Cairns in *Charter v. Charter* (*ubi sup.*), and of the decision of Lord Hannen in *In the Goods of Brake* (*ubi sup.*), and upon the evidence of surrounding circumstances which has been adduced, I am clearly of opinion that the person whom the testator intended to designate in the will is James Alfred Taylor, and not Robert Taylor. I grant probate of the will to James Alfred Taylor.

Barnard asked for costs out of the estate.

Searle did not oppose.

The PRESIDENT made an order that Williams should have his costs out of the estate.

Solicitors for the applicants, *Thomas White and Sons*, agents for *Stanley, Wasbrough, and Doggett*, Bristol.

Solicitors for Williams, *Meredith, Roberts, and Mills*.

Monday, Feb. 12.

(Before the PRESIDENT (Sir F. H. Jeune).)

In the Goods of MIGAZZO (deceased). (a)
Administration—Intestacy—Italian subject—Property and debts in England—Infant child—Other relatives abroad—Probate Act 1857 (20 & 21 Vict. c. 77), s. 73—Grant *ad colligendum* to Italian Vice-Consul.

A domiciled Italian died intestate, leaving in London a child whom he had formally declared, in accordance with the law of Italy, to be his lawful child. The deceased, who left two brothers and a sister resident abroad, was possessed of certain property in this country, some of it being of a perishable character. Upon the application of the Italian Vice-Consul,

The Court made a grant to him *ad colligenda bona*. MOTION for a grant *ad colligenda bona*.

Felice Migazzo, late of 16, Eyre-street Hill, Clerkenwell-road, in the county of Middlesex, died on the 27th Jan. 1894, intestate and a bachelor, domiciled in Italy, leaving, according to the laws and constitution of that country, Giuseppina Migazzo, his natural and lawful child and only next of kin.

The said Giuseppina Migazzo was born on the 8th April 1887, and by an instrument written in the Italian language, and bearing date the 12th May 1892, and duly registered in the archives of the Italian Consulate, at 31, Old Jewry, in the

city of London, the deceased recognised and acknowledged the said child as his natural and lawful daughter. The mother of the said child had previously died in the Italian Hospital, Queen's-street, in the county of Middlesex, on the 16th Feb. 1892.

The said Felice Migazzo left no parent, but two lawful brothers and a lawful sister, him surviving. Neither of the said brothers nor the sister resided in this country.

The deceased died possessed of some cash in a bank in London, and of some leasehold property, furniture, and perishable articles; and he also left some debts in this country.

Giuseppe Buzzegoli, the Italian Vice-Consul, in London, was willing to undertake the guardianship of the child until her aunt or some other relative or proper person could be found to undertake the guardianship.

The Vice-Consul now moved the court to direct that letters of administration of all and singular the personal estate and effects of the said deceased be granted to him, for the purpose only of collecting, getting in, and receiving the personal estate and effects of the deceased, and of doing such acts as might be necessary for the preservation of the same, and the disposal of such part or parts thereof as did not consist of money and leaseholds, and could not advantageously be preserved.

Deane applied for a grant *ad colligenda bona*, for the purpose of protecting the estate until such time as an ordinary grant of administration could be applied for by one of the child's relatives. The only difficulty is that, according to the practice, the guardian must be one of the relations. The Vice-Consul's application is really made in the interests of all parties.

The PRESIDENT.—I do not feel sure about the Vice-Consul's title to apply as guardian of the child; but, under the circumstances, I make a grant *ad colligenda bona* to the applicant, under sect. 73, without describing him as guardian.

Solicitor, *Lewis J. B. Amos*.

ADMIRALTY BUSINESS.

Tuesday, June 20, 1893.

(Before BARNES, J.)

THE MUNROE. (a)

Marine insurance—Collision clause—Sunken wreck.

Where a steamship ran aground and rested on an old sunken wreck, and then moved forward on to iron ore, which had some years before formed part of a cargo of another vessel, and sustained damage by the contact with the wreck and ore, the underwriters were held liable for such damage under a policy covering "loss or damage through collision with any sunken wreck."

THIS was a claim by the International Marine Insurance Company against an underwriter under a policy of re-insurance.

The plaintiffs had re-insured with the defendant and other underwriters the screw-steamship *Munroe* for 2000*l.*, by a policy which so far as is material was as follows:

Being a re-insurance of the International Marine Insurance Company Limited, and (or) on account of whom it

(a) Reported by H. DUNLEY GRAZEBROOK, Esq., Barrister-at-Law.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

ADM.]

THE MAIN.

[ADM.]

may concern, against the risk of loss or damage through collision with any other ship or vessels, or ice, sunken or floating wreck or other floating substance, or harbours, wharves, piers, stages, and similar structures, and including the R. D. C. as in original and all special clauses such as Allans, Canards, &c., so far as regards collision.

It was agreed between the parties that the action should be tried upon the facts appearing in a memorandum of the master of the *Munroe*, the protest, policy of re-insurance, two surveyors' reports, a survey report on behalf of cargo, and a joint certificate of two surveyors' opinions.

The claim was in respect of damage sustained by the steamship *Munroe* taking the ground while entering Port Talbot, and resting on and coming in contact with an old wreck and cargo out of another ship.

In the master's memorandum it was stated,

With reference to the accident to my steamer the *Munroe*, in which she was ashore at the entrance to Port Talbot, I beg to confirm the statement that during the time she was lying there she was lying partly on the wreck of the *Salado*, and partly on the remnants of the wreckage of a cargo of iron ore; that whilst lying there the greater part, if not all, the damage sustained by her was caused by the obstructions and abnormal state of the shore in consequence of the wreckage. This is borne out by the state of the bottom of the ship, which clearly shows that she was subjected to a strain which could not have been put upon her had she lain on the strand in a way which might be expected in a sandy bottom.

According to the protest, the *Munroe* in the course of a voyage from Huelva to Port Talbot laden with a cargo of ore and precipitate on the 7th Feb. 1893 while attempting to enter Port Talbot ran on to the beach, and on the tide falling she was found to be lying on an old wreck. She bumped heavily, and subsequently moved forward and struck on some iron ore which had formed part of the cargo of another vessel. She was ultimately got off on the 13th, and sold for 910*l*.

According to one survey report it was alleged that the "*Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over same until she rested amidships and remained, and that the damages sustained were caused through her striking and grounding on the said wreckage."

According to another report she was found "lying fore and aft on the wreck of a vessel, the frames of which were from a foot to eighteen inches above the sand. During the next two or three tides the *Munroe* moved about her own length further forward off the *Salado*, and on to a bank of iron ore, which was a cargo of another vessel which had been lying there some two or three years. It is my opinion that the damage to plates of bottom was caused by the frames of *Salado* holing and the iron ore indenting them," and that the further damage was "principally caused by the excessive strain the vessel sustained lying on the wreck of the *Salado* and the bank of iron ore."

Pickford and *Bateson* for the plaintiffs.—The vessel became a constructive total loss by damage caused by a collision with a sunken wreck. If so, the defendants are liable under the policy. [They were stopped.]

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendants.—The vessel merely ran on the beach or stranded. There was no collision, so as to satisfy the terms of the policy. Iron ore cannot be said to be sunken wreck.

BARNES, J.—The question in this case is, whether or not, under the circumstances which have happened, there has been loss or damage through collision with the matters described in the clause in the policy which would enable the plaintiffs to recover from the defendants. The facts are stated in the protest, in a memorandum of the master, and in several surveys which have been placed before me, and it seems that on the 7th Feb. 1893 the *Munroe* was entering Port Talbot, and in coming in, as she neared the pier, she took a sheer which those on board of her were unable to counteract, and she ran on what they thought was the beach; but when the water left her they found she was in fact lying on the top of an old wreck of a vessel called the *Salado*. She struck there very nearly amidships, and after an interval came further forward until she struck on some wreckage described as iron ore from some other ship which was lying there, and by both those strikings she was damaged. To what extent the latter was of serious import I do not know. It seems to me that practically no distinction can be drawn in substance between the two cases; but the question is, whether this is loss or damage through collision with a sunken wreck or wrecks. It is said, on behalf of the defendants, that it is nothing more than a taking of the ground, and that the ground was unfortunately harder underneath than it ought to be, owing to some submerged wreckage. I do not so regard the facts. The *Munroe* seems to me to have run on to a sunken wreck and there remained fast until the damage was done by the wreck, and afterwards by the iron ore. The surveyors are of opinion that the *Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over the same until she rested amidships and remained, and that the damages sustained were caused through her striking and grounding on the wreckage. The other documents are very much to the same effect, and the conclusion to which I have come is, that this was "loss or damage through collision with sunken wreck" or wrecks within the meaning of the clause which affects this insurance; and that the whole of the damage is covered thereby. Therefore my judgment will be for the plaintiffs, for an amount to be ascertained in the way agreed upon; or, in the event of any difficulty, the matter can be referred to me. The plaintiffs will have a certificate for their costs.

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whalton.*

Saturday, Feb. 3.

(Before BARNES, J.)

THE MAIN. (a)

Marine insurance—Freight—Valued policy.
Plaintiffs, owners of a steamship, then on an outward voyage, took out a policy of insurance on freight, at an agreed valuation, in the said vessel on her homeward voyage, the insurance to commence from the loading of the cargo.
The vessel met with an accident on her outward voyage, and was detained at the port of discharge for repairs.

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

ADM.]

THE MAIN.

[ADM.]

Some cargo was then engaged, before the date of the policy, for the homeward voyage, part being loaded at the original rate of freight, and the remainder cancelled. More cargo was from time to time shipped at much lower rates than were current at the time the policy was effected, and the vessel eventually sailed with a full cargo. She was destroyed by fire in the course of the voyage, and whatever freight was at risk was consequently entirely lost.

Held, that the policy covered the freight at risk, and that the valuation was binding upon both parties with regard to what actually came at risk under the policy.

THIS was an action on a policy of insurance on freight. The plaintiffs were the Anglo-American Steamship Company (Limited), and the National Marine Assurance Company were the defendants.

In the month of November 1891 the plaintiffs, who were the owners of the steamship *Main*, then on a voyage from Hamburg to New Orleans, proposed to the defendants that they should insure 1500*l.* upon the homeward freight of the said vessel from New Orleans to Liverpool. This they agreed to do, and it was further agreed that the freight should be valued at 5500*l.* The policy was dated 18th Nov. 1891, and was stated to be "on freight, valued at 5500*l.* in the good ship or vessel called the *Main*, from New Orleans to Liverpool," and the insurance was to commence "on the freight, goods, and merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel."

Before this policy was effected, and while the *Main* was on her voyage from Hamburg to New Orleans, a cargo had been engaged from New Orleans to Bremen. None of this cargo was ever shipped, and the voyage to Bremen was given up before the policy was made, and the cargo intended for it was cancelled.

At the time the policy was effected the valuation of 5500*l.* was, according to the agreed facts, a reasonable and proper valuation of the expected freight upon a full cargo, having regard to the rates of freight then current at New Orleans for a voyage from New Orleans to Liverpool.

On the 9th Oct. 1891 the *Main* sailed from Hamburg to New Orleans, and on the 28th Oct. she grounded on the coast of Florida. After salvage operations she was towed into New Orleans on the 1st Dec. On the 7th Dec. the discharge of her inward cargo was commenced, and it was completed on the 21st Dec., when she was shifted to a loading berth. But considerable repairs had to be done upon her, and she was not ready to sail upon her homeward voyage until the 1st March 1892.

Prior to the date of the policy some cargo (not amounting to a full cargo) had been engaged for the intended voyage to Liverpool. The plaintiffs contended that part of such cargo, consisting of 12,042 bushels of grain, 700 parcels of molasses, and 7080 staves, was loaded at the original rates of freight, but this was not admitted by the defendants. It was mutually admitted that the remainder of such cargo was cancelled. More cargo was from time to time engaged, and the *Main* eventually sailed for Liverpool with a full cargo, and with respect to the cargo other than that particularly mentioned above, at rates of

freight which were much lower than those current when the policy was effected.

In the course of her voyage the *Main* was totally lost by fire, one of the perils insured against.

The total actual freight payable to the plaintiffs in respect of the said cargo was 3250*l.* 7*s.*, and of this freight a sum of 952*l.* 3*s.* 9*d.* was payable, and was paid at New Orleans in advance, leaving a sum of 2298*l.* 3*s.* 3*d.* as the actual freight at risk.

The plaintiffs were also insured upon the freight for the homeward voyage by a policy for 2500*l.* granted by the German Marine Insurance Company, and they had received thereunder 2250*l.* in respect of the said loss. They were also insured by a policy for 1000*l.*, granted by the Tokio Insurance Company, and had received 1000*l.*

Joseph Walton, Q.C. and Taylor were for the plaintiffs.

Sir Walter Phillimore and Carver were for the defendants.

The arguments of counsel sufficiently appear in the judgment. In addition to the cases there cited the following were referred to:

Ionides v. Pender, 30 L. T. Rep. N. S. 547; L. Rep. 9 Q. B. 531; 2 Asp. Mar. Law Cas. 266.

Arnould on Marine Insurance, 6th ed., p. 308.

BARNES, J., having reviewed the facts, continued:—The questions raised before me involved chiefly this—whether the plaintiffs are entitled to recover on the footing of the valuation in the policy effected by them with the defendants, or whether it can be open so as to entitle the plaintiffs to recover upon the footing of what actually was at risk only, and that in consequence of the payments made to the defendants by the plaintiffs, that which was at risk has been fully indemnified for, and therefore nothing is recoverable on the policy. I have to consider, first, whether or not the policy attached to and covered the freight on this voyage. The plaintiffs say it did, and that that being so, the valuation applied to the risk on that voyage, and is binding on the parties. I do not think it was really contested, though it is in the defence, that the policy in fact attached upon this voyage to this freight which was at risk, and the real contention of the defendants was that this valuation must be open. It seems to me necessary to decide, first, what was valued. The valuation, by agreement, is on freight of a ship valued at 5500*l.* on a voyage from New Orleans to Liverpool. I think this freight, when it was agreed to, meant the gross freight of the ship. The underwriters do not seem to have been told that some might be paid in advance, and although there was a letter from New Orleans, from which it might, perhaps, have been inferred that the assured in taking out a policy meant to exclude the advanced freight, I do not think, looking at the facts, that they intended when they took the policy out, or that the underwriters assented to or agreed, that what was valued was other than the gross freight for the voyage. The defendants say that valuation was made upon the basis of the current rates at which the ship was expected to sail, and that as much less was ultimately engaged the valuation should be open and be treated as being at a reduced rate. The plaintiffs say the value agreed in the policy is the value agreed by both parties to represent the value of what actually was at risk on the voyage. To support that they

ADM.]

THE MAIN.

[ADM.]

rely upon *Everth v. Smith* (2 Maule & Selwyn, 278) as showing that, although the assured may take out a policy with regard to what they then think will be the engagement of the ship, that they, in terms similar to those on freight generally, will cover and attach to whatever freight in fact is loaded on the voyage on which the ship sails. Lord Ellenborough, in his judgment in *Everth v. Smith*, said: "This was an insurance on freight generally, not on any specific freight; the charter-party is only material to show that upon the ship's arrival at Riga there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any 'freight' is brought home and loss has not happened for which he undertook to indemnify the assured." In that case freight had been earned, and accordingly there had been no loss. At the close of his judgment he says: "On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for or is posterior freight makes no difference: if freight has been fully earned there can be no loss properly demandable of the underwriters." They held, therefore, that in a policy in similar terms the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms. I think, therefore, in this case, the policy attached to the subject-matter at risk, and I do not think that point was really contested. The defendants contended, upon *Forbes v. Aspinall* (13 East, 328), that the policy should be open, and, consequently, there ought to be a reduction based upon what was in fact at risk. That case is an authority for the well-known proposition that where parties contemplate the freight insured to be on a full and complete cargo, and where in fact part of the cargo is only shipped, therefore the latter was all that was at risk, and there must be, therefore, what is called an opening of the valuation. This is not in strictness an opening, but is merely a reduction in proportion to the amount of cargo shipped, the valuation still being held binding on what is in fact shipped. I think that judgment is based on the principle that both parties had agreed that the freight valued was the freight on a full cargo, and as this full cargo was not shipped the value of what was at risk only must be taken. It is no authority for the contention that if the value on the freight on what is about to be shipped is estimated too highly originally, and the assured is mistaken in his valuation, the valuation ought to be reduced. The truth seems to me to be, that the freight upon what is not shipped is never at risk, and therefore to that extent the underwriters cannot be made responsible. There are several other cases (they were not referred to by either counsel) which seem to me to be in point. For instance, one of the points put in argument was, that if a cargo was about to be shipped under a policy in general terms on produce, and the assured could not ship as valuable a cargo as he at first intended, and shipped a cargo of much less value,

then the valuation would not be binding. The plaintiffs contended that it still would be binding. There is a case cited by the text-writers on this point, but I have not, up to the present, been able to verify their statement about it. It is referred to by Lowndes in his book on Insurance, sect. 48, thus: "But excluding fraud and mistake a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case, not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, valuing it at 11,000*l*, and by chance she was loaded with palm kernels, worth only some 3000*l* which were totally lost on the way home, he was allowed to recover the whole of the 11,000*l*." The reference he gives is *Company of African Merchants v. Liverpool Marine Insurance Company*, in *Mitchell's Maritime Register*, vol. 15, p. 914, and vol. 16, p. 145. I have had a transcript made, not being able to procure the book of the case there cited, and I am not quite sure that it quite bears out the statement made by the learned author; but the case I think he refers to is referred to by Mr. M'Arthur in his book on Insurance as being the *Company of African Merchants v. Harker* in 1872, and he gives the same reference. He gives the statement that it is not reported, and then says, "see *Mitchell's Maritime Register*" at the pages I have referred to. That, I think, is another case which is mentioned in the *Shipping Gazette* of 2nd Dec. 1872: but he cites it for the same proposition as Mr. Lowndes. I have not been able to procure a copy of that report, but there are two other cases which seem in point. The first is *Lidgett v. Secretan* (24 L. T. Rep. N. S. 942; 3 Mar. Law Cas. 365; L. Rep. 6 C. P. 615), where a ship was insured, valued at 20,000*l*, from Liverpool to Calcutta, and for thirty days after arrival, and then another policy was taken out for 10,000*l* from Calcutta to London. The ship was considerably damaged on the outward voyage, and was put into a dry dock for repair. While being repaired, the outward policy expired, and she was afterwards destroyed totally by fire, and it was held there that under the first policy the assured was entitled to recover the amount of the depreciation at the expiration of the risk without reference to the sum actually expended on her repairs, and under the second policy the assured was entitled to recover as for a total loss; so that, although the valuation had been made on the basis of her being a sound ship under the second policy, and in fact she was a damaged ship worth much less, the assured recovered the full amount under the second policy. Willes, J. said (L. Rep. 6 C. P. 627): "The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators, and yet nobody has been able to improve upon the practice as to valued policies, which has been recognised and adopted by shipowners and underwriters, and has, at least amongst honest men, the advantage of giving the assured the full value of the thing insured and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case, and its abandonment would, in the end, as it seems to me, prove highly detri-

ADM.]

THE AFRICANO.

[ADM.]

mental to the interests of the underwriters. . . . It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time have sustained damage even to the extent of what may ultimately turn out to be a total loss, that being, in fact, one of the perils insured against." Then he refers to the case of *Barker v. Janson* (17 L. T. Rep. N. S. 473; 3 Mar. Law Cas. 28; L. Rep. 3 C. P. 803): "The result of the decisions in this country as well as in the United States, and I believe in North Germany, is that the value mentioned in the policy is a conventional sum not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss." Then he says: "No authority has been cited for limiting the value to that extent. In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time." And Montague Smith, J. says: "If the repairs had been completed before the second policy attached the vessel would have been of the value mentioned in that policy; but that is a fact with which the underwriters on that policy are not concerned, because value is a matter which the parties have liquidated and ascertained at the time of entering into the contract, and which neither can open. It cannot depend on the actual value at the time of the loss, or at the time the risk attaches." Then the case of *Barker v. Janson* (*ubi sup.*), which he refers to, is still more striking: There the ship was insured on a value policy on time—in the last case I mentioned it was on a voyage policy homeward—and its value stated in the policy was 8000*l.* at the time the policy was made; but, unknown to the parties, the ship had been injured by a storm, so that the expense of the repairs would have exceeded its value when repaired; so the ship was worth nothing, though valued at 8000*l.* at the time. During the continuance of the risk the ship was totally lost. It was held that the policy attached, notwithstanding the previous injury to the ship, and, there being no fraud, the value of the ship stated in it was still binding. Willes, J. in that case says: "No authority has been cited for it, and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to reopen a contract of valuation must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract." And in conclusion he says: "In fine, as pointed out by Patteson, J., in *Irving v. Manning* (1 H. L. Cas. 287), so long as underwriters are willing to adhere to the system of valued policies, they must, where there has been no fraud, pay the stipulated amount. Those cases seem to me to be authorities for the proposition that, though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be erroneous because of facts of which he had no knowledge when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to

be at risk is to be taken as conclusive and binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy. Therefore, I hold that the plaintiffs are right in saying the policy covered the freight at risk on the voyage in question, and that the valuation is binding with regard to what actually came at risk under the policy, and that amount is 5500*l.* The subordinate question in the case is, what amount the plaintiffs are entitled to recover. A sum of 932*l.* odd shillings was paid for freight before the ship sailed. It was paid, according to the admission of the parties, on the shipment of the goods to which the policy related, and therefore that 932*l.* never came at risk. The result is, that 932*l.* out of the sum of 3250*l.* 7*s.* was not at risk, and therefore the valuation of 5500*l.* must be reduced in proportion to the rule-of-three sum arrived at by the relationship of 932*l.* to 3250*l.* as stated in the case of *Williams v. The North China Insurance Company* (35 L. T. Rep. N. S. 884; 3 Asp. Mar. Law Cas. 342; 1 C. P. Div. 757) and other cases that were cited. That would leave the sum of 3889*l.* as being the value of what was at risk, taking the valuation in the policy, during this voyage, and as 3250*l.* have already been paid by other underwriters, that reduces the amount which is recoverable from the present defendants to the sum of 639*l.*, and that figure, if my view of this case is correct, is to be the amount which the parties are agreed that the judgment must be for.

Judgment for 643*l.* 7*s.* 6*d.*, plus a sum of 4*l.* 3*s.* 6*d.* for the return of a proportionate part of the premium.

Solicitors for the plaintiffs, *Botterell and Roche*.
Solicitors for the defendants, *Waltons, Johnson, Bubb, and Wharton*.

Jan. 23, 24, and Feb. 5.

Before the PRESIDENT (Sir Francis Jeune.)

THE AFRICANO. (a)

Necessaries—Priority—Practice.

Where a vessel has been sold and the proceeds brought into court, and the judgment is, in the usual form, expressed to be without prejudice to other claims against the vessel, and reserving all questions of priority of such claims, the practice of the court now is to order a pro rata distribution among the claimants for necessaries, as the court holds the property not only for the first plaintiff, but at least for all creditors of the same class who assert their claims before an unconditional decree is pronounced.

Semble: So long as the funds remain in the hands of the court, an unconditional decree can be modified so as to let in others who, without laches, put forward claims of a like character.

Quere: Whether if a judgment has been obtained in the County Court, and the action is afterwards transferred to the High Court, such a judgment would give priority, or whether the plaintiff in the County Court action should only be admitted to share in the proceeds in the High Court on terms of equality with the suitors in that court.

OBJECTION to Registrar's report, adjourned into court.

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

ADM.]

THE AFRICANO.

[ADM.]

The plaintiffs, Messrs. Fry and Co., who are coal merchants at Cardiff, during 1892 and 1893 supplied necessities in the shape of coal to the steamship *Africano*, which is a Portuguese vessel belonging to Lisbon. Messrs. Fry and Co. brought an action *in rem* against the *Africano*, and on the 30th Oct. 1893 the action came before Jenne, J., and a decree was made pronouncing the sum of 854l. 12s. 7d. to be due to the plaintiffs, together with interest from the date of decree and costs. The decree was expressed to be without prejudice to other claims against the vessel, and reserved all questions as to priorities of such claims. In addition to this action there was one by the crew for wages, and others for alleged necessities.

The ship was arrested in the action by Messrs. Fry and Co., and warrants were issued in two actions in the County Court. The ship remained under arrest, but could not be sold, as the time allowed in a default action had not elapsed. Meanwhile the plaintiffs in the wages action got an admission of liability, and assessment of their claim. They then applied to the vacation judge (Kennedy, J.) and got an order for the sale of the *Africano*.

The plaintiffs in the wages action then moved to have the question of the priorities of the several claims settled by the Liverpool District Registrar, and the President directed the transfer of the actions pending in the Liverpool Registry to the Principal Registry. The matter accordingly came before the registrar, who decided that all the claimants for necessities were entitled to share *pro rata*.

Messrs. Fry and Co. filed a notice of objection to the registrar's report, and a summons was taken out asking for the judge's directions (1) with regard to the payment of the amounts due to the crew of the *Africano*; (2) as to the method in which the question of the priorities was to be determined by the court. By consent of the parties the summons was adjourned into court, and was heard on an admitted statement of facts.

Sir Walter Phillimore and Laing for the plaintiffs.—There is no principle in law or equity justifying a *pro rata* distribution. Up to the time of *The Heinrich Bjorn* (49 L. T. Rep. N. S. 405; 5 Asp. Mar. Law Cas. 391; 11 App. Cas. 279) it was always thought that there was a maritime lien on these necessities:

The Saracen, 2 Wm. Rob. 457; 6 Moo. P. C. 56;
The Clara, Swabey, 1.

The Desdemona (Swabey, 158) is the only case where *pro rata* distribution was ordered. [The PRESIDENT.—That case does not seem to fit in with *The Saracen*, which decided that there was no power to order *pro rata* distribution in any case.] On the question of lien, see MacLachlan on Shipping, vol. 2, p. 51. The plaintiffs are entitled to priorities above all others of equal rate by being vigilant and first in point of time:

The William F. Safford, 1 Lush. 69;
The Cella, 59 L. T. Rep. N. S. 125; 6 Asp. Mar. Law Cas. 293; 13 P. Div. 82.

[The PRESIDENT.—It comes to this, that it must be either writ or judgment if there be a priority.] Where all the suits are in the same court priority of judgment means priority of diligence, but that disappears when you have different courts for different procedure. Then it is either priority of writ or *pari passu*.

Pickford, Q.C. and *Bateson*, for the master and crew of the *Africano* and other necessities claimants, in support of the registrar's report.—The principle underlying all the cases is that of diligence or remissness, and not of attachment or lien. In *The Saracen*, at p. 507, Dr. Lushington states how the law stood originally. He says: "Where the owners were responsible for damage done by collision, they were bound to pay the whole amount, whatever might be the value of the ship which did the damage or the amount of damage received . . . Everyone had his remedy, except where the defendant was bankrupt, or insolvent, or abroad. The only preference in all these cases was the preference of *prior petens*—he who first obtained judgment. Why should he who was so vigilant, and availed himself of the remedy the law gave him, be compelled to surrender the benefit of his diligence to another who was less active? Where all were equally active, or so as to bring their suits before decree, it is possible that this court might so have regulated its proceedings as to distribute the fund rateably to all having similar claims, but not after decree, which in itself confers a preferable title." [JEUNE, J. referred to *The Bold Buccleuch*, 7 Moo. P. C. 267, and *The Saracen*, on app. 6 Moo. P. C. 56.] In the Irish case of *The Queen*, No. 2 (3 Mar. Law Cas. 189) they ranked in priority of judgments:

The Markland, 3 Adm. & Eccl. 343.

The Turliani (32 L. T. Rep. N. S. 841; 2 Asp. Mar. Law Cas. 603) shows what the practice in the registry was considered to be. [JEUNE, J.—All this points rather to priority of judgments.] The court has to consider whether there has been diligence or remissness after reviewing all the circumstances. *The Cella* (*ubi sup.*) decides that, as soon as judgment has been pronounced, it relates back to the date of the writ, and the creditor is a secured creditor.

Holman, for other necessities claimants, also appeared in support of the registrar's report.

The PRESIDENT.—In this case the one point actually raised for decision is perhaps a novel but certainly a narrow one. It is whether, where a vessel has been sold and the proceeds brought into court, claims for necessities, in respect of which actions have been brought, take priority *inter se* in the order of the institution of the actions. The question arises on a report from Mr. Registrar Smith with regard to the distribution of the proceeds of the ship *Africano*, which was sold by order of Kennedy, J. on the 4th Oct. 1893, and the proceeds, amounting to 1215l. 6s. 5d. net, brought into this court. An action for necessities had been instituted against the vessel in the High Court on the 10th Aug. 1893, another such action in the Liverpool District Registry on the 17th Aug., and three such actions in the Liverpool County Court on the 11th Aug., 12th Aug., and 15th Sept. respectively. On the 13th Nov. 1893 all these proceedings were transferred by order to the High Court. It was contended by one set of claimants before the registrar that priority of distribution followed priority of writ; by the other that it followed priority of judgment. The Registrar, in an excellent report, decided that neither contention was correct, and that the fund should be distributed as between these claimants *pro rata*.

ADM.]

THE AFRICANO.

[ADM.]

The only appeal brought before me is by those who, before the registrar, contended in favour of priority of writ, and for whom Sir Walter Phillimore appeared. His view, as I understand it, was based mainly on one argument of principle and one authority. He said that before the judgment in *The Heinrich Bjorn* (*ubi sup.*) it was supposed that a claim for necessities conferred a maritime lien, but that now the law is that the only lien for necessities arises on the institution of the action, that a security is obtained in such institution, and that, accordingly, securities so created rank, like mortgages, in the order of their dates. The case of *The Cella* (*ubi sup.*), he contended, was decided according to this principle. But I cannot agree with this argument. There seems to me to be an obvious link wanting. If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessities to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before *The Heinrich Bjorn* that funds in court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judges from some of whose decisions a belief is said to have arisen that the statute 3 & 4 Vict. c. 65, s. 6, conferred a maritime lien on claims for necessities. In *The Desdemona* (*ubi sup.*), decided in 1856 (Swabey, 158), Dr. Lushington said in a suit for necessities that the court would give priority to any party first obtaining a judgment. In *The William F. Safford* (*ubi sup.*), (1 Lush. 69), decided in 1860, Dr. Lushington said: "The court encourages suitors in actively enforcing their remedy, and gives preference to a party who is first in possession of a decree of the court." It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority. The same view was taken in an Irish case, decided in 1869 (*The Queen*, *ubi sup.*). Nor in the instances of claims arising from collision was preference ever given to the claimant who first became a suitor. It is probable that before the case of *The Bold Buccleugh* in 1847 (*ubi sup.*), the view accepted in this court was that the lien came into existence only with the suit. If so, the authorities which show that in cases of collision a decree, and not the issue of the writ, gave priority, are also authorities against Sir Walter Phillimore's argument: see *The Saracen* (*ubi sup.*), and *The Clara* (*ubi sup.*). It appears to me that the case of *The Cella* (*ubi sup.*) has no real bearing on this point. The question there was, whether when a ship had been arrested in an action for necessities, and the company to whom she belonged was subsequently wound-up, the official liquidator had a claim on the sum representing the value of the ship in the hands of the court as against the plaintiff. It is true that it was held in that case by the President that the plaintiff had a security arising at the commencement of the action *in rem*. But it is quite a different thing to say that such a security takes priority over securities of the same kind arising subsequently in a similar manner. The rationale of the decision in that case appears to me to be explained by Fry, L.J., in approving in this case, as he had previously done in *The*

Heinrich Bjorn (*ubi sup.*), the dictum of Dr. Lushington in *The Volante* (1 W. Rob. 383): "An arrest offers the greatest security for obtaining substantial justice, as furnishing a security for prompt and immediate payment," and adding, "The arrest enables the court to keep the property as security to answer the judgment." This does not at all imply that the court only holds the property for the plaintiff, or for that plaintiff in priority to others of the same class. The true view is, I think, that the court holds the property not only for the first plaintiff, but also for at least all creditors of the same class who assert their claims before an unconditional decree is pronounced. The language of Dr. Lushington in *The Clara*, indicating that the court would have power to delay pronouncing a decree in the first till it could also be pronounced in a subsequent action, "so that both parties might share proportionately," is an authority for this proposition. It is not necessary in this case to decide whether priority in distribution follows priority in judgment. I think it is clear that in the cases to which I have already referred, and especially in the decision of the Privy Council in the case of *The Saracen*, it was held that a creditor who had obtained a final decree held its fruits against another creditor of the same class who commenced his action subsequent to such decree. The learned registrar suggests, no doubt on the authority of the language employed by Sir Robert Phillimore in *The Markland* (*ubi sup.*), that all that this means is that a plaintiff who is guilty of laches loses his right of equality. I am not sure, however, that this sufficiently explains the case in question or the practice formerly recognised. But what I think is to be observed in all these cases is, that the decree was apparently an unconditional decree. I have looked at the original decree pronounced in the case of *The Saracen*, on 6th May 1845, in favour of the claimants then before the court, and find it was an unconditional decree. The decree of 2nd Feb. 1860, in *The William F. Safford*, was also unconditional. At the present time the decree in this court in an action for necessities is either conditional in any case, or certainly if there is any reason to suppose there may be other claims of equal rank; and even if the decree were in any instance made in unconditional terms I am inclined to think that, so long as the funds remained in the hands of the court, it could and should be modified so as to let in other persons who, without laches, put forward claims of a like character. In this instance the judgment given on the 30th Oct. in this court, following the usual form, was expressly "without prejudice to other claims against the said vessel, and reserving all questions of priority of such claims;" and, no doubt, by reason of such judgments being usually, if not always, in similar terms, there exists, as there did not at the date of *The Saracen*, a practice of proportionate division. As far, therefore, as the High Court is concerned, this question of priority of judgments has ceased to be a practical one. There may, however, remain a question whether, when, as in the present case, a judgment has been obtained in a County Court, and the action is subsequently transferred to this court, such a judgment gives any priority. It is not now necessary to adjudicate upon that question, but should it arise for decision it would be worth while to consider whether the plaintiff in the County Court action could be admitted to

ADM.]

THE PRIMULA.

[ADM.]

share in the proceeds in the High Court except on terms of equality with the suitors in that court. The report of the registrar will therefore be confirmed.

Solicitors: for the plaintiffs, *Botterell and Roche*, for *Vaughan and Hornby*, Cardiff; for the master and crew of the *Africano* and others, *Bateson, Warr, and Bateson*; for other necessary men, *Downing, Holman, and Co.*; *Pritchard and Sons*; *Mades and Tunnicliffe*; for the defendants, owners of the *Africano*, *Sampson, Williamson*, and *Inglis*.

Tuesday, Feb. 6.

(Before BARNES, J.)

THE PRIMULA. (a)

Charter-party—Clause as to advance of freight—Construction of—Liability of shipowner.

Where a clause in a charter-party provides for "cash for steamer's ordinary disbursements at port or ports of loading . . . to be advanced . . . on account of freight (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash"; the fair meaning is, that the shipowners are to be in a position to ask through their master for sufficient to pay the disbursements if they require it, but not otherwise.

MOTION for judgment.

This was an action to recover the sum of 48l. 18s. 5d., balance of freight for the conveyance of the defendants' goods in the plaintiffs' steamship *Primula*. The plaintiffs were Messrs. John Blumer and Co., and the defendants were Messrs. J. A. Finzi and Co.

The *Primula* was on two occasions chartered for a voyage from certain ports between Tarragona and Gibraltar to Liverpool. These charters provided (*inter alia*) for the payment of certain lump sum freights for the chartered voyages, and the clause numbered 6 in each of the charters provided as follows:

Cash for steamer's ordinary disbursements at port or ports of loading, not exceeding 150l. in all, to be advanced at exchange of 50d. to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and the balance of freight on right and true delivery of cargo in cash.

On the first voyage the captain of the steamer, having part of his outward freight in hand, expended it in partly disbursing his vessel, and the defendants advanced cash for the balance, amounting, at the stipulated rate of exchange, to 90l. 16s. 6d., and this sum was indorsed on the bills of lading. The defendants charged the stipulated 3 per cent. on the amount—viz., 2l. 14s. 5d. The defendants deducted these two sums from the balance of freight due to the plaintiffs on the delivery of the cargo on the voyage, and also the sum of 14l. 10s. 11d., which last-named sum represents the profit which the defendants would have made by the difference of exchange on 59l. 3s. 6d., the sum required to make up the advance of 150l.

On the second voyage the captain of the steamer had a sufficient balance of his outward freight to fully disburse the vessel at her loading ports, and therefore did not ask for or obtain any advance of freight under the chartered clause above set out.

The defendants deducted from the plaintiffs' freight on the delivery of the cargo the sum of 34l. 7s. 6d., being the profit which they would have made by the difference in exchange on the sum of 150l. if they had advanced that sum on account of freight at the loading ports.

Neither the plaintiffs nor the master of the *Primula* obtained any loan or advance from any persons other than the defendants on account of the ship's disbursements upon either of the voyages in question. The defendants were ready and willing to have advanced the full sum of 150l. on each of the voyages if the master had requested them to do so, and the ship's ordinary disbursements on each voyage actually exceeded such amount.

It was agreed that, if the defendants were entitled under the circumstances above stated to the said deductions, then judgment should be entered for the defendants without the necessity for their formally pleading a set-off or counter-claim. If they were not so entitled, then judgment should be for the plaintiffs for 48l. 18s. 5d.

J. Strachan, for the plaintiffs, referred to

Dahl v. Nelson, 44 L. T. Rep. N. S. 381; 4 Asp.

Mar. Law Cas. 392; 6 App. Cas. 38;

Cross v. Pagliano, 23 L. T. Rep. N. S. 420; 3 Mar.

Law Cas. 492; L. Rep. 6 Ex. 9.

Boyd, for the defendants, referred to

De Silvale v. Kendall, 4 M. & S. 37;

Smith v. Pyman, 64 L. T. Rep. N. S. 436; 7 Asp.

Mar. Law Cas. 7; (1891) 1 Q.B. 742.

The arguments of counsel fully appear in the judgment.

BARNES, J.—In this case the parties have agreed upon the facts. The claim is for the sum of 48l. 18s. 5d., balance of freight for the conveyance of the defendants' goods in the steamship *Primula*. There is no question as to the plaintiffs' right to recover this small balance of freight if there were not an answer to it suggested on the part of the defendants, which has been argued before me as being a right on the part of the defendants to rely on a counter-claim against the plaintiffs for damages sustained by the defendants, amounting to the same sum as is claimed by the plaintiffs. [The learned Judge then dealt with the facts, and continued:] The question, as argued before me, has really been whether or not the defendants are entitled to recover the amount, and therefore, by agreement between the parties, to deduct it from the freight. That depends upon the meaning of this clause. On the plaintiffs' side it is contended that that clause is introduced for the benefit of the shipowner, in order to provide his master with the means of liquidating the disbursements at ports of loading up to the limit of 150l.; that the master is at liberty to use that credit, if I may term it so; and that, if he uses it, the moneys advanced under it are to be treated as part of the freight, and if he does not choose to use it, and does not require to use it because he has money in hand, he is not obliged to use it. On the other hand,

(a) Reported by BART CRUMP, Esq., Barrister-at-Law.
Vol. LXX., N. S., 1797.

ADM.]

PARAPANO AND OTHERS v. HAPPAZ AND OTHERS.

[PRIV. CO.]

the defendants say that the clause makes it obligatory on the master, after he has paid the various disbursements of the ship at the port or ports of loading which are necessary for her voyage, to come to the charterers and ask for the amount, and that if he fails to do so the shipowner is liable for the breach of contract, and for the damages which flow from that breach, and for the loss of profit which the charterers could make if they had made the advance. So the question really comes to this, whether the master is obliged to put the clause in force and ask for the money, or whether he is only to use it if he finds it necessary to do so. It is said by Mr. Boyd for the defendants that the charterers would be liable for the amount of disbursements in this sense, that, if the disbursements are made, the master would have to come and ask for them, and they would then be bound to advance them under the clause, and they would then have an insurable interest in the amount they had advanced; and even if he had failed to do so, still they would be liable to make the advance, and have the advance at risk. I cannot, I confess, follow that argument, because it seems to me that, until the master states what the amount of the disbursement is, and asks the charterers to make the advance, they would not be under the obligation to pay him the amount of the disbursements and advance it to him, and that their liability to make the advance would only arise when he states show much he wants. But I do not think that quite disposes of the arguments for the defendants. Even if that were so, and the freight were not at their risk till they had advanced it, or were liable to advance it, still they may, from the defendants' view of the clause, be entitled to say, "You are bound to come and ask for an advance, and therefore we have lost the profit we should have made if you had done so." That drives one to consider really what was the object of the introduction of this clause, and what is a reasonable meaning to give to it as a matter of business between these parties. Now, I have no doubt whatever that the object of this clause was to enable the shipowner to send his ship to the port or ports of loading with a provision that when she got there the charterers should be bound to pay the master if he wanted it, as part of the freight, sufficient money to disburse the ship so as to enable her to perform her voyage—that is to say, to anticipate part payment of the freight, the shipowner being desirous of having the credit, so to speak, at the loading port which his master could use if he wanted to. Looking to that as the object of the clause, it is fairly clear that one must read various words into it in order to give it clear expression. It is clear that what it means is, that the charterers have to make the advance to the captain. Then the question is, whether the captain is bound to use the clause, and bound to ask for the money from the defendants; and the conclusion to which I have come, as a matter of the fair meaning of the clause, especially having regard to its origin, is that the captain is at liberty to take advantage of the clause or not, as he in fact finds it necessary. If, therefore, he has money provided for him by the owners with which to pay the disbursements of the ship, it is unnecessary for him to go to the charterers and ask for any money as an advance, and I cannot

think it was ever intended that the owners of a ship should be responsible in damages if their master was put in a position by themselves to advance the money for disbursements, or chose to advance it out of his own money, and that they should be held liable for a breach of contract for not going to the charterers, through their master, and asking for an amount for paying bills in port. It involves, possibly, the introduction of some words to make that plain, though I am not quite clear that it really does so, because it has been urged that the ordinary disbursements referred to mean the ordinary disbursements which the master finds it necessary to make, and for which he has to get credit or funds. However that may be, I think the fair meaning of the clause is, that the shipowners are to be in a position to ask through their master for sufficient to pay the disbursements at the port if they require it, but not otherwise, and that being so, the amount which the plaintiffs seek to recover is due for freight, and the defendants are not entitled to make a cross-claim for the amount, and are not entitled to deduct it from the freight. Judgment must therefore be for the plaintiffs for 48*l.* 18*s.* 5*d.*, which is the agreed amount, with costs.

Solicitors: for the plaintiffs, *Botterell and Roche*; for the defendants, *Lowless and Co.*

Judicial Committee of the Privy Council.

Nov. 30, Dec. 1, 1893, and Feb. 10, 1894.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, and Sir R. COUCH.)

PARAPANO AND OTHERS v. HAPPAZ AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Law of Cyprus—Legitimacy—Legitimation of children born before marriage—Canon law—Mahomedan law.

The legitimacy of a Christian Ottoman subject in Cyprus is to be ascertained by the Christian, and not by the Mahomedan law.

Judgment of the court below reversed.

THIS was an appeal from a judgment of the Supreme Court of Cyprus, reversing the decision of the District Court.

The question was whether the case of the children, born in Cyprus before marriage, of a man who afterwards married their mother was to be governed as to legitimacy, and consequently as to rights of inheritance to his property, by the canon law, which would consider them legitimate, both parties being Christians; or by the Mahomedan law, which would consider them illegitimate, unless subsequently recognised as legitimate by the father, both parties being Turkish subjects. Both the courts below held that the case was governed by Mahomedan law, but the court of first instance held that there had been a sufficient recognition by the father to make the children legitimate according to Turkish law.

The Supreme Court reversed the decision on this point.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

PARAPANO AND OTHERS v. HAPPAZ AND OTHERS.

[PRIV. CO.]

J. D. Mayne appeared for the appellants, the widow and children.

The respondents, the next of kin, did not appear, and the appeal was consequently heard *ex parte*. At the conclusion of the arguments for the appellants their Lordships took time to consider their judgment.

Feb. 10. — Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The contest in this case relates to the inheritance of one Peppo Happaz, who died on the 4th June 1889. The defendants, now appellants, are his widow and children, who claim the whole estate. The plaintiffs, now respondents, who have not appeared in this appeal, are collateral relatives of Peppo. They admit that the widow is entitled to one-third of the estate, but claim the other two-thirds for themselves on the ground that the children are illegitimate. That claim is made under the rules of Mahomedan law. Peppo was, and his relatives are, Christians, and members of the Roman Catholic Church. The District Court dismissed the suit. The Supreme Court on appeal decreed the plaintiffs' claim, except that they gave partial effect to a gift made by Peppo to his children two days before his death. In the year 1879 the widow Eudoxia, then a single woman, and with child by Peppo, went to live in his house, and she lived with him there till his death. While there she gave birth to the four infant defendants, the youngest of whom, Rosa, was born on the 6th Aug. 1886. Afterwards Peppo wished to marry Eudoxia, with the double object of living in a more orderly manner, and of making his children legitimate. Eudoxia was a member of the Greek Church, and a dispensation was necessary for Peppo to marry her. This was granted out of the Patriarchate Office in Larnaca on the 3rd Jan. 1888; and on the same day Peppo was married to Eudoxia by his parish priest. The dispensation takes notice of his intention to legitimate the issue, and the marriage certificate states that a formal recognition of them then took place. When Peppo was on his death-bed, on the 26th May 1889, he made another formal recognition of his children in the presence of witnesses, and declared that they should be his heirs. Possibly this was done the better to satisfy the requirements of Mahomedan law, so that, whichever law was found to apply to his case, his wishes might prevail. At all events he did what he could to make his children legitimate. The first step in the contest is to find out what is the law applicable to the case: the Christian or the Mahomedan. In the language of the Cyprus Courts of Justice Order 1882, sect. 3, Ottoman law means the law which was in force in Cyprus on the 13th July 1878, and an Ottoman action means one in which the defendants are Ottoman subjects. By sect. 23 the court in an Ottoman action is to apply Ottoman law as from time to time altered and modified by Cyprus statute law. The only statute law bearing on this point is that of the 11th April 1884, "To amend the law relating to inheritance and succession." By sect. 16 of that law it is provided that the property of the deceased shall devolve on all his legitimate children. That seems to narrow the contest down to the one point of legitimacy. If legiti-

macy is proved, the right to succession follows. By what law then is the legitimacy of a Christian Ottoman subject in Cyprus to be ascertained? By Christian law, or by Mahomedan law? The courts below have both applied Mahomedan law to the case, though they have differed in their views of that law. Their Lordships will now assign their reasons for thinking that the Christian law applies. And they will first consider how the question would stand independently of the Hatti Humaïoun of 1856. When the Turks conquered Cyprus, that island had been for nearly four centuries in the hands of adherents of the Latin Church. The conquerors did not enforce all Mahomedan usages on their Christian subjects, but they allowed non-Mussulman sects to be governed by their own laws in divers matters connected with religion and domestic life. Among such matters are marriage, divorce, alimony, and dower. Now, if the status of husband and wife among Christians is determined by reference to Christian law, it is not difficult to suppose that the status of their children as regards legitimacy may be determined by the same law. It is a matter of well-known history that the Catholic priesthood claimed a right to treat the sacrament of marriage and its incidents as matters appertaining to religion and as subject to ecclesiastical jurisdiction, and that these claims were the subject of much controversy in England, where the lay powers rejected the canonical doctrine of legitimation by subsequent marriage. The Christian view of this question in Cyprus can hardly be doubted, though of course the Turkish view might be different. Upon this point the learned judges below say, "We feel that it is extremely improbable that the Ottoman Government should have consented to confer on its Christian subjects any larger privileges with regard to the legitimising of children than belong to its Moslem subjects." Their Lordships cannot follow this remark. In the first place, the privileges claimed for Christians are not larger. They happen to take in the case which the learned judges are discussing, and hold that the Mahomedan law would exclude, viz., the case of a child born in *zina*. (a) On the other hand, the Christian law will not allow of any legitimation except by marriage of the parents, whereas the Mahomedan law gives the father much greater liberty of action. It is difficult to predicate of either law that it gives larger privileges than the other. They are quite different. In the second place, if any inference may be drawn from the policy of one set of Mahomedan conquerors to that of another, the policy of the conquerors of India is at variance with what the learned judges think to be probable. During the period of their rule, as at the present time, there has been such wide liberty for each religious community to follow its own laws in private affairs, that it may almost be said that territorial law has not existed there except for matters of supreme government, such as the collection of revenue, the maintenance of order, the administration of justice between persons of different sects, and so forth. Their Lordships have been referred to a passage from Hamilton's Introduction to the Hedaya in which this policy is stated: "Many centuries have elapsed since the Mussulman conquerors of India

(a) In fornication.

PRIV. CO.]

PARAPANO AND OTHERS v. HAPPAZ AND OTHERS.

[PRIV. CO.]

established in it, together with their religion and general maxims of government, the practice of their courts of justice. From that period the Mussulman Code has been the standard of judicial determination throughout those countries of India which were subjugated by the Mohammedan princes, and have since remained under their dominion. In one particular, indeed, the conduct of the conquerors materially differed from what has been generally considered in Europe (how unjustly will appear from many passages in this work) as an invariable principle of all Mussulman governments; namely, a rigid and undeviating adherence to their own law, not only with respect to themselves, but also with respect to all who were subject to their dominion. In all spiritual matters, those who submitted were allowed to follow the dictates of their own faith, and were even protected in points of which, with respect to a Mussulman, the law would take no cognizance. In other particulars indeed of a temporal nature, they were considered as having bound themselves to pay obedience to the ordinances of the law, and were of course constrained to submit to its decrees. Hence the Hindoos enjoyed under the Mussulman government a complete indulgence with regard to the rites and ceremonies of their religion, as well as with respect to the various privileges and immunities, personal and collateral, involved in that singular compound of allegory and superstition. In matters of property, on the contrary, and in all other temporal concerns (but more especially in the criminal jurisdiction), the Mussulman law gave the rule of decision, excepting where both parties were Hindoos, in which case the point was referred to the judgment of the Pundits or Hindoo lawyers." Of course this is not any exact statement of the law, but it serves to show that there is nothing improbable in supposing that, when Mahomedans conquered territories inhabited by people of another creed supported by strong religious organisations, they smoothed their way by leaving important local and personal usages to a great extent undisturbed. Such was certainly the policy of Mahomet II. in the 15th century, and probably Selim II. acted on the same principles in the 16th. What are the precise usages so left undisturbed, is matter for inquiry in each country. The solemn edict of the 3rd Nov. 1839, which is referred to in subsequent discussions as a sort of Turkish Magna Charta, usually under the name of the Act of Gul-Hané, is not at all specific on this point. It is rather concerned with asserting the equality of Ottoman subjects in various matters, and the authority of courts of law. But during the disturbance caused by the Crimean war, the Christian powers put pressure on the Sublime Porte to give greater security to its Christian subjects; and this action, after long discussion, resulted in the Hatti Humaïoun of the 18th Feb. 1856. Before stating the special provisions of that law it is of some importance to see what was the opinion of Ottoman authorities as to the then existing position of the Christians. On the 13th May 1855, Aali Pasha, the Grand Vizier, wrote a memorandum which was circulated to the several Powers concerned, and which contains the following passages: "C'est librement au moment même de la conquête dans la plénitude de la plus entière autorité que les Sultans fidèles au sentiment de l'humanité et à l'esprit même de l'Islamisme, ont

accordé aux Chrétiens de l'Empire Ottoman leurs premiers privilèges. . . Les Patriarchats. . . réunissent un tel faisceau de droits civils et religieux que l'on peut vraiment dire qu'à la réserve de l'autorité politique, que le Gouvernement Musulman exerce seul, les Chrétiens sont plutôt administrés, jugés, et dirigés par une autorité Chrétienne que Musulmane. C'est volontairement sans y être amenés par aucune considération que celle de leurs devoirs de Souverains, que les Sultans ont établi un tel état de choses, qui n'a jamais été sérieusement compromis." Such passages in a despatch must not be taken as exact statements of law. But their Lordships may be sure that in so critical a discussion, the Grand Vizier would be well advised, and that his despatch represents that which statesmen, and probably lawyers, considered to be the true position of Christian subjects. It speaks of the privileges of Christians as being in accordance with the very spirit of Islam, and goes on to say that they are civil rights as well as religious, and to describe them in terms not very different from those which their Lordships have just been using with reference to India. In this state of affairs the Hatti Humaïoun of 1856 was promulgated. The original is in French, and a copy of it was handed by Fuad Pasha to Lord Stratford de Redcliffe, and was laid before the Houses of Parliament with an official English translation. Their Lordships remark this, because the version given in the book of Aristarchi Bey, entitled "Législation Ottomane," is incorrect. They quote from the official English translation furnished to them from the Foreign Office. The document refers to the Act of Gul-Hané, and confirms and consolidates the guarantees there given. It also confirms and maintains all privileges and immunities granted by the Sultan's ancestors *ab antiquo* and at subsequent dates to Christians and non-Mussulmans, and declares that the powers conceded to the Christian patriarchs and bishops by Mahomet II. and his successors shall be made to harmonise with the new position of affairs. Then follow a number of provisions for the purpose of carrying these intentions into effect. The passages which bear specially on the point now under consideration are as follows: "All commercial, correctional, and criminal suits between Mussulmans and Christian or other non-Mussulman subjects, or between Christian or other non-Mussulmans of different sects, shall be referred to mixed tribunals. . . Suits relating to civil affairs shall continue to be publicly tried, according to the laws and regulations, before the mixed provincial councils, in the presence of the governor and judge of the place. Special civil proceedings, such as those relating to successions or others of that kind, between subjects of the same Christian or other non-Mussulman faith, may, at the request of the parties, be sent before the councils of the patriarchs or of the communities." This seems to their Lordships to do away with such doubts as may have previously existed. It is said by the learned judges below that the Hatti Humaïoun does not apply, because the patriarch is only to be called in at the request of the parties. But that remark hardly meets the force of the argument. The question to be decided is one relating to the history of the Turkish conquest of Cyprus, and to the policy

adopted by the conquerors. What disputes arising between Christians did the Turks permit to be governed by Christian law? The Hatti Humaïoun does not profess to give any larger privileges in this respect than had been given *ab antiquo*. The important purpose it performs is to provide machinery for giving practical effect to those privileges. One of its provisions is the introduction of the ecclesiastical superior of the parties in certain processes. That is to take place at the request of the parties. But it is not implied that the law applicable to those processes is changed by the Hatti Humaïoun itself, or that it can be changed at the will of the parties. It seems to their Lordships the just inference that the chief of a Christian community is a permissible judge, because the process to be decided is one of Christian law with which he is conversant. And questions of succession are selected as an illustration of such processes. If this conclusion requires strengthening, corroboration is to be found in ministerial and legal acts subsequent to the Hatti Humaïoun. On the 15th May 1867 Fuad Pasha, the Turkish Minister for Foreign Affairs, addressed a minute on the subject of the Hatti Humaïoun to the representatives of the Sublime Porte at London, Paris, Vienna, Berlin, St. Petersburg, and Florence. A copy will be found in the "Législation Ottomane," vol. 2, p. 24. It is written in French, of which their Lordships will attempt a translation. It commences by referring to the Hatti Humaïoun as the confirmation and the development of the Act of Gul-Hané. Then follows a very full and exhaustive statement of the motives and effect of the Hatti Humaïoun, in which there occur the following passages: "The privileges and immunities granted *ab antiquo* to non-Mussulman communities have ever been respected, and no complaint has arisen to mark any encroachment on the spiritual rights of the chiefs of those communities. The Imperial Government has done more. Whenever the councils of these communities have manifested a wish in the sense of an extension of their prerogatives, it has met them generously, and has favoured the adoption of such measures and regulations as are best calculated to place their spiritual jurisdiction in harmony with new manners, institutions, and needs. . . . As for suits which depend upon religious laws, and which by their nature can only interest Mussulmans among themselves or Christians among themselves, such suits shall be brought before the jurisdiction of the sheriff for Mussulmans, and before the ecclesiastical jurisdiction of the community for Christians; which special tribunals are governed by their own peculiar laws and regulations." From those passages their Lordships infer: first, that the Ottoman Government expected the Hatti Humaïoun to be construed, where doubtful, in a sense favourable to the privileges of non-Mussulmans; and, secondly, that when the chief of a religious community had jurisdiction it was assumed he would administer the law of his own community. Again, in the law of 1884 before referred to, sect. 8 runs as follows: "If after inheriting any property the heir changes his religious creed, the property so inherited shall devolve upon his heir at his death in accordance with the law regulating the inheritance of persons professing the creed professed by him at the time of his death." That section proceeds upon facts

which are not the facts of the present case, but it involves the principle that succession is regulated by creed. The law does not apply to the property of deceased Mahommedans. The conclusion is, that the succession in this case is governed by the canon law, under which the infant defendants are clearly legitimate. Taking this view, their Lordships are relieved from considering a question which has given some trouble in England, viz., the question whether the right to inherit follows from the establishment of legitimacy, because the right to inherit is clearly dealt with by the Hatti Humaïoun and the law of 1884. They are also relieved from considering any question of Mahommedan law, or the effect to be given to the deed of gift. In their opinion the Supreme Court should have dismissed the appeal, and they will now humbly advise Her Majesty to make a decree to that effect. They do not think it right to disturb the directions of the courts below as to costs, but they are of opinion that the respondents should pay the costs of this appeal.

Solicitors for the appellants, *Busk and Co.*

Dec. 13, 1893, and Feb. 3, 1894.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, HOBHOUSE, MACNAGHTEN, SHAND, and Sir R. COUCH.)

WALSH v. THE QUEEN. (a)

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Dividend Duty Act 1890 (54 Vict. No. 10), s. 8—Assets in Queensland—Mortgage securities.

The Queensland Dividend Duty Act 1890 imposes a duty upon the dividends declared by companies carrying on business in Queensland, and requires, in the case of companies whose head office is not in Queensland, a return of the average amount of the assets of the company in Queensland during the preceding year.

Held (affirming the judgment of the court below), that advances made by a company outside the colony upon the security of real and personal property within it, were assets in Queensland, within the meaning of the Act, though the debtors did not reside in the colony, and neither principal nor interest was payable in it.

THIS was an appeal from a judgment of the Supreme Court of Queensland (Lilley, C.J., Harding, Real, Cooper, and Chubb, JJ.) in favour of the respondent (the plaintiff below), upon a demurrer to a statement of defence on an information by the Attorney-General claiming a penalty from the appellant as manager of the Union Mortgage and Agency Company of Australia Limited, for a false declaration under sect. 8 of the Dividend Duty Act of 1890 (54 Vict. No. 10), as to the assets of the company in Queensland.

The facts appear from the judgment of their Lordships.

Finlay, Q.C., Haldane, Q.C., and F. Fitzgerald appeared for the appellants, and argued that the asset was the debt due from the mortgagor, not the property mortgaged. The security is only an

PRIV. CO.]

WALSH v. THE QUEEN.

[PRIV. CO.]

accessory in case of the insolvency of the debtor; and the locality of the debt must be looked at; it is where the debtor is, and should be sued, not the locality of the security. This is not "capital employed in Queensland" within sect. 9. The mortgages are not, and never were, in Queensland, but at the head office in Victoria, and are in many cases collateral with securities over property beyond Queensland. They referred to

Commissioner of Stamps v. Hope, 65 L. T. Rep. N. S. 268; (1891) A. C. 476.

Cozens-Hardy, Q.C. and *R. Bray (The Solicitor General, Sir J. Rigby, Q.C.,* with them), who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellant their Lordships took time to consider their judgment.

Feb. 3.—Their Lordships' judgment was delivered by

LORD WATSON.—The Union Mortgage and Agency Company of Australia Limited are incorporated, and have their principal office in London, with branches in the Australian colonies. As their name indicates, their business mainly consists in lending money upon the security of real and personal estate situated in one or other of these colonies. The appellant Walsh is the manager of their branch in Queensland; and, in that capacity, he is charged with the statutory duty of making an annual return, on behalf of the company, to the treasurer of the colony, for the purposes of the Dividend Duty Act of 1890 (54 Vict., No. 10). The object of the statute is to impose a yearly duty, at the rate of 5 per cent. upon that proportion of the total dividends declared by the company during the year which has been earned by their business in the colony of Queensland. With that view, sect. 8 provides that the company shall, on or before the 1st April in each year, forward to the Colonial Treasurer a return in prescribed form, under the hand of and made by their manager, "showing the total average amount of the assets of the company during the preceding calendar year, the average amount of such assets in Queensland during that year, the amount of all dividends declared by the company during that year, and the dates when they were respectively declared." The same section enacts that duty is to be charged upon so much of the total dividends declared during the year "as is proportionate to the average amount of the capital of the company employed in Queensland during the year as compared with the total average capital of the company during the year." Sect. 9 enacts, that the proportion between the capital employed in Queensland and the total capital of the company "shall be deemed to be the same as the proportion between the value of the assets of the company in Queensland and the value of the total assets of the company wherever situate." For the purposes of the section it is declared that the term "assets" means "the gross amount of all the real and personal property of the company of every kind, including things in action, and without making any deduction in respect of any debts or liabilities of the company." An information was laid against the appellant, as representing the company, by the Attorney-General for the colony, claiming a penalty of 500*l.* under the provisions of sect. 20,

upon the allegation that the return made for the year 1890 contained a false statement of the value of the average amount of the company's assets in Queensland during that year. The true value of these assets was alleged to be greatly in excess of 22,838*l.* 9*s.* 4*d.*, the sum at which they were estimated in the return. In his defence the appellant affirmed the accuracy of the return, and also made some explanatory statements, upon which the present controversy depends. These are in substance that, in addition to the assets returned as situated in Queensland, the company had, during the year 1890, made advances outside that colony, upon the security of real and personal property within it, to debtors, some of whom did, whilst others did not, reside in the colony; that, in many instances, the securities so given were collateral with securities over property of the debtor in other colonies; that, in all cases, it was a condition of making the advance that the principal should be repaid, and also that interest as it accrued thereon from time to time should be paid, at the office by which the advance was made; and that their branch at Melbourne, in the colony of Victoria, made the advances in question, and was in possession of the mortgages and other documents by which they were secured. The appellant alleged that, in these circumstances, the moneys advanced in Melbourne, if they were brought to Queensland, which he did not admit, were taken thither by the borrower, and were not capital of the company employed there by the company. The Attorney-General demurred to the defence thus stated. The case was then heard before a full bench of the Supreme Court, consisting of Sir Charles Lilley, C.J., with Harding, Real, Cooper, and Chubb, J.J., who unanimously allowed the demurrer, and ordered judgment to be entered for the plaintiff with costs. The only case presented by the appellant in the argument addressed to their Lordships was, that these secured debts, viewed as assets of the company, are really situated either in London, the head-quarters of the company, or in Melbourne, where the transactions between them and the debtors took place, and where the latter are bound to pay, and not in Queensland. He maintained that, according to the condition in which these assets stood during the year 1890, the substance of each asset consisted in the personal obligation held by the company; that the legal *situs* of that obligation must determine the locality of the asset for the purposes of the Dividend Duty Act; and that the securities, being merely accessory to the personal obligation, can have no effect in regulating the nature or locality of the asset, until the creditor has, by virtue of them, entered into possession. It is obvious enough that, if the first of these propositions fails, the whole argument falls to the ground. Their Lordships do not think it necessary to consider what the result would be if these assets were regarded as personal debts due to the company by individuals, some of whom resided in and others beyond the colony. Though resting partly upon personal obligation, the debts are all charged upon real and personal estate, which the appellant himself alleges to be "in Queensland." Although the debt be not yet due and payable, so that the creditor has had no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only. The

market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt in as securities. It is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a *jus ad rem*, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor. Is such an interest in property admittedly situated in Queensland an asset in Queensland within the meaning of the Act? That is the sole question arising for decision in this appeal, and its merits lie within a very narrow compass. The appellant's counsel did not dispute that the debtor's interest in the subjects which he assigned in security was an asset in Queensland; and they went so far as to admit that the creditor's interest would also be so, if he enforced his security by entering into possession. Independently of any concession in argument, neither of these propositions appears to be attended with doubt. Laying aside, as plainly untenable, the theory that, until he has attained possession, the creditor's right consists in the bare personal obligation of his debtor, it would be difficult to find any good reason for holding that it includes no interest in the subjects of the security which is capable of valuation. The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon estate within the colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the colony. Such an interest is certainly property of the company, and property in the colony, because it affects estate which is admittedly situated there. In that view, it is made an asset in the colony, for the purposes of the Act, by the express provisions of sect. 9. It may be right to notice that, the asset returnable being the charge upon colonial property, and not the personal debt, the amount of the debt is not necessarily conclusive of its value. It is obvious that the value of the Queensland incumbrance may fall short of the amount of the debt; and also that, when the company hold collateral securities elsewhere, it may be proper to take these into account in valuing for the purposes of the Dividend Duty Act. These matters, however, are not *hujus loci*; because, this being a question in demurrer, the appeal must necessarily fail if any substantial part of the assets omitted ought to have been included in the return. For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellant must bear the costs of this appeal.

Solicitors for the appellant, *Flower, Nussey, and Fellowes*, for *Hart, Flower, and Drury*, Brisbane.

Solicitors for the respondent, *Freshfields and Williams*, for *J. Howard Gill*, Crown Solicitor, Brisbane.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Nov. 15, 1893.

(Before NORTH, J.)

Re WALKER'S SETTLED ESTATE. (a)

Settled land — Mansion-house — Rebuilding — Annual rental — Capital money in hand applicable to rebuilding — Settled Land Acts (Amendment) Act 1887 (50 & 51 Vict. c. 30), s. 1 — Settled Land Act 1890 (53 & 54 Vict. c. 69), s. 13, sub-sect. (iv.).

A tenant for life of settled land pulled down part of the old mansion-house on the estate, and erected on the old site and on fresh ground a building containing a billiard-room, a smoking-room, and other rooms and offices, and also a kitchen, servants' hall, and other domestic accommodation, converted the old kitchen into a hall, added the old hall to the drawing-room, raised the ceilings of the other rooms, made other internal re-arrangements, and raised the roof of the house. To provide funds for the work, he borrowed on the security of the settled land a sum repayable by annual instalments. A summons was taken out by him, asking that capital money in hand forming part of the settled property might be applied to an amount not exceeding one-half the annual rental of the settled land, in paying off the annual instalments of capital as they became due.

Held, that whether a "rebuilding" within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890, of a mansion-house, had taken place, was a question to be determined upon the circumstances of each case, and that, in the case in question, there had been such a "rebuilding" of the mansion-house.

Held also, that the "annual rental" within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890, did not include anything in respect of the mansion-house and park in the occupation of a tenant for life, nor in respect of a farm held and farmed by him, but did include the rental value of a farm unoccupied temporarily, though usually let to a tenant.

THIS was a summons by Sir James Robert Walker, the tenant for life of an estate, called the Sandhutton estate, situate near Beverley, in Yorkshire, under a settlement which also comprised capital money under the Settled Land Acts, asking that capital money in hand might be applied in paying off the instalments of a charge on the estate, created to obtain money for rebuilding the mansion-house, so far as such instalments represented capital expenditure, and to the extent of one-half of the annual rental of the estate.

The mansion-house at Sandhutton was old and inconvenient in character, and unsuited to modern requirements; and in the year 1886 Sir J. R. Walker made extensive additions, alterations, and improvements to the building.

The portion of the old house which comprised the domestic offices, servants' rooms, and out-buildings was pulled down, and partly on the

CHAN. DIV.]

Re WALKER'S SETTLED ESTATE.

[CHAN. DIV.]

old site, and partly on fresh ground were erected on one side a billiard-room, a smoking-room, a gun-room, and other rooms and offices, and on the other side a kitchen, servants' hall and other domestic accommodation; the old kitchen and passage leading thereto were converted into a large hall and staircase; the old hall was added to the drawing-room; the height of the other rooms was increased by raising the ceilings and roof of the old house; partitions between rooms were removed, and rooms were re-arranged. The cost of the work was about 20,000*l.*

In order to obtain the means for carrying on the work the tenant for life, in pursuance of the Limited Owners Residences Act 1870, borrowed, on the security of the settled land, the sum of 17,500*l.* repayable by annual instalments of 117*l.* 11*s.* 8*d.* for twenty-five years from 1888.

The questions for decision were: (1) whether there had been a rebuilding within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890, of the mansion-house at Sandhutton; and (2) whether for the purpose of fixing the amount of capital money in hand which might legally be applied under sect. 13, sub-sect. (iv.) in paying off the future instalments, the "annual rental" of the settled land included the letting value of the mansion, land, and farms in the occupation of the tenant for life.

The Settled Land Acts (Amendment) Act 1887 provides by sect. 1:

Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge or otherwise providing for the payment thereof shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.

The Settled Land Act 1890 provides by sect. 13 that the improvements authorised by the Act of 1882, for which capital money under the Settled Land Acts may be applied, shall include

(iv.) The rebuilding of the principal mansion-house on the settled land: Provided, that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

And by sect. 15 that the court may authorise capital money to be applied for any improvement authorised by the Settled Land Acts notwithstanding that a scheme had not been submitted for approval to the trustees or to the court.

Cozens-Hardy, Q.C. and *Coltman* for the tenant for life.—Capital money under the Settled Land Acts may be applied in discharging the future instalments of a rentcharge created by Act of Parliament to pay the expenses of an authorised improvement. They referred to

Re Howard's Settled Estate, 67 L. T. Rep. N. S. 156; (1892) 2 Ch. 233;

Re Dalison's Settled Estates, (1892) 3 Ch. 522;
The Settled Land Acts (Amendment) Act 1887, s. 1.

Sect. 15 of the Settled Land Act 1890, which empowers the court to authorise capital money to be applied in an authorised improvement, although no scheme had, previously to the ex-

cution of the improvement, been submitted to the court, is retrospective, and applies to the cost of improvements made since the Act of 1882. They referred to

Re Ormrod's Settled Estate, 66 L. T. Rep. N. S. 845; (1892) 2 Ch. 318.

The tenant for life has rebuilt the mansion-house within the meaning of sect. 15, sub-sect. (iv.) of the Act of 1890. He has not merely altered and improved it, but rebuilt it. They referred to

Re De Teissier's Settled Estates; De Teissier v. De Teissier, 68 L. T. Rep. N. S. 275; (1893) 1 Ch. 153;

Re Lord Gerard's Settled Estates, 69 L. T. Rep. N. S. 393; (1893) 3 Ch. 252.

We submit that the evidence shows that the old house was unsuitable as the mansion-house of the estate, and that it was a proper case for rebuilding, and ask for a declaration that the capital money in hand may be applied to the payment of future instalments of the rentcharge created under Act of Parliament to obtain money for the rebuilding of the mansion-house. The other point for decision is whether, in estimating half the "annual rental" of the settled land under sect. 13, sub-sect. (iv.), of the Settled Land Act 1890, any allowance should be made in respect of the value of the mansion-house, and land held therewith, or of a farm held by the tenant for life, instead of being let to a tenant. It is settled that in making such estimation the income of capital money invested is taken into account.

T. L. Wilkinson for the tenant in tail in remainder and his sons.—There has been no rebuilding of the mansion-house within sect. 13, sub-sect. (iv.) of the Settled Land Act 1890. He referred to

Re Teissier's Settled Estates; De Teissier v. De Teissier (*ubi sup.*).

The great bulk of the work done to the mansion-house does not amount to a rebuilding. It is merely structural alterations and enlargements. [NORTH, J.—Supposing part has been rebuilt, can I allow the expenditure on that part, and not on the rest of the house?] An inquiry might be ordered for the purpose of distinguishing and severing the expenditure.

Davenport for the trustees of the settlement under the Settled Land Act.

NORTH, J.—I think that in this case the money spent should be allowed. I am sorry not to have had more assistance to aid me in deciding what the word rebuilding in sect. 13, sub-sect. (iv.) means. I have considered the matter, and think it is a question of fact in each case; and in the present case I think there has been a rebuilding within the meaning of the section. Supposing most of a house front were pulled down, a small part being left, and that the rest of the house was rebuilt, it could not be said that there was not a rebuilding; or that a house were burnt and the walls were left standing, the fact that the old walls were used in erecting a new house would not prevent its being a rebuilding. The introduction of alterations and enlargements would not make any difference. It would not make any difference if the site were slightly altered; for instance, if part of the new house was on the old site and part not. If the new house were erected at a distance from the site of the old house, that would be

another matter. It does not follow, however, that every rebuilding would be a rebuilding authorised by the section. If, for instance, the tenant for life of a large estate who or whose predecessors had been content to live in a farmhouse or a small villa residence, pulled down the farmhouse or villa residence as unsuitable, and erected a castle or mansion-house with all the requirements suited to his position as the owner of a large estate, I do not think that ought to be considered a rebuilding within the meaning of the section. On the other hand, I think there must be really a substantial rebuilding, and not merely alterations and enlargements. It is really a question of fact in each particular case. In the present case it is not suggested that the reason for rebuilding was that the old house was in a ruinous state, but that it was not suitable as the mansion-house of the estate. [His Lordship then referred to the defects in the old house which were remedied in the new building, and continued:] I come to the conclusion that there has been a rebuilding, though on a somewhat enlarged scale, so as to make the mansion-house more convenient for occupation, and more suited to modern requirements and to the size and value of the estate to which it is now attached. I do not find anything in the section to say that the rebuilding must be for a particular purpose. The purpose of the rebuilding is left very much to the discretion of the tenant for life, subject to the assumption that he is acting *bona fide*, and it is not suggested here that there is any want of *bona fides*. The amount to be applied in rebuilding is limited by the sub-section, which provides that it is not to exceed one-half of the annual rental of the settled land. In this case I come to the conclusion that the whole expenditure has been spent on rebuilding within the section; and under the circumstances I see no reason in the present case to direct an inquiry as to what portion of it is attributable to rebuilding and what is not, although such an inquiry might be directed in a proper case. The only other point raised for decision is, what is to be included in the annual rental, the half of which is the limit of the sum to be applied under the sub-section out of the capital moneys in the settlement. The question is, what the words "annual rental" in the sub-section mean. I am of opinion that the annual rental meant does not include any allowance for the rental value of a mansion-house and park in the occupation of the tenant for life, nor does it include any allowance in respect of a farm held and farmed by the tenant for life, but that it would include the amount of rent usually paid for a farm unoccupied temporarily though usually let to a tenant. I will make a declaration that capital money under the Act is applicable in paying instalments charged on the settled estate, so far as they represent the rebuilding expenditure to the extent of one-half of the present annual rental of the settled estate.

Solicitors for all parties, *Long and Gardiner*, agents for *Crust, Todd, Mills, and Sons*, Beverley.

Tuesday, Dec. 5, 1893.

(Before NORTH, J.)

PARTRIDGE v. PARTRIDGE. (a)

Will — Construction — Infant — Mansion-house — Devise in strict settlement — Condition subsequent requiring residence — Limitation over — Refusal or neglect to fulfil condition.

A testator devised a mansion-house and other real estate in strict settlement, with a proviso that every person who should become entitled to the possession or to the receipt of the rents and profits thereof, should reside in and occupy the mansion-house for at least nine months in every year, and with a limitation over, in case any such person should refuse or neglect so to do, to the person or persons next entitled in remainder under the provisions of her will. Subsequently the person who in the events that happened became entitled to the possession, or to the receipt of the rents and profits, of the property devised by the will was an infant. In a special case for the opinion of the court the question was raised, whether the condition as to residence was binding on the infant.

Held, that as, under the provisions of the will, the estate was vested in the infant with a limitation over on the refusal or neglect to fulfil a condition subsequent as to residence which an infant could not be said to refuse or neglect to fulfil, the limitation over did not take effect during the minority of the infant.

SPECIAL CASE for the opinion of the court under Order XXXIV.

At the date of her will and down to her death, Harriet Penyston, late of Cornwell, in the county of Oxford, spinster, deceased, was seised in undivided fee simple in possession of one equal undivided third share of and in the mansion-house and other hereditaments situate at or near Cornwell aforesaid, and also of other real estate. She duly made her will, dated the 13th Sept. 1831, and thereby devised all and singular her manors, hereditaments, and real estate of which she should be seised or entitled to at the time of her decease, or over which she should have any power of disposition, unto her two sisters Frances Penyston and Jane Penyston (the latter of whom predeceased the testatrix) during the term of their joint natural lives and the life of the survivor of them, subject, nevertheless, and charged with the payment of certain annuities or yearly rentcharges therein mentioned. And from and after the death of the survivor of the testatrix's two sisters, and subject and charged with the annuities and the powers and remedies thereby given for securing payment of the same, the testatrix gave and devised all and singular her manors, hereditaments, and real estate unto the Rev. John Anthony Partridge (since deceased) and Louisa Isabella his wife, during the term of their joint natural lives and the life of the survivor of them, with remainder to trustees during the lives of John Anthony Partridge and Louisa Isabella his wife, and the survivor of them, in trust to preserve contingent remainders; and after the decease of the survivor of John Anthony Partridge and his wife (subject and without prejudice to the said annuities), the testatrix gave and

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

CHAN. DIV.]

PARTRIDGE v. PARTRIDGE.

[CHAN. DIV.]

devised her manors, hereditaments, and real estate unto and to the use of John Francis Partridge (the eldest son of John Anthony Partridge and his wife) during his life, with remainder to trustees during the life of John Francis Partridge, in trust to preserve contingent remainders; and after the decease of John Francis Partridge (subject and without prejudice as aforesaid) to the use of the first son of John Francis Partridge and the heirs of his body in tail male; and in default of such issue to the use of the second, third, fourth, and every other son of John Anthony Partridge and his wife, severally and successively according to their respective seniorities and the heirs of their several and respective bodies in tail male; and in default of such issue, to the use of the first and every other daughter of John Anthony Partridge and his wife, then born or thereafter to be born, severally and successively, according to their respective seniorities and the heirs of their several and respective bodies in tail male; and in default of all such issue (subject and without prejudice as aforesaid) the testatrix gave and devised the said hereditaments and real estate unto her own right heirs for ever; and the will of the testatrix contained a proviso and declaration in the words following, that is to say:

Provided always, and I do hereby declare and direct, that the said John Anthony Partridge and Louisa Isabella his wife and John Francis Partridge and the person and persons whom the daughters of the said John Anthony Partridge and Louisa Isabella his wife shall marry, and every person who by virtue of the limitations hereinbefore contained shall become entitled to the possession or to the receipt of the rents and profits of the said manors or reputed manors, hereditaments, and real estate shall and do within the space of three months next after the decease of the survivor of my said sisters Frances and Jane reside in and occupy the mansion-house with the offices, buildings, yards, gardens, and appurtenances, situate at Cornwell aforesaid, now occupied by myself and my said sisters, for the space of nine months at the least in every year, and maintain and keep the same and every part thereof in good and tenantable repair, and also shall and do within the space of one year next after they respectively shall so become entitled to the possession or to the rents and profits of the same hereditaments and premises take upon him and her and his and her issue respectively and use in all deeds, letters, and other writings to which they shall be parties or party or which they respectively shall sign, the surname of Penyston only, and take and use no other surname. And also take and use the arms of Penyston only. And also do and shall within the space of one year next after they shall respectively become so entitled as aforesaid apply, sue for, and endeavour to obtain an Act of Parliament or a proper licence from the Crown, or take such other means as may be requisite or proper to enable him and her respectively, and his and her issue, to take and bear the said name and arms of Penyston. And in case the said John Anthony Partridge, or John Francis Partridge, or any other child of the said John Anthony Partridge and Louisa Isabella his wife, or their issue, or the husband of any or either of their daughters who by virtue of the limitations in this my will shall come into possession or receipt of the rents and profits of the said hereditaments and premises, shall refuse or neglect to reside in and occupy the said mansion-house and premises at Cornwell aforesaid, or to take such surname and arms and to use the means which shall be requisite to enable and authorise him and them so to do within the said space of one year, then and in either of those cases the limitation hereinbefore contained of the said hereditaments and real estate to the use of him, her, or them so

refusing or neglecting shall cease, determine and become utterly void; and I give and devise all and singular the said manors or reputed manors, hereditaments, and real estate to the person or persons next in remainder under the limitations in this my will.

Harriet Penyston died on the 29th Feb. 1840 without having revoked, or altered, or re-executed, or republished her will.

Frances Penyston, at the date of her will and of her death, was seized in unincumbered fee simple in possession of the two other undivided third shares of and in the mansion-house and other hereditaments situate at or near Cornwell aforesaid, and also of other real estate.

She made her will, dated the 8th March 1853, and thereby, after charging her real estate with certain annuities as therein mentioned, gave and devised all and singular her manors, messuages, hereditaments, and real estate unto John Anthony Partridge and Louisa Isabella his wife, during their joint lives and the life of the survivor of them, with remainders over to the same persons, in the same order, and in precisely similar terms as are named and mentioned in the will of Harriet Penyston, and the will now in statement contained directions as to residing in the mansion-house, and as to taking and using the surname and arms of Penyston, and a gift over in default in similar terms to those contained in the will of Harriet Penyston.

Frances Penyston made six codicils to her will, by one of which she made a change in the trustees appointed to preserve contingent remainders, and a consequential change in the devise to such trustees, but which codicils did not otherwise affect the devise of real estate contained in her will. She died on the 13th June 1873.

John Anthony Partridge died on the 27th Feb. 1861, and Louisa Isabella his wife on or about the 7th April 1858.

On the death of Frances Penyston, John Francis Partridge entered into the possession of and thenceforth until his death resided in the mansion-house and premises at Cornwell, and took and assumed the name and arms of Penyston. John Francis Partridge (then John Francis Penyston) died on the 7th June 1893 without ever having had any issue.

Anthony William Partridge was the second son of John Anthony Partridge and Louisa Isabella his wife. He died on the 23rd Sept. 1886 without having barred his estates in tail male in remainder under the said wills, and having had issue, three children only, namely, the plaintiff Anthony Francis Partridge, his eldest son, and the defendant William Adolphus Partridge, his second son (who were twins and were born on the 22nd Feb. 1879), and the defendant Robert Charles Partridge, his third son (who was born on the 24th July 1882).

The defendant Edward Thomas Partridge was the third son of John Anthony Partridge and Louisa Isabella his wife.

Mrs. Catharine Mary Penyston, the widow of John Francis Penyston, has ever since the death of her husband resided at the mansion-house and premises at Cornwell.

The plaintiff has not at any time since the death of John Francis Penyston resided at or occupied the mansion-house and premises at Cornwell, nor has he taken or used the surname or arms of Penyston.

The questions submitted for the opinion of the court were: 1. Whether or not the conditions and directions contained in the will of Harriet Penyston, and in the will of Frances Penyston, as to residing in and occupying the mansion-house and premises at Cornwell, and as to taking and using the surname and arms of Penyston, or any, and if so which, of such conditions and directions were binding upon the plaintiff during his infancy. 2. And whether or not the gifts over in the wills respectively contained had taken effect, or in the event of the same conditions and directions or any of them not being complied with during the infancy of the plaintiff did or could take effect, and if so, in favour of what person or persons.

S. Leeke for the plaintiff.—The condition as to residence is an impossible one, as each of the persons successively entitled under the successive limitations could not possibly come into possession within three months of the death of the survivor of the testatrix's two sisters. But, if the words are construed less strictly, the plaintiff was only fourteen years old when he became tenant in tail in possession of the property on the 7th June 1893; and the condition requiring residence in the mansion-house is not binding upon an infant. He referred to

Simpson on Infants, 2nd edit., p. 82;
Luscombe v. Yates, 5 B. & Ald. 553;
Parry v. Roberts, 25 L. T. Rep. N. S. 371.

These authorities show that such a condition is not binding on the infant plaintiff.

C. Ashworth James for the first two defendants (the two younger brothers of the plaintiff).—The plaintiff while an infant has no authority to choose his place of residence. The condition requiring residence is a condition subsequent to the taking of the estate. He referred to

Seymour v. Vernon, 33 L. J. 692, Ch.

The cases of *Walcot v. Botfield* (Kay, 534) and *Re Moir*; *Warner v. Moir* (50 L. T. Rep. N. S. 10; 25 Ch. Div. 605) show the meaning of the word "residence" in such a condition.

Howard for the third defendant, Edward Thomas Partridge (the third son of John Anthony Partridge and Louisa Isabella his wife).—The condition is capable of a construction which makes it possible, and the plaintiff is bound by the condition as to residence although an infant. Where a condition annexed to the estate of an infant is for his benefit he must fulfil it. In *Co. Litt. 246 b* it is stated, "And so it is of an infant; his laches for not performing of a condition annexed to a state either made to his ancestor or to himselfe shall barre him of the right of the land for ever." The case of *Hearle v. Greenbank* (1 Ves. sen. 298, 304) shows that an infant may perform a condition for his benefit at common law. In the case of *Astley v. Earl of Essex* (30 L. T. Rep. N. S. 485; L. Rep. 18 Eq. 290) an estate was held to be forfeited by reason of the non-compliance by a tenant in tail (who was in India when he became entitled to the possession of the estate, and was ignorant of his rights and duties under the will through which he claimed) with a name and arms clause. [NORTH, J.—There the tenant in tail was of full age.] In the case of *Bevan v. Mahon Hagan* (L. Rep. (Ir.) 27 Ch. Div. 399) the neglect of an infant to comply with a condition

to take the arms of a testator lost him the estate. [NORTH, J.—The plaintiff has still six months in which to take the name and arms of the testatrix.]

NORTH, J. read the limitations in the will of Harriet Penyston, and proceeded:—They are all direct limitations not to take effect upon a condition of any sort, but limitations to take effect in due order as the previous takers die out, and to go on to the very end if no previous taker thought fit to bar the entail. Then comes the proviso dealing with several matters which are all introduced by way of conditions subsequent. They are not conditions precedent, because the estate is clearly given in words, but they are conditions on which in particular events the estate that has been taken by various persons may be divested from them and passed over to other persons further down in the order of the limitations. Now, I will read first a part of the proviso without any comment. [His Lordship read the proviso set out above down to the words "tenantable repair," and continued:] Now, to pause there, there is a good deal to be said about that clause. First of all, I will deal with the last part of it. It is said that the condition is an impossible one, because it requires the parties, within three months of a given date, to reside for nine months at least in the house in question. I do not think that is the meaning of that clause. I think that the meaning is pretty clear, although it is badly expressed. It will be noticed that the phrase is that the parties respectively "shall and do within the space of three months next after the decease of the survivor of my said two sisters Frances and Jane reside in and occupy the mansion-house" for the space of nine months. Now, there the draftsman has attempted to put into one clause two different things, one to which the word "do" applies and the other to which the word "shall" applies. I am now extending it in the way in which I think the draftsman would have done better to have extended it, instead of contracting it as he did. I extend it to mean this: shall, within the space of three months next after the decease of the survivor of my two sisters, begin to reside in and occupy, or reside in and occupy for the first time—that is, enter into possession of the mansion-house; and shall reside in and occupy the mansion-house for the space of nine months in each year—that is to say, shall enter into possession within the three months, and shall reside nine months a year. That, in my opinion, is the strict construction of the words, and that that was intended I have not the least doubt, not only from the construction of the words, but from the fact that Miss Frances Penyston's will was drafted at a subsequent date, with this will before the draftsman, and that her will, which in most respects follows precisely the language used here, does expand the words a little, and draw a distinction between commencing residence and continuing to reside. As to the construction of that clause, therefore, I think there is no difficulty. Then to go back, there are a number of persons upon whom that condition is imposed, and the words are that the said so-and-so "and every person who by virtue of the limitations hereinbefore contained shall," what? shall "become entitled to the possession or to the receipt of the rents and profits" of the property, shall do so and so. Now, these various

persons, who all come in or might come in under a long string of limitations, are persons who could not come into possession all at the same time; they must come into possession successively. Therefore it cannot be said that all these persons were to do it all at once, because no person is required to do it except on becoming entitled to possession or to the receipt of the rents and profits. Then, on the other hand, it goes on in this way: that the person so becoming entitled "shall and do within the space of three months after the decease of the survivor of my two sisters Frances and June" (now, as Jane died before the testatrix, one may leave her out; therefore it is within three months after the death of my surviving sister Frances) enter into possession. How is that possible? Of course, it is not possible for a series of persons becoming entitled successively and not concurrently, except so far as not only one, but possibly two or three, might happen to come into possession within three months by reason of early deaths. But the question is, what is the meaning of those words "within the space of three months next after the decease of" my surviving sister? It is said that that applies to the first taker, and that with respect to all the rest it ought to be read within the space of three months next after each of them shall come into possession or receive the rents and profits. That is an alteration in the will that I do not feel myself at liberty to make. Whether that was intended I do not know. Very possibly that may have been intended, but I cannot guess at it, and I have no words in the will by which I can come legitimately to that conclusion. Those words are not expressed here either directly or inferentially, or impliedly. I cannot find any words amounting even by implication to that, and I do not feel at liberty to introduce such words for the first time. Then, is the result this: that all these persons are to be subject to that obligation within three months? I do not think that is the intention, and my view of the matter is, that all these persons are referred to here as being possible takers, anyone of whom might come into possession or receipt of rents and profits at the death of the surviving sister, and any two or three or more, possibly, might do so within three months after that date. Construing this clause as fairly as I can, and giving as much effect to it as I can, I hold that it only applies to such of the persons taking under the limitations as do come into possession or receipt of the rents and profits within three months after the death of the surviving sister Frances, who died in the year 1873. When she died John Anthony Partridge and his wife were both dead. John Francis Partridge, who died in 1893, was alive, and there is no doubt that he did comply strictly with the conditions required as to residence and as to name and arms. In my opinion, in the events that have happened, that does not apply to anybody but him. That is my view of the construction of that clause. Then it proceeds: [His Lordship then read the proviso as to the name and arms, and continued:] The words here are, "shall and do within the space of one year next after they respectively shall so become entitled," and therefore, to prevent any possible question, I think that it is right that the guardians of the infant who has now succeeded to the estate ought to take steps to comply with this clause for the purpose of preventing any question whether the young man in question will take the

property in case of non-compliance. I do not think there is any great hardship in asking him to change his name from Partridge to Penyston, and it seems to me that there is very good reason for doing so. Whether necessary or not, it is a prudent precaution to take, and I think they ought to take that step. Then we come to the final clause, the gift over; but before leaving these gifts I call attention to the fact that they are clearly expressed as something that will divest an estate which has already taken effect. It is something to be done within three months and twelve months respectively after the time at which he has become entitled to the possession or to the receipt of the rents and profits. Then the gift over is: [His Lordship read the gift over as set out above and continued:] As regards that clause, it must be fairly construed, and unless, when a fair construction is put upon it, it does impose the obligation of doing something upon the parties, the omission of which does take the estate away from them, the estate will not be taken away. Now, first of all, I think the reference to the space of one year does not apply to refusal or neglect to reside in and occupy the said mansion-house and premises. That is the first part of the clause, and the alternative is, or (shall refuse or neglect) "to take such surname and arms, and to use the means which shall be requisite to enable and authorise him and them so to do within the space of one year"; and then it goes on, "then and in either of those cases," showing that the testatrix has put two cases distinct from one another. The case of the surname and arms is the only one as to which any space of one year has been imposed, and for that reason, and on the whole construction of the clause, I think it clear that that reference to something to be done within the space of one year has merely reference to taking the surname and arms and using the proper means to get the right of taking them. Then it is said that the clause does not apply to an infant. The plaintiff, who came into possession on the 7th June 1893, is now about fourteen, and the question has been raised as to the necessity for him to reside and take the name and arms. I have already expressed my opinion as to what ought to be done about the name and arms; but John Francis Partridge having come into possession on the 7th June 1893, more than three months have elapsed since that time, and therefore the question is, whether the infant was bound within three months to enter into possession of the house and continue to reside there for the space of nine months in each year. In my opinion he was not, and the infant is entitled to the estate. As I pointed out just now, the testatrix is not giving him the estate on the condition that he does it, but is taking away that estate if he does not; and then one must look to see what the event is on which the estate is to go over. The only event is, if the infant refuses or neglects to do it, and in my opinion an infant cannot refuse or neglect to reside in a particular place if the persons who have the legal custody and care of him do not choose that he should do so. It is not even if he omit to do it, or does not do it, but it is if he refuse or neglect to do it; and in my opinion an infant who cannot control or fix the place where he resides cannot be said to refuse or neglect to reside at a place within those terms.

In my opinion this clause does not apply to the present infant, at any rate during his infancy. It is conceded, and it is clear, that no distinction can be drawn from the tender years of an infant. I cannot see that the obligation which clearly could not possibly exist at the age of two, is to apply to the age of ten, fifteen, or twenty. I can draw no line during the period of legal infancy, and if an infant is not bound to do it, any infant is not bound to do it up to the time he attains twenty-one. Now, as regards this, the passages referred to in Coke on Littleton seem to me in point. The first is at 246 b. He says, having spoken first of all of a married woman: "And so it is of an infant; his laches for not performing of a condition annexed to an estate, either made to his ancestor or to himself, shall bar him of the right of the land for ever." That is to say, if there is a condition precedent which he ought to perform and does not, he may be barred by reason of its not having been performed. Then the other passage at 380 b is more restrictive still. There the proposition taken from Coke is, "No lachesse shall be adjudged in the heire within age." Then Coke proceeds: "Laches or laches is an old French word for slackness or negligence or not doing. And the rule (that no negligence shall be adjudged in an infant) is true where he is thereby to be barred of his entrie in respect of a former right as by a descent; or of his former right (as Littleton doth here put an example) by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges, and penalties going out of or depending upon the original conveyance, for the laches or negligence shall be adjudged in those cases as well in the infant as any other. And see further there, where an infant, being tenant for life or years, shall be punished for doing or suffering of waste; and where he claimeth by purchase a *cessavit* shall lie against him if he pay not his rent by two years," and so on. Then the case Mr. Howard referred to of *Bevan v. Mahon Hagan* (*ubi sup.*) is a very instructive case. It does not, however, apply here. It is sufficient, therefore, to read the head-note to show what is decided: "A testator bequeathed to the son of his daughter A. who should first attain the age of twenty-one years, and should, before attaining that age, have taken and borne the surname of H. and the arms of the testator, certain articles therein specified; and in case there should be no son of A. who should attain that age and have previously assumed the said name and arms, then to the son of the testator's daughter R. who should first attain that age, and before attaining that age should have assumed the said name and arms." That was the gift that had to be dealt with there. "It was proved to the satisfaction of the court that R.'s son had, before attaining the age of twenty-one years, assumed the name of H., and had after, but not before, he had attained twenty-one, obtained a Royal licence to assume the arms and name of the testator." That is, he, as infant, had done part of what he was bound to do, but he had not done the rest. It was held "that the assumption of the name and arms of the testator by the son of the testator's daughter before he attained twenty-one years was a condition precedent to the vesting of the legacy in him; and that R.'s son had not complied with the condition, and that the gift over took effect." It is quite clear that, if there is a condition imposed as a

condition precedent of the sort that can be performed by an infant, and if it is not performed by him, the limitation over is a good one, and will take effect; but in the present case, as I have pointed out, there is merely a limitation to defeat the estate, which depends not upon the taker not doing it, but upon his refusing or neglecting to do it; and, in my opinion, as in the case before Lord Romilly of *Parry v. Roberts* (*ubi sup.*), there is no condition here which he can be said to refuse or neglect to perform during the time that he is an infant. In my opinion, therefore, the omission to enter into the occupation or residence of the house within three months after the death of John Anthony Partridge has not divested from the infant the estate he takes under that will. I have referred to one will only. Part of the property passed under the will of Frances Penyston, but the conditions in that will are exactly the same, although in one or two respects they are rather more fully expressed than in the will of Harriet Penyston. It is unnecessary, therefore, for me to refer to her will, as the remarks I have made on the first will apply to both. There must be a declaration that the gift over in the will contained has not taken effect down to the present time.

Solicitors for all parties, *W. H. Withall and Co.*

Dec. 8, 9, and 19, 1893.

(Before NORTH, J.)

DAVIS v. DAVIS. (a)

Partnership—Tenants in common—Manufacturing business—Freehold houses—Partnership Act 1890 (53 & 54 Vict. c. 39), s. 1, sub-sect. (1), s. 2.

A fan manufacturer, by his will, gave his residuary real and personal estate to his two sons in equal shares as tenants in common. The gift included his three freehold houses, and the goodwill, stock-in-trade, and machinery of the business carried on by him at two of his freehold houses. The two sons continued to carry on the business under the same style and at the same two houses for their own profit without entering into any agreement for a partnership or even mentioning it. No accounts were kept between them and no annual balance-sheet was prepared, but once a week, and sometimes oftener, each drew out the same sum for his own use, and there was no other division of profits. They obtained money by mortgaging the third freehold house, which was let to a tenant, and employed the money in enlarging their workshops at the two houses where the business was carried on. Subsequently they mortgaged the two last-mentioned houses to provide new plant and machinery. The rent of the third freehold house was from time to time, as received from the tenant, divided equally between them. Each of them paid succession duty on his share of the freehold houses devised to them by their father. One died intestate, without issue, leaving a widow and a sister, besides his brother who became heir-at-law, and who, with the sister, constituted the next of kin. Held, that there was a partnership between the two sons with respect to the business, but that such partnership did not include the three freehold houses or any of them, and that the moiety of the

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

CHAN. DIV.]

DAVIS v. DAVIS.

[CHAN. DIV.]

deceased son in the three freehold houses vested, upon his death, legally and beneficially, in his brother as heir-at-law of the deceased, subject to any rights of the widow therein under the Intestates Estates Act 1890.

SPECIAL CASE.

Edward Davis made his will, dated the 12th Feb. 1887, and thereby, after appointing an executor and executrix thereof and making divers pecuniary and specific bequests and devises in favour of his wife and children, the testator gave, devised, and bequeathed all the rest and residue of his estate and effects whatsoever and wheresoever unto his two sons, the plaintiff and Charles Frank Davis (since deceased), their heirs, executors, administrators, and assigns absolutely, in equal shares as tenants in common.

He died in Jan. 1889.

The residuary estate comprised, amongst other things, (a) two freehold houses and premises, numbered respectively 62 and 64, Sumner-street, Southwark, in the occupation of Edward Davis at the time of his death; (b) an adjoining freehold house and premises, No. 60, Sumner-street, let to a yearly tenant at a rent of 30*l.* per annum; and (c) the goodwill, stock-in-trade, plant, and machinery of the business of a patent fan manufacturer, which Edward Davis carried on at the date of his death on the premises Nos. 62 and 64, Sumner-street.

The business had been carried on by Edward Davis on such last-mentioned premises from the time he had acquired the premises, which was by purchase some fourteen years previously to his death. For many years previously to his having so acquired such premises he carried on such business either in partnership or alone elsewhere in Sumner-street. Such business was always carried on by Edward Davis, whether alone or in partnership under the style of Lloyd and Davis. There was no especial advantage in carrying on such business at Nos. 62 and 64, Sumner-street. It might have been carried on with equal advantage elsewhere.

From the death of Edward Davis until the death of Charles Frank Davis hereinafter mentioned the plaintiff and Charles Frank Davis carried on the business for their own benefit under the style or firm of Lloyd and Davis, and on the same premises, which was advantageous in keeping together the connection. No articles of partnership were ever executed, nor was any agreement for a partnership come to, nor was a partnership ever mentioned between the plaintiff and Charles Frank Davis. No accounts as between the plaintiff and Charles Frank Davis were ever kept, nor was any balance-sheet or annual account as to such business ever prepared, but every week, and occasionally oftener, each of them (the plaintiff and Charles Frank Davis) drew from the business and retained for his own use 3*l.* or more, each one so drawing and retaining the same sum precisely as the other, and, save as aforesaid, no division of profits or other moneys was made.

In October 1889 the plaintiff and Charles Frank Davis borrowed a sum of 300*l.* on mortgage of the house and premises, No. 60, Sumner-street, and they expended the same sum in enlarging their workshops at Nos. 62 and 64, Sumner-street, by taking in so as to form part of such workshops a shed in the rear of and forming part of the pre-

mises, No. 60, Sumner-street. The rent of the tenant of No. 60, Sumner-street was thereupon reduced from 30*l.* to 24*l.* per annum.

In September 1891 the plaintiff and Charles Frank Davis borrowed a further sum of 300*l.* on an equitable mortgage of Nos. 62 and 64, Sumner-street, and such sum was used in the business mainly in the purchase of new plant and machinery.

No entries were made by the plaintiff and Charles Frank Davis as to any rent or otherwise howsoever in respect of any of the freehold premises. The rent of No. 60, Sumner-street, was from time to time as received divided equally between the plaintiff and Charles Frank Davis.

On the death of Edward Davis, each of them the plaintiff and Charles Frank Davis paid succession duty on the share in the freehold premises so devised to him.

Charles Frank Davis died on or about the 29th Jan. 1892 intestate and without issue, and leaving (1) the plaintiff his heir-at-law, (2) the defendant Emily Maria Louisa Davis (his widow), and (3) the plaintiff and his sister the defendant Sarah Frost, his sole next of kin, and letters of administration to the estate and effects of Charles Frank Davis were duly granted to the defendant Emily Maria Louisa Davis out of the principal registry of the Probate Division of this honourable court on the 5th April 1893, and she is now his sole legal personal representative. The defendant Sarah Frost takes any interest for her separate use.

The questions submitted for the opinion of the court were: (1) Whether any partnership existed between the plaintiff and Charles Frank Davis in respect of the business. (2) If there was such a partnership, then, whether the premises, Nos. 62 and 64, Sumner-street, and so much of the premises No. 60, Sumner-street, as since the year 1889 had been used for the business, or any part or parts thereof or interest therein respectively, formed part of the assets of the partnership. (3) Whether the moiety of the same premises which belonged to Charles Frank Davis, on the death of Charles Frank Davis, passed beneficially as well as legally to the plaintiff as his heir-at-law, subject to any rights therein of the defendant Emily Maria Louisa Davis to dower, or under the Intestate Estates Act 1890. (4) How the costs of the action (which was a friendly one) ought to be borne.

T. L. Wilkinson for the plaintiff.—No partnership ever existed between the plaintiff and Charles Frank Davis. The fact that they were tenants in common of the residuary estate of Edward Davis, which included this partnership business, houses, and land, does not of itself create a partnership: (Partnership Act 1890, s. 2, sub-sect. 1.) Where there is no contract or agreement for a partnership there cannot be a partnership. The case states that no agreement for a partnership was come to, nor was a partnership ever mentioned between them. There is no reported case in which it has been held that a partnership existed between persons without any agreement for a partnership. In the cases of *Waterer v. Waterer* (L. Rep. 15 Eq. 402) and *Davis v. Games* (12 Ch. Div. 813) it was held that property was partnership property on the ground that it had become involved in partnership dealings; the

decision in each case was grounded on the fact of the existence of a partnership. In the case of *Steward v. Blakeway* (L. Rep. 4 Ch. App. 603) it was held that there was no partnership, but only a part ownership of the land in question which devolved as real estate.

Ashton Cross for the defendants.—The facts stated in the special case as to the conduct and dealings of the plaintiff and Charles Frank Davis show that a partnership existed between them, and the houses and property used in the partnership business became partnership property. There is quite as much evidence of the existence of a partnership in this case as in the cases of *Davis v. Games* (*ubi sup.*) and *Waterer v. Waterer* (*ubi sup.*).

T. L. Wilkinson in reply.—The statement in the special case negatives the existence of any agreement for a partnership, and there must be an agreement for a partnership before a partnership can exist. Here a partnership was never discussed or contemplated. [NORTH, J.—Would they have been liable as partners to outsiders?] There might have been such a holding out to outsiders that they were partners, as to render them liable as such, but that would not make a partnership as between themselves. If there was a partnership constituted by conduct, there are no terms of such a partnership, and the question arises, what property is included in the partnership assets, and what is not?

NORTH, J.—In this case the question is, whether two brothers are partners or not in certain houses and land, the materiality being whether it is converted into personal estate or whether it is real estate. [His Lordship read the special case and proceeded:] Now, those are the material facts. The statement that no agreement for a partnership was ever come to between them was a good deal relied upon by Mr. Wilkinson. He says, and I think correctly, that there must be some agreement for a partnership to constitute a partnership; and I think that is clear, on general principles, and there are phrases in the Partnership Act of 1890 tending to the same conclusion. But I do not think that is to be construed as literally as Mr. Wilkinson wished to construe it. I understand it to mean, what Mr. Ashton Cross argues it to mean, that no agreement for partnership was come to unless the facts therein stated indicate that there is a partnership existing between them. If I did not so construe it I should not deal with the special case at all, because it is clear here that, although the parties had agreed upon a special case, it was with a different meaning attached to the phrases in it; but I consider it means this, that no agreement was ever come to unless the facts stated in the special case are evidence from which a partnership agreement is to be implied. The testator's will contains a devise and bequest of all the real and residue of his estate whatsoever and wheresoever, unto his two sons in equal shares as tenants in common. Besides other property, which is not mentioned in this case, they did take this business as tenants in common, and they took these three houses as tenants in common also. At that time there was no partnership whatever between them, and therefore the property vested in them as tenants in common. That is not a partnership in itself, and the question is whether anything took place afterwards which has had the effect of con-

stituting a partnership. Now, as regards the business, I think there is sufficient to show that there was a partnership. In the first place, looking at the Partnership Act of 1890, I find the first section provides, "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." Now that exactly describes this case. I do not say that that of itself is conclusive, but it comes precisely within the definition given there as to what a partnership is; and the case admits that there were profits divided, because this 3l. a week, or whatever it was, which was taken out by each brother, was a division of profits, although the case states, "and save as aforesaid no division of profits or other moneys was ever made." Whether that was entirely profit or not, at any rate it is clear that it was in part a division of profits. Then we come to sect. 2 of the Partnership Act of 1890; and sub-sects. 1 and 3 seem to me to be material. Sub-sect. 1 is this: "Joint tenancy, tenancy in common, joint property, common property, or part ownership, does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof." Then the 3rd sub-section is material as bearing upon the question of partnership in the business, because the conclusion I have come to, for reasons which I will mention presently, is, that there was a partnership in the business, but that the freehold property was not brought in to the partnership. I deal, therefore, first of all with the business itself; and I think that, although there was no express agreement for partnership, and no partnership was ever mentioned, yet there was a partnership formed between them, as evidenced by what took place. Now, looking at the 3rd sub-section of sect. 2 of the Act, what I find is this: "The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business." Now, that is exactly what I find here. Each of these persons did receive money at their regular drawings, to some extent at any rate, in respect of the profits of the business. Then the section goes on to say, "but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business." The result is, that we have a statement in the Act that the receipt by a person of a share of profits is *prima facie* evidence of a partnership, but that the receipt of such share does not of itself make him a partner in the business." Those phrases seem to me a little bit conflicting, but I do not think there is any difficulty about understanding them, because they were explained clearly with reference to precisely this state of things by the Court of Appeal in *Badeley v. Consolidated Bank* (59 L. T. Rep. N. S. 419; 38 Ch. Div. 238). It is quite true that that case was decided before the Partnership Act of 1890 was passed; but the Act seems to me to be precisely carrying out the state of things which is referred to in that case. There are some observations of Cotton, L.J. in his judgment which are directly in point; but I will read merely at present what Lindley, L.J. said on page 258. He says: "I take it that it is quite plain now ever since *Cox v. Hickman* (8 H. L. Cas. 268) that what we have to get at is the real agreement between the parties. It is no longer right to infer

CHAN. DIV.]

DAVIS v. DAVIS.

[CHAN. DIV.]

either partnership or agency from the mere fact that one person shares the profits of another. It may be, and probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, *prima facie* those two are partners, or *prima facie* the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and, I think, is true even now; but when you have a great deal more to consider it appears to me to be a fallacy to say that you are to proceed upon the idea that sharing profits *prima facie* creates a partnership or an agency, and that *prima facie* presumption has to be rebutted by something else. I cannot help thinking that Sir Montague Smith was quite correct when he dealt with that mode of reasoning in the case of *Mullwo March and Co. v. The Court of Wards* (L. Rep. 4 P. C. 419, 433.) He says this: 'It was contended at the bar that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial, for it takes one term only of the contract, and at once raises a presumption upon it, whereas the whole scope of the agreement and all its terms ought to be looked at before any presumption of intention can properly be made at all.' Now, it appears to me, having read the judgment of Stirling, J. with great attention, that he has inadvertently fallen into that erroneous method of reasoning. He has laid stress on the fact that Smith and Badeley participated in profits, and has treated that circumstance as *prima facie* evidence of partnership which had to be rebutted by other evidence, instead of taking the whole of the documents and the whole of the evidence, and drawing such inferences as he thought right from the whole." Now, adopting that rule of construction, which was the law before the Act, which seems to me to be precisely what is intended by sect. 2, sub-sect. 3 of the Act, I find that the receipt by a person of a share of the profits of the business is *prima facie* evidence that he is a partner, and if the matter stopped there it is evidence upon which one must act, but if there are a number of other circumstances to be considered at the same time, they ought to be considered fairly together, not considering that there is a partnership which is proved by the receipt of a share of profits unless it is rebutted by something else, but taking the whole state of the circumstances together, and not attaching any undue weight to any of them either the one or the other, but drawing an inference from the whole. Now, in the present case, I cannot treat the receipt of a share of the profits as *prima facie* evidence of a partnership if there are other circumstances to be considered side by side with that. But I do not find there are any other such circumstances in any way conflicting with that. Therefore, I think that this section of the Act applies to this case, and that the receipt of profits is *prima facie* evidence of a partnership in the business from which the profits were derived. But in the present case I go rather further, because there are certain circumstances here which not only, in my opinion,

do not tend to show that that *prima facie* inference is not correct; but the other circumstances, so far as they indicate anything, are in favour of that inference. Now, first of all, the point is about the receipt of profits by drawing. Each partner drew precisely the same sum, generally weekly, but sometimes oftener than once a week. The precise sum drawn was usually 3*l.* each, but sometimes it was more, but when the one drew more the other drew more also; and from those facts I have come to the conclusion that there must have been some agreement as to the mode in which they were to draw out the money. It is impossible to believe that the necessities of these two gentlemen were so exactly equal that each wanted precisely the same sum per week that the other had. Therefore I come to the conclusion that the equality of drawings arose from some agreement between them that the drawings out of the profits should be exactly equal; and, so far as I can find, the surviving partner does not furnish the parties who stated the special case with any materials in any way contrary to that view. Then there is another thing also which I think is not to be ignored, although I do not wish to attach too much weight to it. It is clear in this case (and it was not disputed) that the business was carried on by the two brothers in such a way that they would be liable as partners to outsiders. I think that is a circumstance to be looked at here. Of course, it does not follow that because two persons carry on business in such a way as to be so liable to outsiders that it is the necessary consequence that they must be partners between themselves, but the circumstances may be such as to show that there was an internal partnership as well as a partnership to the world. For instance, supposing one of the two held out to the outside world that they were partners. That, of course, would be evidence upon any question between the two as to whether there was a partnership or not. His statement that they were partners would be evidence against him if he afterwards disputed with the other that there was a partnership. The case that I have put is that of a statement being made in words; but, in my opinion, a statement made by conduct comes to precisely the same thing, if one arrives at the conclusion from their conduct that they are held out to the world as partners. That clearly is so here, and I think it is some evidence. I do not wish to attach too much weight to it, but I think, in the absence of anything to the contrary, the fact that they are partners to some extent is evidence of their being partners altogether. Now, there is another thing also, and that is, that they borrowed money upon two occasions, which money was put, mainly at any rate, into the business. Looking at the statement respecting the mortgages contained in the special case, they were joint mortgages by the two, and each would be liable for the money. It is not stated that each mortgaged his interest for the money, but the statement is that the plaintiff and Chas. F. Davis borrowed 300*l.* on the first occasion; and the statement is made in the same way on the second occasion. I infer from that that they were joint mortgagors, jointly liable, and that the property of each was chargeable for the whole. It is a case, therefore, in which I find that they jointly borrow money for which they became jointly liable, and that they put this money, which they

CHAN. DIV.]

DAVIS v. DAVIS.

[CHAN. DIV.]

jointly borrowed, into the business which they carried on together. I think that is an indication, also of some weight, that a partnership existed between them. I come, therefore, to the conclusion upon the Act, assisted by these various points which I have mentioned, that they were partners as regards the business itself. As regards the land, I come to a contrary conclusion. It is not the law that partners in business, who are tenants in common of the land where the business is carried on, are, from that, necessarily partners as to the land. That is expressly negatived by the first sub-section of sect. 2 of the Act of 1890, and there are many cases older than the Act to the same effect. There is the well-known case of *Fromont v. Coupland* (2 Bing. 170), where two persons who horsed a coach and shared profits were held to be partners, although they were not partners in the horses by which the work was done. Take again the well-known case of ships. Take again the case with reference to land, of *Steward v. Blakeway* (*ubi sup.*). In fact, sect. 2, sub-sect. 1, of the Act seems to me conclusive on the point, unless there is something else to be brought into the case, that they were not partners in the land. The land belonged to them as tenants in common, each, that is to say, being the owner of an undivided moiety, and if they did become partners in the land, so as to make the land partnership property, the questions arise, when it became so and how it became so. There is no evidence that there was any subsequent stage at which anything was done by agreement to make the land itself partnership property; and the Acts which I have referred to as supporting the view of a partnership in the business do not apply to the land itself. In addition to the case of *Steward v. Blakeway* (*ubi sup.*) there is another case of *Morris v. Barrett* (3 Y. & J. 384). That case was not exactly the same, although it was not in some respects unlike this case. It is sufficient to refer to the marginal note in that case: "Where the residue of real and personal estates was devised by a testator to his two sons as joint tenants, and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other, it was held, under the circumstances that they continued at the death of one of them joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates." That case is not unlike this case in its circumstances, and it is worth noticing for this reason, that in that case the partnership in the business was admitted; and although they were partners for twenty years in carrying on the business, and the business was carried on, under circumstances singularly like those under which the present business was carried on, yet that did not constitute any partnership in the land. Now, there are certain cases in which land itself has been considered to be brought into the partnership by the nature of the partnership business. *Waterer v. Waterer* (*ubi sup.*) was a case where two persons were partners in business as nursery gardeners.

James, L.J., in giving judgment, on p. 406, says this: "I am of opinion that this case is governed by that class of cases in which Lord Eldon said that, where property became involved in partnership dealings, it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business." Then passing over part of the judgment, I come to this as the reason for it: "A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes which could not be carried on without it. It is in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs from the trees and shrubs themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate." Then another case was cited of *Davis v. Games* (*ubi sup.*). The case of *Waterer v. Waterer* (*ubi sup.*) was cited, and, it seems to me that the case proceeds upon precisely the same principle. In the course of his judgment Hall, V.C. referred to what Lord Eldon said in *Ripley v. Waterworth* (7 Ves. 425) and to what James, L.J. said in the case of *Waterer v. Waterer* (*ubi sup.*), and said he considered that applicable to the case before him, namely, that the one-third share "became involved in partnership dealings," and "must be regarded as partnership property." I have looked at a good many other cases bearing upon this question, and there are several other instances in which lands have been held to be, to use the words of James, L.J., "involved in partnership dealings," and therefore regarded as partnership property. The well-known case of *Darby v. Darby* (3 Drew. 495) was one of them. There two persons purchased land as a joint speculation with their joint moneys for the purpose of laying it out in building plots and reselling it at their joint profit or loss, and it was held that the land was the very essence of the thing to be dealt with, and that therefore it was converted. There is another case of *Hulton v. Hulton* (62 L. T. Rep. N. S. 200), where a solicitor and other persons entered into a similar land speculation. There was a good deal of evidence in that case, and the view I took was, that there was not enough to show the land was not partnership property; but the Court of Appeal held, under all circumstances, that there was. It was a complicated case, and it is not worth while referring to the details in any way, but to the principle. There were other cases where it has been held that, if lands have become involved in partnership dealings, they must be taken to be partnership property. In my opinion, the mere fact that the two houses which, according to the special case, were not more fitted than any others for the purpose of this partnership were used for it, did not make them involved in the partnership dealings in such a way as to become partnership property. As regards the mortgages which were made it must be borne in mind that

CHAN. DIV.]

Re MILLER'S PATENT.

[CHAN. DIV.]

they stand on exactly the same footing. One comprised the houses which were used for the partnership business, and the other comprised a house and land which were not used for the partnership at all. Therefore I do not think the mortgages throw any light upon the matter. Then the only remaining fact is, that during the continuance of the partnership between the brothers they used part of No. 60 for partnership purposes. They began for the first time to use part of No. 60, Sumner-street for the partnership purposes in Oct. 1889, and they spent some money no doubt in adapting it to the partnership purposes, and that money was the joint money of the two. But, in my opinion, that is not enough to indicate any partnership in the land. If the money they did spend upon this additional piece of land had been spent in buying it instead of improving it, it is clear that it would not have been partnership property, because in that case it would have been hit exactly by the words of the 3rd sub-section of sect. 20 of the Partnership Act, which are these: "Where co-owners of an estate or interest in any land not being itself partnership property are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of any agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase." In this case the money that was borrowed was not applied in paying for the additional piece of land that was brought into the business. If it had been it would have been exactly within that sub-section; but it seems to me so like it, that, although not covered by that sub-section, the same law applies to it. Under the circumstances, I come to the conclusion that there was a partnership in the business, but that there was not a partnership in any of the houses Nos. 60, 62, and 64, Sumner-street.

Wilkinson.—Your Lordship's answers to the questions will be, Yes as to the first question; No as to the second part; Yes as to the third question; and your Lordship will sanction the payment of the costs of all parties as between solicitor and client out of partnership property. That will throw five-eighths on my client, who succeeds; two-eighths on the widow; and one-eighth on the other defendant. My client does not object.

NORTH, J.—Yes, I think that is a reasonable way of arranging it.

Solicitors: *Harry Pearse; A. Hammond.*

Saturday, Jan. 13.

(Before KEKEWICH, J.)

Re MILLER'S PATENT. (a)

Practice—Patent—Revocation of patent—Petition—Mode of trial—Foreigner—Security for costs—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 26.

In the case of a petition for the revocation of a patent, the patentee was out of the jurisdiction, but on his attention being called to the proceedings, he

issued a summons for further and better particulars of objections, and for directions that the petition should be heard on oral evidence. The petitioner issued a summons that the patentee be ordered to give security for costs.

An order was made on the patentee's summons in chambers, for delivery of further and better particulars of objections, and the rest of the summons was adjourned into court, as was also the petitioner's summons.

Held, that the patentee's summons for directions as to the mode of trial of the petition, was unnecessary, and he must pay the costs.

Held, on the petitioner's summons, that the principle upon which the court acted in requiring security for costs, was that a person resident out of the jurisdiction is not allowed under ordinary circumstances to institute proceedings in the Supreme Court here without reasonably satisfying the opposite party that if the application fails, there will be an opportunity of recovering the costs of it; here the patentee was brought before the court as a defendant to defend his right; he had made no application to the court whatever, and could not be ordered to give security for costs.

On the 4th June 1890 letters patent No. 8655 were granted to E. C. Miller, of 75, Queen Victoria-street, London, for an invention of an improved manufacture of a composition or alloys for antifriction purposes, as a communication from abroad by the Magnolia Antifriction Metal Company, of New York.

In 1893, with the consent of the Attorney-General, a petition was presented by H. F. Hoveler for the revocation of the patent. It was stated in the petition that the patent was believed to have been applied for and granted to the said E. C. Miller, as a trustee for the company, and that the said E. C. Miller was believed to be resident in New York, and that it was intended to serve the petition on E. C. Miller, if he would accept service. Particulars of objections were sent with the petition. The petition was made returnable on the 13th Jan. 1894. The attention of Miller was called to the proceedings, and he issued a summons for further and better particulars of objections, and for directions that the petition should be heard on oral evidence. The petitioner then issued a summons for an order that Miller should give security for costs. An order was made in chambers on Miller's summons for delivery of further and better particulars of objections, and the rest of the summons was adjourned into court to come on with the petition. The petitioner's summons was also adjourned into court.

Warmington, Q.C. and John Cutler for the petitioner.—Miller's summons for directions as to the trial of the petition was unnecessary; no such summons was issued in *Drummond's Patent* (6 Rep. Pat. Cas. 576). The application should have been made on the day on which the petition was returnable.

W. N. Lawson for Miller.—No extra expense was incurred by including an application for directions as to the mode of trial in the summons for further particulars.

KEKEWICH, J.—I order the petition to go into the witness list, and to be tried on oral evidence, but the costs of the adjournment into court must be paid by the respondent Miller.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CH. DIV.] THE NEW TRAVELLERS' CHAMBERS LIM. v. MESSES. CHEESE AND GREEN. [CH. DIV.]

Warmington, Q.C. and John Cutler for the petitioner.—Miller is a foreigner, and a mere trustee of the patent for a foreign company; he ought to be ordered to give security for costs. There is no decision as to giving security for costs in the case of revocation proceedings, but we contend that the case is governed by the cases of

Vavasour v. Krupp, 39 L. T. Rep. N. S. 437; 9 Ch. Div. 351;

Apollinaris Company v. Wilson, 54 L. T. Rep. N. S. 478; 31 Ch. Div. 632.

The case of *La Société Anonyme des Verreries Trade Mark* (10 Rep. Pat. Cas. 290), decided by Stirling, J., was the case of expunging a trade mark, and is different from a petition for revocation of a patent; but as the patentee here may be called upon to begin, he should be treated as a plaintiff, and made to give security for costs.

W. N. Lawson was not called on.

KEKEWICH, J.—The principle upon which the court has acted in ordering security for costs in the cases cited of *Vavasour v. Krupp* and *Apollinaris Company v. Wilson*, is perfectly clear and perfectly simple. It is this: That no person out of the jurisdiction is allowed under ordinary circumstances to institute proceedings in the High Court here without reasonably satisfying the respondent to his application—be he defendant or be he in any other way respondent—that, supposing the application fails, there will be tangible opportunity of recovering the costs of failure. That is what is laid down by Cotton, L.J. in the case of the *Apollinaris Company v. Wilson*, and also by the interlocutory observation of Bowen, L.J. in the same case, and it is clearly to be gathered from the report of what was done by Jessel, M.R., in *Vavasour v. Krupp*. It is said that here the patentee whose patent is attacked comes within that principle. I cannot see it. No doubt it might be possible for the petitioner to proceed without the respondent being here. He is entitled to the opportunity of coming, and he need not come unless he desires to do so, but he is brought here by the petitioner; he is brought here to defend his rights; he makes no application to the court whatever; he is in no sense an "actor" within the meaning of that word as used by the Court of Appeal. Therefore it does not seem to me that there is any reason why he should give security for costs. It should be observed that in the case of *Vavasour v. Krupp*, which may be taken as a good illustration of the principle and its application, the costs which had to be secured were not the costs of the action, but the costs of the application to the court. It was desired to make an application to the court that notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells. That of course would increase the costs, and provision had to be made against those costs. Again, in the *Apollinaris Company v. Wilson*, Cotton, L.J. says, at p. 634 of 31 Ch. Div.: "It will be an entirely different question what ought to be done with his costs if and when he is made a party. All we have to deal with now is, whether security has been properly ordered to be given for the costs of this motion, which is not a motion made against him, but by him." Mr. Miller is making no motion—no application to the court at all. If it were necessary for him to do that, probably he would come within the rule, and would be compelled to give

security for the costs of that application. Let me illustrate it by reference to a case which frequently occurs. A man somehow or other has notice of proceedings in this court, which he says affect him, and he applies to be made a defendant. That is a matter for the consideration of the court. If he is without the jurisdiction, and comes within the ordinary rule with regard to security for costs, he certainly would be stopped from making that application until he had given security for costs, that is to say, the costs of that application; but having succeeded after giving security, and having got an order that he be made defendant, there is no further security for costs. He is a defendant out of the jurisdiction, and he is at liberty to defend without giving security for costs. That seems to me an analogy more perfect than analogy often is. Mr. Cutler argued that having regard to the particular practice and the jurisdiction conferred by the 26th section of the Patents, Designs, and Trade Marks Act 1883, this gentleman is really plaintiff, that he is really an actor, and that the petitioner is a defendant in an application by the respondent to support his patent. It is quite possible, and according to the practice, very likely it will be so; that when the petition comes on to be heard, Mr. Miller may be called upon to support his patent in the first instance, and if it is a valid one, to prove that it is a valid one, and to prove that he is the first inventor and so forth. That does not make him now a plaintiff any more than in an action of ejectment when the defendant sometimes is called upon to begin on very little evidence being given by the plaintiff, as for instance a will or devise being put in. The *onus* may be shifted at once, and the defendant may have to begin, and therefore it may be said the defendant is plaintiff. I cannot see that that argument can hold good. Then there is only one other point. It is said that this gentleman is a shadow, that he is the nominee of others, and that he is only defending on behalf of an American Company. As long as he defends, that is enough. Whether he defends on behalf of himself or other people, he is here to defend the patent, and defending the patent, I think he is not within the rule. The order on this summons must be that the costs be Mr. Miller's in any event. I ought to add this: I have not noticed particularly Stirling, J.'s judgment, but it seems to me to follow exactly on the same lines as those I have stated.

Solicitors: *Herbert J. Marcus; Robinson and Stannard.*

Friday, Feb. 2.

(Before KEKEWICH, J.)

THE NEW TRAVELLERS' CHAMBERS LIMITED v. MESSES. CHEESE AND GREEN. (a)

Company—Creditor—Disputed debt—Petition to wind-up—Injunction.

This was a motion by the plaintiff company for an injunction to restrain the defendants, the late solicitors of the company, from presenting a winding-up petition, threatened on account of the alleged nonpayment by the company of certain expenses incurred by the defendants in the promotion of the company.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CH. DIV.] THE NEW TRAVELLERS' CHAMBERS LIM. v. MESSRS. CHEESE AND GREEN. [CH. DIV.]

On the 10th Jan. 1894 the defendants gave the company formal notice demanding payment of their debt, and stating, "This demand is in compliance with the provisions of the Companies Acts." The company, however, considered that under an agreement the existing liabilities of the company ought to be paid before any part of the preliminary expenses, and as they believed that the defendants were about to commence winding-up proceedings, they issued the writ in this action, and gave notice of this motion.

Held, that the court had jurisdiction to grant an injunction to restrain the presentation of a winding-up petition; and in this case, assuming that there was a debt, it appeared that it was not a debt presently payable, therefore the injunction must be granted with costs.

THIS was a motion by the plaintiff company for an interim injunction to restrain the defendants, Messrs. Cheese and Green, the late solicitors to the company, from presenting a winding-up petition, threatened on account of the alleged non-payment by the company of certain expenses incurred by the defendants in the promotion of the company.

The company was registered on the 28th May 1891, with a nominal capital of 20,000*l.* in 1*l.* shares, the object of the company being to establish a proprietary club to be called "The New Travellers' Club," and to adopt an agreement for vesting in a trustee for the company the club-house, 96 and 97, Piccadilly, and the exclusive use of the name of "The New Travellers' Club," which belonged to a Mr. Rupert Green. By that agreement it was agreed that Green should pay all the costs of the promotion and formation of the company, and that he should receive, as consideration for the sales to the company under the agreement, and for his undertaking the payment of the preliminary expenses, the sum of 4250*l.*, of which 1250*l.* was to be paid in cash, and the remainder in 3000 fully paid-up 1*l.* founders' shares. Article 6 was as follows:

The said sum of 1250*l.* shall be paid to the said Rupert Green, or as he shall direct, as and when the directors of the company shall think fit.

Under that agreement an allotment of founders' shares was made to Mr. Green. In Nov. 1891 Commander Wickham, R.N., the secretary to the company, received a notice that Mr. Green had assigned all his interest under the agreement to a Mr. and Mrs. Douglas Ross, for whom the defendants, Messrs. Cheese and Green, acted as solicitors, as well as being the solicitors to the company.

On the 10th Dec. 1891 Mr. Ross wrote an order—in the form of a cheque—requesting the directors to "pay Messrs. Cheese and Green the sum of 175*l.* out of the 1250*l.* due to me, and your receipt shall be a sufficient discharge." The directors, however, declined to pay, considering that, in their judgment, the amount was not at present payable. Subsequently on the 28th Dec. 1893, Messrs. Cheese and Green severed their connection as solicitors to the company, and on the 10th Jan. 1894 gave the company formal notice demanding payment of the 175*l.*, and stating, "This demand is in compliance with the Companies Acts." The company, however, considered that the existing liabilities of the company ought to be paid before any part of the preliminary expenses, and, as they believed that the defendants were

about to commence winding-up proceedings, they issued the writ in this action, and now moved for an injunction. The 175*l.* was for disbursements made by the defendants in the promotion of the company, and the directors did not deny that the amount was properly due, but contended that their discretion in the matter was expressly preserved by article 6 of the agreement.

Warmington, Q.C. and George Henderson for the plaintiffs.—We submit there is no debt due now; article 6 of the agreement reserves the right to the directors to pay the 1250*l.* to Green or his order as and when they shall think fit. The club has been formed with 1500 members, and their subscriptions are not due until the 1st April; a winding-up petition would damage the reputation of the company. The cheque of the 10th Dec. 1891 did not constitute an assignment:

Schroeder v. Central Bank of London, 34 L. T. Rep. N. S. 735; 24 W. R. 710.

The court has jurisdiction to restrain by injunction the presentation of a winding-up petition where the debt is *boni fide* disputed, and the company is solvent:

Cercle Restaurant Castiglione Company v. Lavery, 18 Ch. Div. 555.

Renshaw, Q.C. and Eve for the defendants.—[KEKEWICH, J.—"This demand is in compliance with the provisions of the Companies Acts;" what justification is there for using those words?] It is a notice of demand by the defendants for payment of the debt of 175*l.*, under sect. 80 of the Companies Act 1862. We could have presented a petition without notice. This is money out of pocket, and we are justified in our proceedings. The agreement was partly performed, and we submit that we have established our debt. The words "when the directors think fit" do not mean an unlimited period.

KEKEWICH, J.—The injunction ought, I think, to be granted. Mr. Renshaw takes credit that notice was given under the Companies Acts, and says that the defendants might have presented a petition without notice. But there is no doubt that under the notice of the 10th Jan. the defendants proposed, or, in the language of the Court of Chancery, "threatened and intended" to present a petition, and if the presentation is improper and against conscience, it will be restrained in accordance with the decision in *Cercle Restaurant Castiglione Company v. Lavery*, and the other decision reported as a note to the case. I think that this is just a case in which a writ ought to be issued for the protection of the plaintiffs; upon receiving the notice, they were bound to issue it. The defendants seek to recover a debt from the company. Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt—if the question is not a mere question of quantum, but whether there is in fact a debt or not—a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition. Is there a debt in the present case? Who were the original clients of Messrs. Cheese and Green? The costs in question

CHAN. DIV.]

Re ANN; WILSON v. ANN.

[CHAN. DIV.]

were incurred by someone; it might be that they are due to Messrs. Cheese and Green. The costs incurred are not costs properly so called, but are disbursements, with regard to which it is not denied that there is due to these gentlemen 175*l*. Could that sum be recovered against the company? At the time the debt was incurred, the company was not in existence. There was no direct agreement between Messrs. Cheese and Green and the company for payment of these costs. How do they establish their debt? They say they have an equitable assignment in the letter or order from Ross to the directors of the 10th Dec. 1891: (*Rodick v. Gandell*, 1 De G. M. & G. 763.) I doubt who were the defendants' original clients; the assignment was from Ross, and possibly may constitute an agreement on the ground of adopting the original agreement, but I am not at present satisfied that there was any contractual relation between the company and the defendants as to the sum in question. If there was any relation at all it was that of surety for the debt of the original clients of the defendants; there was no discharge of the original clients, but I do not think it necessary to decide the point. These gentlemen, the defendants, were the solicitors acting in the promotion of the company, and attested the signature to the agreement and the memorandum of association. If they desire to establish a contractual relation with the company, they must at any rate bear in mind that they had full knowledge from the first of clause 6 of the agreement, which provided that the sum of 1250*l*. should be paid "as and when the directors of the company think fit." Mr. Renshaw argued that the words "when the directors think fit" do not mean an unlimited period. Under the agreement Mr. Green was to retain 4250*l*., a large sum, but I suppose not too large for the great benefits which he passed. He was to be paid the greater part of that, all but 1250*l*., in 3000 fully paid-up 1*l*. founders' shares. I will not go into the articles, but founders' shares are supposed to be valuable among those who promote companies, and the evidence shows that the parties thought so here. The company say, "You may have these shares, and the rest is to stand over." That is the position of the directors, and they decline to pay this claim until the other liabilities of the company are discharged, because they are of opinion, in the honest exercise of their duties as directors, that the money ought not yet to be paid. I have not heard a word of aspersion on the honesty of the directors, or on the exercise of their powers. Everything points to the fact that it is not convenient to pay the 1250*l*. now. My conclusion is that the directors are doing what is fair and right. Their *bona fides* has not been assailed in the slightest degree. They meant to exercise their discretion. Therefore, even if there is a debt, I do not think it is a debt presently payable, even apart from the complete knowledge which these solicitors had from first to last. Therefore I am of opinion that the injunction must go, and that the costs of the motion must be the plaintiffs' in any event.

Solicitors *Hunters and Haynes; Last and Soas.*

Friday, Dec. 8, 1893.

(Before KEKEWICH, J.)

Re ANN; WILSON v. ANN. (a)

Married woman—Contract—Separate property—General power of appointment—Debts—Liabilities—Assets—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1, sub-sects. 3 and 4, s. 4.

A testatrix married in 1879, and since Jan. 1, 1883, had contracted engagements with certain creditors. She had a life interest under her father's will, with a general power of appointment by will, and with that exception she had no separate estate at the time she contracted the engagements with her creditors. She executed the general power of appointment by her will, and died, leaving her husband her surviving. The creditors, in the administration of testatrix's estate, claimed to have the debts paid out of the property which she had appointed.

Held, that sub-sects. 3 and 4 of sect. 1 of the Married Women's Property Act 1882 ought to be read into sect. 4, and that the proper reading of sect. 4 was that, when the will of a married woman made in exercise of a general power had come into operation by the death of the donee of the power, thenceforward the property so appointed became liable to her debts and liabilities in the same manner as if it had been separate estate at the time she entered into the contracts.

Held, therefore, that the appointed property must be treated as assets of the testatrix just as if it had been separate estate at the time she contracted the debts in question.

RALPH BRADLEY, who died in 1878, by his will gave his residuary estate to trustees in trust for sale, and to divide the proceeds equally among his four children, of whom Alice Bradley was one; but her share was to be retained by the trustees, upon trust to pay the income to her for life for her separate use without power of anticipation, and after her death in trust for such persons as she should by deed or will appoint, and in default of appointment in trust for her next of kin according to the statute. In 1879 Alice Bradley married Frank Ann. She died in 1892, having by her will, made in 1886, in pursuance of all powers, given, after certain legacies, all the residue of her estate to trustees in trust for sale, and to hold the proceeds in trust for her two infant children equally. She had no property whatever other than what she derived under her father's will. She had during her coverture, and subsequently to the passing of the Married Women's Property Act 1882, incurred various judgment and other debts. This was an action for the administration of Mrs. Ann's estate. The creditors, in the administration of the testatrix's estate, claimed to have their debts paid out of the property which she had appointed, on the ground that the property so appointed was, under sect. 4 of the Married Women's Property Act 1882, liable for her debts "in the same manner as her separate estate was made liable under that Act."

The chief clerk allowed the claim. A summons was taken out to vary the chief clerk's certificate on the ground that at the date of contracting the engagements the testatrix had no separate estate free from anticipation, and her

(a) Reported by FRANCIS E. ADY, Esq., Barrister at-Law.

CHAN. DIV.]

Re ANN; WILSON v. ANN.

[CHAN. DIV.]

engagements could not be treated as debts payable out of the appointed property.

Boome for the plaintiffs, the executors.

Clayton (*Warmington*, Q.C. with him) for the infant defendants.—My point is, that the testatrix had no separate property during marriage, except what she was entitled to under her father's will to her separate use without power of anticipation. This is not a case within sect. 4 of the Married Women's Property Act 1882; it is a condition precedent to the effect of that section that the married woman should, at the time of contracting liability, be actually entitled to some separate estate free from anticipation :

Pike v. Fitzgibbon, 44 L. T. Rep. N. S. 562; 17 Ch. Div. 454.

Sub-sects. 3 and 4 of sect. 1 of the Married Women's Property Act 1881 extend a married woman's power of binding her separate estate, but I submit that neither before nor since 1882 had the testatrix separate property :

Palliser v. Gurney, 19 Q. B. Div. 519.

The property appointed by the testatrix's will never became her "separate estate," for the appointment did not operate until after her death. In *Scott v. Morley* (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120) the judgment was limited to separate property. This case is governed by *Re Roper* (59 L. T. Rep. N. S. 203; 39 Ch. Div. 482), and *Ex parte Gilchrist*; *Re Armstrong* (55 L. T. Rep. N. S. 538; 17 Q. B. Div. 521), rather than by *Re De Burgh Lawson* (41 Ch. Div. 568) :

Re Parkin; *Hill v. Schwarz*, 67 L. T. Rep. N. S. 77; (1892) 3 Ch. 510;

Farwell on Powers (2nd edit.) p. 264.

Method and *Chester*, for creditors, were not called on.

KEKEWICH, J.—I think the construction attempted to be put upon sect. 4 of the Married Women's Property Act 1882 is possible grammatically, and may be to some extent justified by the decisions, but it is inconsistent with the Act as a whole, and is so narrow that, in my opinion, the court ought not to adopt it unless it is driven to do so, which in my judgment it is not. We are now dealing with a general power of appointment exercised by will only. In that case, when you refer to the execution of the power, you refer to the death of the appointor; it is at that time, and no other, that it must have the effect given to it by the statute, namely, making the property appointed liable for something. The question is for what? Sect. 4 says "for her debts and other liabilities." The argument is this: A married woman has, strictly speaking, no debts or liabilities at all. This is stated clearly by Kay, J. in *Re Roper* (59 L. T. Rep. N. S. 203; 39 Ch. Div. 482); but that statement assumes, and I am bound to assume, that there are some engagements by a married woman which may be properly called "debts and liabilities." It would stultify the legislation to say that there can be no debts or liabilities of a married woman, when the section speaks of "her debts and other liabilities." What must be meant therefore is, that these engagements—these results of quasi-contract—which would create debts and liabilities in the case of a man, would only create a charge on separate property in the case of a married

woman, and for that her separate estate is to be liable. The argument is that, inasmuch as, according to the decision in *Palliser v. Gurney* (19 Q. B. Div. 519), a married woman cannot enter into a contract binding on her separate estate unless she is, at the time the contract is entered into, possessed of some separate estate, however small, therefore there can be no debts and no other liabilities within the section except upon the basis of separate estate existing at the time the debts or liabilities are contracted; and, that in the absence of that separate estate existing, there are no debts or liabilities at all. The result of that would be this, that a married woman might give orders for large amounts of, say, millinery or jewellery, she having a general power of appointment over certain property, but having no separate estate; and that then the appointees under the will of the property would take it, but the milliner or jeweller would not, simply because she had not a 5*l.* note at the time she gave the orders. The Legislature may have made such a provision, but I do not find it expressed, and it would be entirely inconsistent with the scheme of the Act, which is to put a married woman having separate property on the same level as regards her debts and liabilities as a man or a *feme sole*. In my opinion, the narrow construction suggested is precluded by the words, "in the same manner as her separate estate is made liable under the Act." What is it that the Act does with regard to a married woman's separate estate? It was provided by sect. 1, sub-sect. 3, that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown"; and by sub-sect. 4, that "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property, which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Those sub-sections should be read into this sect. 4, so that the property appointed by the married woman is to be made liable for her debts and other liabilities; that is to say, those engagements which would be her debts or liabilities, if she had been competent to enter into them, would be payable not only out of property belonging to her at the time, but also out of property which was acquired by her after the date of these engagements. That, in my opinion, is the meaning of the statute. But then, it is said, I have against that to apply the doctrine of *Palliser v. Gurney*. It appears to me, however, that the Legislature has met that by saying that the after-acquired property shall be liable. *Palliser v. Gurney* says that the after-acquired property of the married woman is to be under no liability unless she had some property at the time her engagements were entered into; but the Legislature has said, in sect. 4, that when the will has come into operation by the death of the donee of the power, and the power has been exercised by the will, thenceforward the property appointed becomes liable to her debts and liabilities in the same manner as if it had been her separate estate at the time she entered into the contract or engagement. Of course, these words are not in the section, but this appears to me to be the proper reading of the section, and to read it otherwise

would be to adopt too narrow a construction, for the reasons I have mentioned. My holding therefore is, that these engagements which were entered into by the married woman during her coverture, and which might have been proved against her separate estate if at the time of entering into each contract in succession she had separate estate, may now be proved against the property appointed by her will under her general power. Accordingly, I make no order on the summons.

Solicitors: Dennison and Co.; E. C. Kilsby; E. J. Mote.

Thursday, Feb. 8.
(Before KEKEWICH, J.)
LEMMON v. WEBB. (a)

Residential property — Trees — Overhanging branches — Adjoining owners — Nuisance — Cutting of overhanging branches — Ancient trees — Trespass — Injunction — Damages.

The plaintiff claimed a declaration that the defendant was not entitled to cut the branches of the plaintiff's trees, which had overhung the defendant's land for over twenty years, but was only entitled to cut the recent growth; further, that the defendant was not entitled to enter the plaintiff's land for the purpose of cutting overhanging branches, or at all events not until after due notice to the plaintiff. The plaintiff also claimed an injunction and damages. Held, that to allow the branches to overhang the adjoining property was a nuisance, which the person suffering from the nuisance was entitled to abate, but only upon giving reasonable notice. It appearing that the defendant had no further intention of entering the plaintiff's property or cutting branches, there would be no declaration, and no injunction, but the Court ordered the defendant to pay 5*l.* damages, and the costs of the action.

THE plaintiff, Thomas Warne Lemmon, in 1879 became the owner of a residential property called Ewhurst Place, near Guildford, in the county of Surrey. The plaintiff subsequently sold the adjoining property called Malquoits to the defendant Walter Webb. On his boundary the plaintiff had large elm and oak trees, of great age, the boughs of which overhung the defendant's property. The plaintiff alleged that without giving him any notice the defendant cut the branches which overhung the defendant's property. The plaintiff claimed a declaration that the defendant was not entitled to cut the branches of the plaintiff's trees, but was only entitled to cut recent growth; further, that the defendant was not entitled to enter the plaintiff's land for the purpose of cutting overhanging branches, or at all events not until after due notice to the plaintiff. The plaintiff also claimed an injunction and damages.

Warmington, Q.C. and B. F. Norton for the plaintiff.—The defendant by putting his ladder against the trunk of the plaintiff's tree committed a trespass. He gave the plaintiff no notice, and no opportunity of abating the nuisance. Where the nuisance has not been created by the person upon whose property it exists, then the neighbour cannot abate it.

Penruddock's case, 5 Rep. 101; Coke's Rep. vol. 3, part 5, p. 205;
Earl of Lonsdale v. Nelson, 2 Barn. & Cr. 302;
Jones v. Williams, 11 M. & W. 176.

The defendant had no right to abate the nuisance without giving the plaintiff notice. The trees have overhung the neighbour's property for over twenty years, the boughs have existed long over twenty years. Suppose it was the case of a house overhanging, it might be a nuisance, but could not be abated.

Marten, Q.C. and Job Bradford for the defendant.—This is not a case of nuisance, the defendant had a right to his property *usque ad cælum*. The defendant on his own land cut the overhanging branches:

Norris v. Baker, 1 Rolls Rep. 393, nom. *Morrice v. Baker*, 3 Bulstr. 196;
Viner's Abr. vol. 20, "Trees."

No notice was necessary; in *Penruddock's case* the neighbour went on to someone else's land to abate a nuisance. Here there is no nuisance; the defendant owns the property up to the sky. There is no easement as to branches: (Gale on Easements (6th edit.) page 461.)

KEKEWICH, J.—Given two adjoining owners with a hedge dividing their properties, and belonging to one of such owners that hedge containing trees, some of the branches of which overhang the land of the other, what is the right of that other as regards those branches, which certainly interfere with his property, that is to say, with something between heaven and earth belonging to him? The question is one of law, decided at any rate fifty years ago, and really long before that. I need not take *Penruddock's case*, but it will suffice to take the statement of it from the judgment of Lord Wensleydale in *Jones v. Williams*, where he identifies the case in the reports with Jenkins' 6th century, case 57. In that case, and also in the case of *Earl of Lonsdale v. Nelson*, which is twenty years before that, making seventy years ago, there is a clear distinction drawn between nuisance of commission and nuisance of omission. It is argued by the defendant that this is not a nuisance at all. In many senses it is not, but it is so called in all the authorities, and it is too late for counsel in court to say that a neighbour's tree overhanging my land is not a nuisance. It is a nuisance of omission; that is to say, it is negligence on the part of the owners of the tree to allow the branches to overhang the land. These cases show that in that event the person suffering the nuisance is entitled to abate it, but on giving notice. Of course that means reasonable notice—the object, I have no doubt, though I do not find it stated in the books, being that the owner of the tree should have a fair opportunity of abating the nuisance while preserving his own property. It is argued that the plaintiff cannot complain of boughs being cut which he cannot see from his own house, and that the cutting does not interfere with his amenities, and so on. But the tree is his. He must not allow it to interfere with his neighbour's rights. To say a man has not an interest in his oak tree probably 100 years old, or at all events such an interest as entitles him at any rate to have an opportunity of saying how a bough should be cut, and when it should be cut, is a somewhat strong assertion, and not

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

consistent with either law or common sense. He must have that opportunity. In this case the opportunity was not given, and there really is no justification for not giving it. Lord Abinger, in a few remarks in that case of *Jones v. Williams*—and the law is stated to the same effect elsewhere—says at page 182 of 11 M. & W., “It might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice.” And I suppose there might be fairly added to that, danger to property, which has been argued here. There is no suggestion here of danger to life or health, but it is said that these boughs were dangerous to cows. I cannot so find. The obstruction to the bridle path, though it cannot be forgotten, I pass over in this connection, because that is simply a matter of inconvenience. What was the danger? Put aside any such extraordinary tempest as according to the cases on that not very clear branch of the law might be regarded as the act of God, and take the ordinary incidents of winter weather affecting trees of this kind, what real apprehension was there of these branches being broken down? There really was none. It is not suggested that there was any. But fortunately, in order to come to the rescue of the defendant’s case, a bough fell in the following August, and so it is argued that because a branch heavily laden with foliage in August fell, therefore other branches, which were not laden with foliage, might possibly have fallen in the following January. But that does not strike one as a very practical argument. There really was no imminent danger. Why, then, this sudden determination on the part of Mr. Webb? The trees have stood there for a very long time—how long we do not know; but the defendant himself confessed to having regarded them as a nuisance for fifteen years, and his own case is that, by that gradual growth which is noticeable in an oak as much as in any other tree, the boughs have, by slow degrees, become longer, and heavier, and more obstructive, and more dangerous. Well, if he has waited, I will not say for fifteen years, but for two or three years, surely he could have waited for a week, so as to give the plaintiff an opportunity of doing what on proper notice, it seems to me, it would have been his bounden duty to do. I give the defendant credit for what he stated, that he did not do it because he was vexed with the plaintiff on other matters, and I will give him credit that he did not wish to do an unneighbourly thing; but, if he had taken the further precaution of being advised by somebody else instead of advising himself, I think he would not have acted as he did. I do not wish to impute to him anything more than an unfortunate reliance on his own judgment. But in his defence he has set up a claim to the right. When his attention is called to it, when he is told he should have given notice, he really stands by his claim. Of course I know the plaintiff’s case is put a good deal too high, and I know also that there is this question of trespass in cutting the trees, which I pass by because I do not think it is important; but even so the defendant might very easily have taken the line which he now takes in the witness-box, when he says that if it had occurred to him he would have given notice. However, he did not do so. He says he does not threaten or intend to cut other trees, but he reserves his legal rights;

that is to say, he puts me to decide the question, and I decide it against him. Having regard to what he has said, and that there is no evidence of an intention to cut anything else, though I am aware a complaint has been made of other boughs, I think I ought not to grant any injunction, which might be a reflection on the defendant’s honesty. I do not think there is any occasion for a declaration, and the justice of the case will be met by ordering the defendant to pay 5*l.* damages, and the costs of the action in the High Court.

Solicitors: *Broughton, Nocton, and Broughton; Walter Webb and Co.*

Jan. 30 and Feb. 9.

(Before KEKEWICH, J.)

KEITH, PROWSE, AND CO. LIMITED v. NATIONAL TELEPHONE COMPANY LIMITED. (a)

Landlord and tenant—Telephone wires—Agreement—Yearly tenancy—Rent—Waiver—Notice to terminate agreement “forthwith” and disconnect wires—Injunction.

This was a motion by the plaintiffs to restrain the defendant company from disconnecting the wires used by the plaintiffs in their business. By an agreement to terminate in three years from the 1st July 1889 the defendants agreed to supply wires to the plaintiffs, the plaintiffs paying a quarterly rent. Clause 8 of the agreement provided that if the rent was in arrear for fourteen days the company might determine the agreement by notice to the renters, and such agreement should determine as from the time of giving such notice. On the 30th June 1892 the agreement expired by effluxion of time, but the parties went on by mutual consent as before, the rent being paid quarterly, but no fresh agreement in writing was entered into. On the 29th Dec. 1893 the plaintiffs gave notice to the company to terminate the existing arrangement or tenancy at the expiration of six months from the “31st Dec. 1893.” In reply the company sent to the plaintiffs notice dated Saturday, “30th Dec. 1893,” terminating the existing agreement “forthwith,” and demanding rent up to the 31st Dec. 1893, and informing the plaintiffs that the company would on Monday, 1st Jan. 1894, proceed to disconnect the wires and remove the instruments. The plaintiffs paid the rent.

Held, that the essence of the agreement was that the wires should be open to the use of the plaintiffs, and though the court could not compel complete specific performance of an agreement of this kind, it could grant an injunction to restrain the disconnection of the wires; that the relation of landlord and tenant was established as regarded these chattels; that the company by accepting rent for the 31st Dec. had waived their notice; injunction granted restraining the company from interfering with the private wires pursuant to their notice, until trial or further order, the costs to be costs in the action.

THIS was a motion by the plaintiffs for an interim injunction to restrain the defendant company from cutting, disconnecting, removing, or otherwise interfering with any wire, which on the 30th Dec. 1893 was used or connected for use as a

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

private wire, or an exchange wire for telephonic communication for the purposes of the plaintiffs' business.

The plaintiffs' business was, among other things, that of selling, letting, and booking seats at theatres and other places of entertainment. Their head office was at No. 48, Cheapside, and they had numerous branch offices in various parts of London, connected with the head office by telephone wires. They had also "exchange" wires connected with various hotels. The private wires were originally rented from the defendant company under an agreement dated the 14th Oct. 1889, by which the defendants agreed to erect and maintain wires and telephonic apparatus, and the plaintiffs agreed to hire and pay to the company 11l. per annum for each wire, payable quarterly, the first quarter ending the 30th Sept. 1889, and each subsequent payment to be made on the corresponding day in each quarter, the agreement to terminate at the end of three years from the 1st July 1889. Clause 8 of the agreement was as follows:

If the rent shall be in arrear or unpaid for fourteen days next after the days and times herein appointed for payment of the same, or if there shall be any breach or non-observance of the terms of this agreement by the renters, the company may determine this agreement by notice to the renters . . . and such agreement shall determine as from the time of giving such notice, but such determination shall not prejudice or affect the rights or remedies of the company in respect of anything done or omitted by the renters prior thereto.

Then the agreement stipulated that it should be subject to all proper wayleaves, permissions for attachments, poles and other easements, being obtained and retained by the company; and the renters covenanted to give every facility in their power in the way of poles, attachments, &c., for running their own wire, and also those of other subscribers to the company's system, whether exchange or private. The agreement expired by effluxion of time on the 30th June 1892, but the parties went on by mutual consent as before, the rent being paid on the same quarter days, but no fresh agreement in writing was entered into.

On the 29th Dec. 1893 the plaintiffs gave notice to the company to terminate the existing arrangement or tenancy at the expiration of six months from the "31st Dec. 1893." In reply the company sent the plaintiffs notice, dated Saturday, "30th Dec. 1893," terminating the existing agreement "forthwith," and demanding rent up to the "31st inst.," and informing the plaintiffs that the company would on Monday morning, the 1st Jan., proceed to disconnect the wires and remove the instruments. The plaintiffs on the same day paid the rent demanded, and at once applied for and obtained from the vacation judge an *ex parte* injunction. The motion to continue the injunction was argued on the 11th Jan., the argument dealing only with the "private," and not the "exchange" wires.

Warmington, Q.C. and Waggett for the plaintiffs.—The defendants have not given us proper notice. After the agreement terminated on the 30th June 1893 a yearly tenancy was created, and we were entitled to six or at all events three months notice. The plaintiffs are in the position of tenants, being called renters, and paying rent: (Coke upon Littleton, 6 (a) and 20 (a) *tenementum*.) Here there is a grant of apparatus by the

defendants; also a licence by the plaintiffs to the defendants to place appliances for the use of the plaintiffs as well as other persons. The defendants took rent for the 30th and the 31st Dec. after giving the notice: they have waived their notice by accepting rent for the 31st Dec., rent paid in respect of an agreement which they said expired on the 30th Dec. We have a receipt in full discharge of rental between the 1st April and 31st Dec.

Renshaw, Q.C. and W. D. Rawlins for the defendants.—The plaintiffs ask for an injunction practically to enforce specific performance of an agreement, which the court will not grant:

Fothergill v. Rowland, 29 L. T. Rep. N. S. 415; 17 Eq. 132;

Ryan v. Mutual Tontine Westminster Chambers Association, 67 L. T. Rep. N. S. 820; (1893) 1 Ch. 116.

Secondly, the agreement came to an end on the 30th June 1892, and the forfeiture was not waived. When a partnership has come to an end by effluxion of time, and the business is continued without fresh articles, each partner can instantly determine the partnership:

Neilson v. Mossend Iron Company, 11 App. Cas. 298;

Cox v. Willoughby, 42 L. T. Rep. N. S. 125; 13 Ch. Div. 863.

It is idle to grant an injunction; we could give notice to-morrow to terminate the agreement forthwith.

Warmington, Q.C. in reply.—In *Davenport v. The Queen* (37 L. T. Rep. N. S. 727; 3 App. Cas. 115) it was held that, assuming a forfeiture had accrued, it was waived by the receipt of rent:

Croft v. Lumley, 6 H. L. Cas. 672.

KEKEWICH, J.—Many points were discussed on the hearing of this case, but I do not find it necessary to deal really with more than two. The first question is, whether this is a case in which the court ought to grant an injunction if the plaintiff otherwise makes out his equity having regard to the undoubted fact that it would be impossible for the court to decree complete specific performance of the whole agreement. The company agreed in the first paragraph to erect and maintain in working order, subject to provisions, certain wire and telephonic apparatus relating thereto. It would be impossible for the court to supervise a complete performance of that agreement, and to see to the maintenance of the wire and telephonic apparatus during the period of the agreement, and that, no doubt, raises a difficulty. *Fothergill v. Rowland*, before Jessel, M.R. (29 L. T. Rep. N. S. 415; L. Rep. 17 Eq. 132), was referred to, and he there asked counsel for a definition of the cases in which specific performance was impossible, or rather in which an injunction ought not to be granted on the ground that specific performance was impossible; and he says at page 141 of L. Rep. 17 Eq.: "I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorise the interference of the court at all, or something of that kind."

And then he comments on *Lumley v. Wagner*, and an earlier case before Lord Cottenham, leaving it as it is left, notwithstanding the later decisions, in rather an indefinite state. Here it is to be observed that there is no question of erecting the wire and telephonic apparatus. That has all been done. The only question can be about maintenance, and it seems to me that the difficulty of supervising the maintenance ought not to prevent the court from saying that the company must not cut off the wires. They may not be compellable to maintain the wires and telephonic apparatus; that is to say, damages might be the only remedy for non-compliance with that; but yet the essence of the agreement is that the wire and telephonic apparatus being there, shall be open to the use of the plaintiffs, and that seems necessarily to go to the root of the whole matter. Analogies are dangerous, and I am far from saying that the analogy which I am going to mention is strictly applicable; but it has occurred to me to take a parallel case, and this occurs to me to be one which is near it in principle. Suppose an agreement such as is common in the north of England, for the tenancy of manufacturing premises, the lessor providing power, which he agrees, for valuable consideration, to provide and maintain in working order, as is done here. He has (let it be supposed) all the power in action in some neighbouring building, and then in breach of his agreement he threatens, not to allow it to get into disorder and disrepair, but to cut off the power. I can hardly believe that the court would hesitate in such a case to say that "you shall not do it; it is a direct breach of the agreement and goes to the root of the agreement; your agreement was to let the premises with the power, and to say that you will cut off the power is such a direct breach of the agreement and so destroys it that you ought to be restrained." I think those considerations are enough to get over the difficulty. Then comes the other one to which most attention was called; the question whether the action of the defendant company here really made it impossible for them to say the agreement is at an end. There was some argument on the question whether this can properly be regarded as a case of landlord and tenant, and the argument went so far as to suggest that the company are not the landlords, but that Messrs. Keith, Prowse, and Co. are the landlords. To my mind that is not so. The company erect this wire and telephonic apparatus. It belongs to them, and although it is not the ordinary case of a landlord and tenant of real property, still there is a hire agreement, and the word "hire" is used, and Keith, Prowse, and Co., who are to have the enjoyment for a consideration of this apparatus, are described as the renters. To my mind a case of landlord and tenant as regards these chattels is established. Then under the agreement I will assume for the present purpose—though I wish to observe that is an assumption which will require examination—that under clause 8 the company might determine the agreement by notice forthwith as they did. They determined it forthwith on the 30th Dec. It was argued that "forthwith" might mean at some future time. I cannot give that grammatical construction to the word. "Forthwith" means now—as from this moment—henceforth; and they must be regarded, if they gave the notice under that clause, or under any power, as having determined it as from that

moment. Then they at the same time demand rent up to and including the 31st Dec.: that rent was paid and it was accepted as rent. I have the demand, and I have the receipt before me. The result was that the company demanded and received rent for a day beyond the time when the agreement was determined. I think it is impossible for them to affirm and disaffirm—to approbate and reprobate in that way; and according to the ordinary law relating to landlord and tenant they must be regarded as having waived or abandoned their entry. I need not refer to many cases. They are recited in *Davenport v. The Queen* (37 L. T. Rep. N. S. 727; 3 App. Cas. 115). Sir Montague Smith, who delivered the judgment of the court, refers to *Croft v. Lumley* and older cases. I think that the company have put it out of their power now to say the agreement was determined on the 30th Dec., because they have recognised the fact, by receipt of rent for the 31st, that Keith, Prowse, and Co. were in possession as tenants, and liable to payment for the use of the apparatus one day after that. It is a small point, but still one must adhere to the law as I understand it. The case has been treated as if the notice was given under clause 8, and that led to a discussion what the nature of the tenancy or occupation of the plaintiffs was at that time. The agreement was an agreement certain for three years from the 1st July 1889. Therefore it would come to a conclusion in July or the last day of June 1892. From that time forward Messrs. Keith, Prowse, and Co. had enjoyed and used this apparatus without any new agreement, and not only that, but the rent had been paid, and it was ultimately paid according to the old agreement. The result was, that there was, it seems to me as a matter of fact, a holding over upon the terms of the old agreement. I do not mean to decide this point, but I mention it, as my decision on the preceding point might be regarded as implying that now the Telephone Company might intervene, and say, "We determine it to-day, immediately, and we will take care not to ask any rent beyond to-day," and then say they were entitled to immediate entry. If they wish to try that question they will have to try it, of course, and the question must be argued and decided. It was not argued sufficiently before me for me now to pronounce a decision on the point, but my present impression is that the receipt of rent after the 30th June 1892, and the continued occupation by Messrs. Keith, Prowse, and Co., constituted a tenancy from year to year, and that therefore an immediate notice to determine is not open to the company. Keith, Prowse, and Co. took that view, and gave a six months' notice to determine. I am not now saying whether it is right or wrong, but I do not think that the Telephone Company ought to interfere without that question being submitted to judicial decision. That being so, there really is nothing to be done except this—to restrain the company from interfering with the private wires, pursuant to the notice which they gave, until trial or further order. I am not deciding anything more. That notice I regard as inoperative; that is to say, to the extent of allowing them now to cut off the wires. The costs will be costs in the action.

Solicitors: *Reynour, Phillips, and Golding; Gaine.*

Feb. 20 and 21.

(Before KEKEWICH, J.)

GREAT WESTERN RAILWAY COMPANY v. THE
CEFN CRIBBWE BRICK COMPANY. (a)*Railways—Tramway converted into railway—
Mines—Subsidence—Adjacent and subjacent
supports—Injunction—Damages—Railways
Clauses Act 1845 (8 & 9 Vict. c. 20), ss. 77, 78.*

An action by a railway company to restrain the defendants, the lessees of certain mines under the plaintiffs' line of railway, from working their mines in such a way as to injure the railway by taking away the necessary support, and for damages.

By a private Act of Parliament in 1825 a company was incorporated with power to make and maintain a "railway or tramroad," and to take lands for that purpose. By sect. 25, all mines were to be deemed to be excepted out of any conveyance, and might be worked by the owners, though in such a manner as not to injure the company's works. In 1830 certain surface lands were conveyed to the company. In 1855, by an Act of Parliament, there being only a horse tramroad then in existence, the Act of 1825 and subsequent Acts were repealed, and provisions were made for altering the line so as to be suitable in curves and inclines for locomotive engines. The Lands Clauses Act 1845 and the Railways Clauses Act 1845 were incorporated with the Act, but it was provided that anything done before the passing of the Act of 1855, under the repealed Acts, should be as valid as if they were not repealed, and that the Act should be subject and without prejudice to everything so done, and to all rights consequent on anything so done. The company was eventually amalgamated with the plaintiff company. The defendants in working their mines had caused subsidences on and near the railway, and they insisted on their right to continue working unless the mines were bought by the railway company under the provisions of the Railways Clauses Act 1845. The plaintiffs contended that their right to subjacent and adjacent support was preserved by the Act of 1855.

Held, that the subsidences were caused by the defendants' works, and on the evidence the subsidences had been very little accelerated by the working of the railway; the defendants' predecessors had made their bargain in 1830 under the Act of 1825, and there was no reason for saying that, because the railway was used in a somewhat different manner, the rights then reserved to the plaintiffs' predecessors were gone; the plaintiffs were governed by the Railways Clauses Act 1845 from the date of the Act of 1855, so far as the general Act was applicable to any particular case; but the Act of 1855 had, neither by express words, nor by implication, altered the express contract entered into in 1830 under the Act of 1825, the rights under which Act were reserved by the Act of 1855. Injunction granted and inquiry directed as to damages.

THIS was an action by the Great Western Railway Company claiming an injunction to restrain the defendants, who were lessees of certain mines in Glamorganshire, under the plaintiffs' line of railway, from working their mines in such a way as

to injure the railway by taking away the necessary support.

By an Act of 1825 (6 Geo. 4, c. civ.), the Duffryn, Llynvi, and Porthcawl Railway Company were incorporated with power to make and maintain a "railway or tramroad"; also to enter upon and take lands for the purpose; but by sect. 25 all mines were to be deemed to be excepted out of any conveyances, and might be worked by the owners, though in such manner as not to injure the company's works. The provisions of the Act appeared to contemplate a tramroad for running trams, drawn either by horse-power or a fixed engine. By an indenture of the 19th Jan. 1830 certain lands in the parish of Tythegstowe, in Glamorganshire, were conveyed to that company, for the purposes of their Act. Subsequently that company was amalgamated with the Llynvi Valley Railway Company. By the Llynvi Valley Railway Act 1853, the line of the Llynvi Valley Company was extended, and the Lands Clauses Act 1845 and the Railways Clauses Act 1845 were incorporated with the Act. By the Llynvi Valley Railway Act 1855, there being only a horse tramroad then in existence, provisions were made for repealing the previous Acts, and altering the line so as to be suitable in curves and inclines for locomotive engines. This Act it was said gave the company a "new start" as a railway company proper. It was thereby provided that anything done before the passing of the Act, under the repealed Acts, should be as valid as if they were not repealed, and that the Act should be subject and without prejudice to everything so done, and to all rights consequent on anything so done. The Llynvi Valley Company afterwards became the Llynvi and Ogmore Railway Company. In 1883 a broad-gauge line was laid down, and that company was amalgamated with the plaintiffs, the Great Western Railway Company, the Llynvi and Ogmore line then forming part of the Great Western system. The defendants were the lessees of the mines under the land comprised in the conveyance of 1830, and in working their mines had caused subsidences on and near the railway, and they insisted on their right to continue working unless the mines were bought by the railway company under the provisions of the Railways Clauses Act 1845. The plaintiffs, however, contended that their rights to subjacent and adjacent support were preserved by the Act of 1825; but on the other hand the defendants contended that by the Act of 1855 the plaintiffs took up an entirely new position, that of a railway company proper, and were therefore subject to the Railways Clauses Act 1845, under which, if they required subjacent and adjacent support, they must purchase the mines under the surface lands vested in them.

Cripps, Q.C. and Butcher for the Great Western Railway Company.—The question is one of law, namely, whether the Railways Clauses Act 1845 applies to this line or not. If it does, then we have no case. We contend that under the conveyance of the 19th Jan. 1830 we are entitled to adjacent and subjacent support. By sect. 25 of the Duffryn, Llynvi, and Porth Cawl Railway Act of 1825 (6 Geo. 4, c. civ.), all mines are to be deemed to be excepted out of any conveyance, and may be worked by the owners, though in such manner as not to injure the company's works. If sect. 25 of the Act of 1825 is still binding upon the parties,

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.] GREAT WESTERN RAILWAY CO. v. THE CEFN CRIBBWR BRICK CO. [CHAN. DIV.]

we are entitled to an injunction. By the Llynvi Valley Railway Act 1855 (18 Vict. c. 50) all the prior Acts are repealed, but all rights under them are preserved; and, notwithstanding the repeal, all acts done under them are to be valid. Sect. 20 of this Act incorporates the Lands Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845, but does not alter rights previously acquired or affect acts previously done. The case of the *Caledonian Railway Company v. Sprot* (2 Macq. 449; 2 Jur. N. S. 623) shows that we are entitled to all necessary adjacent and subjacent support, and are not affected by subsequent Acts of Parliament: (Lord Cranworth's opinion, page 458 of 2 Macq.) Secondly, does the right of support apply to the old tramroads only, or to the new railway also? Lord Cranworth's opinion, at page 461 of 2 Macq., is in our favour. Where a grant of lands is made for a specific purpose, such as the construction of works on the lands of a railway, the grant, in the absence of a contrary intention appearing on its face, carries with it by implication the right of reasonable and necessary support for the works so to be erected from the subjacent or adjacent lands of the grantor:

Elliot v. North-Eastern Railway Company, 10 H. L. Cas. 333:

London and North-Western Railway Company v. Evans, 67 L. T. Rep. N. S. 820; (1893) 1 Ch. 16.

Warmington, Q.C. and T. H. Carson for the defendants.—There is a difference in the easement now and that granted in 1825. Then light trams ran, propelled by horse-power; now, heavy locomotives. The main point is, whether the Railways Clauses Act 1845 applies. Parliament says, "Continue the tramway as it is, or turn it to a use not contemplated by the Act of 1825, and make a railway line." The Great Western Railway Company elected to make a railway proper, and since then have broken the provisions of the Act of 1825. In the conveyance of 1830 there is no mention of adjacent or subjacent support. The Act of 1825 only contemplated a tramway with horse-power, and is utterly opposed to the position of the parties under the Act of 1855. A railway company is governed by statute, and having purchased lands beneath which mines lie, cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support:

Great Western Railway Company v. Bennett, 16

L. T. Rep. N. S. 186; L. Rep. 2 H. L. 27:

Pountney v. Clayton, 49 L. T. Rep. N. S. 283; 11 Q. B. Div. 820.

As to the placing of a greater burden on the land than the original easement:

Dalton v. Angus, 44 L. T. Rep. N. S. 844; 6 App. Cas. 740;

Murchie v. Black, 19 C. B. N. S. 190;

Harvey v. Walters, 28 L. T. Rep. N. S. 343; 8 C. Pl. 162.

The company must pay us compensation:

Midland Railway Company v. Checkley, 16 L. T. Rep. N. S. 260; 4 Eq. 19;

Knowles v. Lancashire and Yorkshire Railway Company, 61 L. T. Rep. N. S. 91; 14 App. Cas. 248.

KEKEWICH, J.—I have quite made up my mind in this case, and need not trouble you to reply, Mr. Cripps. The one fact upon which all parties are agreed is that the railway, in the particular part with which I have to deal, is in a desperate

state—that subsidences have occurred which render the traffic so dangerous that extraordinary care has to be used, and that further subsidences are at any rate to be apprehended. What has brought about those subsidences? The argument of the defendants has been addressed to proving, or inducing me to believe, that the traffic of the railway is not only one of the causes, but the cause—the *causa causans*, the *causa sine qua non*. The evidence fails to go so far. I do not think that I need discuss the question whether they have contributed in any way to their own injury, because the contribution, according to the evidence, is only by way of acceleration. It has not been the actual cause, but has only, at the most, brought it about at the particular moment. I adopt the view, applying it to this case, which Lord Cranworth expressed in the case of *The Caledonian Railway Company v. Sprot* on the evidence then before him. He says: "First, when Mr. Sprot granted his land for the avowed purpose of enabling the dispoonees to make a railway, without any limitation as to its nature, I think he must be understood to have warranted proper support, however the railway might be used, or to whatever purpose it might be applied." (That is his first reason, with which I am not for the moment dealing.) "Secondly, the gentlemen to whom the Court of Session referred this very question, expressly say that neither increased traffic, nor the alteration of the structure, nor uses of the railway, have materially affected the practicability of working the minerals." Adopting that particular case, I find upon the evidence that there would have been subsidence from the working of the minerals, which has been probably only a little accelerated, if at all, by the working of the railway, and that therefore it is the working of the minerals which has produced this injury. Are the defendants responsible for that? They have endeavoured to show that some injury must have been caused by workings with which they are not at all concerned—by workings in headings into which they have not entered. But that is only part of the injury, and it is, to my mind, clear on the evidence that much of it has been caused by the headings into which they have entered, and from which they have removed the *débris* which accumulated during a long series of years, so that those headings were really full. I conclude from the evidence that, until they opened those headings, the support which they gave to the soil above and around them was, if not actually mathematically equivalent to the original support of the original soil, at any rate practically sufficient for all purposes. They tapped those headings for their own purposes, and the result is that they brought down the soil, and will probably bring it down much more. That opinion is strongly fortified by reference to those headings which are entirely outside the line. There we have subsidences in places at 120 feet or 130 feet from the railway, and it is not suggested that the traffic can have produced any material effect there. On these short grounds, I think that the injury, or part of the injury, which has been caused, and part of the injury which is apprehended—which is by far the major part in each case—is due, and will be due, to the workings of the defendants. They are the successors in title of the grantors to the railway company. Are they in that way responsible as a

matter of law? The railway company took under the conveyance of the 19th July 1830, and to my mind the words of the conveyance are of no essential importance; but, as a matter of fact, the conveyance is expressed to be made pursuant to the Act of 1825. It is a conveyance made to the railway company purchasing under their statutory powers and taking a statutory title. The 25th section of the Act of 1825 provides that from any conveyance of that kind there shall be excepted any mines, minerals, coals, or any stone or slate under any land. So what really was done was this: the vendors conveyed to the railway company a lateral stratum of land, reserving to themselves all other lateral strata beneath that conveyed. Of that, but for the law of support, they would have been absolute owners; they may do as they please there. They may not only work the mines, as has been suggested in argument, but they may use it for any proper purpose, according to the view which was enunciated by Jessel, M.R. in *Eardley v. Granville* (34 L. T. Rep. N. S. 609; 3 Ch. Div. 826), where he contrasted the position of the copyholder having an estate in the minerals and the estate of an ordinary freeholder. He may use it for any purpose whatever, subject to this: that he must not infringe the covenant, whether expressed or implied, into which he has entered with the railway company to provide proper support. The 25th section of the Act of 1825 does express that to some extent. It gives power to the vendors to work the minerals (which was scarcely wanted, but in those days the law was not so settled as it is now), and then says: "and as if this Act had not passed but so as nevertheless not to prejudice or injure such railway, wharves, or other works hereby authorised or directed to be allowed"—of course, that being some other railway or wharf. It did not refer to the adjacent land; that was not in the contemplation of the parties. The common law right of support by the adjacent land is not touched upon and is not interfered with. That seems entirely in accordance with the case of *The Caledonian Railway Company v. Sprot*, and many other cases, some of which have been referred to in the argument. But then it is said that that is taken away from them, or that the present plaintiffs are not entitled to the benefit of it, for two reasons: In the first place, that they have entirely changed their rails from what was a horse tram-road into part of the large system of the Great Western Railway Company, which is worked by steam-engines of modern construction and trucks of very great weight; and that there is an entirely different system in use. As regards its effect on the soil beneath and the actual support required, I have referred to that, and do not mean to refer to it again. In what way other than that have they prejudiced their case by the alteration? Of course it was not contemplated in 1825, and was not contemplated for many, many years later; but when vendors make a bargain of that nature and take the best sum they can get for the property they sell, they must run risks of the kind which Bowen, L.J. points out in the case of *The London and North-Western Railway Company v. Evans*, at page 29 of (1893) 1 Ch. which seems to me to be directly applicable. He says: "It is true that at the date of the Act the minerals were not thought to be of value, and were not taken

into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price had the owners been sufficiently prescient; and after this length of time it must be assumed that all was paid for which was capable of calculation or measurement, and which was thought worth claiming by the owners, and that all conditions precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance and making of their canal." If these gentlemen had been wise enough to anticipate steam-power for locomotion and heavy carriages and trucks, they perhaps would have asked something more than the comparatively small sum which was paid to them. We cannot go into it, but what was paid to them may have been a very large and excessive value for the surface of the soil which they sold. At any rate, they made their bargain, and I see no reason for saying that because the land has been used in a somewhat different way therefore the right to support is gone. It is used in a similar character—it is a railway—and I think it would be straining the doctrine which has been laid down in some cases cited for the defendants as to the law of easement to say that, because a new science has introduced new methods of user, therefore the right to support is lost. Then there is another answer, which is this: Time has gone on, and the Legislature saw fit in 1845 to introduce what has been called a code for the government of railway companies and mine-owners in the Railways Clauses Consolidation Act of that year, and it is said that the present plaintiffs are bound by that. They are the successors in title of the original railway company, and they have really purchased under that Act. The Act of 1855 is the substantial Act upon which this argument depends, and no doubt from that time forward, and for some purposes earlier, but at any rate from that time forward, the railway company is governed by the Railways Clauses Consolidation Act, so far as it is applicable to any particular case. In taking further property or in making further bargains for the acquisition of land or minerals, of course it would apply, and for many other purposes having no concern with minerals at all the Act would apply. But what I am asked to hold is that it applies to alter an express contract entered into in 1825 between the railway company or their predecessors in title and the vendors, without the matter having been gone into before Parliament, and without anything which anyone can put his finger upon as containing even an express or implied condition. There is not even a general provision to touch it at all. It seems to me that it would be construing an Act of Parliament according to an entirely wrong principle to say that a contract entered into under an Act of Parliament in 1825, and actually concluded in 1830—that is to say, the contract between the railway company and the vendors—is to be altered by an Act of 1855, without any words which can be laid hold of to show that that was within the contemplation of the Legislature. There is a further answer beyond that, and that is, that the rights are saved. Though the Act is repealed, what is done under the Act is saved by the repealing of the Act; but whether you rely upon

CHAN. DIV.]

Re WOOD; Ex parte WOOLFE.

[IN BANK.]

the one or the other, the plaintiffs' case upon that point seems to me to be reasonably clear. There is really only one other point which I need notice. It is said that this Act of 1825 confers very great benefits upon the persons there mentioned, and that the railway company cannot insist on the Act of 1825 as regards the 25th section, and the rights contained in their conveyance, without giving also the benefits which the Act reserves to those other persons. That seems to me to be entirely beyond my cognisance at the present moment. Who are those persons? They are certain persons, members of the public, and there is nothing whatever that I have seen—and counsel has not called my attention to anything—to show that anything is reserved to the vendors to the company. The adjoining owners no doubt benefit, not as vendors, but because they are adjoining owners, and other members of the public are to have certain rights of putting their trucks of coals on the tramway—to have access to it, and so forth, either free or on payment of a very small fee, all of which has been done away with by the Act of 1855. But that is not done for the benefit of these vendors. It is not part of the contract contained in this conveyance. They are provisions made for the benefit of the public, and it is not necessary, therefore, for me to say any more. But, as a matter of fact, it has seemed good to Parliament to repeal all that. Those are contracts with the public; and we know that Parliament is not in the habit of requiring all persons interested in such matters to appear before them. Parliament legislates for the benefit of the public—for the railway company on the one hand, and for the public on the other—but when it comes to interference with private rights, then the private person interested has a *locus standi*, and is entitled to oppose a Bill. Here there is nothing of that kind. These gentlemen, predecessors in title of the defendants, are not protected in any way by the Act of 1825. It may happen that they fill other positions in which they might have some claim, but in that particular character they seem to me to have none. I think I have now exhausted all the points which have been made on behalf of the defendants, and in my view they all fail, and the plaintiffs, therefore, are entitled to the relief which they ask, with the costs of the action. As regards damages, it has been agreed that I shall not deal with the matter, and there must be a reference. Probably the parties will agree to refer it to some person, but I desire that it should go to the referee, whoever he is, quite free from any opinion on my part, because I have formed none, concerning the extent to which the defendants are liable. All I say is, that they are liable to some extent, and that therefore they must be restrained, and therefore they must pay the costs of the action. But when it comes to estimating the damages, it may very likely appear—I do not say that it will, because I do not know—that the injury has been caused to a great extent, or mainly, by the acts of others who worked the minerals before them, and for whom they are not responsible. Possibly, also it may have been caused by others who are working in the neighbourhood, and against whom the company may, or may not, have a different case. I therefore wish it to go quite as an open reference, and, of course, unless the parties make some agreement about it, I shall reserve the costs

of that reference, because the amount of damages after all recoverable from these defendants may be small. I think that disposes of every point.

Solicitors: R. R. Nelson; Bompas, Bischoff, Dodgson, Coze, and Bompas.

QUEEN'S BENCH DIVISION, IN BANK. RUPTCY.

Tuesday, Feb. 20.

(Before WILLIAMS and WRIGHT, JJ.)

Re WOOD; Ex parte WOOLFE. (a)

Bankruptcy—Bill of sale—Seizure by grantee—One instalment due—Bankruptcy of grantor—Bankruptcy Act 1883 (46 & 47 Vict. c. 52)—Bills of Sale Act (1878) Amendment Act 1883 (45 & 46 Vict. c. 43), s. 7.

A bill of sale to secure a loan payable by instalments contained no proviso making the principal due on failure to pay any instalment. The first instalment being in arrear, the grantee after demand seized the goods; the grantor became bankrupt, and the trustee tendered the instalment due, which the grantee refused, and sold the goods.

The County Court judge decided that, in the absence of a proviso making the principal payable on failure to pay an instalment, the grantee was not entitled as against the trustee to the proceeds of sale.

The grantee appealed.

Held (allowing the appeal), that such a proviso was unnecessary, as in default to pay any instalment the property secured by the bill of sale passed to the grantee, who was thereupon entitled to seize and sell the same, and out of the proceeds to repay himself his loan.

Lumley v. Simmons (56 L. T. Rep. N. S. 134; 34 Ch. Div. 698) explained.

THIS was an appeal from the decision of the judge of the Derbyshire County Court, refusing to order a sum of 80*l.* to be paid to the appellant John Woolfe, the grantee of a bill of sale.

The debtor was a farmer, and on the 4th March 1893 he executed a bill of sale in favour of John Woolfe, a money-lender, to secure the repayment to him of the sum of 67*l.* and interest, the principal together with the interest then due, to be repaid by instalments of 10*l.* per month for the first six months, and the balance by instalments of 6*l.* per month, but so that the principal together with the interest then due should be paid at the expiration of the tenth month. The debtor did not pay the first instalment when it became due, and on the 17th April the manager of John Woolfe wrote and informed the debtor that unless the instalment was paid by ten o'clock the following morning, he should put the bill of sale in force.

On the 18th April the debtor's wife called and stated that the debtor could not pay, but was willing to sell some stock to meet the debt, if two or three days grace were given him; on the same day the bailiffs were instructed to go into possession. On the 19th April two bailiffs took possession, and the debtor's effects were advertised for sale by auction on the 25th April. On the 21st April the debtor filed his own petition. It was ultimately arranged between the official receiver and John Woolfe that the sale already advertised

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re WOOD; *Ex parte* WOOLFE.

[IN BANK.]

should take place, and that the proceeds should be retained without prejudice to the rights of either party until an application had been made to the County Court judge at Derby. Prior to the actual sale the official receiver tendered to the manager of John Woolfe 10*l.*, the amount of the instalment due when possession was taken, but this was declined. Subsequently John Woolfe applied to the County Court judge to be paid out of the proceeds of the sale in the hands of the official receiver the sum of 80*l.* 1*s.*, being the principal sum due under the bill of sale with interest at 5 per cent. from the date of the bill of sale to the 25th April, the date of the sale, together with costs of levy, mileage, and possession money.

The bill of sale was dated the 4th March 1893, and made between Daniel Wood, of Sharrow Hall, Derby, farmer, and John Woolfe, 41, Corporation-street, Manchester, money-lender, and after reciting the indebtedness of the debtor to Woolfe in the sum of 37*l.*, and that Woolfe had agreed to advance a further sum of 30*l.*, the indenture witnessed that, in consideration of the sum of 67*l.*, Wood assigned to Woolfe all the chattels in the schedule annexed as

Security for the payment of the said sums of thirty-seven pounds and thirty pounds, making together the sum of sixty-seven pounds, and interest thereon, at the rate of five pounds per centum per calendar month; and the said Daniel Wood doth further agree and declare that he will duly pay to the said John Woolfe the principal sums aforesaid, together with the interest then due, by instalments of ten pounds per month for the first six months, and the balance by six pounds per month, but so that the principal sums aforesaid, together with the interest then due, shall be paid at the expiration of the tenth month from the date hereof.

Then followed an agreement by Wood to pay all rent for the premises where the chattels were, and a proviso that the chattels should not be seized for any other cause than that specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act 1882. The validity of the bill of sale was not disputed. The questions submitted to the County Court judge were: (1) whether Mr. Woolfe is entitled to be paid the sum of 80*l.* 1*s.* out of the proceeds of the sale in the hands of the official receiver; (2) whether Mr. Woolfe is entitled to be paid the sum of 10*l.*, being the amount of the overdue instalment at the date of the filing of the petition in bankruptcy by the debtor, or any other and what sum.

The County Court judge held that, as there was no provision inserted in the bill of sale that the whole principal should become due on the failure to pay any instalment, as was the case in *Lumley v. Simmons* (56 L. T. Rep. N. S. 134; 34 Ch. Div. 698, 702), such a provision could not be supplied by implication; that sect. 7 of the Bills of Sale Act 1882, which gives a power to seize "if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment," applied to a default in respect of the whole sum, and not to the case of the default in an instalment only, and that therefore the seizure was wrongful, and the grantee could not claim any part of the proceeds of the sale.

The grantee appealed.

By the Bills of Sale Act 1882, sect. 7,

Personal chattels assigned under a bill of sale shall

not be liable to be seized or taken possession of by the grantee for any other than the following causes: (1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security;

Provided, that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

Herbert Reed, Q.C. and *Walter B. Yates* for the appellant.—The appellant was entitled to the 80*l.* 1*s.* The bill of sale is a grant upon condition that the terms be complied with, and on failure to comply with the terms the grantee can seize, otherwise the security is valueless. All *Lumley v. Simmons* decided was, that a proviso could be inserted in a bill of sale making the principal due on failure to pay an instalment; that does not mean that in the absence of such a proviso no seizure can take place. See also

Simmons v. Woodward, 66 L. T. Rep. N. S. 534; (1892) A. C. 100.

In *Johnson v. Diprose* (68 L. T. Rep. N. S. 485; (1893) 1 Q. B. 512) it was pointed out that on default the right of the grantee was absolute to take and keep possession of the goods. It is true that under sect. 7 the grantor has a right to redeem under certain circumstances mentioned in sect. 7, but the section does not apply here. It would be a great injustice if, when the grantor became bankrupt, the trustee could thereby pay one instalment, and claim the right to keep the goods or their proceeds. The case of *Myers v. Elliott* (54 L. T. Rep. N. S. 552; 16 Q. B. Div. 526) is explained by *Stirling, J.*, and affirmed by the Court of Appeal in *Lumley v. Simmons*.

The respondent was not represented.

WILLIAMS, J.—The learned County Court judge was wrong on the admitted facts. The seizure was rightful. On default by the grantor the grantee's right to immediate possession arose, and the subject-matter of the bill of sale became his property. It is plain that the right of the grantor to redeem then, could only be upon payment of the whole sum. It is true that in sect. 7 of the Bills of Sale Act 1882 the grantor can under certain circumstances redeem within five days of the seizure, but that section does not apply here. Even if it did apply, the circumstances are so different when the grantor has become bankrupt, and his trustee has not elected to take over the liability; the right of the grantor is surely then to the whole proceeds under the bill of sale. I believe the account given by *Stirling, J.* of *Myers v. Elliott* in *Lumley v. Simmons* is accurate. That decision was affirmed by the Court of Appeal.

WRIGHT, J.—After breach and seizure the grantor could not redeem except on payment of the whole sum, and sect. 7 of the Bills of Sale Act 1882 does not apply.

Appeal allowed.

Solicitor for the appellant, *W. J. Holbrook*, Derby.

IN BANK.]

Re CLARK; Ex parte DICKENSON.

[IN BANK.]

Tuesday, Feb. 27.

(Before WILLIAMS and WRIGHT, JJ.)

Re CLARK; Ex parte DICKENSON. (a)

Bankruptcy—Undischarged bankrupt—Property acquired in trade by—Second bankruptcy—Rights of creditors in first and second bankruptcies—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44.

Property acquired in trade by an undischarged bankrupt will not vest in the trustee in bankruptcy under sect. 44 of the Bankruptcy Act 1883, unless and until the trustee has intervened and asserted his title thereto.

A bankrupt who had while undischarged acquired certain property by trading subsequently became bankrupt a second time; the trustee under the first bankruptcy failed to intervene and assert his title to that property until after the second bankruptcy.

Held, that the intervention by the trustee after the second bankruptcy came too late, as by that time the property had passed to the trustee in the second bankruptcy, and that therefore the property must be administered by him in the second bankruptcy, but without prejudice to the claim, if any, of the creditors in the first bankruptcy to rank for proof.

THIS was an appeal by creditors as persons aggrieved against the decision of the judge of the Hanley County Court, on the trustee in bankruptcy's application for directions.

The debtor was a builder and contractor at Hanley, and on the 9th May 1844 a receiving order was made against him, on which he was adjudicated bankrupt on the 23rd May. A trustee was appointed, the assets did not pay the costs, and there was no dividend, and a sum of money was owing to the trustee when he was released on the 28th Sept. 1887. The debtor thereupon at first did jobbing work, but later on began to take contracts. He had not received his discharge, and the official receiver was ignorant of the fact that he was trading. On the 11th May 1893 the debtor executed a deed of assignment for the benefit of creditors; this was followed by a creditors' petition, and on the 16th June a receiving order was made, and on the 11th July he was a second time adjudicated bankrupt. No trustee was appointed, but it was arranged that the official receiver should apply for directions as to how a sum of 500l. available for the creditors was to be distributed. The judge of the Hanley County Court directed the official receiver to apply the money first amongst the creditors under the first adjudication, and if there was any surplus, that was to go to the creditors under the second adjudication. The creditors under the second adjudication appealed.

Herbert Reed, Q.C. and Edward Clayton for the appellants.—The creditors under the second adjudication, whose money has been used to earn these assets, will probably get nothing at all. By sect. 44 of the Bankruptcy Act 1883, the property "of a bankrupt divisible amongst his creditors is (i.) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge," so that *prima facie* all property passes to the trustee; but it has been decided that this is not the case with regard to

after-acquired property which remains in the bankrupt until the trustee intervenes, and until then the bankrupt can dispose of it:

Herbert v. Sayer, 5 Q. B. 965;

Fowler v. Down, 1 B. & P. 44;

Cohen v. Mitchell, 63 L. T. Rep. N. S. 206; 25 Q. B. Div. 262.

And if the trustee does intervene and approve the bankrupt's acts he must take with them the burden also, for a trustee as an officer of the court must do the fullest equity:

Ex parte James; Re Condon, L. Rep. 9 Ch. 609;

Ex parte Simmonds; Re Carnac, 54 L. T. Rep. N. S. 439; 16 Q. B. Div. 308;

Ex parte Vaughan; Re Riddeough, 14 Q. B. Div. 25.

[WILLIAMS, J.—Is this a correct summary of your argument? Where undischarged bankrupt acquires property after bankruptcy the trustee has the right to it, but the court will not give effect to that right until the trustee elects to intervene; and is the question then, Has he intervened in time, or have the creditors in the second bankruptcy got the property?] Yes. Now the trustee did not intervene until after the second bankruptcy, and therefore the creditor's rights under the second bankruptcy must prevail. The deed of assignment, though it was void as an act of bankruptcy against the trustee under the second bankruptcy, operated to transfer to the trustee under the deed the property assigned, and took it away from the bankrupt; it was a dealing by the bankrupt for value of the property; then follows the bankruptcy which avoided that deed, and so the very act which avoided that deed in bankruptcy created a new assignment, and placed the property in the hands of the new assignee, and then it was too late for the trustee to intervene. The trustee under the first bankruptcy has no title to the goods till he affirms the debtor's acts, the property is assigned, and this takes it away from the bankrupt, for it was a dealing with the property for value. The trustee under the first bankruptcy cannot take the property unless he can get rid of the assignment; this is, however, got rid of by the second bankruptcy, but the very act which avoids the assignment, i.e. the second bankruptcy, creates a new assignment which hands the property over to the new assignee, i.e., the trustee of the second bankruptcy. That assignment being in existence, it is too late then for the trustee under the first bankruptcy to intervene. To repeat, the trustee under the first bankruptcy has no title until he affirms the debtor's acts by intervening. Meantime the deed of assignment has taken everything away from the bankrupt, and this is got rid of by the second bankruptcy, but the very act that gets rid of this assignment creates a new assignment for value to the trustee of the second bankruptcy, and so the trustee in the second bankruptcy becomes entitled as against the trustee in the first:

Ex parte Blaiberg; Re Toomer, 49 L. T. Rep. N. S. 16; 23 Ch. Div. 254.

Lastly, the creditor under the first bankruptcy would, I should say, probably be entitled to come and prove in the second bankruptcy, and the best course would therefore be that the trustee should administer the property by paying all the creditors rateably:

Ex parte Morgan; Re Knight, 15 C. B. N. S. 669;

Ex parte Watson; Re Roberts, 12 Ch. Div. 380.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re CLARK; *Ex parte* DICKENSON.

[IN BANK.]

Muir Mackenzie for the official receiver, who is the trustee under both bankruptcies.—I take no part, and will assent to any order the court thinks right, but I will render any assistance possible to the court. [WILLIAMS, J.—I do not assent to the proposition that the creditors under the first bankruptcy can come in and prove in the second bankruptcy.] The case of *Ex parte Ford*; *Re Caughey* (34 L. T. Rep. N. S. 634; 1 Ch. Div. 521), says that it is essential, in order to deprive a trustee, that he should have knowledge that the bankrupt was dealing with the property, and that those who dealt with the bankrupt acted on the faith of his apparent property. With regard to the case of *Herbert v. Sayer*, this doctrine was held not to apply to real estate:

Re New Land Development Association, 66 L. T. Rep. N. S. 694; (1892) 2 Ch. 138.

[WILLIAMS, J. referred to *Marshall v. Barkworth*, 4 B. & Ad. 508.]

Read, Q.C., in reply, referred to

Hallas v. Robinson, 15 Q. B. Div. 288;

Joseph v. Lyons, 51 L. T. Rep. N. S. 740; 15 Q. B. Div. 280.

The creditors under the first bankruptcy were not represented.

WILLIAMS, J.—I am of opinion that the directions here ought to be that this property vested in the trustee or the official receiver in the position of trustee in the second bankruptcy, and ought to be administered in that bankruptcy. I do not propose to say what will or will not be the rights of the creditors in the first bankruptcy under the administration in the second bankruptcy. It must not be supposed from that, that I do not entertain a strong opinion upon the point—for I do—but I shall best perform my duty by not expressing it, as it is not necessary. Now it is right that I should attempt to say what are the principles on which I think it to be the law that the trustee in the second bankruptcy should have this property vested in him, and should deal with it and administer it under the second bankruptcy. The law is somewhat this way: The Bankruptcy statute by its vesting clause vests in the trustee in any bankruptcy the whole of the property of the bankrupt, both that which he had at the time of the making of the receiving order, and that which may accrue to him or be acquired by him after the receiving order, and before his discharge. There is no doubt that the property in question here is property which did accrue to the bankrupt before his discharge, and therefore the words of the section are sufficiently wide to cover it; but notwithstanding the words of the section it seems to me in the very nature of things, which not even an Act of Parliament can alter, that property which comes into existence during the bankruptcy cannot vest in the trustee without his doing something to assert his title thereto. That is the real basis of the decision in *Herbert v. Sayer*. That case recognises not only the proposition that after-acquired property will not vest in the trustee until he does some act of intervention asserting his property, but it affirmatively says that in the meanwhile the right to the property in question vests in the bankrupt, and it is not only therefore that it is necessary there should be some intervening act by the trustee by way of assertion of

his title, but the bankrupt meanwhile gets such a title that he is not only able, as in *Herbert v. Sayer*, to bring an action to enforce his contractual rights, but is able, as was established in *Morgan v. Knight and Fyson v. Chambers*, to assert his property either by bringing an action of trover or detinue against anyone who seeks to deprive him of his property. The moment you have got those two propositions, all the rest seems to follow necessarily. If the law says that, unless and until something happens, the bankrupt, notwithstanding his bankruptcy and notwithstanding the absence of discharge, has the property in question, one of the necessary essentials to that property is the right of dealing with it and the right of parting with it, and if during the time that the property is his, because the trustee has not intervened, he parts with his property, it necessarily follows that the person to whom he parts with the property gets a title to it. That sort of doctrine will be found laid down in *Newnham v. Stevenson* (10 C. B. 713; 13 C. B. 285), a case which is reported twice, and which deals with the doctrine of fraudulent preference before that doctrine was embodied in the statutory form as it is now; and the common law doctrine I allude to will be found laid down there very plainly and very clearly, that is, that in the case of fraudulent preference, although the trustee had a right to intervene and claim the property that had been transferred by way of fraudulent preference, if it was disposed of to a third person in the meantime such third person gets a title which was superior to that of the trustee. The only question one has to deal with here is, whether or not the second bankruptcy, which took place before any intervention or assertion of title by the trustee in the first bankruptcy, must be dealt with on the same footing as an assignment for value to a stranger. In my judgment it ought to be so dealt with. At one time the title of the trustee depended upon an actual assignment by the Lord Chancellor, which was based upon a supposition of an assignment which did not in fact exist by the insolvent debtor. The trustee under the second bankruptcy is therefore an assignee for value in this sense, that, as between the insolvent and his creditors, the insolvent could set up no answer to the claim of the creditors to the benefit of this property. For these reasons the trustee of the second bankruptcy is entitled to this property as against the trustee in the first bankruptcy, and he ought to have the administration of the property. I have little more to say, except that I do not think one need trouble oneself about the case of *Ex parte Ford*, or any other of those cases which are based on estoppel, as I do not think the trustee's title here depends upon estoppel any more than I believe it depends on reputed ownership, which was also discussed in *Ex parte Ford*. Something was said about the position of the trustee in the second bankruptcy being possibly improved by the extent of the intervention in point of time of the deed of arrangement and the assignment contained in it. I do not think the trustee need depend on that assignment, nor, if it were necessary for him to do so, he could successfully do so. I believe that, on the principles discussed in *Newnham v. Stevenson* and the cases there cited, the truth of the matter is that the moment the assignment in the deed of arrangement is dealt with, as an act of bankrupt

IN BANK.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

it is void both as against the trustee and all the world, and no one can claim under or by virtue of it. I do not think I can usefully go over any other cases, but I hope I have made my view clear, be it right or wrong. It will be observed that I do not think that the knowledge of the trustee under the first bankruptcy of what is going on has anything to do with, or is in any way material, to his title.

WRIGHT, J.—I am entirely of the same opinion. In theory the after trading of a bankrupt is for the benefit of the estate, but it has been long established that in practice the presumption is the other way until the trustee intervenes. Here since the bankruptcy a new set of creditors have in some way acquired rights of the kind to which *Cohen v. Mitchell* applies, and are entitled to retain these unless the first trustee has intervened in time. Before the first trustee had intervened the deltor had passed away a perfectly good title by assignment, as against everyone except some future trustee. It is quite true that that assignment became void upon the second adjudication as an assignment, but it was good till the moment of the second adjudication, and at that moment, at the very same time when and by the same judicial act by which the first assignment became avoided, a new and even more powerful assignment was retrospectively created by the Bankruptcy Act in the trustee of the second bankruptcy, and not until after that does the first trustee intervene. Then he is too late, because a perfect title has by statute become vested in the second trustee. I agree with Mr. Reed also that there is something in the point that the first trustee is in a fatal dilemma; he has no title unless he confirms the second bankruptcy, because otherwise the prior assignment is good against him. It is only by virtue of the second bankruptcy that he gets rid of the first assignment. Then, as regards the equity of the matter, it would be highly inequitable to give the whole estate in the second bankruptcy to the creditors of the first for obvious reasons; but whether the creditors under the first bankruptcy are to come in at all, and how they are to rank, I agree we ought not to decide, or to express any opinion about. I do not know how it will be worked out.

Appeal allowed. Order of the court below varied by declaring that the balance of the net assets are vested in the trustee in the second bankruptcy, and ought to be administered by him in the second bankruptcy without prejudice to the claim, if any, of the creditors in the first bankruptcy to rank.

Solicitors for the appellant, *Charles Robinson and Co.*, agents for *Hooper, Dudley*.

Solicitor for the respondent, *The Solicitor to the Board of Trade*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 31, Feb. 1 and 2.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re THE LANDS ALLOTMENT COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Directors—“Trustees”—Breach of trust—Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), s. 10—Statute of Limitations—Trustee Act 1888 (51 & 52 Vict. c. 59), s. 1, sub-sect. 3, s. 8.

Directors of companies established under the Companies Acts are “trustees” within the meaning of the Trustee Act 1888, and by virtue of sect. 8 of that statute they are entitled to the benefit of the Statute of Limitations as a bar to a claim in respect of an alleged breach of trust by reason of the misapplication, through mistake or carelessness, of funds or property of the company in their hands or under their control.

Where, therefore, directors of a company, apparently acting ultra vires of their powers, but not fraudulently, invested funds of their company in the shares of another company, and more than six years afterwards the liquidator in the winding-up of the company applied under sect. 10 of the Companies (Winding-up) Act 1890 for a declaration that the directors had committed a breach of trust, and consequently were liable for the amount expended in the purchase of the shares, it was held that, assuming that the purchase of the shares was ultra vires, which point was not free from doubt, yet, as the misapplication of the money was not a fraud in any sense, the directors were protected by the Trustee Act 1888.

Decision of Wright, J. affirmed.

A director who is not a party to a misapplication of the funds of a company cannot be held liable for not taking legal proceedings to upset the transaction after the matter is concluded.

In the winding-up of the above-named company two summonses were taken out by the official receiver and liquidator, under sect. 10 of the Companies (Winding-up) Act 1890, with the view of making the respondents liable for alleged breaches of trust.

The first summons was against S. Rowles Pattison, the Rev. Dawson Burns, George Dibley, and Morrell Theobald, who had been directors of the company, and it was sought to make them jointly and severally liable to make good to the assets of the company the sum of 35,000*l.*, alleged to have been improperly employed by them out of the moneys of the company in the purchase of 7000 shares of 5*l.* each in the Building Securities Company Limited.

By the second summons the official receiver and liquidator sought to have Edward Barnard, Joseph William Dresser, George Edward Brock, and Morrell Theobald declared jointly and severally liable for 5200*l.* invested in the purchase of 1040 other shares in the Building Securities Company Limited.

(a) Reported by W. IVIMEY COOK and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.

The facts relating to the first summons were as follows:

Early in 1885 J. W. Hobbs was indebted to the Lands Allotment Company to the extent of 35,000*l.*, and the Building Securities Company was formed to take over his business of a builder, including his then existing liabilities, and after the formation of this company, as between the company and Hobbs, it became the duty of the company to pay off this debt of 35,000*l.* But the company, not having the money in its hands for this purpose, made an arrangement with the Lands Allotment Company by which, in substance, the Lands Allotment Company was to take shares in the Building Securities Company to the extent of 35,000*l.* in satisfaction of Hobbs's debt. These shares were fully paid up, and were accepted by the directors of the Lands Allotment Company in good faith. This transaction was referred to in the balance-sheet of the Lands Allotment Company, issued in March 1885, as follows: "Assets by Building Securities Company, 35,000*l.*" At the annual general meeting of the Lands Allotment Company, held in April 1885, at which the respondents to the first summons were present, Jabez Balfour, who was then one of the directors of the company, was questioned by a shareholder as to this item, and according to the shorthand notes of the proceedings he replied that it was an asset representing an amount which had to be paid by the Building Securities Company in respect of an estate they had purchased from the Lands Allotment Company, and he explained that the item was put down as a separate item in order that the shareholders might see what it was. From the reports of subsequent general meetings it appeared clear that in Nov. 1888, and probably in 1887, the shareholders knew that this item of 35,000*l.* represented shares in the Building Securities Company. Under these circumstances the respondents claimed the benefit of the provisions of the Trustee Act 1888 extending the Statute of Limitations to trustees. On the other hand, it was contended that the directors were not "trustees" within the meaning of the Act; and, further, that the case was taken out of the Statute of Limitations by reason of Balfour's false representation at the general meeting, and the acquiescence of the respondents in that false representation.

The facts with regard to the second summons were as follows:

At a board meeting in July 1889 it was resolved to apply for 1040 more shares in the Building Securities Company, and the purchase money (5200*l.*) was paid by three bills, which were duly met by the Lands Allotment Company. At a board meeting in Oct. 1889 the minutes of the July meeting were read over and confirmed. Of the respondents to this summons Barnard and Dresser were alone present at the July meeting. Brock, who had been chairman of the company for some time, signed the minutes at the meeting of October, and on the 17th April 1890, at the annual general meeting, he made a speech, in which, referring to the purchase of the additional shares, he said: "We carefully considered the matter, and, having regard to the excellent return on our then holding and our confidence in the management of the company, we deemed it advisable that we should exercise our right of

subscription, and we have since had no reason to regret the decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent." Theobald was on the high seas at the date of the July meeting, and, though he was present at the meeting in October when the minutes of the previous meeting were confirmed, he did not vote for their confirmation. It was not seriously disputed that this transaction was *ultra vires*.

The summonses were heard before Wright, J. on the 13th and 14th Dec. 1893.

Finlay, Q.C., E. S. Ford, and Muir Mackenzie for the official receiver.—The investments in the Building Securities Company were *ultra vires*. A purchase of shares in another company is not within art. 55 of the company's articles of association. Shares are not securities. There is nothing in the memorandum of association to empower the directors to embark any portion of the assets of the company in another company. Even if the investments are held to be *intra vires*, they were, we contend, an improper employment of the funds of the company. Assuming, then, that the investments were *ultra vires*, the directors cannot claim the benefit of the Statute of Limitations. They are not trustees, and therefore do not come within sect. 8 of the Trustee Act 1888, and, even if it be held that they are trustees, we say that they are precluded from claiming the benefit of that statute by reason of their fraudulent breach of trust in acquiescing in a false statement by Mr. Balfour, made at the meeting in 1885, that the investment of the 35,000*l.* represented an "estate" purchased by the directors from the Building Securities Company. [*Reed, Q.C.*—If the official receiver intends to rely on fraud, he must expressly charge it:

Cavendish Bentinck v. Fenn, 57 L. T. Rep. N. S. 773; 12 App. Cas. 652, 662;

Re New Mashonaland Exploration Company, 67 L. T. Rep. N. S. 90; (1892) 3 Ch. 577.]

[WRIGHT, J.—The official receiver, in making statements in his report, should note down references to the evidence in support of them.] [*Woodfall* and *Reed, Q.C.* took objection to the shorthand-writer's notes of what took place at the meeting in 1885 being admitted in evidence as not having been properly verified.] The affidavit is made exactly in the form given in Dan. Ch. Forms, p. 273, form 6. [WRIGHT, J.—The shorthand-writer does not state that he made the transcript himself.] *Sovereign Life Assurance Company v. Wilmot* (9 Times L. Rep. 525) is not an authority in the respondents' favour. In that case Chitty, J. seems to have assumed rather than decided that directors were trustees within the meaning of the Trustee Act 1888. Before that Act came into operation, it was decided in the numerous cases under sect. 165 of the Companies Act 1862 relating to misfeasance by directors that claims in respect of such misfeasance were claims in the nature of a breach of trust, and that the directors were not entitled to the benefit of the Statute of Limitations in respect of them. See

Re Exchange Banking Company; Flitcroft's case, 48 L. T. Rep. N. S. 86; 21 Ch. Div. 519;

Re Oxford Benefit Building and Investment Society, 55 L. T. Rep. N. S. 598; 35 Ch. Div. 502;

Leeds Estate Building and Investment Company v. Shepherd, 57 L. T. Rep. N. S. 384; 36 Ch. Div. 787;

CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

Re Faure Electric Accumulator Company, 59 L. T. Rep. N. S. 918; 40 Ch. Div. 141;
Re Sharpe; Re Bennett; Masonic and General Life Assurance Company v. Sharpe, 65 L. T. Rep. N. S. 76; (1892) 1 Ch. 154.

Directors are not trustees within the meaning of the Trust Investment Act 1889:

Re National Permanent Mutual Benefit Building Society, 62 L. T. Rep. N. S. 596; 43 Ch. Div. 431.

The only cases which have been decided on sect. 8 of the Trustee Act 1888 are cases with reference to ordinary trustees; e.g.,

Re Bowden; Andrew v. Cooper, 45 Ch. Div. 444;
Moore v. Knight, 63 L. T. Rep. N. S. 831; (1891) 1 Ch. 547;

Re Swain; Swain v. Bringeman, 65 L. T. Rep. N. S. 296; (1891) 3 Ch. 233;

Re Page; Jones v. Morgan, (1893) 1 Ch. 304.

Ingen for Burns.—Burns retired on the 26th Sept. 1886, and the winding-up of the company did not commence till the 24th Oct. 1892, more than six years afterwards. The investment itself was made in 1885. Burns was not a director of the Building Securities Company. Directors are constructive trustees for certain purposes. All the decisions in cases of misfeasance before the Trustee Act 1888 went upon the ground that the directors were constructive trustees, and therefore could not claim the benefit of the Statute of Limitations. They are now included in the Act of 1888 under the description of trustees by implication or construction of law. If there is nothing in the memorandum or articles restricting the right of the directors to purchase, if necessary, shares, they are entitled to do so for a debt. It has been held that a company, although not expressly authorised to do so, can borrow money.

Farwell, Q.C. and Bramwell Davis for Dresser.—When Dresser became a director the investment of the 35,000*l.* had been made. Some form of interim investment is implied by the memorandum. In *London Financial Association v. Kelk* (50 L. T. Rep. N. S. 492; 26 Ch. Div. 107) it was held (1) that a purchase of shares in another company was within the general words of the memorandum of association of a company, and (2) that if directors *bona fide* believe an act done by them to be *intra vires* which is in fact *ultra vires*, the court may hold them not liable. [WRIGHT, J.—The latter proposition only seems to have the authority of Mr. Buckley.] See Lindley on Companies, p. 373. [WRIGHT, J.—I do not think that case helps you much; your real contention must be on the facts.] Directors are not liable for honest mistakes when acting within their powers:

Turquand v. Marshall, 20 L. T. Rep. N. S. 766; L. Rep. 4 Ch. 376.

Woodfall for Dibley.—The taking of shares of the nominal value of 35,000*l.* in the Building Securities Company was not an investment at all, but to secure the repayment by that company of a very doubtful debt, and, although possibly *ultra vires*, it ought, under the circumstances, to be supported:

Re Asiatic Banking Corporation; Royal Bank of India's case, 19 L. T. Rep. N. S. 805; L. Rep. 4 Ch. 252;

Sackets Harbor Bank v. Lewis County Bank, 11 Barb. 213, cited in *Brice on Ultra Vires*, 3rd edit., p. 177.

The present case is distinguishable from *Parker v. Lewis* (29 L. T. Rep. N. S. 199; L. Rep. 8 Ch. 1035), as here no money actually passed. As regards the question whether directors are trustees within the meaning of the Trustee Act 1888, I submit they are. The only case in which that question has arisen is *Sovereign Life Assurance Company v. Wilmot* (*ubi sup.*), and there Chitty, J. appears to have taken it for granted that directors were within the Act. [WRIGHT, J.—I am of your opinion on the question of the Trustee Act 1888. The only question is whether there was any fraud.] Fraud cannot be charged in a reply. He also referred to

British and American Telegraph Company v. Albion Bank, 26 L. T. Rep. N. S. 257; L. Rep. 7 Ex. 119.

Marshall Hall and R. E. Moore for Brock.—If the articles are within the scope of the memorandum, as we submit they are, the acts of the directors were not *ultra vires*.

H. Reed, Q.C. and C. E. E. Jenkins, for Theobald, referred to

Charitable Corporation v. Sutton, 2 Atk. 400;
Re Exchange Banking Company; Flitcroft's case (*ubi sup.*).

Houghton for Pattison.

Muir Mackenzie in reply.—[WRIGHT, J.—I think that most of these transactions were *ultra vires*, and, unless there has been fraud, the Statute of Limitations has run. I see no evidence of fraud either on the first or second summons.] There has been fraudulent concealment on the part of the directors which has prevented the statute from running: (*Darby & Bosanquet's Statutes of Limitations*, 2nd edit., p. 556.) He also referred to

Joint Stock Discount Company v. Brown, 20 L. T. Rep. N. S. 844; L. Rep. 8 Eq. 381.

WRIGHT, J.—As regards the first summons in this case, I am of opinion it must be dismissed. The facts shortly were these: The Lands Allotment Company, of which the respondents were directors, had made advances to one J. W. Hobbs, a builder, in respect of which he owed them 35,000*l.* or upwards. A new company, called the Building Securities Company, another of the Balfour group, was then being formed for the very purpose of taking over the business of J. W. Hobbs, and, as it had undertaken to pay off Hobbs's liabilities, it would have had to pay to the Lands Allotment Company this 35,000*l.* For the common convenience of both companies, or at any rate for the convenience of Mr. Balfour and those in whose interests he acted, a proposal was made—it does not at all appear by whom—that in substance the Building Securities Company should hand over 7000 of its 5*l.* shares to the Lands Allotment Company, and that Hobbs's liability should be thereupon treated as extinguished. I think there is no evidence at all that any of the gentlemen who are respondents to these present proceedings had any doubt that that was an excellent business arrangement. The Building Securities Company went on for a considerable time without getting into any difficulties, and there was nothing to show that there was any reason to suppose that that was a waste of the assets of the Lands Allotment Company at all. I am of opinion that it was entirely *ultra vires* of the Lands

CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

Allotment Company to invest any of its capital or assets in the shares of a company trading for a purpose entirely foreign to its own. There are no words, in my opinion, in the memorandum of association of the Lands Allotment Company which could possibly be held to justify the investment in the shares of the Building Securities Company. But if the question is merely one of *ultra vires*, then say the defendants, "True, we were, or admit we were, trustees, and therefore liable but for the Trustee Act 1888; but we are relieved by that Act." No decision on that point as regards directors of a company has been cited. A case of *Re Sovereign Life Assurance Company v. Wilmot* (*ubi sup.*) before Chitty, J., has been referred to, in which, however, it does not appear to me that he decided the point at all. The point is one of the greatest importance, which no doubt must be decided sooner or later, and I hope very soon, by a higher tribunal. I think, without at all deciding that the Act of 1888 does not apply of its own force to directors of companies as directors, of which there is a great deal of doubt, that it does not apply to them. Trustees mentioned in the Act of 1888 are persons who in contemplation of law are in reality trustees, and I think that the Act, taken by itself, would not apply to relieve directors of companies acting as such as distinguished of course from cases in which they may be trustees of property or anything else for their company or for anybody else. But then I think that, under sect. 165 of the Companies Act 1862, the courts have always treated directors as being, although not trustees, very much in the position of, or for most purposes in the position of trustees. And it is as being assimilated to trustees that they are sought to be held liable in this case. But if these directors had been trustees in the fullest sense they would have been relieved by the Act of 1888; and, since their liability is only because of or depends upon their being assimilated to trustees, it seems to me it would be wrong to hold them entitled to less protection than that to which real trustees would be entitled. It seems to be an *à fortiori* case. If they are treated as trustees merely on the ground that, although they are not trustees, they ought to be treated like them, it seems to me to follow that they ought to be entitled to at least the same protection in the matter of limitations as real trustees. Then, if that is the case, it rests upon the applicant here to show that the directors are disentitled from claiming the benefit of the Statute of Limitations on the ground of "fraud or fraudulent breach of trust to which the trustee was party or privy." Then the question is, whether there is evidence here on which I ought to act that these gentlemen were disentitled by reason of "fraud or fraudulent breach of trust to which the trustee was party or privy." I am not quite sure that that is exactly the question, because, if I am right in saying that directors are within the protection of the Act, not because of the words of the Act, but because the court assimilates them to trustees, it may well be that directors will be disentitled by something short of what would disentitle a real trustee to the protection of the Act. I do not wish to decide any of these points. But here nothing else is dealt with except one particular fraud, that is a fraud of concealment, which is sought to be supported

particularly by the shorthand-writer's evidence of what took place at the meeting of 1885. Apart from that, I am quite satisfied that there was neither fraud nor negligence on the part of any of these gentlemen, unless it be Mr. Balfour. I think they might perfectly well believe themselves justified in acting upon the articles of association; and on the articles of association, apart from the memorandum of association, I have no doubt that this investment was within the powers, and, being within the powers, I see no evidence at present which shows it was such an irrational thing for the directors to do as to make them guilty of misfeasance. These gentlemen were advised by the solicitor of the company; they were also advised at one time by a gentleman who acted as chairman—Mr. Pattison, a solicitor—and unless what passed at the meeting of 1885, or at the subsequent meetings, is evidence of fraud, I do not think there is anything on which I ought to act. Then comes the second summons. It seems to me that the further investment of the sum of 5200*l.* in the additional shares was *ultra vires*, and I cannot see that Mr. Dresser or Mr. Barnard have any answer on that part of the case at all. As regards, on the other hand, Mr. Brock and Mr. Theobald, there is nothing to show; there is no real evidence, at any rate, to show that either of these gentlemen was party beforehand to the transaction being brought forward at the board. There is merely the statement by Mr. Brock on a subsequent occasion that the directors had all thought it an excellent investment; but neither Mr. Brock nor Mr. Theobald was present at the meeting at which the resolution was passed for taking up these further shares, and, although they did attend what is called the confirming meeting in October, it does not appear to me that that fact alone makes any difference, because before the confirming meeting in October the whole thing had been carried really into execution. All the bills given for the shares had been either paid or put into currency, and all that was done at the so-called confirming meeting was that the usual resolutions were carried and the minutes of the previous meeting were read and confirmed. I think that all this is not enough to fix liability upon anybody.

From that decision the official receiver now appealed.

Finlay, Q.C. and *E. S. Ford* (*Muir Mackenzie* with them), for the appellant, substantially repeated the arguments adduced by them in the court below, and again referred to the authorities there cited.

Marshall Hall and *R. E. Moore* for the respondent Brock.

Ingpen for the respondent Burns; *Swinfen Eady*, Q.C., *Woodfall*, and *G. E. Tyrrell* for the respondent Dibley; *H. Reed*, Q.C. and *C. E. E. Jenkins* for the respondent Theobald; and *Houghton* for the respondent Pattison, were not called upon to argue.

LINDLEY, L.J.—This is an application under sect. 10 of the Companies (Winding-up) Act 1890, which has replaced a previous section of the Companies Act 1862. Sect. 10 enacts that: "Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present

[CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company . . . examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable together with interest." Now, under that section two summonses have been taken out against former directors of this Lands Allotment Company which is now being wound-up. The object of the first summons is to compel certain of the directors to refund or make good the sum of 35,000*l.*, to which I will allude presently. The object of the second summons is to compel two of the directors—namely, Mr. Brock and Mr. Theobald—to make good a sum of 5200*l.* Now, as to the 35,000*l.*, the case stands thus: It appears that a Mr. Hobbs was indebted to this company to the extent of 35,000*l.* It appears that a company, called the Building Securities Company, was formed to take over Hobbs's business—to take over his assets and his liabilities—and under the arrangements made in the formation or after the formation of the Building Securities Company it became their duty, as between them and Hobbs, to pay off that 35,000*l.* which he owed to the Lands Allotment Company, and they proceeded to do that in this way: They had not, as I infer from the form taken by the transaction, got 35,000*l.* to pay off Hobbs's debt with. Therefore the Building Securities Company said to the Lands Allotment Company: "If you will buy 35,000*l.* of our shares and send us a cheque for that sum, you shall have the cheque back, and so we will repay you Hobbs's debt. And that device was carried out. Now, what is the effect of that? In point of fact no money passed out of the coffers of the Lands Allotment Company into the coffers of the Building Securities Company. It was a mere paper transaction so far as cash was concerned. It is very true that cheques were handed into the bank one day and taken out the next—it went through bankers. But the net result and the real substance of that transaction when you get at it—when you see through the cloak which is thrown around it—is that the Lands Allotment Company took 35,000*l.* worth of shares in the Building Securities Company in satisfaction of Hobbs's debt. That is the real truth. That is what was done. Now, it is said that that is a transaction which is *ultra vires* the directors of the Lands Allotment Company. I doubt, if you look at it, as I am disposed to do, as a matter of substance, whether it is *ultra vires*. I have not the slightest intention of throwing any doubt whatever upon its being *ultra vires* if the effect of it was to invest money of the Lands Allotment Company in the purchase of shares in the Building Securities Company. I have not the slightest doubt that then it would be *ultra vires*, notwithstanding the ingenious argument we have heard upon the memorandum of association of the Lands Allotment Company. But in substance I doubt whether it was not within the powers of the directors to take fully paid-up shares of any company in satisfaction of a debt which they

could not get paid. At all events, I shall pass that over, and for the rest of my observations I shall assume that the learned judge in the court below was right in holding it to be an *ultra vires* transaction. Then, if it was an improper transaction, all those directors who were parties to this improper investment—for in this point of view it was improper—would naturally and obviously be liable to make good these moneys. All that is conceded if the assumption is granted. Then comes the question whether they are protected by the Statute of Limitations which is applicable to trustees. The learned judge in the court below has held that they are, and I confess that it appears to me that he is obviously right in the construction which he puts upon the Trustee Act 1888. Just consider what we are asked to do here. We are really asked to put ourselves in a most grotesque position. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of the Statute of Limitations, which comes into operation through a statute which was passed for the benefit of trustees. I cannot be party to any decision so supremely absurd. It appears to me, I confess, when this Act of Parliament—the Trustee Act 1888—is looked at, and when you have to apply it to directors, you must bear in mind that, though directors are not trustees—if you talk of them generally, it would be a mistake altogether to say that they are—yet they have always been considered and treated as trustees of moneys which come to their hands or which are actually under their control. They have, ever since companies were invented, been held liable to make good moneys which they have misapplied upon the footing that they were trustees. And prior to the passing of the Trustee Act 1888 it had always been held that directors were not entitled to the benefit of the Statute of Limitations when they had committed breaches of trust, and were, as regarded such moneys and in respect of such moneys, to be treated as trustees. Now, when the Legislature has passed an Act of Parliament protecting trustees against actions for breaches of trust—viz., the Trustee Act 1888—how can it be with any sense said that they are not to have the benefit of that statute? I cannot go that length; I am satisfied that that statute does apply. Now, let us look at the words of sub-sect. 3 of the first section of the Trustee Act 1888. It says this: "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds." I rather think, when you look at the decision (a) in which Bowen, L.J. took so much pains in classifying trustees and in distinguishing constructive trustees from express trustees, you will find that directors are express trustees of moneys of which they have control. But if not, certainly they come within the other part of the definition of trustees "whose trust arises by construction or implication of law." It is precisely because they are one or the other that formerly

(a) The case here referred to is probably *Soar v. Ashwell* (69 L. T. Rep. N. S. 585; (1893) 2 Q. B. 390, 396).

[CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

they always have been held liable, and have always been denied the benefit of the Statute of Limitations. That being the case, I have no hesitation in saying that these directors are within the Trustee Act 1888—that is, always subject to some observations I must make about the alleged concealed fraud. I have no doubt the statute applies to them, and applies to all directors who have got in their hands or under their control money of a company, and who by mistake or carelessness misapply it. Of course we know that there are words in sect. 8 of the Trustee Act 1888 which render the Statute of Limitations inapplicable to the cases there mentioned, which are, substantially, cases of misappropriation of money to the use of the persons misapplying it, and also to cases of fraud. Well, but although so far I have no doubt whatever that the Trustee Act 1888 is applicable, yet this point is raised which is important: It is said that this is one of those cases of concealed fraud in which the Statute of Limitations does not come into operation—that is to say, that the cause of action did not accrue until the fraud was discovered. Now, the misapplication in this case was not fraudulent in any sense. I am quite satisfied from the affidavits of the directors that they thought that it was a very good transaction. They made a mistake in their powers. There is no doubt at all about that, assuming, as I do now, that this was an *ultra vires* transaction. But the case of concealed fraud is attempted to be made out in this way: that at a meeting when this matter was referred to, the 35,000*l.* was entered in the first balance-sheet and subsequent balance-sheets as an asset under the words which I will read. It is on the credit side: "Assets—By Building Securities Company, 35,000*l.*" Now, that by itself, to my mind, may mean anything. It is, of course, clear to this extent, that it means an asset. It may mean land owned by the Building Securities Company. It may mean that it is an investment in that company. I mean to say that that entry in the balance-sheet is quite consistent with either view. But we have it proved—subject to a remark which I will make presently—that on the 18th April 1885, not long after this transaction had taken place, and after the balance-sheet to which I have referred had been circulated among the shareholders, Mr. Balfour made a speech or answered a question put to him. [His Lordship read the question with respect to the 35,000*l.* of the Building Securities Company, and Mr. Balfour's reply that it was an asset representing an amount which was to be paid by the Building Securities Company in respect of an "estate" which that company had purchased from the Lands Allotment Company. His Lordship continued:] Now, whether the real word used there was "estate," as the shorthand-writer maintains, or was "asset," as is suggested, the statement by Mr. Balfour that that 35,000*l.* is an asset representing an amount which is to be paid by the Building Securities Company is untrue. No one could justify that in any sense. Whether you treat it as an "estate" or an "asset," it is untrue. Now, the case is put in this way, that this untrue statement was made by Mr. Balfour at a meeting at which these directors who are now sought to be charged with this breach of trust were present; and that, unless they did not then and there get

up and deny it and put it right, they are to be treated as parties to that untrue statement, and as having concealed the transaction. I think it would be pressing that contention against them a great deal too far. In the first place, I can easily understand that they did not realise the effect of Mr. Balfour's statement about the money being paid at all. And the affidavits which they have filed, and to which I have referred, satisfy me that they thought it was a thing not to be concealed, but a thing rather to be proud of. They thought they had done an uncommonly good thing for this company in putting 35,000*l.* into the shares of the Building Securities Company. Why should they want to conceal it? Why Mr. Balfour should have gone out of his way to make that statement, I do not know; and, although there is evidence, I think the evidence is far too weak to justify us in holding them liable for these moneys on the ground that they were parties to a fraud in concealing what they had done. I am strengthened very much in that conclusion by the expressions which occurred subsequently. [His Lordship referred to what took place at the annual meeting in 1887, when the chairman stated that the Building Securities Company investment was just the same as it had been for the last two or three years; that the Building Securities Company was a very good company; and that the directors considered it a very capital investment by the board. His Lordship continued:] Later on, in 1888, it is quite obvious that everybody knew the exact nature of this investment—knew that it was an investment of money in shares of the Building Securities Company. Now, the only deduction which I can draw from these materials is that it would not be right—I do not think that any jury would do it—to saddle these directors with a charge of fraud in respect of this transaction—either fraud or concealment. And I acquit them of it altogether. It appears to me, therefore, although if the true view is that this was an *ultra vires* transaction they would be liable to replace the money, they are protected by the Statute of Limitations, to which I have referred, and that the appeal against the learned judge's decision as regards them must be dismissed with costs as against all of them. I now come to the second transaction, which is a different matter altogether. It appears that in July 1889 a further sum of 5200*l.* was invested—it really was this time invested—in the purchase of shares of this Building Securities Company. There were 1040 shares of 5*l.* each which were applied for and taken. They were not paid for in cash at the time. They were paid for by three bills at various dates. Now, at the meeting of the 1st July 1889, neither Mr. Brock nor Mr. Theobald, who are sought to be made liable for this improper investment, were present. On the 9th Oct. 1889, after two of the bills which had been given had become due, and had been paid, and whilst the third bill was running, and before it became due, the minutes of the meeting of the 1st July 1889 were confirmed with others—there were several of them. At that confirmation meeting, on the 9th Oct. 1889, Mr. Theobald and Mr. Brock were both present, and it is because Mr. Theobald was present at that meeting that it is sought to charge him with liabilities in respect of this sum. Now, it is quite certain upon the evidence that he had nothing to do with the

CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

transaction originally. He was away on the sea, and had nothing to do with the matter at all. The case against him is simply that he was party to that confirmation. It is put in this way, that he thereby adopted or ratified it, and that he at all events might have taken legal proceedings, or induced the company to take legal proceedings, to set aside the transaction. Now, I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done. I do not think it would be in accordance with the principles applicable to these cases if we were now for the first time to make a precedent of that kind. I am satisfied from Mr. Theobald's affidavit that he knew nothing at all about the matter; and that when he did come back, and found out what was done, in any business point of view it was too late; the matter was over so far as he was concerned. It appears to me, therefore, that Wright, J. was quite right in exonerating Mr. Theobald from all liability in respect of that sum. Now, as regards Mr. Brock the case is a very different one indeed. Mr. Brock, although he was absent in July 1889, had been a director of this company for some time, and had been chairman of the directors. When he came back, which he did before the 9th Oct. 1889, he as an acting director, and as chairman of directors, took the chair at a meeting, and he signed the resolutions confirming what had taken place. If the matter had stood there I should have thought that he would have been in the same position as Mr. Theobald. But the case does not stop there at all, for on the 17th April 1890 there was a meeting at which Mr. Brock appears to have made this speech. [His Lordship read Mr. Brock's speech, as set forth above, and continued:] Now it is impossible, I think, after that to say that Mr. Brock knew no more about the matter than Mr. Theobald. I cannot construe that speech—even making all allowance for the use of the word “we”—as amounting to anything else than a statement by Mr. Brock that “we,” including the directors and including himself, “carefully considered” this application before they made up their minds to accept that offer. He was chairman from April, and his chairmanship covered the whole period of the negotiations which led to this, and he says, “We carefully considered the matter, and we deemed it advisable that we should exercise our right of subscription.” I have come to the conclusion that Mr. Brock was so mixed up in this, and took so active a part in it, from his own statement, that he is liable. I think that his view was that until the matter got into liquidation it was a judicious thing to do. He not only approved of it, but he thought it was an uncommonly good thing for the shareholders, and he claims credit to himself for his intelligence in seeing, as he thought, that it was an uncommonly good thing. I take him as doing exactly what he says he did—exercising his judgment upon it, believing it was *intra vires*, perfectly honestly, but making a mistake as to the powers of directors in investing money. As regards him, therefore, it appears to me that the appeal must succeed, and he must be held liable for this 5200*l.* He will be liable with the two other directors of course; but there is no appeal with regard to the other two.

KAY, L.J.—The transaction as to the 35,000*l.* seems to have been of this kind: This Lands Allotment Company had been formed, and Hobbs, the builder, was indebted to them in a sum of 35,000*l.* Then afterwards, in Nov. 1884, the Building Securities Company was formed. We are told that it was formed for the purpose, amongst other things, of taking over the building business of Hobbs. Then the parties were in this position: The Building Securities Company were going to buy Hobbs's business, and of course they would owe to Hobbs a large sum for the purchase of that business. What the amount was we are not informed. Hobbs was, as I have said, indebted in 35,000*l.* to the Lands Allotment Company, and an arrangement was made—the inference is quite irresistible from the facts we know—between Hobbs and the Lands Allotment Company and the Building Securities Company, under which the Building Securities Company were to pay Hobbs's debt upon condition that the 35,000*l.* should be invested in shares of the Building Securities Company. In point of fact it was a kind of compromise of the indebtedness of Hobbs to the Lands Allotment Company. I do not know of course what all the circumstances were, but it is quite possible it may have been the very best way of getting Hobbs's debt paid, because it seems to me that these Building Securities Company shares were very valuable at that time and for some while afterwards, and paid a very large dividend for years after that time. Now, I will not pause to consider whether that was *intra vires* of the Lands Allotment Company or *ultra vires*. But it would require a great deal of argument to convince me that the directors of a company like the Lands Allotment Company might not make a compromise of that kind, if it was a compromise, with a person largely indebted to their company. I conceive that the directors of every company, being the managing agents of a trading concern, have considerable authority and power in dealing with outstanding debts due to the concern. It is quite possible that this may have been the very best arrangement that could have been made for compromising that large liability of Hobbs to the Lands Allotment Company. But I will assume that it was not; and will treat this, for the purpose of argument, as an investment in shares of the Building Securities Company of 35,000*l.*, moneys which were the moneys of the Lands Allotment Company. I am very clearly of opinion that, if they did buy shares in that company, it might be an act beyond their powers. The buying of the shares was not, be it observed, as an interim investment of moneys that they wanted at the time to invest in certain securities; but it appears they did buy the shares as shareholders out and out in this Building Securities Company. They intended to hold the shares, and they did hold them for a very long time afterwards. Then comes the question, what was the position of the directors who made an improper and *ultra vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees, or in the position of trustees or quasi-trustees, or to be treated as trustees in any sense. But if they deal with the funds of a company, although those funds are not absolutely vested in them, but are funds which are under their control in a manner which is beyond their powers, then.

as to that dealing, they are treated as having committed a breach of trust. I do not believe that there has ever been any dissent from the language of the late Sir George Jessel, M.R. in the case of *Re Forest of Dean Coal Mining Company* (40 L. T. Rep. N. S. 287; 10 Ch. Div. 451, 453), which I am citing from the judgment in *Re Faure Electric Accumulator Company* (59 L. T. Rep. N. S. 918, 920; 40 Ch. Div. 141, 151), where the position of directors of a trading company is conveniently stated. Sir George Jessel said this: "They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company." So that when directors get assets of their company under their control or into their hands, and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust. Well, then, that is not denied, but it is said that directors are not absolutely trustees; that they are *quasi*-trustees; and that, being in that position, they do not come within, and were designedly omitted from, the definition of "trustee" in the Trustee Act 1888, which is now superseded by the Trustee Act 1893. One section of the Act applying to this case limits the liability of trustees. With deference I entirely dissent from that argument. It seems to me that the words used in the definition clause of that Act—the first section—do expressly include precisely such a case as a director dealing with moneys of the company in such a way as to make him liable as trustee. For the purposes of that Act, the expression "trustee" is to be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee. Now, how does this obligation of a director and trustee arise if it does not arise "by construction or implication of law?" It seems to me that the words are apt to include that very case, and were intended to include a case of that kind. It is said by way of argument, "How is it, then, that the definition clause does not expressly include directors?" But it would have been quite wrong to have included directors, because directors are not always trustees. As directors they are not trustees at all. They are only trustees *quâ* the particular property which is in their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that *quâ* such funds they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Trustee Act 1888. Therefore the eighth clause of that Act, which applies to all persons who come within the definition of "trustee," does operate to exonerate these directors from that misapplication of funds to which otherwise I assume they would have been liable. But then it is urged—and upon this part of the case I desire to add a few words to what Lindley, L.J. has said—that, if that was so, still the fact of this investment was concealed by a fraud of one of the directors in which the other directors concurred; and that that concealment by fraud prevents time from running in favour of the directors until the fact was discovered. Well, I do not wish at all, at present, to express any decided opinion whether, if the fraudulent statement could be traced to all these directors, and they could be made responsible for

it, time would or would not run until it was discovered. The ordinary application of that doctrine is in cases where you are suing people and the ground of your action is the fraud which has been committed. Undoubtedly, where the ground of your action is fraud committed, time does not begin to run until the discovery of the fraud. That I entirely admit. It is not, however, quite the same thing where the ground of the action is not fraud at all, but where the ground of the action is, as here, a perfectly honest misapplication of money—a misapplication made by persons who might not unreasonably believe that they had power to do that which they were doing, and which was not, as far as any one of them was concerned, in the least degree a corrupt dealing. The investment of these moneys, however wrong it might be with regard to the powers of the company, as being beyond those powers, could in no sense be said to be a fraud on the part of the directors who made the investment. And—I do not wish to express any decided opinion on this point—as regards the rights of the shareholders in respect of that investment, if the fact of that investment had been fraudulently concealed from the shareholders, it might be that time would not begin to run until the discovery of the facts which gave them a right to sue. But now the question is, is that fraud—if there was a fraud—brought home so clearly to these particular directors whom it is now sought to make liable as to bring them within that doctrine, if such a doctrine exists? Now, if we were dealing with Mr. Balfour, the case would undoubtedly be very different, because Mr. Balfour, according to the evidence before us, did make a statement at a public meeting of the shareholders which was, whichever view you take of the actual word used—whether it was "estate" or "asset"—an utterly untrue statement. And if the action were against Mr. Balfour, and it was said, "Time did not begin to run in your favour until the untruth of that statement was discovered by the shareholders, because that statement put them off their guard completely, and prevented them knowing the facts which gave them a right to sue you," I do not say that that argument might not prevail. But we have not got Mr. Balfour before us at all. The persons who are before us are persons who were present at that meeting, and it is sought to make them liable because they, being present at that meeting, must be taken to have heard Mr. Balfour's statement, and therefore to have concurred in that statement and thus to have joined in misleading the shareholders. I am not prepared to say that the evidence is insufficient. All the evidence we have got is that they were at the meeting. I have no doubt that the directors at the time—all those directors, at any rate, who are now sought to be charged—believed, as they say they believed, that this was a perfectly valid and proper transaction. They had no ground whatever for concealing it. And in order to bind them by a false statement of this kind made by Mr. Balfour, speaking for myself, I should require it to be proved very clearly that they thoroughly apprehended the falseness of the statement that was made, and concurred in it for the purpose of deceiving the shareholders who were present. I do not think the evidence comes up to that. The mere fact that they were present at the meeting does not seem to me enough to enable the court to

CT. OF APP.]

Re THE LANDS ALLOTMENT COMPANY LIMITED.

[CT. OF APP.]

treat them as having committed a fraud for the purpose of concealing the actual facts from the shareholders in reference to this investment in the shares. Therefore I think that the learned judge in the court below was quite right in treating them as absolved from this investment by the lapse of time that has taken place. Now, I will only say a very few words with reference to the other point, as to the liability of Brock, together with the two gentlemen who have been declared liable—namely, Barnard and Dresser—for the second investment in the shares of the Building Securities Company. That investment was not made till 1889, and therefore six years had not run when these proceedings were taken against them to make them liable. The Statute of Limitations therefore has nothing to do with that case, and there the only question is, who were the persons who really did concur in making that investment—a thing beyond the powers of the company? Any director who did concur in that misapplication of the funds of the company to the extent of 5200*l.* would be jointly and severally liable. Barnard and Dresser were the persons who were present at the meeting of the 1st July 1889, when it was resolved to make this purchase of further shares in the Building Securities Company, and they have been declared liable, and I understand that there is no appeal on their part. Brock was at that time, and had been for some time previously, the chairman of the company. He was not present at that meeting; but before that meeting he had expressed at previous meetings his approval of the holding of the 35,000*l.* of shares in the company. For example, on the 28th Nov. 1888 he was present at a meeting, and again on the 15th April 1889. [His Lordship read the minutes of what occurred at those meetings, and continued:] Now, if Brock, with those views as to the very advantageous nature of the first investment, had been asked the question, "Shall we increase our holding or not?" the great probability is that he would have concurred. Did he concur or did he not? He was not, as I have already remarked, present at the meeting of the 1st July 1889, but he was present in Oct. 1889 at a meeting which confirmed the minutes of the meeting of the 1st July 1889, amongst other minutes. Then there was that speech of his when he was in the chair on the 17th April 1890, which Lindley, L.J. has referred to. [His Lordship read it, and continued:] Observe that this is said by a gentleman who has expressed high approval of the first investment of 35,000*l.* He was perfectly satisfied with it, thought it a very good investment—thought it would be unwise to sell these shares. It is the language of a man who, if he had been asked to concur in this further investment, would most probably, judging from what he had said on previous occasions, have concurred without the least hesitation. Now, can anyone reading this speech of Brock believe that the investment was made without his concurrence? I have listened with interest to all the ingenious arguments of Mr. Marshall Hall on the subject of the editorial "we" and so on. But the editorial "we" is not quite the same thing as the "we" of a director, who, being at the time the chairman of a company, is speaking of an investment, and says, "We have carefully considered the matter, and agree that an investment ought to be made." I cannot possibly allow him to escape under that

extremely ingenious argument from the conclusion to which I have come by reason of this statement of his own that he was one of the persons who, before the investment was made, concurred in the propriety of making that investment—carefully considered it and agreed that it should be done. That being so, I think it is clear that he must be made liable, together with Dresser and Barnard. As to Theobald, there is nothing to make him party to this further investment, except the fact that he was present at the meeting of the 9th Oct. 1889, at which, amongst other things, the minutes of the meeting of the 1st July 1889 were read and confirmed. I agree with Lindley, L.J. as to that. I do not think that there was enough in that circumstance alone to make him liable, looking to the evidence that he himself has given. Therefore, I think that Theobald cannot be made liable as to this further investment.

SMITH, L.J.—My brethren who have preceded me have fully covered this case with regard to the different points which had to be adjudicated upon, and I entirely agree with them, and have nothing to add thereto. I wish, however, to say one word concerning the Trustee Act 1888, about which so much has been properly said by Mr. Finlay and Mr. Ford. Now, as I understand the argument, it is this: "There may be an express trustee; there may be a trustee whose trust arises by implication of law"—I leave out "construction of law"—"and there may be a *tertium quid*." The *tertium quid* which Mr. Finlay suggested was a gentleman in a fiduciary position. Now, I do not agree with him at all about that *tertium quid*. It seems to me that the *tertium quid* is a man who is not an express trustee, and whose trust does not arise by implication of law. If that be the true reading of this section, it is perfectly obvious—supposing these gentlemen come within what I term the *tertium quid*—that these gentlemen have not the Statute of Limitations to rely upon against the present claim. If, however, they are "express trustees" or "trustees whose trust arises by implication of law," then they have the Statute of Limitations to rely upon by virtue of the relief which is afforded by this Act of 1888, unless they are deprived thereof by reason of the three exceptions which are set out in sect. 8 of that Act. Therefore it seems to me, whichever way you take this case, the Statute of Limitations is available for these gentlemen. I now come to the other point. I am not going to say much upon it, but only enough to show that I do not forget it, namely, the question of fraudulent concealment. That does not arise, it seems to me, under this Act of 1888 at all. It has nothing to do with it. It arises upon the fact that, although under both statutes the defendant may after six years plead the Statute of Limitations, yet, if there had been a sufficient fraudulent concealment, then he cannot set up the statutory defence which is given to him, namely, that the transaction occurred six years before the date of the writ. It seems to me, therefore, that, as regards this sum of 35,000*l.*, the directors may set up the Statute of Limitations, because they are trustees whose trust arises by implication of law. As regards Brock, I agree with what the Lords Justices have said. He did think he was acting in the best interests of the company, but he did that which was *ultra vires*—that which he cannot

justify—and, therefore, he must be made liable with Barnard and Dresser.

Solicitors for the appellant, *Phelps, Sidgwick, and Biddle*.

Solicitors for the respondents, *Snow, Snow, and Fox; Beaumont and Rigden; A. F. Church; E. C. Rawlings; W. D. Cunningham*.

Feb. 24 and 26.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re THE TRADE MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ETOILE, MARCHIENNE, BELGIUM. (a)

APPEAL FROM THE CHANCERY DIVISION.

Trade mark—Rectification of register—Mark resembling another already on register—"Calculated to deceive"—"Person aggrieved"—Expunging—Users—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), ss. 67, 72, sub-sect. 2, s. 90—Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 14.

B. and Co. carried on business in London as dealers in window-glass, which they purchased in Belgium and shipped to Australia and other colonies.

In 1876 they registered as a trade mark the device of a star, which they had used in connection with their glass since 1875, and their glass was known in the trade by the designation of "Star Brand."

In 1885 a Belgian glass manufacturing company registered in Belgium, as a trade mark for glass, the device of a red star, which they had used there since 1880.

In 1890 they registered in England, as a trade mark for window-glass, the words "Red Star Brand." They consigned large quantities of glass to England in cases marked with a red star, but did not deal directly with the Colonies.

B. and Co., having discovered that glass was being sold in New Zealand under the description of "Red Star Brand," applied to expunge the Belgian company's mark from the register.

Held, that, inasmuch as B. and Co. had the right, under sect. 67 of the Patents, &c., Act 1883, to use their mark in whatever colour they deemed proper, the mere fact that the Belgian company's mark consisted of words instead of a device did not prevent it from being calculated to deceive; and that therefore B. and Co. were "persons aggrieved" within the meaning of sect. 90 of the Act, and were entitled to have the mark expunged from the register.

Decision of Stirling, J. (69 L. T. Rep. N. S. 708) affirmed.

A MOTION was made, under sect. 90 of the Patents, Designs, and Trade Marks Act 1883, on behalf of Henry Brooks and Co., of London, for an order that the Register of Trade Marks might be rectified by expunging therefrom a trade mark (No. 96,732) registered on the 20th March 1890, by La Société Anonyme des Verreries de l'Etoile, Marchienne, Belgium.

Messrs. Brooks and Co. and their predecessors had for many years carried on business in London as Australian merchants and exporters, and they dealt largely in window-glass. Of this business

the ordinary course was as follows: Messrs. Brooks and Co. purchased in Belgium glass which had been manufactured in that country; the glass so purchased was delivered to them at Antwerp, and shipped by them to this country, whence it was again shipped by them to various places (chiefly in Australia and New Zealand), in execution of orders received by them.

For the purposes of this business they, in the year 1876, caused to be registered various trade marks, and amongst them that (No. 2980) of a star, in connection with window-glass.

According to the evidence, this trade mark was in use at least as early as 1875; and Messrs. Brooks and Co.'s glass, to which the mark was affixed, was in that year, and had ever since been, ordered by their customers by the designation of the "Star Brand."

The Belgian company were engaged in the manufacture of glass. Their predecessors had registered in Belgium as a trade mark for glass, on the 27th Jan. 1885, the device of a red star with the letters "L. L." underneath, and on the 28th Oct. 1892 the same device without those letters.

On the 20th March 1890 the Belgian company registered in England as a trade mark for window-glass, not the device registered in Belgium, but simply the words "Red Star Brand," and this was the mark which Messrs. Brooks and Co. sought by their motion to expunge.

It appeared that the Belgian company and their predecessors had used the device registered in Belgium as a trade mark ever since 1880, and had during that period consigned to England large quantities of glass in cases bearing the device of a red star upon them. It was stated by their manager that they did not ship to Australia or the English colonies.

In the course of the present year Messrs. Brooks and Co. were informed by an agent of theirs in New Zealand that window glass was being offered there for sale as "Red Star Brand." They thereupon made inquiries, and in consequence learnt for the first time of the registration of the Belgian company's mark. Immediately thereafter the present notice of motion was given.

On the 27th Oct. 1893 the motion came on to be heard before Stirling, J.

On the 4th Nov. 1893 it was decided by Stirling, J. (69 L. T. Rep. N. S. 708) that Messrs. Brooks and Co. were "persons aggrieved" by the entry of the Belgian company's mark, and were entitled, under sect. 90 of the Patents, &c., Act 1883, to have it expunged on the ground that it so nearly resembled their mark as to be calculated to deceive within sect. 72, sub-sect. 2. His Lordship also decided that Messrs. Brooks and Co. were not precluded by delay from obtaining the relief which they claimed.

From that decision the Belgian company now appealed.

Moulton, Q.C. and Roger W. Wallace for the appellants.—The trade mark registered by the appellants does not so closely resemble the respondents' mark as to be calculated to deceive within the meaning of sub-sect. 2 of sect. 72 of the Patents, Designs, and Trade Marks Act 1883, as amended by sect 14 of the Act of 1888. Moreover, the evidence shows that during all the years

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

that it has been on the register there never has been any actual deception. [KAY, L.J.—Is the appellants' mark sufficiently distinguished from that of the respondents by the word "Red?" Colour being immaterial, under sect. 67 of the Act of 1883, the respondents are able to use a red star.] But the words "Red Star Brand" cannot interfere with the respondents' trade mark of a star, whether coloured or not. The words which the appellants have registered are wholly inapplicable to the respondents' mark. We submit that if an injunction were being sought for against the appellants, it would be limited to restraining the use of their mark in the colonies, to which the respondents' trade is confined:

Barber v. Manico, 10 Rep. Pat. Cas. 93;

Orr-Ewing and Co. v. Johnston and Co., 42 L. T. Rep. N. S. 67; 13 Ch. Div. 434.

[KAY, L.J.—The appellants' trade mark is a star. They have not registered that device as a trade mark, but they have registered the words "Red Star Brand." Is that not calculated to deceive, having regard to the respondents' mark?] We submit that it is not. The discretion is entirely in the court under sect. 90 of the Act of 1883.

Graham Hastings, Q.C. and *John Cutler*, for the respondents, were not called upon to argue.

LINDLEY, L.J.—This case is an important one unquestionably, not only to La Société Anonyme des Verreries de l'Étoile, Marchienne, in Belgium, but to persons interested in trade marks generally. The case is peculiar, and for this reason: The applicants, Messrs. Brooks and Co., who in 1876 registered as their trade mark for glass a star, complain of a trade mark which does not consist of a star, but consists of the words "Red Star Brand." At first sight, without knowing what Messrs. Brooks and Co.'s rights are under their registered trade mark of a star, the two marks seem to be, or might be, two different marks. But in order to consider whether they are or are not different marks, and in order to see whether the Belgian company's trade mark is calculated to deceive, one must consider what Messrs. Brooks and Co.'s rights are under their registered mark of a star. That depends on sect. 67 of the Act of 1883, which enacts that: "A trade mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour." So that Messrs. Brooks and Co. if they liked could use this star for their glass in any colour they chose—green, red, blue, orange, or anything else. That being the case, it seems tolerably clear, if not quite obvious, that the Belgian company could not register in England for glass a red star. Now, it does seem a little surprising that if they could not register a simple red star they should be enabled to register the description of that very same thing in words—that is to say, that although they cannot appeal to the eye they may appeal to the ear. I cannot see that that is right, and that I understand is the real view taken by the learned judge in the court below, in his judgment which has been read. Two marks may be calculated to deceive either by appealing to the eye or to the ear, or one appealing to the eye and the other to the ear. If you find, as you do here, that the appli-

cants' glass is sold as "Star Glass," or "Star Brand," and when once you bear in your mind that the star may be in any colour, I cannot see that a mark of "Red Star Brand" is not calculated to deceive. So far, I think, the applicants are "persons aggrieved" within the meaning of sect. 90 of the Act of 1883. I think also that if now the Belgian company were seeking to register the words "Red Star Brand" in the face of the evidence before us, it is quite plain that the comptroller would decline to register it—he would decline to register it on the ground that it was not a proper trade mark, having regard to the trade mark of Messrs. Brooks and Co. But that is not quite the present case. The question now is not whether the Belgian company should be permitted to register this mark, for they did in fact register it in 1890, but the application is to expunge their registered mark. That is a strong thing to do, no doubt, and to expunge it after some three years' enjoyment is stronger still. Now, at first I was disposed to think that there might be some difficulty on the part of Messrs. Brooks and Co. in expunging after the lapse of three years, but the delay is explained. It was explained to the satisfaction of the learned judge in the court below, and it is explained now, I think, to our satisfaction. The real truth is that for reasons which I will give presently Messrs. Brooks and Co. did not in fact know of this registration. How it came to pass that they did not know, considering that the Belgian company must have advertised their application, is, I think, tolerably obvious. Messrs. Brooks and Co., although they carry on business here, are exporters. They do not sell in this country. There is nothing to prevent their so selling. They might expand their business to-morrow, for anything I know; but in fact they have not. They are export merchants; and it may well be that being export merchants they have not paid that attention to the registration of marks for the sale of goods in this country which they would have done if their business had been a retail or wholesale business in this country. That may possibly explain the fact that they did not know, notwithstanding the advertisement, that the Belgian company had so long ago as 1890 registered this mark "Red Star Brand." Now, it is suggested that there is further evidence forthcoming, but we are told frankly enough by Mr. Wallace that the evidence which he proposed to adduce does not touch that particular point. It is not in other words to the effect that Messrs. Brooks and Co. did know of this registration in 1890. Apart from that there certainly has been no delay whatever. They have found out quite recently that the Belgian company's glass—this "Red Star Brand"—is competing with their glass in New Zealand, where they also have a registered trade mark. Having discovered that, they say, "We will see if we cannot expunge this mark—the "Red Star Brand"—of the Belgian company. I think they are entitled to do that. It does not at all follow from this, nor is it to be inferred from this, that Messrs. Brooks and Co. could obtain an injunction to restrain the Belgian company from using this trade mark. I say nothing about that. But I think they are entitled to have the trade mark "Red Star Brand" expunged. I think, therefore, that the appeal must be dismissed with costs..

KAY, L.J.—I am of the same opinion. The present application is made under sect. 90 of the Patents, Designs, and Trade Marks Acts 1883 to 1888. Under that section the court may, "on the application of any person aggrieved," by any entry made without sufficient cause in any such register, make such order for expunging or varying the entry as the court thinks fit. Therefore, the question is, whether the applicants can show that the entry of which they complain, and which they seek to have expunged, has been made without sufficient cause. Now, I turn back to sect. 72 of the Act of 1883, and there it is, as amended by sect. 14 of the Act of 1888, enacted that: "Except as aforesaid, the Comptroller shall not register with respect to the same goods or description of goods a trade mark having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive." The words in the Act of 1883 were "so nearly resembling." The section has been altered by substituting for those words "having such resemblance to" (see Act of 1888, sect. 14). Now, first of all, what does "calculated to deceive" in that section mean? It must mean calculated to deceive by the use of the mark; not by its being merely on the register, but by the use that may be made of it. The question here is certainly a new one, I think, because in the present case the applicants have registered the device of a star, without any words at all, and the persons against whom they are applying have registered since the Act of 1888 the words "Red Star Brand" without any device. Now, I doubt whether that could have been done at all under the Act of 1883, for there the trade mark must have been a "fancy word" or a device. I do not think "device" would include a series of words like these. Under the Act of 1888, however, it seems that words may be registered, because by sect. 64, sub-sect. (e)—as amended—among the things that may be registered is "a word or words having no reference to the character or quality of the goods, and not being a geographical name." I presume that the trade mark "Red Star Brand" was registered under that sub-section of sect. 64. Now, have the words "Red Star Brand," which the Belgian company have registered, such a resemblance to the trade mark which the applicants have put on the register as to be calculated to deceive? Mr. Moulton, in his argument, admitted that the applicants, having registered as their trade mark the device of a star, the Belgian company could not register the word "Star" nor could they register the words "Star Brand." I think that is quite obvious, because although one mark appeals to the eye and the other to the ear, they would so nearly resemble each other as to be calculated to deceive. But Mr. Moulton rested his argument chiefly upon the fact that the words "Star Brand" were preceded by the word "Red." He said that that made all the difference; that "Red Star Brand" did not so nearly resemble the device of the star without any colour at all as to be calculated to deceive. But then I refer to sect. 67, which provides in effect that the applicants, having registered the star without colour, may use that star in any colour they like. Therefore they may use a red star, and therefore the addition of the word "Red" does not seem to me to help the Belgian company, because they are in this position: They could not

have registered a device of a star at all in any colour, and if they had tried to register a red star they would have been met at once by sect. 67. So, finding that they are unable to register a device of a red star, they endeavour to escape the Act of Parliament by registering the words "Red Star Brand." To my mind the words "Red Star" do so nearly resemble the device of the star which the applicants have registered as to be calculated to deceive. And I confess that I should come to that conclusion even without the evidence that is before us. But the evidence that is before us seems to me to put that absolutely beyond question, because a number of the witnesses say that, if glass were inquired for by the word "Star" only, they should deem it to mean the applicants' glass. Anybody using a device of a star on glass is using that which would be taken to mean the applicants', and therefore would seriously interfere with the trade of the applicants. And if he might put upon the register a device which everybody would understand to mean the applicants' glass, all I can say is that he would then be putting upon the register a device so nearly resembling the star of the applicants as to be calculated to deceive. The only other question is, whether there has been so much delay that the applicants should on that ground be refused relief. I think the evidence deals with that point effectually. The applicants did not know until within a very few weeks before their application was made that this "Red Star Brand" mark had been registered at all, and therefore there is no question of delay. They came as soon as they could. They were led to the discovery by this fact that they found in the colonies, where their principal trade was carried on, that they were being competed with by glass under the name of the "Red Star Brand." That put them upon inquiry, and then they found, I understand, that those words, "Red Star Brand," were upon the register in England, I think, therefore, that the decision of the learned judge in the court below was right, and that the appeal fails.

SMITH, L.J.—I agree. I have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *Ernest Salaman, Fort, and Co.*

Solicitor for the respondents, *C. Urquhart Fisher.*

Jan. 30, 31, Feb. 1 and 27.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

GOUGH v. WOOD AND CO. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Trade fixtures—Machinery supplied under hire-and-purchase agreement—Mortgage of land—Default of hirer in payment of instalments under agreement—Removal of fixtures—Rights of mortgagees as against owner of fixtures.

The plaintiff claimed damages against the defendants for the removal of a boiler and pipes from certain greenhouses on grounds belonging to E., of which the plaintiff was mortgagee. E., the mortgagor, was a nurseryman, and he was tenant of the premises on a long lease. The boiler and pipes were the subject of a hire-and-purchase

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

agreement made in Nov. 1889, by which the defendants agreed with E. that the boiler and pipes should become his property on the payment of the price by certain instalments, but that until complete payment they were to remain the property of the defendants. E.'s lessor joined in the agreement.

The mortgage was made after the agreement, and without notice of it, but before the boiler and pipes were fixed upon the premises. The boiler and pipes were fixed in brickwork. E. made default in payment of the instalments, and the boiler and pipes were removed by the defendants under the agreement while E. was still in possession of the premises. The ground of the plaintiff's claim was that the boiler and pipes had been affixed to the mortgaged property without his consent, and had become part of the soil, and were irremovable against him.

Held, that the plaintiff, by allowing E. to remain in possession, impliedly authorised him to carry on his business of nurseryman, which would properly include the hiring and bringing on to the premises of fixtures necessary to his business, upon the terms that the owner should be at liberty to remove them on the determination of the hiring agreement.

Held also, that, having regard to this implied authority, to the fact that the fixtures were not the property of E., and that E. was in possession at the date of their removal, the plaintiff's claim failed.

Cumberland Union Banking Company v. Maryport Hematite, &c., Company (66 L. T. Rep. N. S. 108; (1892) 1 Ch. 415) considered and approved.

Decision of Wright, J. affirmed.

THIS was an appeal by the plaintiff from a decision of Wright, J.

The following statement of the facts of the case is taken from the judgment of Lindley, L.J.:

One Edmonds held some land on lease from a person named Moon. Edmonds was a nurseryman, and he carried on business on the land in question. He wanted heating apparatus for his hothouses, and he applied to the defendants Wood and Co. to supply it. They agreed to do so on the hire-and-purchase system; and by an agreement, dated the 1st Nov. 1889, made between Edmonds, Wood, and Co., and Moon, Wood, and Co. agreed to put up some heating apparatus—viz., a boiler and 553 yards of hot water pipes—for Edmonds for 96l. 19s., payable by quarterly instalments. It was agreed that this hot water apparatus should be hired by Edmonds for a year; and that until payment of the last instalment the apparatus should remain the exclusive property of Wood and Co., and that in default of payment they should be at liberty to enter and remove the apparatus. The agreement further stated that Moon, the landlord, joined in the agreement for the express purpose of giving Wood and Co. power to enter and remove the apparatus pursuant to the agreement, and Moon agreed not to distrain upon the apparatus to the detriment of Wood and Co. Upon payment of the whole of the instalments the apparatus was to become the property of Edmonds. This agreement was not under seal, and did not therefore amount to a grant of land or of an easement, to which any subsequent mortgage would be subject.

On the 12th Nov. 1889 Edmonds mortgaged his land to the plaintiff Gough. He had no notice of the agreement. Shortly afterwards, whilst Edmonds was in possession, Wood and Co., the defendants, who had no notice of the mortgage, put up the hot water apparatus. This was fixed in the usual way. The boiler was set in brickwork, and the pipes were cemented into a wall through which they passed. The apparatus was so fixed as to be irremovable without injuring the brickwork; but, on the other hand, it was not fixed more than was necessary for use as a heating apparatus. Its removal was contemplated in two contingencies, viz., first, by the defendants if they were not paid; and, secondly, by Edmonds as a trade fixture when it had become his. After this the plaintiff made Edmonds a further advance, but whether with or without notice that the apparatus had been put up did not appear. Edmonds made default in paying the instalments, and the defendants thereupon entered and removed the heating apparatus. This was done whilst Edmonds was still in possession. The plaintiff afterwards brought this action against Wood and Co. for wrongfully removing part of the property mortgaged to him.

On the 9th Nov. 1893 the action came on for trial before Wright, J., when the following judgment was delivered:—

WRIGHT, J.—I hold that one man's property cannot be taken away from him by being fixed into the land of another. I cannot imagine such a contention as has been raised prevailing. If the defendants Wood and Co., the owners of the boiler, had assented to the boiler being made part of the freehold in question that would have been another matter; or, if they stood by and had seen it that might have been another matter. But there is no evidence of that except one expression of the witness that it is usual to fix boilers in the way in which this one was fixed. From that I should be asked to infer that Wood and Co. in supplying the boiler meant that it should be fixed in the way described. That is not enough, I think; but, even if that were enough on the first point, there is a second point on which the plaintiff must fail also. This boiler was obviously in the nature of a trade fixture itself. No fixtures were included in the mortgage at all, and this boiler was movable as between the mortgagor Edmonds and his landlord, and also as between Wood and Co., the owners of the boiler, and Edmonds. And I do not think that that is enough to give the mortgagee any right to defeat the hiring agreement under which Wood and Co. set up their claim. I think, therefore, that the action must be dismissed. There will be judgment for the defendants, with costs.

From that decision the plaintiff now appealed.

Bosanquet, Q.C. and Tindal Atkinson for the appellants.

Swinfen Eady, Q.C. and Ernest Pollock for the respondents.

The arguments, and the authorities cited in support thereof, sufficiently appear from the judgments. *Cur. adv. vult.*

Feb. 27.—The following written judgments were delivered:

LINDLEY, L.J.—This is an action for damages for the removal of fixtures from land mortgaged to the plaintiff. The facts are simple. [His

Lordship stated them, as set forth above, and continued:] The action was heard before Wright, J., who gave judgment for the defendants, and the plaintiff has appealed from his decision. The plaintiff's claim, put shortly, is that not being a party to the agreement of the 1st Nov., and not having notice of it, he is not bound by it, either at law or in equity; and that the heating apparatus having been affixed to his property without his consent the apparatus ceased to be a chattel and became part of the soil and irremovable as against him. The plaintiff does not deny that the apparatus was a trade fixture removable as between landlord and tenant during the tenancy, even apart from any special agreement to that effect; but he relies on cases which show that trade fixtures put up by a mortgagor cannot be removed by him as against his mortgagee, and contends that Wood and Co. are in no better position than Edmonds himself would have been. The plaintiff's counsel also relied on *Ex parte Cotton* (2 Mon. Dea. & De G. 725) and *Cullwick v. Swindell* (L. Rep. 3, Eq. 249), in which trade fixtures of a firm on land belonging to one of the partners were held to pass by a mortgage of that land executed before the fixtures were put up. The cases of *Mather v. Fraser* (2 K. & J. 536); *Climie v. Wood* (20 L. T. Rep. N. S. 1012; L. Rep. 4, Ex. 328); *Longbottom v. Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5, Q. B. 123); *Holland v. Hodgson* (26 L. T. Rep. N. S. 709; L. Rep. 7, C. P. 328) show beyond all doubt that if the apparatus in question had been the property of the mortgagor, and he had fixed it, although only for the purposes of his trade, it would not have been removable by him as against his own mortgagee. The fact that the mortgage is by a lessee and not by an owner in fee is immaterial: (*Southport and West Lancashire Railway Company v. Thompson*, 58 L. T. Rep. N. S. 143; 37 Ch. Div. 64; *Meux v. Jacobs*, 32 L. T. Rep. N. S. 171; L. Rep. 7, E. & Ir. App. 481, where the mortgage was equitable.) Further, the partnership cases mentioned above show that fixtures put up by a firm on the separate property of one of the partners pass to his mortgagee. His co-partners could not recover them from him, and he, of course, could not claim them from his mortgagee. Whether on taking the partnership accounts he would or would not have to account for their value would in no way concern the mortgagee. None of those decisions, however, cover the present case. We have to consider, not the right of a mortgagor to remove property of his own which he has fixed, but the right of a third person to unfix and carry away a chattel of his own which he has fixed at the request of a mortgagor in possession, and for the purpose of enabling him to carry on his trade; a chattel, moreover, which has been fixed upon the terms that its owner may remove it if not paid for, and which, not being paid for, has been removed before the mortgagee has taken possession. The case undoubtedly presents difficulties which ought not to be passed over unnoticed. Wright, J. went, I think, too far in holding "that one man's property cannot be taken away from him by being fixed in the land of another." Cases can be put in which this might happen; and the law stated in Brooke's Abr. "Property," 23, and reproduced (although with a wrong reference) in Bac. Abr. "Trespas" E. (2) is, I take it, good law even now. It is there said:—"If a piece of timber which was

illegally taken from J. S. have been hewed, this action (viz., trespass) does not lie against J. S. for retaking it. But if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real property." If I employ a builder to build me a house, and he does so with bricks which are not his, I apprehend that they become mine, and that their former owner cannot recover them or their value from me. The old law expressed in the maxim, *Quicquid plantatur solo solo cedit*, although much relaxed since the days of the Year Books, has not yet been replaced by the rule which prevents the owner of real property from granting a better title than he himself has; nor has the maxim in question yet given way to the ordinary rules which are applicable to sale of chattels whilst still unfixed to land. It is not, however, necessary in this case to attempt to reconcile any conflicting principles of law; when it becomes necessary to do so attention will have to be paid to the judgments in the important cases of *Holland v. Hodgson* (*ubi sup.*) and *Wake v. Hall* (48 L. T. Rep. N. S. 834; 8 App. Cas. 195). The present case is, in my opinion, governed by two decisions relating to trade fixtures put up by mortgagors in possession. The first is *Sanders v. Davis* (15 Q. B. Div. 218), in which it was held that a tenant of a mortgagor in possession might remove trade fixtures put up by himself, and that those fixtures did not belong to the mortgagee. The mortgage was prior to the lease, and the lessee was not the mortgagee's tenant; so that the ordinary doctrine relating to trade fixtures, which only applies as between landlord and tenant (see *Fisher v. Dixon*, 12 Cl. & Fin 312), was not strictly applicable to the case. The fact that the person who put up the fixtures was tenant to the mortgagor and had a right to remove them as against him was held sufficient to prevent the fixtures from becoming the property of the mortgagee. The next case is *Cumberland Union Banking Company v. Maryport Hematite, &c., Company* (66 L. T. Rep. N. S. 108; (1892) 1 Ch. 415), which was similar to the present in all material respects. In that case North, J. decided against the mortgagees on the ground that, having regard to the position of the parties, the mortgagees could have no better title to the fixtures than their mortgagor. We were asked to overrule this case: but, in my opinion, it was rightly decided, having regard to the fact that the mortgagor was in possession, which is the case here also. This circumstance affords an answer to the argument based on the fact that the defendants fixed their apparatus to the plaintiff's land without his consent. By leaving the mortgagor in possession, the mortgagee impliedly authorised him to carry on his business and to sell and remove the plants, trees, and shrubs which, though fixed to the soil, constituted his stock-in-trade. This implied authority can hardly be confined to such things, but may fairly be regarded, and I think ought to be regarded, as authorising the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing

CT. OF APP.]

GOUGH v. WOOD AND CO.

[CT. OF APP.]

bonâ fide with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded. This implied authority and the fact that the hot-water apparatus was not the property of the mortgagor are the important features of this case, and are, in my opinion, sufficient to protect the defendants from the claim of the plaintiff. Whether Wood and Co. could have removed the apparatus if it had been put up before the mortgage to the plaintiff, or if he had taken possession before removal, are questions which it is unnecessary to decide, and on which I express no opinion. In such a case as the present the mortgagee's security is neither better nor worse than when he took it, and no injury is inflicted on him. The appeal must be dismissed with costs.

KAY, L.J. — The plaintiff claims damages against the defendants for the removal of a boiler and pipes from certain greenhouses on the grounds of a nurseryman of which the plaintiff is mortgagee. Edmonds, the nurseryman and mortgagor, held the premises on a long lease. The boiler and pipes were the subject of a hiring and sale agreement made on the 1st Nov. 1889, by which the defendants agreed with Edmonds that the boiler and pipes should become his property on the payment of the price by certain instalments, but that until complete payment they were to remain the property of the defendants. Edmond's lessor was a party to this agreement. The mortgage was made after this agreement, viz., on the 12th Nov. 1889. The mortgagee knew nothing of this agreement. The mortgagor was left in possession, and the boiler and pipes were fixed upon the premises after the date of the mortgage. Default was made by Edmonds in payment of the instalments, and the defendants, on the 14th Oct. 1892, while the mortgagor was still in possession, removed the boiler and pipes as by the agreement of the 1st Nov. 1889 they were empowered to do. No question arises between the mortgagor and his landlord who, as I have said, was a party to the hire and purchase agreement. The boiler and pipes were fixed in brickwork in the usual way, and were certainly fixtures in the sense that they became part of the land and ceased to be mere personal chattels. If bricks or timber belonging to A. be wrongfully taken by B. and built by him into a house belonging to C., A. cannot recover them against C., though their identity is clear (*Bac. Abr. "Trespass, E."* 2), and the reason is given that the nature of the material is changed and that it has become real property. Even a tenant who has a right as against his landlord to remove trade fixtures during the term, cannot maintain trover for them while annexed to a part of the realty: (*Lee v. Risdon*, 7 Taun. 188; *Davis v. Jones*, 2 B. & Ald. 165; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Minshall v. Lloyd*, 2 M. & W. 450). There is no doubt that a mortgagee is entitled to all fixtures as against his mortgagor, whether put upon the land before or after the mortgage: (*Walmsley v. Milne*, 7 C. B. N. S. 115; *Meux v. Jacobs*, 32 L. T. Rep. N. S. 171; L. Rep. 7 E. & I. App. 481; *Cullwick v. Swindell*, L. Rep. 3 Eq. 249; *Climie v. Wood*, 20 L. T. Rep. N. S. 1012; L. Rep. 3 Ex. 257.) This is so, whether the mortgage is of a freehold or of a leasehold property (*Ex parte Barclay*, 5 De G. M. & G. 403). Therefore the

mortgagor could not have removed these fixtures without the consent of the mortgagee, and, of course, he could not authorise anyone else to do so. Where articles are affixed to the land so that they are no longer personal chattels no one can take them from a mortgagee without his consent, unless he had a conveyance of them by deed or an agreement for value binding upon the mortgagee. Where the mortgagee has taken possession there is an additional difficulty, because then no one could enter to remove the fixtures without committing a trespass. If fixtures could be removed under an agreement like this against a subsequent purchaser or mortgagee without his consent, he would be subject to a danger which at present has never been understood to exist. Besides the chance of infirmity of the mortgagor's title to the land there would be the risk that the fixtures upon it might, by a contract between the mortgagor and a third person, remain the property of such third person and be removable by him. I should be sorry to see this additional danger imposed upon a *bonâ fide* purchaser or mortgagee. A case may easily be supposed where such a law might deprive him of a large part of the value of the property, as, for example, the machinery in a mill or large manufactory. The question therefore is, whether the mortgagee has assented to the removal of the fixtures. He had not taken possession at the time when the fixtures were removed. The mortgagor was a nurseryman carrying on his business upon the land mortgaged. He was left in possession by the mortgagee, and during such possession it must be inferred that the mortgagee assented to the mortgagor doing everything that was usual and proper to enable him to trade as a nurseryman. For example, until prevented by the mortgagee taking possession, he might remove and sell the young trees that he was cultivating for that purpose, though they, while growing, were a part of the land. If then, while in such possession, he obtained the boiler and pipes upon an agreement which allowed the vendor to remove them if default was made in paying for them, why should not the mortgagee be taken to have assented to the vendor being allowed to remove them just as a purchaser of trees might do with the consent of the mortgagor in possession? Suppose that after the mortgagee had taken possession the boiler and pipes had been fixed under the previous agreement with the mortgagor, the mortgagee if he allowed them to be fixed, could not ignore the agreement under which they were so fixed. Ought he to be in a better position if they were fixed and removed under that agreement before possession was taken by him? As the boiler and pipes were removed while the mortgagor was in possession and was carrying on, with the assent of the mortgagee, a business for the purposes of which they were fixed, I think his licence may be held to extend so far as to permit the removal while that business was being carried on by the mortgagor and before the mortgagee put an end to it by taking possession. Turning to the authorities, it has been decided that if a mortgagor in possession enters into partnership with other persons, and the first puts fixtures on the mortgaged premises, they cannot be removed against the mortgagee: (*Ex parte Cotton*, 2 Mont. Dea. & De G. 725; *Cullwick v. Swindell*, L. Rep. 3 Eq. 249; *Climie v. Wood*, 20 L. T. Rep. N. S. 1012; L. Rep.

3 Ex. 257; 4 Ex. 328.) In *Sanders v. Davis* (15 Q. B. Div. 218), a mortgagor while in possession let to a tenant named Hunt, who put certain tenant's fixtures upon the demised premises. The mortgagee then sold the property, including the tenant's fixtures, and the tenant's assign of the fixtures was held entitled to recover the value of the fixtures from the mortgagor. Manisty, J., who was one of the judges in that case, says that the mortgagee allowed the mortgagor to remain in possession and deal with the property. If the mortgagee had taken possession and let, and his tenant had brought trade fixtures on to the premises, he would have been entitled to remove them when the tenancy terminated, and he continued: "I cannot see why a mortgagee should be in a better position in this respect when he permits the mortgagor to deal with the property and let in a tenant. I think he must be taken to have known of the letting to Hunt, and to have acquiesced in it, and consequently he would not have been able to prevent Hunt from removing the fixtures." That is, that there was an implied assent by the mortgagee to the terms on which the fixtures were placed which bound him to allow their removal. In *The Cumberland Union Banking Company v. Maryport Hematite, &c., Company* (66 L. T. Rep. N. S. 108; (1892) 1 Ch. 415) the facts were practically the same as in the present case. Mortgagors in possession of a colliery which they had mortgaged put up certain machinery under a hire-and-purchase agreement. The mortgagees obtained the appointment of a receiver, and on his giving up the property it was held that the machinery might be removed by the vendor of it. The learned judge says in part of his judgment: "I think it was not in the power of the mortgagors to confer on the mortgagees a better title than they themselves had to the property which they agreed to mortgage to them." But he based his decision on the fact that the receiver was going to abandon the colliery. I do not understand the language of the learned judge in that case to mean that the fixtures could be removed without the consent of the mortgagee. The decision may be supported upon the ground of an implied assent by him. If it means that the fixtures could be removed without such implied assent, I should respectfully differ from that view. As the mortgagee has not taken possession in this case before the removal of the fixtures, I think that it is right to imply his assent to the fixing and removal of the boiler and pipes, and that on this ground the decision may be affirmed.

SMITH, L.J.—I have had an opportunity of reading Lindley, L.J.'s judgment. I entirely agree with it, and have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Robbins, Billing, and Co.*

Solicitors for the respondents, *Torr, Janeway, Gribble, Oddie, and Sinclair*, agents for *Atchleys*, Bristol.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Nov. 23, 1893.

(Before CHITTY, J.)

Re BRYANT; BRYANT v. HICKLEY. (a)

Will—Infants—Maintenance clause—Trust or power—Discretion of trustees—Interference by court.

A testator gave his residuary estate to five trustees (of whom his wife was one) upon trust to pay the income to his wife during widowhood, and in the event of her marrying again he directed his trustees to pay her 4000*l.* a year out of the income, and subject thereto the capital and income were to be held for such of his children as being sons attained twenty-five, or being daughters attained that age or married. And the testator directed that, after the decease or marriage again of his wife, his trustees should apply the whole or such part as they should think fit of the income of the share to which any child should for the time being be entitled, or contingently entitled, for or towards the maintenance and education or otherwise for the benefit of such child, and whether under or over the age of twenty-one years.

The testator's widow married again, and there were three young children of the testator who continued to reside with and were maintained by her, although shortly after her marriage she applied to her co-trustees to make her an allowance of 300*l.* a year out of the income towards their maintenance and education, but they in the exercise of their discretion declined to make any allowance. On an application by the infant children for an order directing the trustees to pay a sum for their maintenance out of the income:

Held, that there was no imperative trust to apply any part of the income for the maintenance of the infants; that the four trustees having honestly exercised their discretion not to make any allowance for maintenance, the court could not overrule their discretion; and that, if in consequence of all the trustees not being agreed the discretion was to be exercised by the court, the court exercised the discretion adversely to the application.

THIS was an originating summons taken out by three infants, aged nine, seven, and six years respectively, by their uncle as their next friend, asking that the trustees of their father's will might be ordered to make them an allowance for their maintenance out of the income of his estate.

The testator Frederick Charles Bryant, by his will dated the 2nd July 1888, after appointing his wife Lillian and four other persons executors and trustees thereof, and his wife guardian of his infant children, and after making various specific and pecuniary bequests, devised and bequeathed all his real estate and the residue of his personal estate upon trust to permit his wife to occupy his mansion-house during her life or widowhood, and subject thereto upon trusts for sale and conversion, and for investment of the residue of the moneys arising from such sale and conversion after payment of his debts and legacies, and upon trust to pay the income of the investments to his

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

Re BRYANT; BRYANT v. HICKLEY.

[CHAN. DIV.]

wife during her life or until she should marry again, and so that during the subsistence of her interest therein she should be under the obligation of maintaining and educating in a manner suitable to their station in life such of the testator's children as being sons should be under twenty-one years, and not engaged in any business or profession yielding them an income sufficient in the estimation of the trustees for their maintenance, and as being daughters, should not be or have been married. And in the event of his wife marrying again, the testator directed his trustees to pay to her during the residue of her life out of the income of his residuary estate the annual sum of 4000*l.* for her separate use without power of anticipation, in addition to any benefits she might be entitled to under the settlement executed on her marriage with the testator, and, subject as aforesaid, the trustees were to hold his residuary estate both capital and income for such of his children living at the time of his death as being sons, should attain twenty-five years, or being daughters, should attain that age or marry, as tenants in common, the shares of sons to be double those of daughters, and the shares of daughters marrying under twenty-one to be settled as therein mentioned, and in the event of no child living to attain a vested indefeasible interest, there was a gift over. The will contained the following maintenance clause:

I direct that, after the decease or marriage again of my said wife, my trustees shall apply the whole or such part as they shall think fit of the income arising from the share in the residuary trust fund to which any child or other issue of mine shall for the time being be entitled, or contingently entitled, for or towards the maintenance and education, or otherwise for the benefit of such child or other issue, and whether he or she shall be under or over the age of twenty-one years.

The testator died in Dec. 1888, leaving three children, the plaintiffs in the action.

In Oct. 1891 the testator's widow married again, and the children continued to live with their mother, and were maintained and educated by her. In addition to the 4000*l.* a year to which the mother was entitled under the will, she received about 1000*l.* a year under the settlement made on her marriage with the testator.

Shortly after her marriage the mother applied to her co-trustees for an allowance of 300*l.* a year towards the maintenance and education of the children out of the income of the testator's residuary estate, which, after paying the annuity of 4000*l.*, and the expense of keeping up the mansion-house, which was unlet, amounted to between 600*l.* and 700*l.* a year. The co-trustees in the exercise of their discretion declined to make any allowance, considering that it would not be for the benefit of the children to do so under the existing circumstances. After some correspondence an originating summons was taken out by the infants by their next friend, asking that the defendants, the trustees, might be ordered to apply a proper part of the income of the infants' respective shares in the testator's residuary estate for or towards their maintenance and education, and in or towards repayment to the mother of the sums expended by her for their maintenance and education since Oct. 1891.

Farwell, Q.C. and *Charles Browne* for the plaintiffs.—The ability of the mother to support her

children is not a matter into which the court will inquire:

Lewin on Trusts, 9th edit., p. 660;
Douglas v. Andrews, 12 Beav. 310.

There is an imperative trust requiring the trustees to apply the income, or part thereof, for the maintenance of the infants; the only discretion the trustees have is as to the amount. Even if the trustees have a discretion as to whether they will make any allowance or not, it must be exercised unanimously, and where they do not agree the court will exercise it in their place. They referred to

Tempest v. Lord Camoys, 21 Ch. Div. 576, n.;
Malcomson v. Malcomson, 17 L. Rep. Ir. 69.

C. W. Greenwood, for the mother, supported the application.

Levett, Q.C. and *W. F. Hamilton* for the four trustees.—The correspondence shows that the real object of the application is to enable the mother to put by money for the benefit of her husband. The maintenance clause does not amount to an absolute trust, but gives the trustees a discretion:

Wilson v. Turner, 48 L. T. Rep. N. S. 370; 22 Ch. Div. 521.

The trustees have in their discretion, honestly exercised, refused to make any allowance under the present circumstances, and the court will not interfere to overrule their discretion:

Tempest v. Lord Camoys, 48 L. T. Rep. N. S. 13; 21 Ch. Div. 571.

They also cited

Brophy v. Bellamy, 29 L. T. Rep. N. S. 380; L. Rep. 8 Ch. App. 798;
Re Lofthouse, 53 L. T. Rep. N. S. 174; 29 Ch. Div. 921.

Farwell, Q.C. in reply.

CHITTY, J.—This is an application by three infants by their next friend, asking that, out of the income of their father's estate, the sum of 300*l.* a year may be allowed for their maintenance. The father is dead, their mother is alive, and since the father's death she has married again. She by statute is now the guardian of the children, and also by statute, having separate property, she is subject to all such liability for the maintenance of her children as a husband is by law subject for the maintenance of his children. The question turns upon a clause in the will which I will read in a moment. There is a contest raised at the bar with reference to the nature of this clause, and it is urged in support of the application that when the will is properly read there is on the face of it a necessary implication that the trust or power, whichever it ought to be called, must be exercised, and exercised, if the argument meant anything, for the benefit of the mother. [His Lordship then stated the effect of the will, and read the maintenance clause, and proceeded:] I am unable to find in that will any such necessary implication as is contended for. The lady is now, so far as the will goes, under no obligation to maintain the children. She is freed from that, and the rest is left to the law which I stated at the commencement of this judgment. It is quite plain, from the form of the clause which I have just read, that the testator did not mean to create a trust for the benefit of his widow. I think it is not necessary to say more upon that part of the

case. Now the income of the testator's estate appears to have been less than that which it was hoped it would amount to. There is a surplus income of 600*l.* a year or thereabouts applicable under the clause. The trustees are five in number, the widow herself being one. She supports the application, but the other four trustees, against whom not one word can be said, oppose it, and they take up this ground: they say that they have considered the circumstances, and that in the exercise of an honest discretion they have come to the conclusion that it is not fit and proper that they should apply the income, or any part of it, at present, and in the existing circumstances, for the maintenance of the children. As against this position it is argued in support of the application that there is manifested in the clause a trust which must be executed, and, admitting that there is some discretion vested in the trustees, it is said that this is a discretion which they must all exercise, and that if they do not agree, as is the case, in exercising it, the court must exercise it in their place. Now a similar clause came before the Court of Appeal in *Wilson v. Turner* (*ubi sup.*). No substantial difference is to be found in the language of the clause in *Wilson v. Turner* and that which I have just read. The point in that case was with reference to the liability of a father to account for income which he had received from trustees, the father having unduly obtained from the son a gift of the corpus of the property which was set aside, and the father had to account for what had been thus received, and the question was whether he was to account also for the income. The trustees without exercising any discretion in the matter whatever had paid over the whole of the income to the father, and the Court of Appeal, affirming the Vice-Chancellor's decision, held that the father must account for the income. The exact point of the case was, that the trustees had not exercised their discretion, and consequently that it was a wrongful payment on their part, and that the father being privy to it, and having received the money, was bound to account. But the Master of the Rolls dealt with the clause critically, and expressed his opinion that the trustees were not bound to apply any part of the income for the maintenance of the son. Lindley, L.J. examined the clause also with care, and said: "It runs in this way; reading it shortly, it declared that the trustees should (so far it looks like a trust) after the decease of the wife, apply the whole or such part as they should think fit of the annual income, for or towards the maintenance of the children. Let us see how under those words apart from authority it could be said consistently with the language that it was the duty of the trustees to apply any part of this fund to maintain the children. I think it would be doing violence to the language to say that this was a trust obliging the trustees so to apply the fund, and if it were not for authority I should be content to stop there and say I cannot so read this clause." Then he examined the authorities and came to the conclusion that I have already stated. Now I do not understand that the Court of Appeal in *Wilson v. Turner* intended to overrule the decision of the Court of Appeal to which the same Master of the Rolls was a party, in the case of *Tempest v. Lord Camoys* (*ubi sup.*), which was decided a few months before. That decision has a bearing upon

the case which I have now to decide. There the court held that the case was one of mixed trust and power, and that there was no obligation on the part of the trustees to lay out the funds in their hands in the purchase of real estate, but that the trustees had a discretion in regard to the time, the manner, and the circumstances in which they would execute this trust. The short facts were, that one of the trustees proposed to buy a particular estate, and insisted upon it; the other trustee, as I held, in the exercise of an honest opinion, said that he did not think it was proper to buy that particular land. Here the trustees were differing in opinion as to the exercise of their discretion. I held, and the Court of Appeal affirmed what I did, that the court would not control the exercise of the discretion by the trustee who refused to buy the land, and consequently that the order that was asked for could not be made. The trustee there who dissented did not take up the position, "I will not look into this matter at all; I will not lay out the money in the purchase of land," but he said, "Willing as I am to execute the trust, I say that this particular purchase is not a fit and proper one." That being honestly done, the court declined to interfere with his discretion. The other case of *Tempest v. Lord Camoys* was an early one, before Lord Cairns, where there was a power given to the trustees in their absolute discretion to execute a lease. It was a power in terms; but Lord Cairns, on reading the whole will, came to the conclusion that it was a power vested in them for the purpose of giving effect to the general scheme that was found in the will, and consequently it was obligatory on them to execute the lease. That would seem merely in point of language to be a pure power and discretion. Now I think that in *Wilson v. Turner* the Court of Appeal did not mean to lay down the proposition that, in regard to such a clause as I have before me, there was not a duty to be performed by the trustees; they had not to consider the case of the trustees saying, "We will have nothing to do with the maintenance of the children, and we will not take into consideration the circumstances of the case." Therefore the observations that fell from the judges of appeal must be taken to be addressed to the particular point that they had before them, and, as I have said, it was a case in which the trustees had exercised no discretion whatever. If, however, I were to take the language literally, the result would be that I must decide this case in favour of the four trustees. If, however, on the other hand, the correct view is that there is an obligation to entertain the question of duty to consider the matter, and then a discretion arising in the execution of the duty, then I may inquire whether the four trustees are acting honestly or not in the discharge of their duty, and I may say here at once that I do not see the slightest ground for imputing anything like a breach of duty to the four trustees. The four trustees take up this position: "We have looked into this matter; we find that the surplus income is 600*l.* a year only; we see that the children are being well educated and maintained by their mother, who has not only the 4000*l.* a year from the father's estate under his will, but has an additional income of nearly 1000*l.* a year derived from the settlement that he made on her on his marriage; we find that the mother is not only able, but that she is willing to maintain, and is

CHAN. DIV.]

PETHICK v. MAYOR, &C., OF PLYMOUTH.

[CHAN. DIV.]

maintaining, these children and educating them according to their station and rank in life; we see that hereafter when the children grow older, and the boy has to go possibly to a public school or to a university, that the money will be required to assist him in his career; we see that the children also take no vested interest, and take nothing under the will except through the medium of this power until, as to the boy, he attains twenty-five, and, as to the girls, until they attain that age or marry, and it may be in the course of events when they attain the age of twenty-one, they may want money for purposes for which it is not wanted as they now are, and we think it is for the benefit of these young persons that we should have in hand the fund available for their maintenance and education as they grow older, and available also for their maintenance if not for their education when they have passed their infancy—when they have arrived at the age of twenty-one years." The trustees have no ill-feeling towards the lady, nor towards her husband, as far as anything is disclosed on the evidence; they have taken all the circumstances into consideration, and they say further, "It is our duty in executing this trust or power, whatever the court chooses to call it, to have regard to the interests of the children, and we think this application is not made in their interests, but in the interests of another, and to put it plainly, in the interests of the stepfather." [His Lordship then read a letter written by the stepfather, and proceeded:] This letter does justify the trustees in saying that the object of the application is to put by money—that, in other words, the wife might be enabled to save for the benefit of the husband. It is not of course improper that she should save it, if she thinks fit, for her husband, but this shows that the money is not really wanted for the maintenance and the education of the children. I come to the conclusion that the four trustees have acted honestly and prudently in the exercise of their discretion, and I think I am not in a position, as a matter of law, to overrule their discretion. Mr. Farwell in his ingenious reply tried to sever the different points, and to make out that somehow or other there being a discretionary power which had not been exercised (it is a curious argument), the court would exercise it in the place of the trustees. Mr. Farwell may like a further opinion on this or may not—I cannot say; but I think it is at least right that I should express my opinion that, supposing that argument to be well founded, and that the discretion has now passed to the court, and that it is exercisable by the judge sitting here, I do exercise the discretion, but adversely to the application. I think I need say no more about the case, except that the application fails.

Solicitors: *Clowes, Hickley, and Steward; Wilson, Bristows, and Carpmael.*

Dec. 21, 1893, and Jan. 19, 1894.

(Before CHITTY, J.)

PETHICK v. MAYOR, &C., OF PLYMOUTH. (a)

Urban authority—Urinal—Proper and convenient situation—Nuisance—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 39.

Where a site has been selected by an urban authority acting under sect. 39 of the Public Health Act 1875, as proper and convenient for a public urinal, the burden of showing that the site selected is not a proper and convenient site within the meaning of the section lies on the person complaining of the particular site, and it is not sufficient for him to suggest other sites as being more proper and more convenient.

THIS was a motion by the plaintiff to restrain the corporation of Plymouth until the trial of the action from erecting a public urinal, lavatory, and offices, in Freedom Park, Plymouth, opposite and adjacent to certain houses of the plaintiff, so as to cause a nuisance to the plaintiff or his tenants.

The defendants as the urban authority were erecting a public urinal, &c., in Freedom Park, Plymouth, of which they were the owners. Sect. 39 of the Public Health Act 1875 provides that, "any urban authority may, if they think fit, provide and maintain in proper and convenient situations urinals, &c., for public accommodation."

The plaintiff was the owner of a number of houses abutting on the road overlooking the park, and the building complained of was being erected about 230 feet from the nearest of his houses, and in full view of all of them, and evidence was given on the plaintiff's behalf to show that the erection of the urinal on the site selected would seriously damage his property, and would be a nuisance, and that there were other sites which would be more convenient and more proper.

Byrne, Q.C. and Manby, for the plaintiff, referred to

Biddulph v. St. George's Vestry, 8 L. T. Rep. N. S. 558; 3 De G. J. & Sm. 493;

Vernon v. Vestry of St. James, Westminster, 44 L. T. Rep. N. S. 229; 16 Ch. Div. 449.

Farwell, Q.C. and Methold for the defendants.

CHITTY, J.—On this motion the plaintiff complains of the wrong alleged to have been committed on him by the defendants, acting as the urban authority. Sect. 39 of the Public Health Act 1875 empowers the urban authority to provide urinals, &c., for public accommodation. The plaintiff's case is, that what the defendants propose to do will result in a nuisance to him, and there is a second point with reference to the site. The defendants, the corporation of Plymouth, as the urban authority, are the owners of Freedom Park, which contains about nine acres of ground. It is not contested that the public authority reasonably consider that the public require the urinal and other accommodation, and that its erection is justified as far as the public accommodation is concerned. The plaintiff is the owner of a number of houses which abut on the road overlooking the park. He is building other houses in continuation of this row of houses, which is known as Queen's-gate and Queen's-gate Villas. I have before me plans of the buildings, the erection of which has

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

PETHICK v. MAYOR, &C., OF PLYMOUTH.

[CHAN. DIV.]

been just commenced, and also an affidavit of Mr. Bellamy, the consulting engineer and surveyor to the board, showing in detail what the building will be when completed. It stands about 230 feet from the nearest of the plaintiff's houses. The part nearest the houses is the ladies' entrance. Speaking generally, I have come to the conclusion that the defendants intend to act reasonably in all respects, and intend to conduct the place according to the best methods known at the present day. There are two questions on sect. 39. Though it is necessary to consider the section as a whole, it is convenient to point out that there are two matters in dispute which are to a certain extent distinct—viz., first, the nuisance; secondly, the proposed situation. As regards the apprehended nuisance, the motion is one *quia timet*. I have recently endeavoured to explain the principles on which the court acts in cases of private nuisance in *The Attorney-General v. Corporation of Manchester* (68 L. T. Rep. N. S. 608; (1893) 2 Ch. 87); and the general conclusion there stated is, that the plaintiff seeking an injunction to restrain an alleged future nuisance must show a strong case of probability that the apprehended nuisance will in fact arise. Mr. Manby has argued the case with skill, but I have come to the conclusion that the plaintiff has not made out a case for an injunction on the ground of nuisance, and I am of opinion that he has not established that any nuisance is likely to arise. It is of course plain that sect. 39 does not empower the urban authority to do any act amounting to a nuisance, whether public or private. In this respect, as regards persons in the position of the plaintiff, I must treat the defendants as James, L.J. treated the defendants in *Vernon v. Vestry of St. James, Westminster* (*ubi sup.*), viz., as trustees of a neighbouring estate, with similar powers of erecting similar conveniences. Much of the argument addressed to me would have formed excellent material to be laid before the meeting of the council, but it is irrelevant in a court of justice. I am unable to extract the real ground on which the plaintiff bases his case of apprehended nuisance. Interruption of the view or depreciation of the value of the building is *damnum absque injuria*, and not a private nuisance. Take an illustration: Suppose a man erects houses of a high-class character, he cannot complain if an adjoining owner erects mean and low tenements on his own land. Although the value of the better class of houses is thereby very considerably diminished, there is no actionable wrong. Now I have been dealing with the question of nuisance as if it were a separate point, but I agree, though it is the chief term used in the affidavits and notice of motion, it is not the only question in the case. The defendants say, if there is no nuisance made out, there is an end of the case; but the plaintiff contends that sect. 39 provides in express terms that the convenience must be set up in "a proper and convenient" situation. I think he is right, and that I am bound to consider that question. On this point there are two arguments. First, the defendants say the urban authority are the sole judges of what situation is proper and convenient, and that, in the absence of bad faith, or arbitrary, perverse, or vexatious conduct, the court cannot overrule them. I think, having regard to former legislation, there is a limitation placed on the discretion of the urban authority—viz., that they are bound to select a

proper and convenient situation. The evidence of the plaintiff consists in pointing out other situations, especially the point H on the plan, near Captain Julian's house, as more proper and convenient. I decline to consider that question at all; i.e., I decline to decide that there is some other proper and convenient situation which is more proper and more convenient than the one chosen. I should be attempting to decide a question in which other persons—e.g., Captain Julian—are interested without hearing them. The plaintiff points out the lie of the land, the proximity to his houses, and other matters. Unquestionably a public convenience such as this, near a dwelling-house, is something to be disliked. It is contended that each man says, "Put it near my neighbour." I do not adopt that cynical view in its entirety, as there is still a certain amount of public spirit to be found. Objections were raised to the site H. They were considered by the council, and thought sufficient. I cannot follow the affidavits into that. It is said the council ought to select a site which would offend nobody, but I doubt whether any urban authority could achieve such a marvellous result. It is the duty of the urban authority to take into consideration the propriety and convenience of the spot selected in this sense—viz., they must see that the place is one which requires the convenience, and then choose a site which is proper and convenient both with reference to the public, and with reference to the surrounding land, and the owners and occupiers of houses in the neighbourhood. The question was before the council some considerable time. They gave it their due attention, and appointed a special committee to consider it. There was no undue haste. The council found it a difficult question, and their resolution in favour of the present spot was only carried by a small majority. Nothing of course turns on the narrowness of this majority, but I mention the fact to show that there was due consideration as to the site. It must be borne in mind that the council are on the spot, and amenable to the opinion of their fellow townsmen and constituents. It appears to me that their judgment was honestly arrived at after due consideration. Now there arises a subordinate question on the words "proper and convenient situation"—viz., what is the exact weight and effect of the decision of the urban authority? Have they, as in *Biddulph's* and *Vernon's* cases an absolute discretion as to the selection of a site with which in the absence of bad faith the court cannot interfere? I am not prepared to say that there is any difference in construction between sect. 39 of the Public Health Act 1875 and sect. 88 of the Metropolis Management Act 1855, under which *Biddulph's* and *Vernon's* cases were decided; but, if the just view be that the urban authority has a discretion, then I am clearly of opinion that it has exercised that discretion in such a manner that the court cannot interfere. Assuming on the other hand that it is a bare question of fact in which the voice of the urban authority is not conclusive, still I am of opinion that, when the court considers the question, it must attribute considerable weight to the honest view of those on the spot—viz., the urban authority, on whom Parliament has thrown in the first instance the duty of selecting a proper and convenient site. Though some degree of inconvenience or apprehended inconvenience has

CHAN. DIV.]

BARNARD v. TOMSON.

[CHAN. DIV.]

been shown, at least the plaintiff has not discharged the burden which lies on him of showing that the site selected by the urban authority is not a proper and convenient site within the meaning of the section. Having arrived at this conclusion, I decline to grant the injunction. The costs of the motion will be costs in the action.

Solicitors: *Wedlake, Letts, and Wedlake*, agents for *Batchelor and Geake*, Plymouth; *Sharpe, Parker, and Co.*, agents for *J. H. Ellis*, Town Clerk, Plymouth.

Thursday, Dec. 14, 1893.

(Before NORTH, J.)

BARNARD v. TOMSON. (a)

Building society—Contract between society and members—Rules for time being in force—Withdrawals—Dissolution—Priorities.

By the rules of a building society registered under the Building Societies Act 1874, the amount of each share was 12*l.*, and any unadvanced member desiring to withdraw from the society became entitled, after giving one month's written notice to the directors at any one monthly meeting, to have the amount of his monthly payments returned to him, provided that in the case of notices of withdrawal by more than one such member, they were to be paid in rotation according to priority of their notices, and the directors were not compelled to pay more than one withdrawing member at any one monthly meeting. At the beginning of 1889 it was discovered that the society had suffered a serious loss through the dishonesty of the secretary. This was made known at the annual meeting in April of that year; and in July an accountant issued a balance-sheet showing a deficiency of 7000*l.* on the 28th Feb. 1889, and a report advising a reduction of the shares from 12*l.* to 10*l.*, which balance-sheet and report were adopted by the members on the 30th July 1889. In Feb. 1890 the reduction of the shares to 10*l.* was confirmed, and new rules were adopted under which any unadvanced member became entitled, on giving one month's written notice, to withdraw the amount standing to his credit in the books of the society, but the amount due from the society to any member in respect of any share or shares held by him on the 28th Feb. 1889 was to be five-sixths of the net amount of his payments in respect of such share or shares, and no more. In Nov. 1892 a deed of dissolution of the society was executed and registered. Some members of the society had given notices of withdrawal before the loss was known; others had given such notices after the loss was known, but before the reduction in the amounts of the shares. An action was brought for the purpose (inter alia) of ascertaining the rights of the different classes of members.

Held, that all the members were bound by the rules for the time being in force, including those regulating the amount of each share, and that those members whose notices of withdrawal had matured before the date of the deed of dissolution were entitled to priority of payment under the rules for the time being in force.

THE action was brought by G. H. Barnard, an unadvanced member of the Tabernacle Building

Society, against the trustees of an instrument of dissolution of the society, and Thomas Sochon, Elizabeth Sheppard, William Thomas Yates, and John Knight, members of the society, for the purpose of ascertaining the respective rights and priorities *inter se* of the several classes of members.

The society was established in 1847, and in 1876 was registered under the Building Societies Act 1874. The amount of each share in the society was 12*l.*

On the 5th April 1889 the auditors of the society reported to the directors that the secretary had been guilty of irregularities, and had thereby caused the society considerable loss. Notice was then given of the annual meeting of the society, to be held on the 16th April, at which the members were informed that the auditors had not finished the examination of the books, but suspected the secretary of irregularities, which would result in loss to the society; and a resolution was passed authorising the engagement of a public accountant to go through the books and report thereon, and the meeting was adjourned to the 18th June.

On the 18th June the accountant attended at the meeting, and stated that the society had suffered considerable loss from the irregularities of the secretary; and the meeting was adjourned until the 30th July 1889.

On the 26th July the accountant issued his report, which, so far as is material for the purpose of this report, was as follows:

Annexed you will find profit and loss account for the year ending 28th Feb. 1889 and balance-sheet at that date. My investigation extended over a period of eight years, defalcations having been discovered so far back as the early part of 1881. I have already explained to you verbally at the meeting held on the 18th June last, the methods adopted by the late secretary in the perpetration of the frauds against the society. Apart from the questions of fraud, the books have been kept in a careless and unbusinesslike manner. The item "Reserve Fund" which has been appearing in your printed accounts is misleading. It represents a fund formerly invested part in consols and part in another building society but withdrawn in September 1887, the society lending the amount to itself at 4 per cent. and using it for ordinary business purposes. The gross deficiency, as far as can be ascertained inclusive of loss on property or land is over 7000*l.* The amount the society has now to make provision for, is that shown in the balance-sheet, viz. 5239*l.* 1*s.* 1*d.* Under the circumstances probably the best course for the society to take would be to take the necessary steps to reduce the capital, otherwise the payment of dividends until the capital is again intact might probably give rise to difficulty. There is no reason why the society should not with careful judicious and economical management have a good future before it, and if the shareholders approve a sinking fund could be created for the purpose of making good the loss now suffered to those of the present shareholders who maintain their connection with the society. . . . The rules of the society might with advantage be revised.

At the adjourned meeting on the 30th July 1889, the accountant's report and balance-sheet were adopted, and it was resolved, "That it is desirable that the nominal share of 12*l.* be reduced to 10*l.* per share." The object of this reduction was to meet the losses aforesaid, and the affairs of the society were from that date conducted on the footing of such reduction. On the 12th Feb. 1890 accordingly, at a special general meeting, the

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

rules were duly altered and such reduction was duly sanctioned. The plaintiff alleged that all the members of the society, except the defendant Knight, assented to such alteration either by voting therefor or by accepting dividends on the reduced amounts of their shares; but the defendant, Thomas Sochon, in his statement of defence, denied that he had assented to the alteration of the rules.

The rules as they existed from the 20th Jan. 1876 to the 12th Feb. 1890 provided as follows:

Rule 18. That any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings be entitled to receive back the net amount of monthly subscriptions paid in. That if more than one member shall give notice to withdraw at one time, they shall be paid in rotation, according to priority of notice, provided always that the widows and children of deceased members shall have the precedence, but the directors shall not be compelled to pay more than one applicant for withdrawal at any one monthly meeting, and in all cases of the withdrawal of shares, subscriptions in arrear and all fines incurred previous to any such application shall be deducted from the amount which the member shall be entitled to receive.

The rules as altered on the 12th Feb. 1890 were as follows:

Rule 21. Any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings and leaving his pass-book at the chief office, be entitled to withdraw the amount standing to his credit in the books of the society. If more than one member shall give notice to withdraw at one time they shall be paid in rotation according to the priority of notice; provided always, that the widows and children of deceased members when entitled shall have the precedence. The directors, however, shall not be required to pay more than one applicant for withdrawal of shares; subscriptions in arrear and all fines incurred previous to any such application shall be deducted from the amount which the member shall be entitled to receive. Any share withdrawn before it has been twelve months in existence shall forfeit any interest or bonus which may have been credited or paid upon it, and the board may from time to time fix and charge a withdrawal fee on the share of such amount as may be necessary to provide for any losses which may have arisen or may be expected to arise in connection with the carrying on of the business or with property on the hands of the society.

Rule 21A. The amount due from the society to each member in respect of any share or shares held by him on the 28th Feb. 1889 shall be deemed to be and be taken as five-sixths of the net amount paid on such share or shares, and notwithstanding anything herein contained to the contrary no member shall be entitled to receive back from the society, should he withdraw his share or shares so held on the 28th Feb. 1889 as aforesaid before the happening of the event mentioned in rule 7, more than the amount so deemed to be due to him.

On or about the 26th Feb. 1890 the defendant Knight duly gave notice in writing of withdrawal, and demanded the return to him at the expiration of one month of the sum of 1236*l.*, being the net amount of the subscriptions paid in by him. A dispute then arose between the defendant Knight and the society as to whether the notice of withdrawal was subject to the rules as amended or to the rules in existence at the time the defendant Knight became a member of the society, and the dispute was referred to arbitration under the provisions of the Building Societies Act 1874 and

the rules of the society. Ultimately on the 13th Oct. 1892 the arbitrators made their award, whereby they awarded and determined that the sum of 1236*l.* was to be paid by the society to the defendant Knight in respect of his shares in the society, and that that sum was to be paid pursuant to the notice of withdrawal of the 26th Feb. 1890, and in accordance with rule 18 of the rules of the society; and also ordered the society to pay to the defendant Knight his costs.

In accordance with the provisions of rule 18, the defendant Knight submitted in his statement of defence that he was entitled to be paid the sum of 1236*l.* in priority to all members of the society who gave notice of withdrawal after the 26th Feb. 1890, or who have given no notice of withdrawal.

It was alleged in the statement of claim, and not denied by the several defendants, as follows:

There are 196 members of the society, and of them forty-six have given notice of withdrawal under one or other of the foregoing rules, and at varying times, some before the fact that losses had been incurred was known to the members, some after the fact was known, but before the reduction of the shares had been assented to. One member, moreover, the defendant Knight, never assented to the reduction of the shares, and 150 members gave no notices of withdrawal at all. On the 11th Nov. 1892 an instrument of dissolution of the society was duly executed by the statutory number of members. On the 16th Nov. 1892 such instrument of dissolution was duly registered. The defendants Tomson, Hughes, and Hill are the trustees appointed by such instrument of dissolution. In carrying out the trusts of such instrument of dissolution, questions have arisen as to the respective rights and priorities of the following five classes of the members: (a) Those giving notice of withdrawal before the fact that losses had been incurred was known. The defendant Sochon is such a member, and holds, among others, two shares in respect of which such notice was given. (b) Those giving notice of withdrawal after the fact that losses had been incurred was known, but before the reduction of the shares. The defendant Sheppard is such a member, and holds two shares in respect of which such notice was given. (c) Those giving notice of withdrawal after the reduction of the shares had been assented to. The defendant Yates is such a member, and holds twenty-one shares in respect of which such notice was given. (d) Those giving no notice of withdrawal. The plaintiff is such a member, and holds four shares. (e) The member that never assented to the reduction of the shares. The defendant Knight is the only such member, and holds 103 shares. The several parties hereto sufficiently represent such classes of members as aforesaid.

The plaintiff claims: (1) That the respective rights and priorities of such classes as aforesaid may be ascertained and declared; (2) an inquiry to which of such classes each member of the society belongs; (3) administration if and so far as necessary of the trusts of the said instrument of dissolution.

The dates on which the notices of withdrawal were given by the members, and other material facts, are stated in the judgment of the court.

S. Hall, Q.C. and Ashton Cross for the plaintiff. —The members of the society who have given notices of withdrawal have not, now that the society has become insolvent, any right to priority of payment in consequence of their notices. The rules of the society providing for withdrawals ceased to have force as soon as the society became insolvent. There are now no priorities. They referred to

Pepe v. City and Suburban Permanent Building Society, 68 L. T. Rep. N. S. 846; (1893) 2 Ch. 311.

CHAN. DIV.]

BARNARD v. TOMSON.

[CHAN. DIV.]

The machinery for the administration of the society's affairs is only adapted for a going concern. There are now no monthly meetings, and no notices of withdrawal can be given. All the members withdraw, and must be paid off. They referred to

Re Sunderland 32nd and 36th Universal Building Societies, 62 L. T. Rep. N. S. 293; 24 Q. B. Div. 394;

Re Mutual Society, 24 Ch. Div. 425, n.

[NORTH, J.—You ask me to assume that the society would not have gone on, without evidence to prove it.] When the accountant's report was issued, if not before, the members had notice that the society was insolvent, and the rules as to withdrawals ceased to have effect. In the case of *Walton v. Edge* (52 L. T. Rep. N. S. 666; 10 App. Cas. 33) the rules of the society differed from those in the present case, and the decision depended upon the construction of the rules. The rules of the society in this case expressly provide that the widows and children of deceased members shall be entitled to payment in priority to other members who have given notices of withdrawal. A notice of withdrawal by a member of a building society does not give that member a prior charge on the assets when the society has become insolvent. The defendant Knight has obtained an award against the society for 1236l. after the alteration of the rules; and he would have been paid that amount if the society had gone on. His award was under the rules of the society, which ceased to have effect upon the execution of the instrument of dissolution; and the question now is, what right the award gives him as against the members of the society. The instrument of dissolution overrides the award, and deprives him of his right to be paid 1236l. The assets should be divided equally among the members, according to their shares.

Sir A. T. Watson, Q.C., and Beddall for the defendants the trustees of the instrument of dissolution.—The trustees wish for a decision as to the rights of the members *inter se*, and against the assets of the society, and for administration of the trusts of the instrument of dissolution. [NORTH, J.—I cannot decide anything now except the rights and priorities of the members *inter se*; as to their rights against the assets, I can direct inquiries only.]

Everitt, Q.C. and Boome for the defendant Sochon, and members of the society included in Class (a).—The members included in Class (a) do not lose their right to priority obtained by giving notices of withdrawal which matured before the fact that losses had been incurred was known, and before any insolvency was suspected. The decision in *Re Mutual Society* (*ubi sup.*) has always been distinguished and dissented from. A right of priority obtained before a winding-up is good afterwards: (*Walton v. Edge, ubi sup.*) Rights of members obtained by contract *inter se* are not to be ignored on the winding-up of the society. They referred to

Re Alliance Society, 52 L. T. Rep. N. S. 695; 28 Ch. Div. 559;

Re Sunderland 32nd and 36th Universal Building Society (*ubi sup.*).

With respect to the members in Class (c), the fact that any member consented to a reduction of his shares from 12l. to 10l. a share does not

deprive him of any right of priority he had obtained by giving notice of withdrawal. The award obtained against the society by the defendant Knight is clearly contrary to law, and is not binding on the members after the dissolution of the society, although it was binding on the society. The mere advice of the court is not conclusive as against competing members. They referred to

Re Knight and Tabernacle Permanent Building Society, 67 L. T. Rep. N. S. 403; (1892) 2 Q. B. 613.

[NORTH, J.—If there is a way of getting rid of the award, get rid of it. If you do not, I am bound by it.]

Oswald Norman for the defendant Sheppard, as representing members included in Class (b).—A vested right of priority is not taken away by rules passed by the majority. Sheppard assented to the reduction of the shares by accepting dividends upon the reduced shares.

Macoun for the defendant Yates, representing the members included in Class (c).—It was pointed out that the defendant Yates's notice of withdrawal had not matured previously to the date of the instrument of dissolution, and therefore was of no validity; and George Hughes was added to represent the members of Class (c) who after the reduction of the shares had been consented to had given notices of withdrawal which had matured before the date of the instrument of dissolution. The right of priority of those members who gave notices of withdrawal under the old rules ceased when the new rules, which rescinded the old rules, were made. Therefore the members of Class (c) who obtained priority under the new rules by giving notices of withdrawal thereunder have now a right of priority over all other members. Their priority, acquired before the date of the deed of dissolution, still remains in force. He referred to

Walton v. Edge (*ubi sup.*).

There is no evidence that the society has ever been insolvent. It was not insolvent after the losses and at the date of the accountant's report, as is clear from that report. It continued for three years afterwards in prosperity, and paid dividends. With regard to those members who obtained a right of priority under the old rules of the society, the new rules bind all members of the society, including the defendant Knight. He referred to

Pepe v. City and Suburban Permanent Building Society (*ubi sup.*).

The vested right of priority under the old rules is divested by the new rules. [NORTH, J.—The alteration may place persons who have a vested right under the old rules in a corresponding position under the new rules, but the new rules do not wipe out the vested right altogether.] The new rules substituted a new contract between the members and the society for the contract under the old rules. [NORTH, J.—I do not see any substitution of a new contract. It is part of the contract that new rules are to govern, as the old rules did in their time.] The award obtained by the defendant Knight fixes the amount due to him, but does not give him a right to priority of payment.

CHAN. DIV.]

BARNARD v. TOMSON.

[CHAN. DIV.]

Swinfen Eady, Q.C. and Peterson for the defendant Knight.—The rules of the society make the award obtained by Knight binding on all the members. The reduction of the amount of the shares was not evidence of the insolvency of the society. The reduction was a proper method of dealing with the loss incurred. The contract between the society and the members as to withdrawing their shares cannot be put an end to as has been suggested. They referred to

Auld v. Glasgow Working Men's Building Society,
56 L. T. Rep. N. S. 776; 12 App. Cas. 197.

Knight is entitled to payment of the amount found due to him in his turn according to the date of his notice of withdrawal.

S. Hall, Q.C. in reply.—The question is one of the construction of the rules. The priority given by the rules only continues while the society is a going concern.

NORTH, J.—The first question is, whether the rules bind every member of the society. In my opinion they do. Rule 18 of the original rules provides, "That any members not having received an advance who may be desirous of withdrawing from the society, shall by giving one month's written notice to the directors at one of the monthly meetings be entitled to receive back the net amount of monthly subscriptions paid in." This is part of the contract entered into between the member and the society, that he is to be entitled to receive back the specified amount on giving the stipulated notice. Then the rule goes on, "That if more than one member shall give notice to withdraw at one time they shall be paid in rotation according to the priority of notice. Pausing there for a moment it seems to me that this settles the matter not only as between each member and the society, but through the society as between the different members who come in upon the footing of these rules; and as between two members who give notices of withdrawal at different times, each is by virtue of his contract with the society to come in according to the order of date of his notice; and one member would have priority over another according to the dates of their notices, by reason of the common contract which each of them has made with the society on the footing of the rules. But the rule goes on, "Provided always that the widows and children of deceased members shall have the precedence." If these latter words were not in the rule it would be exactly like the rule in the case of *Re Sunderland 32nd and 36th Universal Building Society* (*ubi sup.*), and I cannot see any substantial distinction between it and the rule of the Blackburn Society which was the subject of the decision of the House of Lords in *Walton v. Edge* (*ubi sup.*). Do these words make any difference? In my opinion they do not. The contract is, the withdrawing members (leaving widows and children out of the case) are to rank and to be paid according to the priority of their notices. Then it is added, "Provided always that the widows and children of deceased members shall have the precedence." In my opinion that does not produce any effect, except that it might make the actual payment to a member who had given notice of withdrawal rather later than it would otherwise be in case the widow and children of a deceased member were entitled to receive payment at a time when there was only a limited

fund available for making the payments. Then, looking at the amended rules, I do not see that there is in this respect any substantial distinction between them and the old rules. Rule 21 of the new rules provides that, "Any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings and leaving his pass-book at the chief office, be entitled to withdraw the amount standing to his credit in the books of the society." That, in my opinion, is in substance just the same as the old rule. I do not think that such a formal alteration as requiring the leaving of the pass-book alters the meaning of the rule. "If more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice: Provided always that the widows and children of deceased members when entitled shall have the precedence. The directors, however, shall not be required to pay more than one applicant for withdrawal at any one monthly meeting, and in all cases of withdrawal of shares, subscriptions in arrear, and all fines incurred previous to any such application shall be deducted from the amount which the member shall be entitled to receive." That again is like the old rule. The directors are not compelled to pay more than one withdrawing member at any one monthly meeting, but then that is no reason to suppose they would not be glad to do it, if they had funds available for the purpose. But this is one of those minor matters which relate to the time at which members who are entitled to receive payment will actually get paid, and it does not touch any question of principle or affect the right of withdrawing members to be repaid, and to be paid *inter se* according to priority of notice. The next point raised was this: That if there is a priority under the rules according to the dates of the notices, that priority continues only while the society is a going concern. It has been held, for instance, by the House of Lords in *Walton v. Edge* (*ubi sup.*) that there may be some priority even after a winding-up order. But I am not considering that now; I am only considering whether priority ceases at an earlier date than the winding-up of the society, or, in the present case, the date of the instrument of dissolution. The *Sunderland 32nd and 36th Universal Building Society* was the case relied on, in which the point was raised whether the society had become known to be substantially insolvent at an earlier date than the winding-up order. The main point to be noticed is this: There were ten societies, and their books were in 1886 investigated by some accountants. The accountants' report showed that eight of the ten societies, including the 36th and 32nd, were insolvent. On the 14th Feb. 1887 this report was submitted to an aggregate meeting of the shareholders of all the societies, and a resolution was then passed recommending the appointment of a general committee consisting of the directors and two delegates from each society to consider the affairs of all the societies. The meetings of the 32nd and the 36th societies were respectively held on the 16th and 17th Feb., and at those meetings it was decided to appoint delegates, according to the resolution of the aggregate meeting, and to send to each shareholder a copy of the report. The report showed, as regards the 36th society, a deficiency of upwards of 14,000*l.*, and as regards the

CHAN. DIV.]

BARNARD v. TOMSON.

[CHAN. DIV.]

32nd society a deficiency certainly of upwards of 3000*l.*, and possibly of upwards of 7000*l.* As regards the 36th society, nothing further was done after the 17th Feb. As regards the 32nd society some small further dealings took place. On the 17th June resolutions were passed for the voluntary winding-up of both societies. The County Court judge considered that there was a difference between the two societies, and that the 36th society was declared to be insolvent on the 17th Feb., but that the 32nd society was not declared to be insolvent until the 3rd May 1887. The Divisional Court held that there was no such difference, but that on the 17th Feb. as regards the 36th society, and it might be on the 16th Feb. as regards the 32nd society, an entirely new state of things was created. The court considered that this state of things had so altered the position of the societies and had brought about so nearly their probable suspension, that the rights of withdrawing members ought to determine, not merely at the date of the winding-up, but at the time at which the report was actually made known to the shareholders. The judgment of the court pronounced by Mathew, J., was this: "We are of opinion that this rule" (that is the rule as to withdrawing members) "was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and therefore only to provide for a withdrawal from the society while it was, or was believed to be, still insolvent. There was sufficient evidence to show that, before the times at which two of notices were given and the third became the effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shown from the scheme of reconstruction laid before the members which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists." Then he referred to the case of *Brownlie v. Russell* (48 L. T. Rep. N. S. 881; 8 App. Cas. 235), and said: "As appears from the judgment of the Lord Chancellor, a winding-up order takes away the right because it necessarily 'puts a close to the whole concern, terminates at the date the account of each shareholder, and cuts off all chance of profit which, if the thing had gone on, both classes of members might have had.' But all these consequences were as clear and inevitable in the cases of these societies when the report of the accountants was published in Feb. 1887, as if a winding-up order had then been actually made." That shows that the court considered the actual report of the accountants or its publication on the 16th or 17th Feb. as the turning point to which these various expressions—the necessity of suspending business; the fact, or the belief in the fact, that the society was insolvent; the notoriety

of the fact that the society could not meet its liabilities—all referred. Those are phrases which, if used in their general meaning, afford tests which it would be very difficult indeed to apply; tests, in fact, not altogether consistent. But as applied to the particular matter before the court, viz., the report and resolution of February, those expressions are quite clear and intelligible. Then the learned judge goes on: "The case of *Walton v. Edge* (*ubi sup.*) was relied on by the learned counsel for the appellants as an authority for the proposition that members who gave effective notice before the date of the winding-up order were entitled to priority in payment to those members who had not given notice. But the question in that case was as to the rights of members who gave notice, not only before the winding-up, but when there was no information that any winding-up was going to take place, and when nothing special was alleged to affect them with notice that the society was not to continue as a going concern.' The view we take is in accordance with the valuable judgment of Lord Shand in the case of *Carriek v. North British Building Society* (22 Scottish Law Rep. 833). It is not the order to wind-up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case as this puts an end to the right to withdraw." The ground therefore of the decision in that case is perfectly clear. And following that case entirely, I have to inquire whether such a state of things as it was there held would put an end to the right to withdraw existed in the present case. Can it be said here, to adopt Lord Selborne's words in *Walton v. Edge* (*ubi sup.*), that there was any "information that winding-up was going to take place, or anything special to affect the members with notice that the society was not to continue as a going concern?" Or to take Mathew, J.'s words, was there here any "state of things which to the knowledge of all concerned rendered liquidation inevitable?" My answer to those questions is, No. It is necessary to look at the position of the company. The statement of claim which has been treated as a sufficient statement of the facts says, "That early in the year 1889 the auditors of the society discovered or suspected that the then secretary had been guilty of irregularities in the discharge of his duties, and had thereby caused the society considerable losses. Notice of these losses was given to the members in June or July 1889. . . . On the 30th July 1889, at an adjourned general meeting of the society, it was unanimously resolved that it is desirable that the nominal share of 12*l.* be reduced to 10*l.* per share. The object of this reduction was to meet the above losses, and the affairs of the society have ever since been conducted on the footing of this reduction. On the 12th Feb. 1890, at a special general meeting, the rules were duly altered, and such reduction was duly sanctioned. All the members of the society except the defendant Knight have assented to such alteration either by voting therefor or by accepting dividends on the reduced amounts of their shares." Then on the 12th Feb. 1890 those resolutions are passed. We need not go further than that date. What was the condition of things at that time? It is not suggested that anything has taken place since then to bring the society nearer to suspension than it was at that time. How did the matters

stand at that date? The report of the accountant was issued to the members in July 1889. We know that early in 1889 suspicions had arisen. In June or July 1889 the facts were ascertained, and were communicated to the members. Looking at the book which contained notices to withdraw I find that most of the notices were given before the facts had been ascertained. Throughout the year 1888 there were four or five or six notices a month; in May I think there were rather more. Then when we get to 1889, I find that in January there were two notices, in February one, and in March one, and then, for some reason which I do not know (some information had, I suppose, leaked out), in April notices to withdraw were given by eight-and-twenty members. Then in May there were only seven notices, in June six, and in July two. The report was dated the 26th July, and it was issued to the members a day or two afterwards. It is a full report by the accountant who had examined the books; he said: [His Lordship read the report, as set out above, down to "5329*l.* 1*s.* 1*d.*," and continued:] The balance-sheet is then set out as down to the 28th Feb. 1889, and it shows liabilities of 48,421*l.*, and assets of the same amount, less the deficiency of 5239*l.*, the assets, putting it roughly, being 43,000*l.*, as against liabilities 48,000*l.*, so that the loss sustained was really only a small percentage of the figures mentioned in the balance-sheet. There is no suggestion in that report, and no contemplation of a winding-up, of the impossibility of carrying on the business, or even of a state of insolvency, or anything near it. On the contrary, the report suggests a temporary loss which can be made good out of dividends. There is not a suggestion even that the society cannot go on. It is taken for granted that it will go on, and the report says that "under the circumstances, probably the best course for the society to adopt would be to take the necessary steps to reduce the capital." Why? "Otherwise the payment of dividends until the capital is again intact might probably give rise to difficulty." Therefore they contemplate the society going on with a nominal reduction of its capital for the purpose of continuing the distribution of dividends. Therefore it is to be a dividend-earning society. "There is no reason why the society should not, with careful, judicious, and economical management, have a good future before it, and, if the shareholders approve, a sinking fund could be created for the purpose of making good the loss now suffered to those of the present shareholders who maintain their connection with the society. The rules of the society might with advantage be revised." Looking at that report, it, I think, is a very cheerful report. The winding-up or suspension of the society, and the impossibility of carrying on its business, is the very last thing in contemplation. I do not think it was in contemplation at all. What they did contemplate was the making of dividends in the future, and the best means of enabling the society to distribute those dividends. There was to be a fresh start, a revision of the rules, and not an abandonment of the society. This report was published to the shareholders at the end of July. The result was that on the 6th Aug. there was one withdrawal, in the month of September two, and no others during the remainder of that year. In 1890 there was one withdrawal in January, and one in February; but that is a mistake. I think Knight's

ought to be added; but there is only one here in February, although Knight is added in pencil; and there are two in April. Therefore, in the opinion of the members, as shown by their acts, so far from there being any depression, or panic, or consternation produced by this discovery there was nothing of the kind. The report says they are to go on and to provide for the losses, and even to make up the capital which had been abstracted. The effect produced upon the shareholders' minds, so far as the notices to withdraw indicate, is clearly shown by the fact that such notices practically ceased after the publication of the report. The result is, that I can find nothing whatever, prior to the instrument of dissolution, to indicate such a state of things as would put an end to the operation of the existing rules upon the principles laid down in the cases to which I have referred. Something may have taken place shortly before the instrument of dissolution, but there is nothing to indicate any date, and I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that all the notices to withdraw are good down to that time, subject to this, that with regard to Mr. Yates the cases seem to show that for a notice to be good it must be completed by the expiration of the period fixed, before the date at which the line is to be drawn. In the present case a month's notice is required, and Mr. Yates's notice had not been running for a month prior to the date of the instrument of dissolution. It appears to me, therefore, that he is not entitled to any priority by reason of his notice, but that all the other parties are. Mr. Knight seems to be in a very fortunate position. How he contrived to get there I do not quite understand, but there is an existing award in his favour, to the full benefit of which he is, in my opinion, entitled. It is impossible, I think, to say that he has in any way lost the right he had by reason of the expression of reasons in the award. The award is based upon the footing of his being a withdrawing member of the society, and that I cannot get out of. The award finds that a sum of 1236*l.* is due from the society to him, and, in my opinion, he is entitled to receive that sum. By the terms of the rules the award is binding upon the society, and, in my opinion, it is also binding upon every member of the society. It would be impossible to say that an award made in a dispute between a member and the society ceases to be binding upon its members when a winding-up takes place. It has been duly arrived at during the life of the society, and is, in my opinion, binding for all purposes. A claim was made by the defendant Knight for dividends, but it has not been persisted in. If it had it would have been necessary for me to express an independent opinion as to how far on that point, which is not covered by the award, Mr. Knight would be bound. Having regard to the cases which have been decided since Mr. Knight's case was before the Divisional Court, I confess I do not see how there can be any doubt about the conclusion as to that also. The opinion expressed by Lord Cairns in *Doman's case* (3 Ch. Div. 21) is a very important one, and is one of the earliest on the point, and, in addition to the case before Chitty, J. of *Pepe v. City and Suburban Permanent Benefit Building Society* (*ubi. sup.*), there is the very recent case, before Kekewich, J., of *Bradbury v. Wild* (68 L. T.

CHAN. DIV.]

Re VENN AND FURZE'S CONTRACT.

[CHAN. DIV.]

Rep. N. S. 50; (1893) 1 Ch. 377). Another point raised by Mr. Macoun was that all the persons who had given notice to withdraw before the alteration of the rules had in some way waived their notices by assenting to the alteration. I do not think they have done so. The two sets of rules were said to be two separate contracts, but it is a fallacy to suppose that there was any new contract. The contract between the members and the society is to be found in the rules and regulations for the time being in force, and whether the phrase "for the time being" is or is not used seems to me immaterial. It is the rules and regulations for the time being which establish the existing relations between members and the society, and although the particular arrangements between them may vary from year to year, if the contract is that they shall vary from year to year, there are not two contracts, but one contract. In my opinion, therefore, it is impossible to say any existing priority was lost by reason of the alteration which was made in the rules.

Sir Arthur Watson, Q.C.—Mr. Knight, although he will get his 1236*l.*, will be paid in his turn.

NORTH, J.—Yes; he has no priority.

Solicitors: Alfred Hammond; J. R. Parkeman; W. M. Willcocks; J. B. Edwards; Hatchett, Jones, and Co.

Jan. 20, 23, and Feb. 15.

(Before STIRLING, J.)

Re VENN AND FURZE'S CONTRACT. (a)

Vendor and purchaser—Leaseholds—Title—Requisition—Sale long after testator's decease by executor not appearing to be such on the face of the deed with ordinary covenants—Presumption.

A contract of sale of leaseholds stipulated that the title should commence with a lease of the 29th Sept. 1852. The contract stated that this lease was granted in consideration (*inter alia*) of a surrendered term, and required that the purchasers should assume that all necessary parties concurred in the surrender, and should not require an abstract or production of such surrendered term or evidence thereof, or of any title before the lease, or make any objection or requisition in connection therewith. The abstract showed that the lease was granted to T. as executor of P. in consideration (*inter alia*) of a surrendered term, and that, by deed of the 7th May 1878, T., who did not appear on the deed as executor, and entered into ordinary covenants of title, assigned to V., the predecessor in the title of the vendor.

Held, that an objection on the part of the purchasers that the lapse of twenty-six years between the lease and the sale by T. *prima facie* destroyed T.'s power to sell as executor could not be maintained, the rule in *Re Tanqueray-Willaume and Landau* (46 L. T. Rep. N. S. 542; 20 Ch. Div. 465) not being applicable to the case of an executor selling leaseholds.

Re Whistler (57 L. T. Rep. N. S. 77; 35 Ch. Div. 561) followed.

Re Molyneux and White (13 L. Rep. Ir. 382; 15 Ib. 383) distinguished.

Held also (in accordance with *Colyer v. Finch*, 28 L. T. Rep. O. S. 27, 28; 5 H. L. C. 905, 922, 923,

and *Corser v. Cartwright*, L. Rep. 7 H. L. 731, 735, 736), that the frame of the deed of the 17th May 1878 was insufficient to rebut the presumption that T. was selling as executor.

Held, therefore, that the abstract disclosed a *prima facie* title in accordance with the contract, and the purchasers were not entitled to have the will of P. abstracted, or proof of T.'s powers to sell and convey to V.

By a contract of sale dated the 6th April 1893, it was provided (clause 1) that the vendor should sell and the purchasers should purchase the premises known as "The Devon Arms, Torquay," held by lease dated the 29th Sept. 1882, and made between Sir Lawrence Vaughan Palz of the one part and Richard Henley Taylor of the other part, for the unexpired residue of the term of ninety-nine years from the 29th Sept. 1852, if the three persons in the said indenture of lease named should so long live, subject as therein mentioned, at the price of 2000*l.* Clause 3 provided that the title should commence with the said lease.

Clause 5 was in the following terms:

The aforesaid indenture of lease was granted in consideration (*inter alia*) of a surrendered term. The purchasers shall assume that all necessary parties concurred in surrendering the previous term to the ground landlord, and shall not require an abstract or production of such surrender nor evidence thereof, nor of any earlier title to the said indenture of lease, nor make any objection or requisition in connection therewith.

The vendor delivered to the purchasers an abstract of title commencing with the lease, in which Taylor was described as "executor of the last will of William Peeke, late of Tormsham, deceased," and the demise was expressed to be made in consideration of (*inter alia*) the surrender of the term and interest of the lessee, the said Taylor, as such executor, in the hereditaments thereafter described. The lease was for a term of ninety-nine years, determinable as therein mentioned, with a covenant for perpetual renewal. The document next shown on the abstract was an indenture of the 7th May 1878, by which Taylor assigned the property comprised in the lease to George Venn. No mention was made in this assignment of the fact that Taylor was an executor, and the covenants for title entered into by him were those usually found in an assignment by a beneficial owner. George Venn died in the year 1891, having bequeathed the property to his wife, the present vendor, whom he also appointed executrix of his will.

The purchasers' first requisition required that the will of Peeke should be abstracted, and, as it was shown by the abstract that the lease was granted to Taylor as executor of the will of Peeke, required proof that Taylor had power to sell and convey to Venn. The vendor, in reply, referred the purchasers to clause 5 above mentioned. Some correspondence followed between the solicitors of the purchasers and those of the vendor, the purchasers insisting that their requisition showed no wish to go into the earlier title, and expressing themselves willing to receive proof of Taylor's power to sell by any means not necessitating the abstracting of the will if proof could be so furnished. The vendor replied that the purchasers were precluded by this contract from requiring an abstract of the will, and the first requisition could not be answered without abstracting it.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law

The purchasers thereupon took out the present summons to determine (1) whether the purchasers were entitled to require that by the delivery of a further abstract or otherwise the vendor should furnish evidence to show that the sale by Taylor on the 7th May 1878 was valid; and, if by the terms of the contract the purchasers were precluded from requiring any such evidence, then (2) whether they were entitled to be discharged from the purchase.

E. P. Hewitt for the purchasers in support of the summons.—*Re Whistler* (57 L. T. Rep. N. S. 77; 35 Ch. Div. 561) does not decide the point in question here whether *Re Tanqueray-Willauwe and Landau* (46 L. T. Rep. N. S. 542; 20 Ch. Div. 465) applies to executors selling leaseholds. The contract was made within twenty years in that case. In *Re Ryan and Cavanagh* (17 L. Rep. Ir. 42), where a sale of leaseholds took place seventeen years after the death of the testator, it was held that the executor's power of sale must be presumed to be still existing, as it was within the twenty years allowed by *Re Tanqueray-Willauwe and Landau*. In *Re Molyneux and White* (13 L. Rep. Ir. 382; 15 L. Rep. Ir. 383), which was not cited in *Re Whistler*, executors put up property for sale thirty-seven years after the death of their testator. Chatterton, V.C. held that the rule in *Re Tanqueray-Willauwe and Landau* applied. The Court of Appeal, without deciding that the rule of twenty years strictly bound executors, held that, if so long a period had elapsed as fairly raised the question whether there are or are not debts left unpaid, the executors must answer the question: (Farwell on Powers, 2nd ed. 84, 85.) The expenses incurred by an executor in his office are similar to funeral and testamentary expenses. It has never been suggested that when executors sell real estate the twenty years rule is extended. In *Re Tanqueray-Willauwe and Landau* there was not merely a charge of debts but of funeral and testamentary expenses. It was not suggested in the argument or the judgment that that had any effect on the limit of time fixed by the court for purposes of administration. We submit the limit should be twenty-one years from death. *Re Whistler* does not apply here. The distinction between that case and the present one is, that here the lease was not granted to the testator but to the executor, and as the abstract does not show when the testator died, forty years and not twenty-six may have elapsed. Again, in *Re Whistler*, the vendor's solicitor expressly states that the sale was being made by the vendor as executor, and that as a matter of fact a debt was still unpaid. The vendors' solicitors, in deciding not to furnish any further abstract, say they cannot show power to sell without abstracting the will. They show no title, if there is any, to sell either as beneficiary or trustee. We are not precluded from making the requisition, and the vendors have not shown a title we are bound to accept.

Carson for the vendor.—The purchasers are precluded from making their requisition by sect. 3, sub-sects. 3 and 4, of the Conveyancing and Law of Property Act 1881. The purchasers say that the onus is on us to show that the sale in 1878 was good. My answer to that is, that the sale is presumed to be good unless they show it to be bad. Where an executor is selling he need

not be stated to be an executor on the face of the deed: (*Corser v. Cartwright*, L. Rep. 7 H. L. 731; see judgment of Lord Cairns at p. 735.) On the question whether the lapse of twenty-six years has imposed any duty upon me to furnish the purchasers, the case is, I submit, within the rule laid down by Kay, L.J. (then Kay, J.) in *Re Whistler*, which is an express decision that the rule of twenty years does not apply to executors. *Re Ryan and Cavanagh* (17 L. Rep. Ir. 42) is quite a different case from *Re Whistler*. One depends upon a will, the other on the general law. We say that the so-called will in *Re Tanqueray-Willauwe and Landau* is merely a dictum of Jessel, M.R., and he couples the lapse of twenty years with the fact that beneficiaries are in possession. The reason apparently given for the rule is, that twenty years is the period of limitation for a specialty debt, and that most landowners owe mortgage debts; but the period of limitation for these debts is now twelve years, and not twenty, according to *Sutton v. Sutton* (48 L. T. Rep. N. S. 95; 22 Ch. Div. 511). *Re Whistler* is cited without dissent in Williams on Executors (9th ed.) 579, 1923, and also in Dart's Vendors and Purchasers (6th ed.) 67, 695. As Kay, J. observed in *Re Whistler*, it is not merely debts which an executor has to pay. In this case of a renewed lease the executor had to raise money to pay the fine on the falling in of a life, and he may have to raise money to pay deferred legacies. It is very important that executors should have a free hand in dealing with the testator's estate:

Attorney-General v. Potter, 5 Beav. 164;

Charlton v. Earl of Durham, 20 L. T. Rep. N. S. 467; L. Rep. 4 Ch. App. 433;

Gough v. Birch, Lewin on Trusts (9th ed.) 531.

Hewitt in reply.—The correspondence shows that what the requisition asks is whether Taylor had power to sell. In *Corser v. Cartwright* there was no question of lapse of time. The rule of Jessel, M.R. does not rest on possession. In *Re Whistler* it was stated that a debt existed. We have no such statement here, nor a statement that the sale was made by Taylor as executor. Here the time is twenty-six years, and we have no knowledge when Peeke died.

Feb. 5.—STIRLING, J. (after stating the nature of the summons, and considering the facts of the case) went on to say:—The objection in substance is that, inasmuch as twenty-six years elapsed between the grant of the lease to Taylor and the sale by him to Venn, and nothing is known as to the date on which the testator died, it must be taken that *prima facie* Taylor's power to sell as executor is gone; and no other title is shown. In support of this contention the case of *Re Tanqueray-Willauwe and Landau* (*ubi sup.*) was relied on. It was there held that, where executors in whom real estate is vested for a legal estate in fee subject to a charge of debts are selling, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease. [His Lordship then read passages from the judgments of Jessel, M.R. and Brett, L.J. in that case at 20 Ch. Div. 480, 483.] The question whether the rule thus laid down ought to be applied to the case of an executor selling leaseholds arose in *Re Whistler* (*ubi sup.*). [His Lordship then read the head-note of that case and the judgment of

CHAN. DIV.]

Re DUKE OF MARLBOROUGH; DAVIS v. WHITEHEAD.

[CHAN. DIV.]

Kay, J., and proceeded:] Although the facts in that case are different from those which occur in the present one, and although there the contract was entered into within twenty years of the testator's death, it appears to me to be an express decision that the rule in question is not applicable to the case of an executor selling leaseholds. It is said, however, that this decision conflicts with that of Chatterton, V.C., and the Court of Appeal in Ireland, in *Re Molyneux and White* (*ubi sup.*), a case not cited in *Re Whistler*. In my opinion these decisions were not based on the rule in question. The Lord Chancellor of Ireland, in giving the judgment of the Court of Appeal, says: "There is patent evidence that the debts have as a matter of fact been paid. . . . The Vice-Chancellor came to the conclusion that there was clear evidence before him that the debts were paid, and the vendors were violating the trusts reposed in them (15 L. Rep. Ir. 386). We do not decide as to the limit of twenty years" (by which I understand the period fixed as the limit in *Re Tanqueray-Willame and Landau* to be referred to) "but we think that the order of the Vice-Chancellor was right, and that the vendors, not being able to say that there were debts still due had no right to sell." I think, therefore, that I am bound to hold, in accordance with what is laid down in *Re Whistler*, that the rule laid down in *Re Tanqueray-Willame and Landau* does not apply to the present case, one reason being that the duties of an executor in connection with his testator's personal estate are not confined to payment of debts. This being so, it seems to me that the sale which took place in 1878 may well have been made in discharge of the duties of Taylor as executor. It is urged, however, that the deed of May 17, 1878, does not purport on the face of it to be made by him in that capacity; and further, that inasmuch as he entered into the ordinary covenants for title, it ought to be inferred that he was selling as beneficial owner. Now in *Colyer v. Finch* (28 L. T. Rep. O. S. 27; 5 H. L. C. 905) Lord Cranworth says (at 5 H. L. C. p. 923): "It does not matter that the mortgage to Finch was not made avowedly for the purpose of raising money to pay debts; that is not at all necessary, unless it was apparent on the face of it that it was not and could not have been so intended. I very much incline to think that, when a party, the devisee of real estate charged with the payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling debts to be paid. The old case of *Elliot v. Merryman* (2 Atk. 43; Barnar. Ch. Cas. 78), which is always referred to, before the Master of the Rolls, makes no such distinction as to whether it was expressed to be made for payment of debts or not. If there be a charge on the devisee in fee, taking an estate charged with the payment of debts alone, or debts and legacies, if he sells, the great convenience of mankind requires that it should be just as if an executor sells when property comes to him, unless it can be shown that the purchaser knew that the purchase money was not going to be so employed, and that he was ancillary to something like a fraud. It is to be presumed, because he may presume, that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will." This passage is cited with approval

by Lord Cairns in *Corser v. Cartwright* (L. Rep. 7 H. L. 731; see pp. 735, 736). I understand it to be laid down by these eminent authorities that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is presumed to be acting in the discharge of the duties imposed upon him as executor, unless there is something in the transaction which shows the contrary; and, further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity. Beyond the lapse of time and the frame of the deed of May 17, 1878, there is nothing in the present case which gives rise to the suggestion or inference that Taylor was acting otherwise than in the discharge of his duty as executor. Neither the lapse of time nor the frame of the deed is sufficient, in my judgment, to raise the presumption that he was acting otherwise. In my opinion, therefore, the abstract delivered by the vendor discloses a *prima facie* title on his part in accordance with the contract, and the purchasers are not, in the state of circumstances now disclosed, entitled to insist on his requisition. This decision in no way precludes the purchasers from themselves making inquiry as to the terms of the will of William Peeke; and it is needless to say that I express no opinion as to what would be the effect of an objection to the title based on the result of such inquiries.

Solicitors for the purchasers, *Belfrage and Co.*, for *E. Lee Mitchell*, Wellington, Somerset.

Solicitors for the vendor, *Wood, Bigg, and Nash*, for *Kitsons, Mackenzie, and Hext*, Torquay.

Jan. 25 and Feb. 20.

(Before STIRLING, J.)

Re DUKE OF MARLBOROUGH; DAVIS v. WHITEHEAD. (a)

Voluntary assignment—Assignment of leaseholds by wife to husband for a limited purpose—Admissibility of parol evidence to show the true transaction—Statute of Frauds (29 Car. 2, c. 3, ss. 7, 8).

Shortly after the marriage of the Duke and Duchess of M., the duchess purchased a leasehold house with moneys forming part of her separate estate. Shortly after the duchess executed what purported to be an absolute voluntary assignment of the house to the duke. The duke mortgaged the house for 16,000l. There was parol evidence to show, and the Court found, that the assignment was made merely for the purpose of enabling the duke to borrow money, the duchess not wishing her name to appear on the mortgage deed, and that, subject to this, it was intended that the house should continue to belong to the duchess, and the duke was always willing and intended to reconvey.

Held (following *Haigh v. Kaye*, 26 L. T. Rep. N. S. 675; L. Rep. 7 Ch. App. 469), in preference to *Leman v. Whitley* (4 Russ. 423), that, as the late duke, if he had refused to reconvey the equity of redemption to the duchess, could not have set up the Statute of Frauds, his creditors claiming under him were in no better position: the equity of

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

redemption in the house, therefore, belonged to the duchess.

By the judgment in a creditor's action for the administration of the estate of the late Duke of Marlborough, an inquiry was directed "whether the leasehold house known as 3, Carlton House Terrace, in the county of Middlesex, belongs to the defendant, the Duchess of Marlborough, absolutely, or forms part of the testator's personal estate." The inquiry, after being prosecuted in chambers, was adjourned into court.

The defendants Whitehead and the Duchess of Marlborough were executors and trustees of the late duke's will. The late duke and the duchess were married on the 7th June 1888. About that time the house in question was purchased by the duchess out of her separate estate, and assigned to her by deed of the 19th Feb. 1889. In the following autumn, the duke being pressed by his creditors, the duchess agreed to permit him to raise money on the security of the house, but she stipulated that the mortgage should not be given in her name.

By deed of 5th May 1890 the duchess as beneficial owner made a voluntary assignment of the house to the duke, he covenanting to pay the ground rent and perform the covenants. By deed of 6th June 1890 the duke mortgaged the house to secure a sum of 16,000*l*. The duchess in her affidavit stated that she did not wish it to appear on the face of the proposed mortgage that she was borrowing money, and she therefore instructed the defendant Whitehead, her solicitor, to prepare an assignment of the house to the duke. She further said:

It was never intended between us that I should part with the house, but the agreement was that it should be transferred to my husband simply and solely to enable him to borrow a sum of money upon it, and that, subject to the mortgage, the house should remain mine. The matter was mentioned between us at subsequent dates, and the question of the reassignment to me was mentioned on several occasions, and it was always intended by both of us that it should be carried out.

She also stated that, at an interview between the late duke, the duchess, and the defendant Whitehead, in the autumn of 1890, preparatory to the departure of Mr. Whitehead for America on the duchess's business, the duke told Mr. Whitehead in her presence "that the house had been transferred into his name by me to enable him to borrow money upon it, and that the house belonged to me, and would be reassigned to me." The conversation on that occasion was a general one as to the explanation and information Mr. Whitehead should give to the duchess's friends and trustees in America, who would not hesitate to ask questions.

The defendant Whitehead, with reference to this interview, deposed that he then suggested a re-transfer to the duchess, subject to the mortgage. The duke agreed with the suggestion, but thought the matter not immediately pressing, and no such transfer was ever made.

Buckley, Q.C. and Vernon Smith for creditors of the late duke.—There is no writing to show the transaction. In *Lincoln v. Wright* (33 L. T. Rep. O. S. 35; 4 De G. & J. 16) the plea of the Statute of Frauds was no defence, because there the real transaction was a mortgage, and not an absolute conveyance. If the deed presents the whole

transaction, then you must not go behind it to establish a parol variation:

Davis v. Otty, 12 L. T. Rep. N. S. 789; 35 Beav. 208.

The duchess could not ever have had the right to call upon him to reconvey, for he could have refused, hoping to borrow more. She had not ever the right to say, "You have incumbered it enough." [STIRLING, J.—If he had borrowed everything he wanted on that particular occasion, she could have asked him for a reconveyance of the equity of redemption. Why not?] That implies the assumption that he had borrowed enough. On the question whether parol evidence was admissible they referred to the following cases:

Leman v. Whitley, 4 Russ. 423, 426;

Childers v. Childers, 30 L. T. Rep. O. S. 3; 1 De G. & J. 482;

Lord Irnham v. Child, 1 Bro. C. C. 92;

Cripps v. Jee, 4 Bro. C. C. 471;

Bartlett v. Pickersgill, 1 Cox. 15.

Grosvenor Woods, Q.C. and W. C. Druce for the present Duke of Marlborough, who had obtained leave to attend the proceedings.—We are perfectly willing that the duchess should take the equity of redemption.

Graham Hastings, Q.C. and Macnaghten for the defendant, the Duchess of Marlborough.—The duke knew perfectly well that the deed did not represent the true transaction between the parties. The object here was to assist him, and the duchess might have said, "You shall not borrow any more than a certain sum." Subject to the raising of the money it was her house, and it must be reconveyed to her. Fraud comes in, in that he wishes to keep it notwithstanding the transaction itself. [STIRLING, J.—Both of them knew that the conveyance was absolute.] Now that we have proved the true transaction, the Statute of Frauds cannot be set up. The creditors are in no better position than the duke. The present case is analogous to *Childers v. Childers* (*ubi sup.*).

Beale, Q.C. and Earnley Blackwell for the defendant Whitehead.

Buckley in reply.

Feb. 20.—STIRLING, J. (after stating the facts and considering the evidence) thought it was made out that the house was transferred to the late duke simply for the limited purpose of enabling him to borrow money, and that, subject to the mortgage created by him, it was intended that the house should continue to belong to the duchess. His Lordship continued:—If the question raised related to a sum of stock, *e.g.*, consols, transferred for the like purpose, I should be of opinion that the equity of redemption belonged to the duchess. The plaintiff, however, who represents the creditors of the late duke, raises the objection (as I conceive he is perfectly entitled to do) that the evidence with which I have been dealing is rendered inadmissible by the Statute of Frauds, sects. 7 and 8. To this it is answered that to exclude the evidence would be to cover a fraud; and the question to be decided is whether, under the circumstances, this is a valid answer to a plea of the statute. The general principle that the statute is not to be used as a protection to fraud has long been recognised by courts of equity, but it does not seem to have been applied in a uniform manner. For the purposes of the present case,

CHAN. DIV.]

NIND v. NINETEENTH CENTURY BUILDING SOCIETY.

[Q.B. DIV.]

the most important decisions to be considered are those of *Lord Irnham v. Child* (1 Bro. C. C. 92), *Leman v. Whitley* (4 Russ. 423), *Lincoln v. Wright* (33 L. T. Rep. O. S. 35; 4 De G. & J. 16), and *Haigh v. Kaye* (26 L. T. Rep. N. S. 675; L. Rep. 7 Ch. App. 469). *Lord Irnham v. Child* was a case of a bill being filed to redeem an annuity suggesting that it was part of the agreement that it should be redeemable, the agreement being left out on the face of the deed on the idea that if inserted the transaction would be usurious. Parol evidence was offered to this, but not admitted to contradict, the deed not being charged to have been omitted by fraud. In that case the Lord Chancellor says: "It is admitted that the deed will bind if no fraud has been committed, but objected that when a fraud interferes, there the evidence may be introduced. The objection is founded on a great deal of wisdom and good sense. But the question is, if it were always to be admitted, whether it would not be subversive of justice; the court has held that it would. If the agreement had been varied by fraud, the evidence would be admissible. The argument, then, must be to impute fraud to the party. The rule of evidence is not subverted, if there is clear proof of fraud. The committing the agreement to writing is an argument against fraud." [His Lordship, after reading further passages from the same judgment, proceeded:] The decision itself was explained in *Marquis of Townshend v. Stan-groom* (6 Ves. 328, 332), and seems against the claim of the duchess. I think that *Lord Irnham v. Child* does not govern the present case. There the question whether the deed in question should be expressed to be redeemable or irredeemable was considered by the parties, and the former alternative was deliberately rejected; and if in the present case the question whether upon the execution of the deeds of the 5th May and the 6th June 1890 a declaration of trust or reconveyance of the equity of redemption should be executed had been raised between the duke and the duchess and they had decided that none should be, the cases would have seemed to me parallel. But no such question arose until afterwards, and when the true state of things was brought to their attention by their legal adviser, the duke appears to have expressed his willingness to reconvey. In argument a distinction was drawn between the present case and *Lincoln v. Wright* (*ubi sup.*) on the ground that in the latter case the deed was put in a form contrary to the intentions of the plaintiffs. I do not read the judgment of Turner, L.J. in this sense: at all events it appears to me that no such explanation is applicable to *Haigh v. Kaye*. [His Lordship considered that case, and referred to *Leman v. Whitley* (*ubi sup.*), where a son conveyed an estate to his father, nominally as purchaser, but really as a trustee in order that the father might raise money on it by way of mortgage for the use of the son, and the father, dying before any money was raised, by will subsequent to the conveyance made a general devise of all his real estates, the case was held within the Statute of Frauds and parol evidence inadmissible to prove the trust; and to the judgment of Sir John Leach, M.R., who treated the transaction as a purchase and gave the son a lien on the estate as vendor for the apparent consideration, none of which had been paid. He

then continued:] If the views of the law which prevailed in *Leman v. Whitley* had been followed in *Haigh v. Kaye*, it seems to me that the plaintiff ought to have been held entitled to a lien on the property for 850*l.*, the nominal purchase money, instead of a reconveyance. As *Haigh v. Kaye* is more recent, and also (as a decision of the Court of Appeal) of higher authority than *Leman v. Whitley*, I consider myself bound to follow the former in preference to the latter. If the late Duke of Marlborough had in his lifetime refused to convey the equity of redemption at the request of the duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary the evidence appears to me to show that he was willing and intended to reconvey, though unhappily he put off carrying his expressed intention into effect till it was too late. In my opinion the plaintiffs, as claiming under him, are in no better position; and I think the inquiry must be answered by finding that the equity of redemption in the leasehold house, No. 3, Carlton House Terrace, belongs to the defendant the Duchess of Marlborough.

Solicitors: *Lewis and Lewis*; *Milcard and Co.*; *G. C. R. Marshall*; *Spencer Whitehead*.

QUEEN'S BENCH DIVISION.

Saturday, Jan. 13.

(Before DAY and LAWRENCE, JJ.)

NIND v. NINETEENTH CENTURY BUILDING SOCIETY. (a)

Landlord and tenant—Underlease—Breach of covenant to repair in head lease—Solicitor's and surveyor's charges for preparing notice under Conveyancing Act—Liability of under-lessee—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 14—Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13), ss. 2 and 4.

The effect of sub-sect. 3 of sect. 14 of the Conveyancing Act 1881 is to confer the benefits of sub-sect. 1 on an under-lessee for a part of the term, though it has no application to an under-lessee of a part of the estate. An action can therefore be brought under sect. 2 of the Conveyancing Act 1892 by a lessor against an under-lessee of part of the term to recover as a debt the costs and expenses incurred in the employment of a solicitor or surveyor in preparing the notice of the breaches of the covenant in the head lease for which re-entry has been threatened. When the breaches complained of have in fact been remedied by the under-lessee immediately on receipt of the notice, the under-lessee has obtained relief by his own conduct and the operation of the Act of 1881, and is within the liability of sect. 2 of the Act of 1892, without any written waiver of the breach being given by the lessor.

THIS was an appeal from a decision of his Honour the judge of the City of London Court. The action was brought in respect of surveyor's and solicitor's fees incurred in the preparation of notices of breach of covenant under sect. 14 of the Conveyancing Act 1881 in connection with certain house property of the plaintiffs. The property consisted of twelve houses, which in 1880 were

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.]

NIND v. NINETEENTH CENTURY BUILDING SOCIETY.

[Q.B. Div.]

leased by the plaintiff to various persons. Subsequently, in 1885, the leases all became vested in one Hall, by whom they were mortgaged by sub-demise to the defendants. In 1891 the defendants took possession of the premises, which were then very much out of repair, contrary to the covenants in the head lease.

In Nov. 1892 notice was served by the lessor specifying the breaches complained of, and requiring the defendants to remedy them, as provided by sect. 14, sub-sect. 1, of the Conveyancing Act 1881, which enacts that—

A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

And by sub-sect. 3 of the same section it is enacted that

For the purposes of this section . . . a lessee includes an original or derivative under-lessee.

The necessary repairs were done by the defendants, who afterwards paid rent for the premises which was accepted by the plaintiff. The latter then brought this action for 5l. 5s. per house (but reducing his total claim to 50l.) in respect of the expenses he had incurred in the shape of surveyor's and solicitor's fees in the preparation and serving of his notices specifying the breaches of covenant complained of.

Sect. 2, sub-sect. 1, of the Conveyancing Act 1892 provides that

A lessor shall be entitled to recover as a debt due to him from the lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer or otherwise in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act 1881 or of this Act.

By sect. 4 of the same Act power is given to the court on forfeiture of superior leases to protect "any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof," upon such conditions as the court shall think fit.

The judge of the City of London Court was of opinion that the defendants as under-lessees of the whole premises were within the benefit of the Conveyancing and Law of Property Act of 1881 and the liability of the Conveyancing and Law of Property Act of 1892, and gave judgment for the plaintiff.

From that decision the defendants appealed to the High Court.

D'Eyncourt for the appellants.—The Act of 1881 does not give an under-lessee any right of relief against a lessor; and sub-sect. (3) of sect. 14 only gives him such right against an under-lessor. The lessor can turn him out without a remedy. That was decided in 1891 in the case of *Burt and another v. Gray and another* (65 L. T. Rep. N. S.

Vol. LXX., N. S., 1799.

229; (1891) 2 Q. B. 98), confirming the opinion expressed by Kay, J. in *Cresswell v. Davidson* (56 L. T. Rep. N. S. 811; W. N. (1887) 87). The Act of 1881 does not create any privity between the lessor and an under-lessee. After the decision of *Burt v. Gray* (*ubi sup.*), sect. 4 of the Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13) was passed for the express purpose of providing relief for under-lessees; and under that section, and under that section only, the defendants can obtain relief, but they are not within either the benefits or liabilities of the Act of 1881, and consequently are not liable to an action for surveyor's and solicitor's fees under sect. 2 of the Act of 1892. That section was passed on account of the case of the *Skinners' Company v. Knight* (65 L. T. Rep. N. S. 240; (1891) 2 Q. B. 542), which decided in 1891 that those fees were not within the compensation for breach of covenant for which a lessee was liable under sub-sect. 1 of sect. 14 of the Act of 1881. Those expenses, therefore are now brought within sect. 14 of the Conveyancing Act of 1881, which is the object and effect of that new section; and if, as the appellants contend, they are not lessees within sect. 14, no new liability is imposed upon them by sect. 2. There is another point. The latter part of sect. 2 has not been complied with by the lessor; the breach has not been waived by writing under his hand, nor has the lessee been relieved from it under the provisions of the Act of 1881 or that of 1892.

T. Terrell for the respondent.—With regard to the last point. There has been no request by the defendants for a waiver in writing, so that if a condition is lacking on the plaintiff's part it is because a still earlier condition is unperformed by the defendants; but the defendants have been relieved under the provisions of the statutes. Their own conduct by means of the operation of sect. 14 has relieved them from the forfeiture which the head lease provided for, and both in form and substance they owe their relief to the provisions of the Conveyancing Act of 1881. On the other point, the cases of *Burt v. Gray* (*ubi sup.*) and *Cresswell v. Davidson* (*ubi sup.*) both turn on the fact that the under-lessees were under-lessees of part of the property only. Such an under-lessee is declared by those authorities to have no right of relief against the lessor, and to protect him sect. 4 of the Act of 1892 was passed. But under-lessees of part of the term are not within those cases nor within that section. They were already within the reach of the Act of 1881 by virtue of sub-sect. 3 of sect. 14. They were therefore entitled to relief under that section, and consequently are liable for these expenses, which are by sect. 2 of the Act of 1892 brought within the compensation to which the lessor is entitled and made recoverable in this way. There are dicta of Kay, J. in *Cresswell v. Davidson* (*ubi sup.*) expressing doubt as to whether such an under-lessee as this is within sect. 14, but they were not necessary to the decision of the case before him, and need not and ought not to be followed here.

D'Eyncourt replied.

DAY, J.—In my opinion the judge of the City of London Court was quite correct in his ruling. The first question is whether the Act of 1881, and consequently the 2nd section of the Act of

Q.B. Div.]

Re WEBB; LAMBERT v. STILL.

[CT. OF APP.]

1892, apply to the sub-lessee of part of a term. In *Burt v. Gray* (65 L. T. Rep. N. S. 229; (1891) 2 Q. B. 98) following the case of *Cresswell v. Davidson* (56 L. T. Rep. N. S. 811; W. N. (1887) 87) it was held that the Act of 1881 did not apply to the sub-lessee of part of the demised premises, and I do not question the correctness of that decision; but there has been no decision in the case of a sub-lessee of a part of the term; and it seems to me, after considering the statutes and the authorities which have been cited before us, that the Act of 1881 does apply to an under-lessee like that in the present case. There is nothing in *Burt v. Gray* (*ubi sup.*) to indicate that the judges who decided that case would have held otherwise than as we are holding in the present case, and we are agreed that this case is within the words of sect. 14 of the Act of 1881. By sub-sect. 3 of that section "lessee" is declared to include "original or derivative under-lessee;" the adjectives used are not familiar to readers of real property law, but I suppose they mean any underlease whatever; that is, any underlease of part of the term, as distinguishing from an underlease of part of the property. The defendant therefore was a lessee under sect. 14, and liable to have proceedings taken against him under that section. Proceedings have been taken, and he has had notice to remedy the breach of covenant, and he has repaired, and has since paid rent which has been received by the plaintiff. The plaintiff demanded compensation; but it has been held in *The Skinners Company v. Knight* (65 L. T. Rep. N. S. 240; (1891) 2 Q. B. 542) that the compensation which can be recovered under sect. 14 of the Act of 1881 does not include these particular matters of surveyor's and solicitor's costs, and he therefore brings this action under sect. 2 of the Act of 1892. If the defendant had not complied with the notice to repair he could have applied for relief under sect. 14, sub-sect. 2, when the court could have imposed the payment of these expenses as the condition on which relief would be granted, but he has complied with that notice, and the only way of recovering these expenses is by such an action as this. Two sections of the Act of 1892 are said to have been passed to obviate particular difficulties, namely, sect. 2 to remedy the difficulty arising out of the case of *The Skinners Company v. Knight* (*ubi sup.*), where it was held that the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice did not come within the compensation for which a lessee is liable under sect. 14, sub-sect. 1, of the Act of 1881, and sect. 4 to remedy the defect or blot exposed by *Burt v. Gray* (*ubi sup.*), and to make under-lessees of part of an estate amenable to, or rather to give them the benefit of, the Act of 1881. Our opinion is, that sect. 4 would have been unnecessary for under-lessees of part of the term who were already within the meaning of the term "lessee" in the Act of 1881, and were therefore subject to the liability created by sect. 2 of the Act of 1892, under which this action is brought. A second point has been raised before us on behalf of the defendants, and it is said that there is a condition precedent which has not been fulfilled, for the action can only be brought when there is a waiver in writing under the latter part of sub-sect. 1 of sect. 2 of the Act of 1892. But there is no evidence of any request by the lessee,

so that a prior condition on his part is not fulfilled, and, besides, in my judgment, the defendant has been relieved under the provisions of the Act of 1881; if not in point of form, at least in point of substance, he is relieved by his own conduct and the operation of the statute. The appellants must therefore fail on both points, and the decision of the judge of the City of London Court must be affirmed.

LAWRANCE, J.—I am of the same opinion.

Appeal dismissed. Decision of the judge of the City of London Court affirmed.

Solicitors for the plaintiff, *Corse, Mossop, and Berney*.

Solicitors for the defendant, *Griffinhoofe and Brewster*.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 2 and 3, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re WEBB; LAMBERT v. STILL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor - trustee—Professional charges—Settled account—Release—Re-opening and setting aside—Lapse of time.

The defendants, who were solicitors, were trustees and executors of a will with power to charge for professional services. Having wound-up the estate, they sent a letter to the residuary legatees containing an executorship account, and saying that, if they would call at their office three days later, they would give them any explanation they might require and hand them a cheque for their share of the residue. The account contained an item of 116l. for costs relating to the executorship. The residuary legatees attended as requested, approved of the account, received a cheque for their respective shares of the residue, and executed a release to the defendants. The defendants did not deliver any detailed bill of costs to the legatees, nor did they inform them that they were entitled to have one delivered and to have it taxed. Nine years afterwards the legatees brought an action claiming a declaration that the release was not binding on them, and delivery and taxation of a bill of costs.

Held, that, although it was the duty of the defendants to have told the plaintiffs that they were entitled to have a bill of costs and to have it taxed, the omission to do so was not a sufficient ground for setting aside the release and opening the settled account in the absence of proof that some injustice had been done, that some unfair advantage had been taken, or that excessive charges had been made.

Decision of Romer, J. affirmed.

THIS action was brought by certain beneficiaries under the will of William Webb to re-open a settled account and to set aside a release.

The defendants were solicitors carrying on business under the name of Still and Son. They were the testator's solicitors and the executors and trustees of the will.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

The testator, who was a builder, by his will dated the 26th April 1881, bequeathed certain leasehold houses to the defendants, S. F. Still and E. R. Still, upon certain trusts for the benefit of the testator's five children and their issue, and gave the residue of his personal estate and his real estate to his five children in equal shares.

The will contained a clause providing that the defendants and every future trustee or executor of the will who should be a solicitor might act as solicitor to the estate, and should be entitled to charge and should be paid for all business done by him in relation to the administration of the estate or the trusts of the will, and also to several contracts for works and buildings therein referred to, in the same manner as if he had not been a trustee or executor, and for the time which he should necessarily or properly employ in the execution of his duties as trustee or executor.

The testator died the day after he executed his will, and it was shortly afterwards proved by the defendants.

On Saturday, the 23rd June 1883, the defendants sent to each of the testator's four surviving children, and the administratrix of the one who was dead, the following letter:

The executors of the late Mr. William Webb are now in a position to wind-up his estate, so we are sending you herewith a copy of the executorship account, showing that the balance to be divided amongst the residuary legatees is 331l. 3s. 4d., your fifth share of which is 66l. 4s. 8d. We also inclose an account of payments the executors have made on your behalf, which will have to be deducted from your share of the residue. If you will call here on Tuesday next, at two o'clock, we will give you any explanation you may require as to the accounts, and hand you a cheque for the balance due to you.

A lithographed account of the receipts and payments of the executors, showing the balance above mentioned, accompanied this letter. This account showed receipts amounting to 1548l. 18s. 6d., and disbursements amounting to 1217l. 15s. 2d., among the latter being a sum of 24l. 2s., Still and Son's costs relating to obtaining probate; a sum of 19l. 17s. 4d., their costs against the testator up to the date of his death; and a sum of 116l. 17s. 2d., "costs relating to executorship and counsel's fees." There was nothing to show how these three items were made up, and the defendants never furnished the legatees with any vouchers nor detailed accounts.

On the 28th June the residuary legatees came to the office of Messrs. Still and Son and received cheques for their shares of the residue, and executed a release releasing the executors from all demands in respect of the residuary estate. Annexed to this release was a copy of the account. The residuary legatees also signed at the foot of the executorship account the following memorandum: "We have examined and approve of the foregoing account." There was, however, a conflict of evidence as to the exact date on which the account was signed.

On the 26th Sept. 1892 three of the residuary legatees having been advised that they could probably get the amount of the costs reduced considerably on taxation, obtained a common order for taxation, but on the application of Messrs. Still the order was on the 23rd Jan. 1893 discharged.

In Feb. 1893 they commenced the present action, and in the statement of claim alleged that

on the 28th June they believed that they were only signing receipts for the amount they received; that the letter of the 23rd June did not mention any release; and that no draft copy of the release was at any time furnished to them, nor was any intimation given to them that they would be asked to sign any release, nor was the release ever read over or explained to them; that no particulars of the bills of costs had ever been furnished to them, and that such bills were grossly excessive in amount, and they claimed a declaration that the release was not binding, administration of the personal estate of the intestate, and delivery and taxation of the bills of costs.

The plaintiffs obtained an order for discovery of documents. The costs ledger of Messrs. Still and Son was produced, which contained the particulars of the charges for the business done with reference to the estate. Among the items were charges for attendances by one partner on another to pay fees due to themselves. The charges in the ledger amounted to 148l. 7s. 6d., which was 7l. 8s. 4d. more than the amount of the two sums of 116l. 17s. 2d. and 24l. 2s. charged in the account rendered to the residuary legatees.

The managing clerk of the solicitor of the plaintiffs deposed that he believed that on taxation at least one-sixth of the costs would be disallowed; but no gross overcharge was proved, nor was any error shown in the items of the account other than costs.

Romer, J. dismissed the action, and the plaintiffs appealed.

Oswald, Q.C. and *Pochin* for the appellants.—Sufficient time was not given to the appellants to examine the accounts; they had no independent advice; no vouchers or bills of costs were produced; they received no copy of the release before or after they signed it; neither the release nor the accounts were properly read over or explained to them; the charges for costs are extortionate, and by including them in the release the trustees prevented the beneficiaries from having them taxed without first setting aside the release. The judgment of *Kay, L.J.*, in *Re Fish; Bennett v. Bennett* (69 L. T. Rep. N. S. 233; (1893) 2 Ch. 413, 425), shows that the court will watch very jealously the conduct of a solicitor-trustee who prepares the document giving him a right to charge his costs. A solicitor is not allowed to take a benefit from his client:

Welles v. Middleton, 1 Cox. 112;

Tyars v. Alsop, 61 L. T. Rep. N. S. 8;

Morgan v. Minett, 36 L. T. Rep. N. S. 948; 6 Ch. Div. 638.

The general rule that settled accounts cannot be opened without showing *prima facie* some errors in them does not apply to accounts between trustees and *cestuis que trust*, nor between solicitors and clients. It is sufficient here to prove that no vouchers were produced or bills of costs delivered to entitle these plaintiffs to have the accounts opened, although they executed the release and approved of the accounts. But some of the items in the "cost ledger" are improper, and proof that one item is clearly wrong is sufficient to open the account:

Ward v. Sharp, 50 L. T. Rep. N. S. 557.

It was the duty of the defendants to have told the plaintiffs before they approved of the accounts and signed the release that they had a right to

have the costs taxed; and they cannot now avail themselves of the ignorance of their *cestuis que trust* and set up this release, which was executed without any independent professional assistance:

Walker v. Symonds, 3 Swanst. 1, 58, 73;

Moore v. Frowd, 3 My. & Cr. 45, 48;

Todd v. Wilson, 9 Beav. 486.

This case is within the principles stated in

Coleman v. Mellersh, 2 Mac. & G. 309.

The length of time which has elapsed since the release was executed and the accounts approved does not amount to laches or acquiescence for the plaintiffs were ignorant of their rights:

Bennett v. Colley, 2 My. & K. 225, 232;

Lindsay Petroleum Company v. Hurd, L. Rep. 5, P. C. 221;

Erlanger v. The New Sombrero Phosphate Company, 39 L. T. Rep. N. S. 269; 3 App. Cas. 1218, 1279;

Lewin on Trusts, 9th edit. p. 1058.

Bousfield, Q.C. and *Yate Lee* for the defendants.

—These accounts will not be opened after the lapse of so many years unless it is proved that the defendants took some unfair advantage, and there is no evidence of that. On the evidence *Romer, J.* held that all the grounds alleged for setting aside the release were disproved. The defendants were not the solicitors of the plaintiffs, and the fact that the plaintiffs were not told that they had a right to have the bill taxed, and that the vouchers were not produced to them, and that some items might be disallowed on taxation, is not sufficient. No proof has been given of any erroneous charges. The items entered in the defendants' books amounted to over 7l. more than they charged. It was not necessary for the defendants to give the particulars of their charges:

Stedman v. Collett, 17 Beav. 608;

Turner v. Hand, 27 Beav. 561;

Ex parte Hemming, 28 L. T. Rep. O. S. 144.

None of the cases cited on behalf of the plaintiffs go far enough to support their contention. The nearest is *Todd v. Wilson* (*ubi sup.*), and the words of the judgment perhaps fit this case, but the facts are very different. There the solicitor had no right to make any professional charges, and therefore the whole of his bill was improper. *Re Fish* (*ubi sup.*) only decided that a settlement by the trustees of the bill of costs of a solicitor-trustee did not prevent the *cestuis que trust* from disputing it. *Coleman v. Mellersh* (*ubi sup.*) was a case in which the solicitor had made a gross overcharge. That is not the case here. The other cases are cases of a solicitor taking a benefit from his client, and have little bearing on the present case. No bill was ever made out by the defendants, and it does not follow that, if it had been made out, it would have been a copy of the items in the ledger.

Oswald in reply.—This case cannot be decided in favour of the defendants without overruling *Todd v. Wilson* (*ubi sup.*). No case has been cited where a solicitor-trustee has been allowed to retain his charges without delivering a bill. Some of the items charged here would be disallowed on the principle of *Re Chapple*; *Newton v. Chapman* (51 L. T. Rep. N. S. 748; 27 Ch. Div. 584). In *Coleman v. Mellersh* (*ubi sup.*) the account was opened because there was an improper charge of 75l., and there is no difference between charging

one large sum and a number of small ones. The cases cited on behalf of the defendants do not apply. In *Stedman v. Collett* (*ubi sup.*) both sides had proper knowledge. Here they had not. The other cases are cases under the Solicitors Act, and they were decided on the provisions of the Act.

LINDLEY, L.J.—This is an appeal from the refusal by *Romer, J.* to set aside an account and a release settled and signed ten years ago. I think that, on the materials before us, he was quite right. The position of the parties was this: A gentleman had died, leaving a will appointing the two defendants, the Messrs. Still, who were solicitors, his trustees; and that will contained a clause enabling them to make what I will call shortly, professional charges for their services. The plaintiffs are three of his residuary legatees. The value of his residuary property appears to have been about 1500l. The solicitors wound-up his affairs, and on the 23rd June 1883 they wrote this letter to the residuary legatee: [His Lordship read the letter.] The account which accompanied this letter is, on the face of it, a clear, full, and fair account of what had been done in the winding-up of the estate—a full debtor and creditor account, intelligible to anybody who is capable of understanding an account at all. One item in it is, "Paid Messrs. Still and Son, costs relating to the executorship, 116l. 17s. 2d." The residuary legatees, having got this account, sign at the foot of it a memorandum, "We have examined and approve of the foregoing account." The date is not put down, so I say nothing about the date. It may have been the 28th June when the release was executed. After having had the account, and after having had an opportunity of putting such questions as they thought fit to put, they sign this memorandum of approval. On the 28th June 1883 they signed a release, releasing the trustees and executors from all demands in respect of the residuary estate. They did that upon the receipt by them of their shares of the residue. Let us see what it is, if anything, that was wrong in that transaction. The duty of Messrs. Still, who were solicitors and trustees, was difficult to perform. When solicitors who are trustees have power to charge their costs, they ought to be very particular; and, in strictness, what they ought to have said to the residuary legatees, and what, according to the evidence, they did not say, was this: "You see we have charged you 116l. for the costs. You are entitled to ask us to give you a detailed bill of those costs, and, moreover, you are entitled to have that bill taxed if you think proper." Although the residuary legatees were not Messrs. Still's clients upon a retainer, so that they could make out a bill of costs and sue them for it, yet in their position of trustees and solicitors it was their duty in strictness to have given these persons the information which I have stated, and this they failed to do. What is the consequence of that? An account settled and a release executed cannot be set aside for the asking. What is necessary in order to set aside a settled account or a release, or both together, when the release proceeds upon the footing of an account? It is essential to show that there has been some injustice done—to show that there has been some fraud, some pressure, some overcharge, something wrong, to cloak which the release has been obtained. Prove that and the

[CT. OF APP.]

Re WEBB; LAMBERT v. STILL.

[CT. OF APP.]

release cannot stand. If, then, it could be shown in this case that any unfair advantage whatever had been taken of these persons, and if a single impartial, competent witness had been called to say, looking at what is called the costs ledger, and looking at what was done, that 116*l.* was an improper sum, I think, subject to the question of time, that these residuary legatees would have been entitled to relief. But they do not do anything of the sort. Having got discovery of documents, they find it utterly impossible to substantiate or maintain any attack whatever on this account except the item of costs. There is not a single error found, there is not a tittle of evidence to show that there is any mistake, either of omission or charge, in that part of the bill which relates to the winding-up of the testator's estate, and I take it now, after all the discovery which has been obtained in this suit, that that part of this account is unassailable, and is straightforward, honest, and correct. But then the appellants attack this item of costs; and how do they do it? They treat Messrs. Still as having sent in a bill containing the items which are found in what is called the costs ledger. But Messrs. Still have not done so. It is not to be assumed that, if they had sent in a bill, they would have sent in a copy of the items in their ledger. What is to be assumed is, that if they had sent in a bill they would have taken care about framing it. The real truth is, they never furnished a bill. They had asked these people to allow these costs at 116*l.*, and it was perfectly competent for them to do so. I have already pointed out that they ought in strictness to have given more information than they did; but what ground have we for supposing that 116*l.* is an exorbitant or improper charge? To my mind there is not the slightest evidence to show anything of the sort. What we have to ask ourselves is this: Is it justice to set aside a release or a settled account ten years after its date upon a surmise that a charge may be unreasonable, when there has been every opportunity of proving that it is unreasonable and not a tittle of evidence is adduced to show that it is? In my opinion the judgment of Romer, J. was correct, and this is an action that ought never to have been brought. The appeal will be dismissed with costs.

SMITH, L.J.—I am of the same opinion, but I wish to make a few remarks in consequence of the way in which this case has been presented to us against Messrs. Still. This is an action brought to open a transaction which took place about ten years ago. The settlement and release now impeached were preceded by a letter of a most proper kind, which has been read by Lindley, L.J. Everything is in order except one matter, to which I will presently refer. The five beneficiaries have the account sent to them; they have the opportunity of investigating that account, and of asking for any explanation; they presumably having investigated that account sign their approval of it as being accurate and correct, and, in addition to that, they sign a release, releasing from all demands in respect to the residuary estate the Messrs. Still who had been acting as executors and trustees of the testator. That took place as long ago as June 1883. How and under what circumstances nine and a half years afterwards three of these five beneficiaries find out that the residuary legatees did not understand

the release, and that they did not understand the settled account, for that they were illiterate and poor and what not, as is stated by the plaintiffs' counsel, I do not pause to inquire. Now, what happened? These proceedings are taken by a solicitor, Mr. Chapman, at the instance of these three, to get a bill of costs delivered by Messrs. Still, and to have it taxed. The first proceeding was the common order to tax, which was entirely out of order, and that having failed, he brings this action. In this action imputations have been made upon Messrs. Still which ought not to have been made, and I wish to state this from the bench. [His Lordship then considered the imputations, and continued:] I entirely agree with Romer, J., on the evidence in this case, that there has been nothing shown to impeach the honour, integrity, or honesty of Messrs. Still in winding-up this estate, and that these accounts ought not to be re-opened. But there is one point remaining. It is admitted that Messrs. Still did not tell the beneficiaries that they were entitled to have a bill of costs, and that if they liked they might have it taxed. They did not do that; but I have always understood that to open a settled account gross error almost amounting to deceit must be established. If that be too high, it is quite clear that you cannot have a settled account opened by the court merely for the asking, but there must be some ground for showing that the man who seeks to open it after a lapse of time has through some grave error been damned. I am not going to repeat what Lindley, L.J. has just said on that point; but it seems to me that there is no evidence on which we could hold that the 116*l.*, or the 19*l.*, or the 24*l.*, were excessive charges for the work done by Messrs. Still. The criticisms which Mr. Oswald most ably made on the different items were satisfactorily answered by Mr. Bousfield, who said that there was no bill of costs ever made out at all, and that the bill of costs that would be sent in, if one was ordered, would be something very different from the copy of the items in the ledger. Even if a bill consisting of those items were delivered, the most that the clerk of the plaintiffs' solicitor, Mr. Chapman, can screw himself up to is that, if it was taxed, one-sixth or more would come off, the result of which would be that these beneficiaries would get about 3*l.* 12*s.* apiece. I agree with the judgment of Romer, J.

DAVEY, L.J.—I am not prepared to differ from the other members of the court as to the result of this appeal; but I must confess that I do not feel quite so clear about it as my learned brethren. Nothing that is decided in this case will in any way impugn or impeach those sound doctrines relating to transactions between trustees and *cestuis que trust* which have been laid down in previous cases. The question in this case is one between trustees and *cestuis que trust*. The law imposes upon trustees taking a benefit from their *cestuis que trust* the obligation of putting their *cestuis que trust* in point of information in the same position as they are themselves, and none the less when the trustees have employed themselves, as solicitors, to do work on behalf of the trust, and some of the charges in question are charges which they have retained for their own benefit in remuneration for such employment. I do not think there is any magic in the trustees being solicitors. I should say exactly the same

[CT. OF APP.]

Re WEBB; LAMBERT v. STILL.

[CT. OF APP.]

if they were surveyors or accountants. Wherever a trustee employs himself, in my opinion, he ought to give the fullest information to his *cestuis que trust* with regard to any sum which he retains out of the trust estate for his remuneration for those services. But the question is, whether the plaintiffs in the present case have, by their pleadings and their evidence, made out such a case as entitles them to the relief which they seek. It appears to me that both Mr. Oswald and Mr. Bousfield put their case a great deal too high. If I understood Mr. Oswald's argument rightly, he contended that it was sufficient for him to show that it was an account between trustee and *cestuis que trust*, and that no vouchers had been delivered, and no bills of costs had been delivered, and thereupon he was entitled to have the account opened, notwithstanding the release and settlement of accounts. In my opinion that is not the law, and I do not find in any of the cases cited by Mr. Oswald, or the cases which I have had an opportunity of consulting, that there is any authority for such a proposition. I conceive that between trustees and *cestuis que trust*, as well as between other persons, in order to open a settled account, you must show some error in the settled account. You must show that there is some objection in substance, that there is something wrong in the settled account by which injustice has been done to the persons who complain. That is the law, as I understand it, stated by Lord Cottenham in *Coleman v. Mellersh* (*ubi sup.*), where he points out that there is this material difference in dealing with settled accounts where the parties between whom the account has been settled are in a fiduciary position and where they are not. Where they are in a fiduciary position the court sets aside the account upon proof of some error and allows the account to be taken notwithstanding the settlement; but where the parties are not in a fiduciary position, upon proof of an error in the absence of fraud, all the court does is to give an opportunity to surcharge and falsify. What Lord Cottenham says is this: "A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify, upon the supposition that one error having been proved others may be expected upon investigation to be discovered; but, if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, show that the alleged settlement ought not to be considered as an act binding upon the parties signing, and that it would be inequitable for the accounting party to take advantage of it, the court is not content with enabling the party to surcharge and falsify an account which never ought to have been so settled, but directs the taking of an open account. Amongst the grounds on which the court rests the application of this principle, none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts prove that he possessed and abused the confidence which had been reposed in him; all these appear to me to concur in the present case." And one might refer to the case of *Williamson v. Barbour* (37 L. T. Rep. N. S. 698; 9 Ch. Div. 529) and *Gething v. Keighley* (9 Ch. Div. 547) before

the late Master of the Rolls, for illustrations of what I conceive to be the settled rule of this court. Therefore I think that Mr. Oswald put his case too high. But, on the other hand, I think Mr. Bousfield put his case too high, because, if I understood his argument rightly, it was this, that the solicitor-trustees were not the solicitors of the parties, and therefore they owed no obligation to the parties to give them information as their clients. But Mr. Bousfield seemed to overlook this, that the parties did not stand to each other in the ordinary relation of one adult person dealing with another adult person, they were in the relation of trustees and *cestuis que trust*; and whether the question is as to a bill of costs which the trustee-solicitors are making, or to a sum of money whatever it may be which the trustees have in their hands and have to account for to their *cestuis que trust*, I conceive that the rules of this court impose upon the trustees in such dealings and in such accounting the obligation of giving the fullest information and assistance. If that be so, I ought to add that, in my opinion, some of the questions which were so much agitated in the evidence are, to my mind, unimportant. I do not conceive that the mere fact of a release having been executed is of the slightest importance. I take it that a release in the eye of a court of equity is nothing more than a record by deed of a settled account, and, unless the settled account is unimpeachable, the fact of the parties having signed a release will not assist those who depend upon it for a defence. Therefore the questions whether the release was executed on the Tuesday or on Thursday, whether the parties were asked beforehand to execute the release, or what was said when the release was executed, appear to me of very little importance. The material thing is the account. Can the account be opened, or ought the account to be opened? Now, if Mr. Oswald had succeeded in showing us that there was any grave or substantial error in the accounts, I myself should have been disposed to say that the learned judge in the court below was wrong in not giving his clients relief. The account itself contains a great many items. It is an executorship account, and, with regard to the bulk of the account, neither by the pleadings nor by his evidence has Mr. Oswald attempted, as it seems to me, or successfully attempted, to show any error whatever. How does the matter stand? His clients have had the advantage of having all the documents in Messrs. Still's possession relating to this account produced to them in the course of this litigation, and I think we are entitled to assume that, if those documents, or the absence of documents, had laid any ground for entitling Mr. Oswald's clients to open this account, we should have heard something from him on the subject. If he had been able to say, for example, that there were items which the documents furnished did not vouch, or of the payment of which there was no evidence, or if he had been in any way able by cross-examination of Messrs. Still or otherwise to impeach the account as a whole, I feel quite confident that we should have heard something about that from him. But we heard nothing of the kind, and therefore I think we are entitled to say that Messrs. Still, quite independently of the settled account, and quite independently of the release, have established to the satisfaction of the court

APP.] LEVER v. LAND SECURITIES CO.; DE CARTERET v. LAND SECURITIES CO. [APP.]

the general correctness of the accounts. Now, with regard to the bills of costs—and it is upon that, of course, that we feel most difficulty—I do not myself doubt for one moment that there was an obligation upon the trustees, at least, to inform their *cestuis que trust* that those amounts were amounts which they had deducted in payment of their own bills of costs, the particulars of which and the detailed bills of costs of which they were bound to furnish if they were required. I myself should be disposed to go further than Lindley, L.J., and to think that they ought to have incorporated with their account the actual bills of costs themselves, and that the amounts should have been entered in the general account as “116l. retained by Still and Co. as per bill of costs accompanying.” But, whether I am right in that or not, at least they were bound to tell their *cestuis que trust* that they were entitled to the details, and, moreover, that if they were not satisfied with those accounts or preferred to have the bills of costs tested in the proper way, that they were entitled before settling the account to have that done; and I cannot help expressing my opinion that it was an error, and I think a serious error, in Messrs. Still and Son, who were solicitors of considerable experience, not to have taken that course, and my regret that they did not do so. But, after all, what is the result of their not having taken that course? Why this, that, when the correctness of the account is challenged, they are liable to have it proved against them that they have made overcharges in their bills of costs, and that, if that is proved, they cannot rely upon the settled account or the release as a defence to any claim. That, I think, is the utmost that can be said as to their position. I quite agree that, if Mr. Oswald had proved that the amounts charged for the bills of costs and retained by them were excessive, or, to use his own language, “extortionate,” the settled account and the release would, under the circumstances, have been no defence whatever, and they would have been liable to have had the bills of costs taxed. But I must say I do not think that Mr. Oswald has successfully made any such case. He has used over and over again the expression “extortionate charges.” For myself, I do not see the evidence of it. He has referred to their costs ledger, which contains various memoranda for the purpose of making out their bills of costs; but I do not think, in justice to Messrs. Still, that we are entitled to assume that every item which is written down in the course of business from day to day in this costs ledger would necessarily appear in their bill of costs when it was made out. Still less do I think we are entitled to assume that those attendances to which Mr. Oswald very properly and naturally drew attention, and which I believe could not be maintained on taxation—attendances on themselves to pay their own fees and things of that kind—are included in the sum which is charged in the account, because I observe that, taking Mr. Oswald’s own figures, the amount which is charged in the account is at least 7l. 8s. 4d. less than the amount of their entries in the costs ledger, and therefore I could not think it fairly assumed against them that those items to which some objection might be taken on taxation would necessarily form part of a bill of costs for that 116l., if one were made out, delivered, and subjected to taxation. Having

regard to the lapse of time, and having regard to the circumstances under which the case is brought before us, I think Mr. Oswald ought to have proved that, looking at the amount of work done, and looking at the amount of the estate, 116l. was an excessive amount. I do not say grossly excessive, but was an excessive amount to charge for the solicitor’s work of the executorship. If it were so, I do not see that it would have been difficult for Mr. Oswald to call a respectable solicitor of experience in such matters to have told the court that it was so. Instead of that, what did he do? All he did was to put in the managing clerk of the solicitor who instructs him, and all he says is (I do not at all say he was not stating his own belief, though, of course, with a natural bias, for which he cannot be blamed, for the side which his employer was interested to support), “I believe I could get one-sixth off that bill,” and one-sixth, as I understand him, not off the amount which is charged in the executorship account, but off an assumed bill of costs to contain all the items which are contained in the costs ledger. That is not enough, and, having regard to the very small benefit, if any, which could possibly result to these plaintiffs if they got what Mr. Oswald asks us to give them, and having regard to his failure, in my opinion, to prove any error which would justify us in opening the account, I think the decree ought to be affirmed. Of course, we cannot alter Romer, J.’s decree in regard to costs; but for myself I think I should not have been disposed to have made the plaintiffs pay costs in the court below.

Solicitor for the plaintiffs, *R. Chapman.*

Solicitors for the defendants, *Trower, Freeling, and Parkin.*

Nov. 1, 2, and 8, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)
LEVER v. LAND SECURITIES COMPANY LIMITED.
DE CARTERET v. LAND SECURITIES COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Discovery—Postponement of inspection—Question of law to be determined—Amendment of pleadings—Order XXV., r. 2—Order XXXI., r. 20.

A common order for discovery was made against defendants, who made an affidavit of documents, of which there were a large number, and then applied by summons that inspection might be postponed until certain questions of law mentioned in the summons had been determined. These questions of law were not raised by the pleadings.

Held, that the statement of defence should be amended so as to raise the points of law which the defendants desired to have determined, and that the court then had jurisdiction under Order XXV., r. 2, to order the points of law to be set down for hearing, and to postpone the inspection until they had been disposed of.

Semble, that Order XXXI., r. 20, is not to be construed so narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the court has no jurisdiction after such an order to make

a subsequent order for questions of law to be determined before inspection.

THE defendant company was incorporated, under the Companies Act 1862, on the 22nd Dec. 1863. Its business was (*inter alia*) to make advances of money repayable with interest upon the security of (*inter alia*) messuages, lands, hereditaments, and real property of all descriptions and tenures, and of all estates and interests therein. The nominal capital was 2,000,000*l.*, in 40,000 shares of 50*l.* each, of which 20,000 had been issued, upon which 252,920*l.* had been paid up.

On the 29th July 1891 Ashton Lever issued a writ against the company, in which he claimed an injunction to restrain the company and the directors (*inter alia*) from paying any dividends on the shares except out of the net profits of the company, and from applying any part of the assets of the company which represented capital in payment of dividends. The writ purported to be on behalf of Lever and all other the shareholders of the company.

At the date of the issue of the writ Lever was the holder of one 50*l.* share in the defendant company, 10*l.* being paid up thereon, and had held such share for a period of twelve years.

On the 19th Dec. the statement of claim was delivered, in which it was alleged (*inter alia*) that the company, in violation of its articles of association, had paid a dividend of 2 per cent. (amounting to 4000*l.*) for the half-year ending the 30th June 1891, not out of the net profits, but out of the floating capital of the company, such floating capital being a sum of 70,565*l.* 5*s.* 8*d.*, which, according to the thirty-third annual balance-sheet of the company, made up to the 30th June 1891, represented the excess of assets over liabilities of the company. It was further alleged that many of the securities of the company were worth less than the money advanced on them, and could not be realised except at a loss.

On the 14th Jan. 1892 the statement of defence was delivered, in which the company alleged that the sum of 70,565*l.* 5*s.* 8*d.* represented the balance of undivided profit on the 30th June 1891, and that the 4000*l.* paid thereout as a dividend was so paid pursuant to resolutions passed unanimously at the thirty-third general meeting of shareholders of the company held on the 29th July 1891, approving and adopting the report and accounts for the year ending the 30th June 1891. The company contended that, under such circumstances, the action of the plaintiff was contrary to the wishes of the other shareholders.

On the 22nd Jan., on the application of Lever, an order was made in the common form for discovery and production of documents by the company.

On the 16th Feb. the company took out a summons asking that further security might be given by Lever for the costs of discovery. The summons was adjourned for Lever to answer the affidavit in support of it.

On the 22nd Feb. a receiving order was made against Lever, and on the 16th March he was adjudicated a bankrupt.

On the 13th June Henry de Carteret was appointed trustee in the bankruptcy, and on the 28th July, at a meeting of the committee of inspection, it was resolved that the trustee should continue Lever's action, and on the 3rd

Nov. an order was made that the action should be carried on by the trustee.

In July 1892 De Carteret, having been entered on the register of shareholders of the company as trustee in the bankruptcy of Lever in respect of Lever's one share, received a copy of the report and balance-sheet of the company for the year ending the 30th June 1892, and also received a dividend, as recommended in the report, amounting to 4*s.*

On the 10th Feb. 1893, upon the application of the company, an order was made limiting the discovery ordered by the order of the 22nd Jan. 1892. The company then made an affidavit of documents in accordance with the second order, but even then the number of documents discovered was so large that the examination of them would involve great expense.

On the 8th June the company took out a summons to have it decided—(1) whether, having regard to the receipt by De Carteret as trustee of the bankrupt of the dividend paid by the company in July 1892, the said De Carteret was not precluded and debarred from his right to the injunction sought and other relief in the action; and (2) whether Lever's cause of action (if any) devolved upon and was enforceable by the trustee in bankruptcy. And the company asked (relying on Order XXXI., r. 20) that all further discovery by the defendant company to the plaintiff of the documents of the defendant company and otherwise in the action, and all inspection of such documents, might be postponed until after the determination of the questions submitted, or that such other order might be made as to the court should seem meet.

KEKEWICH, J. considered that, so far as Order XXXI., r. 20, was concerned, the defendant company was precluded by the making of the common order of discovery of the 22nd Jan. 1892 from afterwards raising the questions of law now submitted; that they ought to have been raised at the time of the application for discovery; and that Order XXXI., r. 20, did not point to any independent application at a future time; but his Lordship was of opinion that the enormous expense of examining the documents discovered ought not to be incurred if it could be avoided, and that he ought to restrict the litigation, which he regarded as dishonest, if he had jurisdiction to do so; and he held that the court had such jurisdiction outside the Orders and Rules. He accordingly made the following order: "This Court doth order that this action be forthwith set down by the defendants for the determination of the following question, namely: Whether upon the pleadings as they now stand, and having regard to the receipt in 1892 of a dividend by William Henry de Carteret, the trustee in bankruptcy of Ashton Lever, the plaintiff, William Henry de Carteret, is entitled to any and what part of the relief claimed in this action? And it is ordered that the inspection authorised by the said order, dated the 22nd Jan. 1892, be postponed until the above question is determined, and it is ordered that all costs of this application be reserved."

From this decision the trustee appealed.

Lincoln Reed for the appellant.—If the company wished to postpone discovery and inspection, and to raise a point of law, they ought to have applied to do so before the order for discovery and

inspection was made. It is now too late. Order XXXI., r. 20, does not apply, and there was no jurisdiction to make the order appealed from. Kekewich, J., said he had inherent jurisdiction to make it; but this is not a case in which the inherent jurisdiction of the court applies.

Warmington, Q.C. and A. W. Rowden for the company.—The order is in substance right, and is authorised by the practice of the court. If the points now raised had been mentioned in our pleadings we should have been within Order XXV., r. 2. The court has ample jurisdiction under the Orders and Rules, in the interests of justice, to order any substantial question to be tried. Moreover the pleadings show that discovery and inspection would really be of no practical use. The pleadings can be amended so as to solve the difficulty.

Reed in reply.

The COURT directed the case to stand over for a week, the defendants in the meantime to amend their pleadings as they might be advised, so as to be in a position to avail themselves of Order XXV., r. 2, by including in their statement of defence any points of law which they considered ought to be decided before discovery and inspection were granted, and the determination of which might render inspection unnecessary.

The defence was amended accordingly, and the case again came before the court on Nov. 8.

LINDLEY, L.J.—This is an appeal from an order made by Kekewich, J., which runs thus: [His Lordship then read the order set out above, and continued:] The circumstances which have given rise to the controversy are these. The plaintiff, Mr. Lever, commenced an action against this company upon the ground that they had been paying dividends out of capital. He became bankrupt, and Mr. de Carteret is his trustee in bankruptcy, and the action is being continued by him. The question whether the plaintiff is entitled to any relief or not depends, of course, upon the facts which may be proved, and upon the application of the doctrine of *Foss v. Harbottle* (2 Hare, 461) to those facts. Whether the action will succeed or not I do not know. One very important and material question is whether, upon the pleadings and upon the admissions, and now upon the amended statement of defence, this case is within *Foss v. Harbottle* or not. That is the real question which the defendants at all events desire to raise at once, and I think they are entitled to raise that question. Now what is the difficulty? The difficulty arises in this way: In Jan. 1892 the common order was made for an affidavit of documents and for discovery. That order has not been appealed against. I think myself that that was perhaps an oversight, and at all events has led to trouble, because if it had been discovered that there was so much difficulty, not to say oppression, in complying with that order, and an application had been made to extend the time to appeal from it, and for a special order to be made, I think probably that application would have succeeded, and the whole of this difficulty would have been avoided. But for reasons which I do not know, that course was not pursued, and the plaintiff, therefore, naturally insists on the order of Jan. 1892, and what he asks for is that under the stress of the order he

may be allowed to inspect all books and documents of the company as are scheduled, and as he may think proper. I give him the credit of supposing that he will not do that maliciously and spitefully, but still, when you look at the schedule of documents, you can see that to send persons down into the office of this company with a roving commission like that is to say the least a very serious—and *prima facie* seems to me rather an oppressive—proceeding, and I do not wonder at any judge struggling, if he can, to prevent it. When the case came before us last week there was a difficulty in applying Order XXV., r. 2, to it, because no point of law was raised by the pleadings, and we suggested that the statement of defence should be amended, which has been done, and now the defendants ask the court to apply the power which it has under Order XXV., r. 2, which I will read. It runs thus: "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial." That is by consent or by an order. The object of that is to prevent unnecessary expense in any form or any shape. A question is suggested which one of the parties contends will put an end to the case. The court thinks it may be so, and orders that question to be tried. The pleadings being now right in point of form, I see no difficulty in making an order to that effect, and I think we must do it. Whether the construction put upon Order XXXI., r. 20, by the learned judge in the court below is a little narrow or not is a point by no means free from difficulty. That rule runs thus: "If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection." It appears to me that it is rather a narrow construction of that rule to say that the right to the discovery has been determined by the common order, and that the court is powerless after that to make an order under this rule. I am not at all prepared to hold off hand that the right to the discovery does not mean there the exercise of that right, and that if an application were made to delay the enforcement of that right, this order might be used for that purpose. We come now to the practical question, what is to be done? It appears to me that we ought to vary the order, and to give liberty to the company to raise the question of law—to vary the order made by Kekewich, J. by substituting the language as to the issue now raised by the pleading for the somewhat similar language which occurs in his order. The order will therefore be varied by putting it thus: "This court doth order that this action be forthwith set down by the defendants for the determination of the following question of law:" Then

CT. OF APP.]

ALLEN v. ALLEN.

[CT. OF APP.]

insert the necessary paragraph from the amended pleading. The rest of the order will stand. The costs of this appeal ought to be disposed of with the costs of the original application before Kekewich, J.; that is, be reserved, and he will decide what is to be done both as to the costs of the application before him which he has reserved, and the costs of this appeal.

SMITH, L.J.—I am of the same opinion. I entirely agree with the endeavour which Kekewich, J. has made to stop this inspection if possible until it is distinctly ascertained whether it is absolutely necessary or not for the plaintiff's case. He took that step, and we need not decide whether or not he had jurisdiction to take it under the rules, nor have we to decide to-day what is the true construction of Order XXXI., r. 20, because at the suggestion of the court there has been an addition to the statement of defence, which clearly brings this case within Order XXV., r. 2; and everything now being in order, the court is of opinion that this inspection is manifestly oppressive unless it is absolutely necessary for the plaintiff's case, and is one which ought not to be had, or at any rate which should be postponed until it is seen that it is necessary for the plaintiff's cause of action against the defendant that it should be had. There is a preliminary question to be decided, as has been pointed out by Lindley, L.J., and therefore I think the justice of this case requires that we make the order which has been sketched out by him. That meets the merits of the case. It was stated by counsel for the plaintiff that we had no power to postpone or delay the carrying out of the order as it stood. In other words, he said he had got an order for discovery and inspection, the discovery had been completed but the inspection had not; and he contended that this court had no power to say that the order should not be carried out, and that it must be carried out forthwith. I deny that. In my judgment this court has jurisdiction, where it is necessary, to stay obedience to an order for such time as it thinks necessary. I think that order is a right one.

DAVEY, L.J.—My experience at the bar has led me to believe that the salutary and necessary power of the court to order discovery and inspection of documents may, in cases of this character, be extremely oppressive to defendants; and I am not surprised that the defendants in this case desire to avail themselves of every power which the rules of the court give them to, at any rate, postpone the giving of that inspection. It is not only to the parties themselves that inspection of documents and accounts of a company like the defendant company is oppressive; but it must be remembered that if the documents which are discovered in this affidavit of documents are produced for inspection, the plaintiff will have the opportunity of inspecting the accounts of various persons who are customers or clients of, or borrowers from, the defendant company, and of making themselves acquainted with affairs at present confined to the breasts of the defendants and their customers. That being so, the plaintiff's counsel says that the issue which is raised on the amended pleadings is so unsubstantial that the court ought not to stay its hand until the trial. I express no opinion one way or the other as to what will be the result of the trial of that issue; but I

am bound to say I do not think it frivolous or unsubstantial, and I think that the defendants ought to have the opportunity, if they are willing to take the risk of costs in doing so, of having that question which they have now properly raised in their pleadings decided before the court exercises the power it has of ordering inspection. But then it is said that the defendants came too late. Now, speaking for myself only. I do not think that it is so according to the construction which I put upon Order XXXI., rule 20. It must be remembered that before the plaintiff can get actual inspection he wants a further order in addition to the common form order for discovery and inspection. I think that I am correctly stating the practice when I say that, after the affidavit of documents is put in, if the plaintiff wants inspection within a certain time, or at a certain place, he has to get a further order, and I do not see why the salutary provisions of Order XXXI., rule 20, should not be brought into force and exercised by the court at any time when the court is asked to make that order, or the intervention of the court is sought for the purpose of obtaining inspection. In my opinion, therefore, the case comes within the true construction of rule 20 of Order XXXI., and I am not at all disposed to put a narrow construction upon that rule, or to restrict the power thereby given to the court to have questions or issues decided, which if decided one way will render the inspection unnecessary. I think at whatever stage the party comes to ask for the intervention of the court in order to procure inspection, inspection is sought within the meaning of this rule; therefore I agree with the order which has been stated by Lindley, L.J.

Solicitors: Gibbs, White, and Crocker; R. C. Ponsonby.

Wednesday, Dec. 13, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

ALLEN v. ALLEN. (a)

APPEAL FROM THE DIVORCE DIVISION.

Divorce—Wife's costs—Wife in possession of separate estate more than sufficient to pay her costs—Liability of husband—Relative incomes of husband and wife—Rules and Regulations in Divorce and Matrimonial Causes, r. 158.

Where an application is made by a wife under the Rules and Regulations in Divorce and Matrimonial Causes, r. 158, for an order directing her husband to pay her costs already incurred, and to give security for her future costs, the judge has a discretion to be exercised having regard to all the circumstances of the case; and he may take into account the relative incomes of the husband and wife, and is not bound to refuse the application because the wife has separate property much more than sufficient to pay her costs.

ON the 17th March 1893 a wife filed a petition for judicial separation on the ground of cruelty, and the next day her husband filed a petition for divorce on the ground of adultery. The suits were afterwards consolidated.

ON the 19th March the wife presented a petition for alimony *pendente lite*. The husband had an income of about 4000l. a year, and the wife had

(a) Reported by W. C. BISS, Esq., Barrister-at-Law

separate property producing an income of about 280*l.* a year.

On the 23rd June an order was made directing the husband to allow the wife alimony *pendente lite* at the rate of 500*l.* a year, in addition to her separate income.

In August the wife took out a summons for her husband to show cause why he should not be ordered to pay her taxed costs of suit up to the time of setting down the cause, and to pay into court or give security for a sufficient sum of money to cover her future costs of and incident to the hearing.

The summons came before the judge on the 12th Aug., who directed the parties to go before the registrar.

On the 17th Nov. the registrar reported as follows: "It having been referred to me to report as to the means respectively of the husband and wife in this suit, and whether, having regard to their respective incomes, the husband should be ordered to pay the wife's costs already incurred, and to secure to the wife the costs of the hearing or otherwise, I beg to report as follows: Since the allotment of alimony the solicitors for both parties have been before me, and I have carefully reconsidered their respective incomes. The husband's means are derived from various investments." He then made some observations with reference to the fluctuations in their value, and continued: "I think, therefore, that the husband's income may be considered to amount to about 4000*l.* a year. The wife has an income of 280*l.* derived from various investments, and a further sum of 500*l.* a year has been awarded her during the suit for alimony. The husband's income would therefore, after deducting 500*l.* a year for alimony, amount to about 3500*l.*, and the wife's, with the alimony, to 780*l.*—i.e., 280*l.* would be her income absolutely, and a further allowance of 500*l.* a year, but only during the suit. The suit is an expensive one, as there have already been two commissions, at the husband's instance, to France. The wife's costs already incurred amount (subject to taxation) to 318*l.*, and 90*l.* have been already paid to her in respect of these costs, and probably about another 50*l.* will be incurred before the trial. It is submitted that the husband should be ordered to pay the costs already incurred, and pay or secure the costs of the hearing."

On the 20th Nov. the case came before Barnes, J., who made the order asked by the summons.

The husband appealed.

During the argument it was admitted that the 6000*l.* which produced the wife's income of 280*l.* a year, was her absolute property.

Lockwood, Q.C. and Searle for the appellant.—The object of the rule, which requires the husband to make provision for the wife's costs, is to protect her solicitor, so that she may not be prevented from obtaining legal assistance. If the wife has separate estate of her own sufficient to enable her to employ a solicitor the reason for the rule ceases. The registrar acted on a wrong principle in considering the relative incomes of the husband and wife; the only question was whether the wife had sufficient separate estate to pay her costs. Here the wife has absolute separate property worth about 6000*l.* There is no ground for apply-

ing a rule which was founded on the view that a married woman had no property at all with which she could deal. The proviso in rule 158 of the Rules and Regulations (Dec. 26, 1865), shows that if the wife possesses sufficient separate estate it is a ground for refusing to order payment of her costs pending suit. The court may, and often does, order a wife with an abundant separate estate to pay her husband's costs of matrimonial proceedings in which she has been unsuccessful. [LINDLEY, L.J. referred to *Russell v. Russell*, 66 L. T. Rep. N. S. 436; (1892) P. 152.]

Lawson Walton, Q.C. and R. H. Pritchard for the wife.—The rule that the husband should provide his wife with sufficient means of defending herself is founded on public policy, as it is important that she should be able to do so in the interests of herself and her children:

Robertson v. Robertson, 45 L. T. Rep. N. S. 237; 6 P. Div. 119;

Wilson v. Wilson, 2 Hagg. Con. 203, 204.

It is said that as she is possessed of a large sum she can pay her costs out of that; but that would be a reason also for giving her no alimony *pendente lite*. The income of that sum was taken into consideration when the amount of alimony was fixed, and if she has to pay her costs out of her capital her income must be diminished. It is not the practice of the court to consider the amount of capital, but only the income:

Westmeath v. Westmeath, 2 Hagg. Sup. 133.

Rule 158 shows the court has a discretion, and there is no appeal from a discretionary order. The cases of *D'Aguilar v. D'Aguilar* (1 Hagg. 788); *Ronalds v. Ronalds* (L. Rep. 3 P. & D. 259); and *Carstairs v. Carstairs* (10 L. T. Rep. N. S. 696; 3 Sw. & T. 538) further show that the judge has a discretion.

Searle in reply.—The husband is entitled to appeal. This is not a question of costs within sect. 49 of the Judicature Act 1873. The only question is whether the wife has sufficient to pay her costs. It cannot be said that 6000*l.* is not enough, and therefore it is a question of principle and not of discretion. In the cases referred to, the married woman was only entitled to the income settled for her separate use, and therefore the amount of capital was not taken into consideration. In neither of the cases had the wife the absolute control over a large sum of money as in this case.

LINDLEY, L.J.—This is an appeal by the husband from an order of Barnes, J. directing him to pay the wife's costs already incurred, and to pay or secure her costs of the hearing. This order was made in accordance with the usual practice of the Divorce Court that the husband should be ordered to put the wife in funds to pay her costs of the proceedings. The appeal is founded on the argument that there is no occasion for such an order, as the wife has property amply sufficient to enable her to defend herself. The suit has not yet come on for trial. Alimony *pendente lite* has been ordered at the rate of 500*l.* per annum, and her own income, arising from separate property to which she is absolutely entitled, is 280*l.* a year. The order for alimony was made after considering the incomes of herself and her husband, hers being 280*l.* and his about 4000*l.* a year. After this the wife took out a

CT. OF APP.]

ALLEN v. ALLEN.

[CT. OF APP.]

summons for the husband to show cause why he should not pay her costs up to the setting down for trial, and pay into court or secure a sufficient sum to cover her costs of the hearing. The matter was referred to the registrar, who, after considering the income of the husband and the income of the wife, including the allowance for alimony, submitted that the husband should be ordered to pay the wife's costs already incurred, and pay or secure the costs of the hearing. Barnes, J. made an order in conformity with this report. Whether this order is right depends on rule 158 of the Rules and Regulations of the 26th Dec. 1865. That rule, as amended in 1875, is as follows: "After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause, by order of the Judge Ordinary or of the registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband; and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial shall have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar: provided that in case the husband should, by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the court as to his liability." Under that rule it is obvious that the judge has a discretion, not merely as to the amount, but as to whether an order ought under the circumstances to be made at all against the husband. I will assume that the present case is not within sect. 49 of the Judicature Act, which prohibits appeals as to costs, for that section may perhaps be held not to apply to an order made *pendente lite* to pay costs or secure costs. Still the order is a discretionary order, and we should not interfere with it unless the judge has gone on a wrong principle, or gone so far wrong as to cause a miscarriage of justice. It is contended on behalf of the husband that the judge has proceeded on a wrong principle, and that on the question whether the husband shall be ordered to pay or secure the wife's costs the relative incomes of the parties ought not to have been taken into consideration; but that the only question is whether the wife has property enough to enable her to pay her own costs. But the more I consider the case the more I think that the judge was right in considering their relative incomes. If we were to disturb the order as to costs, we should indirectly disturb the order as to alimony, for if we were to make an order which would have the effect of reducing the wife's separate income by making it liable to costs, we should in fact be reducing the alimony. In considering the question of alimony, the court must consider the relative incomes, and so reasoning back, since an order as to the wife's costs must

affect the order for alimony, I cannot say that the judge was wrong in considering the relative incomes on the present occasion.

SMITH, L.J.—It is contended that the judge has proceeded on a wrong principle. In August last the wife took out a summons against her husband with reference to her costs. It was referred to the registrar, who reported that the husband had an income of about 4000*l.* a year, out of which he had to pay 500*l.* a year for alimony and that the wife had separate property bringing in 280*l.* a year, in addition to the 500*l.* a year alimony. Barnes, J. made an order directing the husband to pay the wife's costs up to the hearing and to secure her future costs. It is contended that this is wrong because the wife has separate property sufficient to pay costs. But if we look at rule 158 we shall see that Barnes, J. was right. [His Lordship read the rule.] Now, in the proviso to this rule "having separate property" must be read "having sufficient separate property." What is "sufficient" separate property? It has been argued that no order can be made against the husband if the wife has property which can be charged with her solicitor's costs, and is sufficient in amount to pay them. I do not think that the true meaning of the rule. An order has been made for alimony, and if we were to reverse the order now appealed from the alimony of 500*l.* a year which was considered just when the wife had, in fact, 280*l.* a year of her own would have to be adjusted. I think it was for Barnes, J. to decide what was sufficient separate property to make it right to refuse an order for costs pending suit. He may take into consideration what the husband has, but the main point is, has the wife sufficient separate property to prevent the order from being made? Of that question he is the judge, and we cannot say that in deciding as he has he has done wrong in taking into consideration the relative means of the parties.

DAVEY, L.J.—*Prima facie*, a husband suing his wife is, by the practice of the Divorce Court, liable to be ordered to make provision for her costs. Whether there are circumstances sufficient to take a case out of that rule it is for the judge of the court below to say. If it were shown that Barnes, J. proceeded on a wrong principle, or took circumstances into consideration which he ought not to have taken into consideration, the appeal ought to succeed; but whether he exercised his discretion wisely as to amount is a question with which we ought not to interfere. It has been contended that the decision proceeded on a wrong principle, because it was founded on the relative incomes of the husband and wife, which it is said ought not to have been taken into consideration. Now, what was it the learned judge had to decide? Whether the wife had a sufficient separate income to induce the court to abstain from making an order for her costs. In my opinion, before coming to a conclusion on that, the income of the husband ought to be taken into consideration, for the means of the wife to defend the action must in some measure depend upon what is necessary for her maintenance, and the wife of a man with 4000*l.* a year is entitled to spend more on her maintenance than the wife of a poorer man. Again, the alimony was settled with regard to the husband's means, and to alter the order now under appeal would practically

[CT. OF APP.]

Re SEAL; SEAL v. TAYLOR.

[CT. OF APP.]

interfere with the alimony. I am of opinion that Barnes, J. took nothing into consideration which he ought not to have taken, and that his discretion ought not to be interfered with.

Solicitors for the husband, J. R. Roberts, agent for G. J. Simpson, Sheffield.

Solicitor for the wife, F. A. K. Doyle.

Dec. 14 and 15, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re SEAL; SEAL v. TAYLOR. (a)

Will—Falsa demonstratio—Gift of residence and premises “as now occupied by me.”

Testator devised “my residence called S. House and premises thereto as the same are now occupied by me” to his wife during widowhood. A stable adjoined the house, over which was a room, the only access to which was through the house. The testator let to two of his sons, for the purposes of their business, an office standing in the yard of the house, together with the stable, and they were in the sons’ occupation at the date of his death.

Held (affirming the decision of Chitty, J.), that the devise included the room over the stable, but not the other part of the stable nor the office, as the property which was in the testator’s occupation answered the whole of his description, and therefore the words “as the same are now occupied by me” could not be rejected as a falsa demonstratio.

Travers v. Blundell (36 L. T. Rep. N. S. 341; 6 Ch. Div. 436) distinguished.

Stanley v. Stanley (7 L. T. Rep. N. S. 136; 2 J. & H. 491) considered.

By a will, dated the 19th March 1885, Samuel Seal, a retired stone merchant, devised to his wife, during widowhood, a house and land purchased by him from Francis Jackson, and after making various other devises and bequests he gave his residuary estate to trustees upon trust during his wife’s widowhood to divide the income among his children as therein mentioned, and after the decease or marriage of his wife, to convert the same into money and distribute the proceeds among his children as therein mentioned.

By a codicil, dated the 19th Jan. 1888, the testator revoked the above devise to his wife, and in lieu thereof devised “my residence called Stoneleigh House and premises thereto as the same are now occupied by me, and after her death or marriage again, I devise the said residence and premises to my son Joseph Seal for his life, and after his death” to the uses therein contained in favour of his children, and he directed that his wife and his son Joseph should, as long as they should be respectively seised of the residence and premises for life, keep the same in good repair and condition, and insured against loss or damage by fire in the names of his trustees, up to the full value of the dwelling-house and buildings thereto belonging.

The testator died shortly after making this codicil, and on the 27th May 1889 an order was made on originating summons, directing the usual accounts and inquiries as to his real and personal estate.

The testator had built Stoneleigh House, and resided there. It stood in grounds of about an acre, which were a part of between three and four acres purchased by the testator in 1849. The grounds were bounded on the north-easterly side by a high road, and on the south-easterly side by a lane. The front entrance to the house was by a drive through the grounds from the high road. On the other part of the purchased property and adjoining the grounds of Stoneleigh House, was a house called Stoneleigh Lodge, and also some cottages, all fronting on the high road. At the back of Stoneleigh House and adjoining it was a stable, and in the yard was an office standing near the house, and also a washhouse adjoining the office. The stable was approached by a private road leading out of the lane through the south-westerly part of the grounds attached to the house. Beyond the private road was a field of about two acres, which was also a part of the property purchased in 1849. Over part of the stable was an upper room, the only access to which was through the house, and it was occupied as part of the house. With this exception the stable and the office were not in the testator’s occupation at the time of making his codicil, or at his death, as for several years he had let them together with the two-acre field at one rent to two of his sons, who carried on business as stone merchants, and used them for the purposes of the business. The testator kept a carriage in the stable, and went to the office to write his letters.

By his certificate the chief clerk reserved for the consideration of the court the question how much of the property about Stoneleigh House passed under the devise to the widow during widowhood.

By the order on further consideration, Chitty, J. declared that the devise in question “included the following premises, and no other, namely, the freehold house and garden, and premises at Sandal Magna, Yorkshire, known as Stoneleigh House, including the room over the coachhouse used as a bedroom, and communicating with the house, and the washhouse adjoining the office, and the soil of the private road, but subject as to such road to a right of way for all purposes with carriages and horses thereon to the stable and stable-yard, and also for foot passengers only to the office, being the premises (except as to the bedroom over the coachhouse which is not shown on the plan) edged with a pink line, and coloured pink on the map exhibit to the affidavit of S. Seal, filed this day.” The parts coloured pink included the acre of ground, except the stable and office, which were coloured blue.

From this order the persons interested in Stoneleigh House under the devise appealed.

Warmington, Q.C. and A. à B. Terrell for the appellants.—The appellants claim the whole of the house and premises, including the office, stable, and coachhouse, but not the field, as that does not come within the words “premises thereto.” The testator cannot have intended that the office should not pass with the house. The words “as the same are now occupied by me” are only a *falsa demonstratio*. In *Hardwick v. Hardwick* (L. Rep. 16 Eq. 168, 175) Lord Selborne said: “If the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them

(a) Reported by W. C. BIRK, Esq., Barrister-at-Law.

[CT. OF APP.]

Re SEAL; SEAL v. TAYLOR.

[CT. OF APP.]

in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded." In this will the leading words of description are "my residence called Stoneleigh House and premises thereto," and the words "as the same are now occupied by me" are only a reference to the fact that he lived there expressed in inaccurate terms. The cases of *Travers v. Blundell* (36 L. T. Rep. N. S. 341; 6 Ch. Div. 436) and *Stanley v. Stanley* (7 L. T. Rep. N. S. 136; 2 J. & H. 491) support the appellants' contention.

Farwell, Q.C. and *Butcher* for the respondents. —As the appellants give up their claim to the field, they cannot contend that the reference to occupation is to be treated as *falsa demonstratio*. But independently of that it cannot be so treated. Here there is property which exactly fits all the terms used by the testator in describing it, and therefore none of them can be rejected as a *falsa demonstratio* :

Webber v. Stanley, 10 L. T. Rep. N. S. 417; 16 C. B. N. S. 698, 752;

Smith v. Ridgway, L. Rep. 1 Ex. 331.

"As" is a word of limitation as distinguished from description, and implies "so much as." The testator only intended to provide his widow and son with a residence, and only intended them to have what he occupied himself. A right of way to the stable and office is given by implication :

Pearson v. Spencer, 4 L. T. Rep. N. S. 769; 1 B. & S. 571.

Terrell in reply.

LINDLEY, L.J.—This is not a case of so much difficulty as I at first thought. On the opening of the appeal it seemed to me, on reading the language of the will, and looking at the plan, that the whole of the messuage with its appurtenances must have been intended to pass; but we must, in order to judge of the case, see how the property stood at the time of the codicil and of the testator's death. Its state was the same at each of these periods. The testator when he made his will had a residence called "Stoneleigh House." Adjoining the grounds belonging to the house, there was on one side a house called "Stoneleigh Lodge," with some cottages, and on another side a field of two acres. The testator lived with his wife in Stoneleigh House. Two of his sons were stone merchants. He himself had carried on the same business, but had retired. He let to the two sons at one rent, for the purposes of their business, the two-acre field, the stable belonging to Stoneleigh House, except one first floor room, the only access to which was from the house, and an office in the yard, with the exception of a washhouse annexed to it. He and his wife occupied Stoneleigh House and the buildings belonging to it, except those parts of the premises which were in the occupation of the two sons. The sons had access to the stables and office, not by the front drive, but by a private way at the back, which seems to have been taken out of the two-acre field. By his will the testator did not specifically devise Stoneleigh House; he gave to his wife during widowhood another house, and Stoneleigh House was not mentioned, but passed under the residuary devise to his trustees. By a codicil he

revokes the devise to his wife, and devises to her during widowhood "my residence called Stoneleigh House and premises thereto, as the same are now occupied by me." What is meant by that expression? If we read it as a whole, there is no difficulty in applying it to the property. The first part of the description is not complete, "Stoneleigh House and premises thereto"—some word has been left out. The testator completes it by saying "as occupied by me." We have no difficulty in finding property which answers the whole of this description. Mr. Warrington says: take the devise as a devise of Stoneleigh House, and reject "as the same are now occupied by me" as a *falsa demonstratio*. If we were to do so we should be doing what in the opinion of the Court of Exchequer Chamber (see *Webber v. Stanley*) Wood, V.C. wrongly did in *Stanley v. Stanley* (*ubi sup.*). We should be violating the rules laid down in *Webber v. Stanley* (*ubi sup.*) if we were to accede to the appellants' contention simply because we saw that inconvenience would result from the other construction which is in strict conformity with the words. Personally, moreover, I think we are giving effect to, and not defeating, the testator's intention. The appeal, therefore, must be dismissed.

SMITH, L.J.—The question we have to decide is, whether the words "as the same are now occupied by me" are a limitation or a *falsa demonstratio*. I do not wish to decide whether this case comes within the rule in *Travers v. Blundell* (*ubi sup.*) or the rule in *Webber v. Stanley* (*ubi sup.*), and *Smith v. Ridgway* (*ubi sup.*). If extrinsic evidence is not resorted to, the construction of the codicil is plain—it is a devise of property in the testator's own occupation. If the extrinsic evidence is admitted, I think it is in favour of the respondents, not of the appellants. Some years before the date of the codicil the testator had demised the stable, office, and field to two of his sons, for the purposes of their business, and from that time till the making of the codicil and thenceforth till the testator's death the sons occupied them. What could be more natural than that the testator by his codicil should provide for the occupation by his widow of what he had along with her occupied for so many years, and that he should have no intention to give her anything more? The appeal will be dismissed.

DAVEY, L.J.—After the full and exhaustive discussion this case has received, I have come to the conclusion that we cannot reverse the decision under appeal. The difficulty is to apply to the facts the rules of law which have been laid down, and the difficulty in applying them is increased by the fineness of the distinctions. As *Smith, L.J.* says, the question is whether the words "as the same are now occupied by me" are words of description or limitation. That is a question of construction, and I am under the impression, though I do not give it as my concluded opinion, that in considering it we cannot look at extrinsic evidence. We must first construe the words, and having done so, then look at the extrinsic evidence to see whether there is anything which those words fit. The whole description is, "my residence called Stoneleigh House and premises thereto, as the same are now occupied by me," and I think that the latter words limit and qualify the earlier words. Extrinsic evidence can only be applied to

CT. OF APP.]

PRYOR v. PETRE.

[CT. OF APP.]

see whether there is anything answering this description. The description does exactly apply to the premises which were in his own occupation. Then we are bound to say that that property alone passes under the devise. That consideration alone is enough to dispose of the case. I may add that, so far as Lord Hatherley's opinion in *Stanley v. Stanley* (*ubi sup.*) differs from that of Erle, C.J., in *Webber v. Stanley* (*ubi sup.*), it cannot in my judgment be supported. I think that he erred in attaching too great weight to extrinsic facts. The present case appears to me to come within the first category in *Webber v. Stanley* (*ubi sup.*): "Where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more, passes." Taking the words of the will in their natural sense there is a property which answers every word of the description, and that being so the argument *ab inconvenienti* has no application. It is only after we have construed the words of the will that we can apply extrinsic evidence to them. I think that Mr. Farwell successfully distinguished *Travers v. Blundell* (*ubi sup.*) on the ground that the meaning of the will was to give all that property which the testator's father had devised by his will and described as that part of Rigby's estate purchased by him, which the testator then described as consisting of four fields, which he named. There was no property described by the testator's father as the part of Rigby's estate purchased by him, which consisted of those four fields. There was, therefore, no subject to which all the testator's words applied, and the court had to consider what was the substance of the gift, whether the testator meant to give what his father had described as the part of Rigby's estate purchased by him, adding an incorrect statement of the particulars of which it consisted, or to give the four fields. In the present case there is a subject answering all the testator's words.

Solicitors: J. Cotton and Son, agents for Townsend, Wakefield; Seal.

Thursday, Feb. 22.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

PRYOR v. PETRE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Conveyance of land adjoining highway—Presumption as to ownership of soil ad medium filum viæ—Circumstances rebutting presumption.

The defendant sold a wood to the plaintiff which was bounded on one side by a grassy lane, on which were trees and underwood, in which game was accustomed to lie and to nest. There was a public right of way over the lane, though it was seldom used. The wood was described in the conveyance by referring minutely to its acreage, and to a plan indorsed on the conveyance. The boundary marked on this plan did not include any part of the lane, nor did the acreage. In the schedule to the conveyance the land purchased was described by reference to the Ordnance map, and there the lane was shown as a distinct plot from the wood, and was distinguished by a

different number, the number of the wood only being referred to in the schedule.

It was recited in the conveyance that one of the conditions of the contract for sale was that, in addition to the purchase money, the purchaser should pay for all trees on the land agreed to be sold, at a valuation, and that a valuation had been made, and the value was stated and added to the purchase money.

Held, that evidence was admissible to show that none of the trees on the grassy lane were included in the valuation.

Held also, that the circumstances of the case were sufficient to rebut the presumption of law that the soil of the lane ad medium filum viæ passed by the conveyance.

Decision of Romer, J. (69 L. T. Rep. N. S. 795) affirmed.

THIS action was brought by Mr. Arthur Pryor, against Mr. L. J. Petre, to establish his right to the soil of one moiety of a lane (*usque ad medium filum viæ*), where such lane adjoined certain land purchased by the plaintiff from Mr. Petre.

The lane in question, which was a grassy wooded one, averaging about fifty feet in width, and known as Coldhall Lane, was situated in the parishes of Margaretting and Writtle, near Chelmsford, in the county of Essex, and had never been metalled, repaired, or had a regular roadway made over it.

The plaintiff and defendant were owners of adjoining land, and in 1890 the plaintiff purchased from the defendant, who sold as tenant for life, certain property including a wood called King Wood, on the north side of which was Coldhall Lane. The wood and other lands were duly conveyed to the purchaser by an indenture dated the 31st Dec. 1890, in which the land conveyed was described by acreage minutely stated to three places of decimals, which would not include any part of the lane. It was also described by reference to a map indorsed on the deed; the boundaries of the land conveyed, as delineated on such map, not including any part of the lane. It was also described in a schedule to the conveyance by reference to the numbers of the plots marked on the Ordnance map, and to the acreage thereby given. In that map King Wood was divided from Coldhall Lane, which had a separate number, and was shown as a distinct plot of land, bearing trees and underwood, and the number of the wood only was referred to in the schedule. It was recited in the conveyance that by the contract the trees on the land purchased were to be paid for at a valuation, which sum was to form part of the consideration for the purchase; that the valuation had been made, and that the value of the trees was 1324l. 14s. 6d., which sum was added to the purchase money for the land, making a total of 4998l. 2s. 8d.

At the trial before Romer, J., it was admitted by the plaintiff that the valuation did not include any of the trees in the lane, though it was contended that no regard ought to be paid to that fact in this action, as it was inadmissible as evidence.

There was evidence that there was a public right of way over the lane. Along the side adjoining King Wood were a number of trees of substantial value, and also some underwood, and it was shown to be a favourite place for game to lie, and also a favourite nesting place for them. The defendant

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

CT. OF APP.]

PRYOR v. PETREE/

[CT. OF APP.]

had often shot over it, and his predecessors had cut down trees and underwood on it.

The plaintiff claimed (1) a declaration that the conveyance passed to him not only King Wood, but also the adjoining half of the soil of the lane, and the trees and underwood growing on such half, subject only to all lawful rights of way over the lane; (2) an injunction to restrain the defendant from cutting down, topping, or interfering with such trees and underwood; and (3) damages.

The case was tried by Romer, J., who held (69 L. T. Rep. N. S. 795) that the circumstances rebutted the presumption of law that one moiety of the lane adjoining the land conveyed passed to the plaintiff.

From this decision the plaintiff appealed.

Neville, Q.C. and Begg for the appellant.—The circumstances of this case are not sufficient to rebut the presumption that the soil of the highway *usque ad medium filum* passed by the conveyance:

Berridge v. Ward, 10 C. B. N. S. 400;

Micklethwaite v. Newlay Bridge Company, 55 L. T. Rep. N. S. 336; 33 Ch. Div. 133;

Dwyer v. Rich, Jr. Rep. 6 Com. Law, 144;

Holmes v. Bellingham, 7 C. B. N. S. 329;

Turner v. Ringwood Highway Board, 21 L. T. Rep. N. S. 745; L. Rep. 9 Eq. 418.

[SMITH, L.J. referred to *Curtis v. Kesteven County Council*, 63 L. T. Rep. N. S. 543; 45 Ch. Div. 504.] The fact that the trees in this lane were not included when the valuation of the trees was made is not admissible as evidence. The parties are not entitled to go behind the conveyance and give evidence of the preliminary negotiations. The question is, on the construction of the conveyance, what land passed to the purchaser? The deed merely states the value of the trees on the land sold, and the question is what land was sold. On the deed alone there is nothing to rebut the presumption of law that half this lane was passed to the plaintiff. There may have been a mistake in the valuation, and the purchase money being nearly 5000*l.*, the omission of a few trees the value of which is 12*l.*, is not a circumstance which can be taken into account when considering whether this presumption of law is rebutted. The cases relied on by the defendant in the court below are clearly distinguishable. In *Leigh v. Jack* (42 L. T. Rep. N. S. 463; 5 Ex. Div. 264) the vendor intended to dedicate the land to the public as a highway, but never did so, and it was held that the presumption did not arise. In *The Duke of Devonshire v. Pattinson* (58 L. T. Rep. N. S. 392; 20 Q. B. Div. 263) it was held that the presumption was rebutted by the fact that the fishery in the river, half the bed of which was claimed by the owner of the adjoining land, had always been leased separately, and at the time of the conveyance actually was in the possession of a tenant. In *The Plumstead Board of Works v. The British Land Company* (31 L. T. Rep. N. S. 752; 32 L. T. Rep. N. S. 94; L. Rep. 10 Q. B. 16, 203) it was held that the form of the conveyance showed that it was intended that no part of the soil of the road in question should pass to the purchaser. In *Beckett v. Corporation of Leeds* (26 L. T. Rep. N. S. 375; L. Rep. 7 Ch. App. 421) it was amongst other things proved that the lord of the manor, who was resisting a claim made by

a person to whom he had conveyed adjoining land, had received for a great number of years a substantial money profit from the land claimed, and therefore the presumption was rebutted. In *Marquis of Salisbury v. Great Northern Railway Company* (32 L. T. Rep. O. S. 175; 5 C. B. N. S. 174) the facts were very different to the present case.

Millar, Q.C., Hopkinson, Q.C., and Ribton, for the defendant, were not called on.

LINDLEY, L.J.—I think this case is very near the line, but, for the reasons which I will give presently, it appears to me the decision arrived at by Romer, J. is right. The question is a very simple one, and it is whether a strip of land, which is part of a highway, has or has not passed by the conveyance of some adjoining land. *Prima facie* a conveyance of adjoining land would pass the half of the soil of the highway which adjoins the land so conveyed. That point was settled a great many years ago, the leading case on the subject being *Berridge v. Ward* (*ubi sup.*). It is a very strong case, but it is quite sufficient for the present purpose to read the marginal note, which says: "Where a piece of land which adjoins a highway is conveyed by general words the presumption of law is, that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it." Now the question of course in this case is, whether there are circumstances sufficient to exclude the presumption. In the first place, it must be borne in mind that it is a presumption which can be rebutted. It is not like the grant of a piece of land; it is not a part of the thing conveyed; it is a presumption that a piece of land not described in the conveyance, and which according to the literal construction of the conveyance is excluded from it, nevertheless passes by it. It is only an inference, and an inference that is capable of being rebutted by circumstances which show that the parties never really intended it. What are the circumstances of this case? We have a conveyance of a piece of land called King Wood, and the recitals in the conveyance are extremely important. In a schedule to the conveyance the wood is described by reference to the Ordnance map, and to this I attach considerable importance. The Ordnance map shows King Wood, and it is thereon numbered 77, and it also shows the lane in question, but it has a separate number, because the wood and the lane are in separate parishes. The important bearing of that is, that the lane is numbered separately from No. 77, and when you find in the conveyance a description of the parcels with reference to the Ordnance map and the numbering on that map, the numbers appear to me to be too important to be left out of consideration. Now it is recited in the conveyance that the vendor, who is the tenant for life, has agreed to sell to the purchaser, Mr. Pryor, the freehold and copyhold hereditaments therein after described, and thereby conveyed and assured, and the inheritance of the said freehold hereditaments in fee simple in possession, and the customary inheritance of the said copyhold hereditaments free from incumbrances, for the sum of 3673*l.* 8*s.* 2*d.* Then comes a recital which is very important. "And whereas it was one of the conditions of the contract that in addition to the purchase money

the purchaser should pay for all the timber and other trees on the lands agreed to be sold, at a valuation, and the same have accordingly been valued at the sum of 132*l.* 1*s.* 6*d.*," making the whole purchase money 499*l.* 2*s.* 8*d.* Therefore we have here a statement made by these two gentlemen that the timber on the land agreed to be sold has been valued at a certain sum. Now it is an admitted fact that the trees which were so valued did not include some thirty or forty trees which are upon the slip of land in question. It is said that fact is not admissible in evidence. I cannot understand how, in the face of a recital like this, we are not entitled to know what trees have been valued in that sum. What we have to address our minds to appears to be whether this presumption is or is not rebutted; therefore this evidence is of the utmost importance, and clearly admissible. Then by the operative part the vendor conveys, among other things, "And also those woodlands known as King and Chapel Woods, comprising as to Barman's Farm, with the copyhold hereditaments hereinafter described, 157*3*/*4* acres, measured according to the Ordnance survey for the parish of Margaretting aforesaid, and comprising as to the said woodlands 52*6*/*4* acres, measured according to the Ordnance survey, as the said farm, lands, hereditaments, and premises are part of the estate known as the Copt-hold Hall Estate, and were conveyed to the said William Forward, Earl of Wicklow, and are with the copyholds described in the schedule, and are also delineated on the plan drawn on these presents, the freehold being edged with a pink line, and the copyhold with a blue line." Now, when we turn to the plan we find, as was the case in *Berridge v. Ward* (*ubi sup.*), that the pink line, that is the line we have to consider, is so drawn as to all appearance to exclude this strip of land. That, of course, after *Berridge v. Ward*, is not conclusive by any means; neither does the acreage coupled with it amount to sufficient to rebut that presumption, because, when we look closely to the schedule, we find that the woodland is numbered 77 on the Ordnance map, and we find the acreage 35*2*/*10*8. We do not find the other piece which is numbered 5 on the Ordnance map, or any part of it, either in the first part of the schedule, or in the second part which is entitled "woodland." Therefore, so far as the description in the parcels goes, we cannot find this little piece of land which is in dispute specified either in the schedule or in the plan. But that is not enough to exclude the presumption. When we come to consider the recital with reference to the valuation of the trees, it appears to me the learned judge has decided this case rightly upon that recital, and upon the facts as to the trees—the trees which were valued were trees on the property sold. It is not the case of a recital that the value of the trees is to be ascertained by valuation and so on—it is not open to that remark—but it is a recital that the trees on the land agreed to be sold have been valued. Then we ask what trees were valued, and we find that those on this piece of land are not included. One of the facts I have mentioned would not be conclusive, but when you join them all together it is difficult to say that this piece of land passed by presumption of law, and I think there is sufficient to rebut the presumption. I think the decision of Romer, J. is right, and that this appeal must be dismissed.

Vol. LXX., N. S., 1799*.

KAY, L.J.—I am of the same opinion. I agree with the decision of the learned judge in the court below. The question really is, whether or not the presumption which I think arises in this case, that the land *ad medium filum viæ* of Coldhall Lane, which adjoins one side of King Wood, passed by the conveyance, is rebutted by circumstances which the court is bound to regard. Now Lindley, L.J. has enumerated those circumstances. First of all, on the face of the deed the acreage given does not include any part of this road. Secondly, it is described by reference to the Ordnance map, and the numbers on the Ordnance map are copied on the map which is part of this conveyance, and this moiety of the road is included in a piece numbered 5, and No. 5 is not referred to in this deed. Then, on the conveyance the freehold land, which includes this wood, is edged with a pink line—a pink line is drawn at the margin of the road, so as not to include one moiety of the road. Now I agree that those facts alone, after the decision of *Berridge v. Ward* (*ubi sup.*), although they are rather strong and significant, might not be enough to rebut the presumption; but then we have another fact which, added to those facts, to my mind does turn the scale. The presumption is, I think, rebutted by an accumulation of facts, some of which alone might not be enough to rebut it; but when you get the force of the whole accumulation, that accumulation seems to me, as the learned judge has held, sufficient to rebut the presumption. The schedule in this deed mentions the wood by its number on the Ordnance map, and gives the acreage of the wood down to three figures of a decimal—that is, including the thousandth part of an acre. That is strong evidence that the acreage of this part of the lane, which would amount to something, is not *primâ facie* included in the parcels of this deed. However, notwithstanding all the facts I have enumerated, I think the presumption would still remain unrebutted; but then there is another fact, and upon that fact a question of evidence has been raised. Before I refer further to that fact I will read a part of the language of the Court of Appeal in the case of *The Duke of Devonshire v. Pattinson*, where Fry, L.J., who delivered the judgment of the court, said (58 L. T. Rep. N. S. 394; 20 Q. B. Div. 273): "By the deed of March 21, 1846, the duke conveyed to Messrs. Dixon the Castle Saucery, described as a close bounded by the river Eden on or towards the north, and the deed contained the usual general words. The defendants rightly contend that to such a deed as this, containing such a description of a close, there applies the well-known presumption that, although the close is described as bounded by the river, yet that the grant carries with it a moiety of the bed of the river, and they have further contended that this presumption can be repelled only by words in the deed itself. In our opinion the latter contention cannot be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed." Then the learned Lord Justice refers to the cases of *Beckett v. Corporation of Leeds* (*ubi sup.*), *Marquis of Salisbury v. Great Northern Railway Company* (*ubi sup.*), and *Micklethwaite v. Newlay Bridge Company* (*ubi sup.*), and continues: "The conclusion that you may regard the circumstances under which a deed

[CT. OF APP.]

PRYOR v. PETRE.

[CT. OF APP.]

is executed as rebutting the presumption is only an illustration of a wider principle. 'In deeds as well as in wills,' said Lord Wensleydale, in *Waterpark v. Fennell* (7 H. L. Cas. 684), 'the state of the subject at the time of execution may be inquired into.' Now, as Lindley, L.J. has already mentioned, in this deed, after reciting the general contract for the sale of the freehold and copyhold hereditaments thereafter described and conveyed, there is another recital which runs thus:—"And whereas it was one of the conditions of the contract that in addition to the purchase money the purchaser should pay for all timber and other trees on the lands agreed to be sold at a valuation, and the same"—that is, the timber and other trees on the land agreed to be sold—"have accordingly been valued at the sum of 132*l.* 1*4s.* 6*d.*"—a very minute valuation going down even to pence—"making with the said sum of 3673*l.* 8*s.* 2*d.*, the total money of 4998*l.* 2*s.* 8*d.*" Now it is said that evidence as to what trees were included in that valuation is not admissible. Why not? The words I read from the judgment in *The Duke of Devonshire v. Pattinson* (*ubi sup.*) certainly cover the point, for not only was this valuation a circumstance under which the deed was executed, but it is a circumstance referred to on the face of the deed, and therefore it seems to me, by all the principles of evidence, that in order to understand what the deed means when applying it to the subject-matter which it purports to convey, we may and must inquire what were the trees which were valued. During the course of the argument I put an illustration. Suppose the words had been "the trees valued which are in number 372," or any other number, is it possible to say that you may not inquire what those 372 trees were? Then Smith, L.J. put another illustration. Supposing it had been "all the trees marked with a cross," is it possible to say that you might not inquire what trees were marked with a cross? Then another illustration might be put. On the face of this deed you have a statement that the trees on the land sold had been valued, and the value brought out to a sixpence, and if you knew what those trees were it will assist you in determining whether this presumption as to the passing of the land *ad medium filum* of the road was rebutted or not, for the fact is that, although on that land there are growing trees the value of which is stated to us to be 12*l.*, not one of those trees is included in this valuation. It was said there may have been a mistake in the valuation. But we have no right to presume a mistake. Here we have a deed which we have to construe. We cannot rectify the deed or deal with anything outside the deed, we have to construe the deed and apply it to the subject-matter to which it refers, and the question is strictly parcel or no parcel, did or did not this land *ad medium filum* of the road pass by the deed? It is impossible to maintain that we can assume that any mistake was made. It seems to me that this is a fact which we must treat as though the vendor and purchaser had themselves met and agreed what trees should be valued, and had themselves determined that the trees on this part of the land were not to be valued. And why? The only reason that can be imagined is because this part of the lane was not included in the sale. To my mind that distinguishes this case from *Berridge v. Ward* (*ubi sup.*). There is a fact here

that did not occur in *Berridge v. Ward*, which, coupled with all the other circumstances to which I have referred, seem to me to be enough to rebut the presumption of law that the land *ad medium filum* of this road passed by this deed. I therefore think the decision of Romer, J. was right, and that this appeal should be dismissed.

SMITH, L.J.:—I am of the same opinion. If everything in the deed is looked at, Mr. Pryor cannot make out he purchased the land in dispute. If you look at the deed alone it is shown by the plan and by the acreage referred to in the deed, that this land is not included, and therefore, if the deed alone is looked at, and nothing more, in my judgment the plaintiff could not prove his case. But he is entitled to say, if you look at the deed there is a way running on the north side of King Wood—it does not matter whether it is a highway or an occupation way—and, therefore, according to the law which has now been long settled, and is past revocation, there is a presumption that, when King Wood was conveyed to him, he had conveyed to him *primâ facie* the land up to the middle of the road in Coldhall Lane. But that presumption can be rebutted, and if it can be shown from the circumstances attending the execution of the conveyance and the circumstances existing at the time the conveyance was executed that the *primâ facie* presumption is rebutted, then those circumstances are admissible to show that this piece of land was not included in the deed, and is not conveyed by the deed. Now Mr. Neville contended that the circumstances with reference to the valuation of the trees was not legal evidence in this case. I do not agree with him. The passage read by Kay, L.J. from the judgment of Fry, L.J. in *The Duke of Devonshire v. Pattinson* (*ubi sup.*) sets that point at rest, and I will simply read what I believe to be a short *resumé* of the law from the judgment of Lopes, L.J., in *Micklethwaite v. The Newlay Bridge Company* (*ubi sup.*), which sums up in the clearest and shortest possible manner what I believe to be the law on this subject. He said that the result of the authorities appeared to him to be this: "That if land adjoining a highway or a river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption." Now what is there here to rebut the presumption? There is a recital in the deed that prior to its execution the value of trees upon the land which was to be conveyed by the deed amounted to 132*l.* 1*4s.* 6*d.*, and when those facts are understood, and it is found that not one of the trees on the land in dispute was taken in that valuation, it seems to me that is legitimate evidence for the purpose of showing whether the *primâ facie* presumption is rebutted or not. Supposing just before signing the deed the vendor walked the bounds, and he walked along the north side of the wood, and he recited that in the deed, that would negative the presumption. I do not think it would have been necessary to recite it in the deed, because proof would have to be given, when it came to a question of parcel or no parcel, as to what in reality had been done. I can see no difference between the marking of trees and valuing them as has been done in this case; there-

CT. OF APP.] **MONSON v. MADAME TUSSAUD LIM.; MONSON v. LOUIS TUSSAUD.** [CT. OF APP.]

fore I come to the conclusion that this piece of evidence is admissible, and, applying it to this case, in my judgment the presumption of law in this case is rebutted, as *Romer, J.* held.

Solicitors for the plaintiff, *Duffield and Bruty*.
Solicitors for the defendant, *A. G. Maskell*,
agent for *Maskell and Arthy*, Chelmsford.

Jan. 23, 24, and 29.

(Before Lord HALSBURY, LOPES and
DAVEY, L.JJ.)

MONSON v. MADAME TUSSAUD LIMITED.

MONSON v. LOUIS TUSSAUD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Libel—Interlocutory injunction—"Just and convenient"—Jurisdiction of the court—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 8.

Some time previously to this action being brought, the plaintiff had been tried in Scotland for the murder of a person who had died under suspicious circumstances at a place called Ardlamont, and at this trial the jury returned a verdict of "Not proven." The defendants in the first action placed in their waxwork exhibition a portrait model of the plaintiff with a gun, said to be the plaintiff's, near it; and in another part of the establishment a representation of the "scene of the Ardlamont mystery" was set up. Sixpence extra was charged for admission to the room in which the plaintiff's model was exhibited, and the admission was through a turnstile at which was a notice, "To the Chamber of Horrors." Upon these facts, coupled with the nature of the models of other persons exhibited in the same room as, and near, the plaintiff's model, he brought an action of libel. The facts in the second case were somewhat similar.

The plaintiff applied for an interim injunction pending the trial of the action.

Held, by the Queen's Bench Division (granting the application), that the exhibition was libellous, and the case was one in which, according to the decision in *Bonnard v. Perryman* (65 L. T. Rep. N. S. 506; (1891) 2 Ch. 269), an interim injunction ought to be granted.

Upon an appeal by the defendants, certain additional evidence was referred to which raised a question whether the plaintiff had not in fact acquiesced in and agreed to the exhibition.

Held, by the Court of Appeal (allowing the appeal) that upon the additional evidence the case was not one in which an interim injunction ought to be granted.

Seem, that, in considering whether an interim injunction ought to be granted against the publication of a libel, the court will make no distinction between trade libels and libels upon personal character.

Per Lord Halsbury: Though there was a question for the jury, of libel or no libel, yet in his opinion the exhibition was libellous, and, but for the additional evidence, the case was one in which an interim injunction would be "just and convenient," and therefore ought to have been granted.

Per Lopes, L.J.: There not being so clearly a libel

that a verdict for the defendant would be set aside as unreasonable, the case was not one in which, apart from the additional evidence, an interim injunction could be granted according to the decision in *Bonnard v. Perryman*.

Bonnard v. Perryman discussed.

THIS was an application for an injunction to restrain the defendants, their agents or servants, from publishing, exhibiting, or causing to be exhibited, the portrait model of the plaintiff, or from advertising, announcing, and placarding the same, in any way to the injury of the plaintiff, pending the trial of an action for libel.

The plaintiff, Mr. Alfred John Monson, was tried at Edinburgh in Dec. 1893 for the murder of Lieutenant Hambrough, at Ardlamont House, Argyllshire. The trial resulted in a verdict of not proven, and the case came to be known as the "Ardlamont Mystery."

In Jan. 1894 the defendants, Madame Tussaud Limited, who are waxwork exhibitors in London, and Louis Tussaud, who has a similar, but smaller, exhibition in Birmingham, placed in their exhibitions a portrait model, in wax, of Monson. Both exhibitions contained a room called the Chamber of Horrors, reserved exclusively for portraits and relics of notorious criminals. In neither case was the plaintiff's figure placed in that chamber.

In the case of Madame Tussaud Limited, it was placed in a room above and communicating with the Chamber of Horrors by a flight of stairs, and approached through a turnstile, at which an extra payment was made, where there was a notice, "To the Chamber of Horrors." In this room, besides the model of Monson, were relics of Napoleon and Wellington and three other figures in wax, viz., Mrs. Maybrick, who was convicted of the murder of her husband by poisoning him with arsenic; Pigott, a witness in the Parnell Commission, who committed suicide; and Scott, a man who was associated with Monson in the charge of murdering Mr. Hambrough, but fled from justice and was not tried. In the Chamber of Horrors itself was a representation of the scene of the "Ardlamont tragedy."

In the case of Louis Tussaud the plaintiff's figure was placed near a turnstile leading to the Chamber of Horrors, and in the same room with models of Her Majesty the Queen, the Archbishop of Canterbury, and other eminent personages. The defendants in this case advertised in the newspapers and by sandwich-men, inviting the public to come and see "The Chamber of Horrors, and the instruments of torture; see Vaillant the Anarchist, and Monson of Ardlamont."

B. Coleridge, Q.C. and Cooper Wyld for the plaintiff.—An actionable wrong is being done to the plaintiff which the courts will restrain by injunction. That wrong consists in the innuendo conveyed by the exhibition of a portrait model of the plaintiff under the circumstances of his history. Formerly this might have been the subject of an action on the case. No direct precedent, however, is found for such an action as this; we rely upon the principle that certain deeds or actions derogatory to the person are actionable. A defamation may be expressed as well by pictures or signs, &c., as by written or printed matter. See

Hawkins Pl. Cr. 8th edit. p. 542; sects. 2 and 3;
Austin v. Culpepper, 2 Shower, 320;

(a) Reported by G. H. GRANT, and E. MANLEY SMITH, Esqrs.,
Barristers-at-Law.

CT. OF APP.] *MONSON v. MADAME TUSSAUD LIM.; MONSON v. LOUIS TUSSAUD.* [CT. OF APP.]

De Bost v. Bousford, 2 Camp. 511;

Eyre v. Franklin, 42 J.P. 68;

Jefferies v. Duncombe, 11 East, 226.

An action on the case lies for words published, although the innuendo in them is left to the reader's intelligence. See

Cropp v. Tilney, 3 Salk. 225.

It is not contended that a man has a copyright in his own face, nor is it suggested that this is a caricature. But it is a question whether the defendants have a right, in the case of a private individual, to expose him in such a manner for their own profit. See

Pollard v. Photographic Company, 60 L. T. Rep. N. S. 418; 40 Ch. Div. 345.

General evidence would be sufficient proof of any damage to the plaintiff. See

Riding v. Smith, 34 L. T. Rep. N. S. 500; 1 Ex. Div. 91.

There is a distinction between a public man and a private individual. In this exhibition it is not suggested that the plaintiff is exhibited as a public man for his talents or any cause that any man would desire to have published. The only reason for Monson's presence there is the fact that he was tried for murder and did not free himself. The only other figures in the room with him were Pigott, Mrs. Maybrick, and Scott. It is like exhibiting a person on account of a deformity. In the catalogue the scene of the Ardamont Mystery is included in a list of exhibits all connected with murderers and criminals, and placed in the Chamber of Horrors. Secondly, assuming that an actionable wrong has been shown, this court will interfere by injunction. The powers of this court to grant interim injunctions, in libel cases, have been always on the increase. The practice began in the case of trade libels, and has since extended to other cases. It is strenuously insisted upon by Sir E. Jessel, M.R. in *Quartz Hill Mining Company v. Beall* (46 L. T. Rep. N. S. 746; 20 Ch. Div. 501.), who there says, "I have no doubt whatever that there is jurisdiction to grant such an injunction." He referred also to

Beddow v. Beddow, 9 Ch. Div. 89;

Bonnard v. Perryman, 65 L. T. Rep. N. S. 506; (1891) 2 Ch. 269;

Salomons v. Knight, 64 L. T. Rep. N. S. 589; (1891) 2 Ch. 294;

Shaw v. Earl of Jersey, 4 C. P. Div. 120.

H. Wace and E. A. Nepean (Finlay, Q.C. and Gye with them) for Madame Tussaud Limited.—This is not a case in which the court will grant an interim injunction. In *Bonnard v. Perryman* (*ubi sup.*) the court explained the true principle, quoting and adopting the language of Lord Esher in *Coulson v. Coulson* (3 Times L. Rep. 846) as follows: "To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." The defendants are here doing no more than the illustrated newspapers do. In the defendants' affidavit it is sworn that there is no

imputation whatever intended upon the plaintiff, but that his portrait is exhibited in perfect good faith, and in the ordinary conduct of their business, as a model of a person in whom the public has become interested by reason of the trial. In the same room with Monson are relics of Napoleon and of the Duke of Wellington. The cases cited for the plaintiff only show that it is libellous to exhibit a person so as to hold him up to ridicule, which is not denied. But that is not enough. The judgment of Lord Campbell in *Emperor of Austria v. Day and Kossuth* (4 L. T. Rep. N. S. 494; 3 De G. F. & J. 217) shows that the Court of Chancery would not restrain a libel at all; and *Salomons v. Knight* is conclusive authority as to the circumstances in which it will now be granted, namely, if the plaintiff apprehends injury to person or property by the libel.

T. Willes Chitty and Ernest Pollock for Louis Tussaud.—This case differs from that of *Madame Tussaud Limited* in the position occupied by the plaintiff's model. [The learned counsel described the position of the figure.] The jurisdiction to grant injunction for libel is very limited. [COLLINS, J.—It may be that the modern jurisdiction given to the courts of common law by the C. L. P. Act 1854 is wider.] There is no case in which an injunction to restrain a libel has been granted, unless some injury was apprehended which could not be answered in damages. The principles on which such an injunction should be granted are well laid down in *Liverpool Household Stores Association v. Smith* (58 L. T. Rep. N. S. 204; 37 Ch. Div. 170). It is possible that in this case the jury would find that the plaintiff had not been libelled.

Coleridge, Q.C. in reply (called upon as to the last point).—No reasonable jury could help finding this exhibition libellous. Under the peculiar circumstances of Monson's history it is impossible to exhibit him without libelling him.

MATHEW, J.—In the case of *Monson v. Madame Tussaud Limited* an application was made on behalf of the plaintiff for an injunction to restrain the defendants, until after the trial of a pending action, from publishing, exhibiting, or causing to be exhibited, a portrait model of the plaintiff, and from advertising, announcing, and placarding the same in any way to the injury of the plaintiff. The ground on which the application is based is that the exhibition of which the plaintiff complains is calculated to disgrace him, and expose him to the obloquy and contempt of the public. Now, it was agreed between counsel on either side that any right which the plaintiff might have to complain of this exhibition depended upon principles which underlie the law of libel. No other ground has been suggested upon which the exhibition of this portrait model could be restrained. The plaintiff is a person who was tried in Scotland for the murder of Lieutenant Hambrough, and suspicion of having committed this crime fell upon him in conjunction with a person named Scott, who fled from justice. That trial resulted in a verdict of "Not proven." It was after the trial that the figure of the plaintiff was first exhibited by the defendants, and it is now complained that the exhibition called public attention to the fact that the plaintiff was suspected of having committed an atrocious crime,

and that the trial had resulted in the way I have mentioned. The case presented on behalf of the defendants was, that there was no imputation at all upon the plaintiff, but that he had become a notorious character, and if a man becomes notorious either for creditable or discreditable reasons, the defendants were at liberty to gratify public curiosity regarding him. In order to ascertain if there is any foundation for the plaintiff's complaint and his application for an injunction, it is necessary to consider the facts and circumstances laid before us in the affidavits. The first and most important part is that dealing with the nature of the defendants' show. A catalogue of the show is published for general circulation, and it contains a history of the exhibition, and dwells on the fact that a principal feature in the institution is a chamber of horrors containing portraits of malefactors and miscreants. That was part of the original institution, and when the show was transferred from Paris to London, that portion was continued. The circular goes on to say what the object of the exhibition is: "If the hour brought with it a man or a woman famous or infamous, the personage of that hour was forthwith modelled, coloured, dressed, and given an apporportioned place in the Baker-street galleries," i.e., in the defendants' show. This is therefore an exhibition of famous and infamous persons. Those who are neither famous nor infamous are not liable to be placed here. Now, what was the position assigned to the figure of the plaintiff in this exhibition? It is very clear from the affidavits. It appears that one part of the building was reserved for persons who may be called famous. For visiting this part of the exhibition a certain fee is charged. There is an extra fee for the other part. Then there is a turnstile through which visitors are admitted on payment of an extra sixpence. The visitor then passes through a room containing four figures as well as other articles, and passing down some stairs he finds himself in the Chamber of Horrors, a chamber containing portraits of persons deserving of execration and horror. In this room there is a presentment of the scene of the Ardlamont mystery or tragedy. I gather also that there was a representation of the body of the unfortunate young man Hambrough. Now, in that chamber the figure of Monson does not appear. If it had appeared there it could not have been disputed that no inference was possible but that he was placed there as a person connected discreditably with that tragedy. There could be no doubt that he would be there in order to suggest that he was one of the persons suspected of crime in connection with the mystery. But the defendants' counsel points out to us that the figure of Monson was not there—it was in the room above, the room within the turnstile, in which, as I said, there were four figures, and it is important to see who those four figures were. They were Mrs. Maybrick, Pigott, Monson, and Scott. Their names and nothing more appear on the figures. What is the proper inference to be drawn from that fact? There were, as I have mentioned, other objects in the same room—relics of Napoleon and of the Duke of Wellington; but the only figures there were those I have named, and the figure of Monson was associated with these three other figures. The first question is, whether it made any difference that the figure of Monson was placed in this ante-chamber, and not

in the Chamber of Horrors. To my mind it makes no difference. I think the clear intention was to connect Monson discreditably with the scene of the Ardlamont tragedy in the Chamber of Horrors, just as though a label had been put on the figure stating that this was the Monson who was suspected of the murder of Lieutenant Hambrough. I think, under the circumstances, that a jury would be bound to find that an actionable wrong had been done to the plaintiff. That being so, the only remaining question is whether we ought, in this case, to exercise our powers to restrain this exhibition until trial of the action. That depends upon the second part of the case. The learned counsel for the defendant stoutly resisted the suggestion that any imputation whatever was meant to be made on the plaintiff. He was most explicit on the subject. An affidavit filed on the part of the defendants stated so, but the affidavit contained other passages which might seem to qualify that statement. However, the learned counsel relieved us of all difficulty about that by stating that the defendants were exhibiting the plaintiff's portrait in good faith because he was a notorious person, and that they did not insinuate, far less charge him with, any offence in connection with Hambrough's death. Now, that being the position of things, we were brought to the second point, whether or not we ought to exercise our jurisdiction, and our attention was called to familiar cases and decisions of the Court of Appeal as to the interference of the court in cases of this kind. The authorities to which I have referred were cases dealing with publications of a libellous character, and where application is made to the court in such cases to restrain publication of the libel before trial the court points out the two considerations to be dealt with before it will interfere. It was stated that as a general rule the court ought not to interfere unless it was certain that a jury would find a verdict for the plaintiff, and so clear a verdict that a judge would say that a verdict the other way was perverse and unreasonable. And it was further stated that, where a justification was intended to be raised, or where damages would compensate the plaintiff for the defamation, the court, as a general rule, ought not to interfere. Now our jurisdiction to interfere in this case, assuming that this exhibition is clearly defamatory, is not denied; but it is said that, having regard to those decisions, we ought not to interfere by injunction. A reasonable jury, as I have said, would and ought to find that the defendants' exhibition was disparaging and damaging to the character of the plaintiff. We are relieved from the consideration which the Court of Appeal has said ought to be entertained that a justification may possibly be proved at the trial, because, as I said, it is stated in the most explicit terms that there is no intention to impute any misdeed to the plaintiff, and the defence rests wholly upon the absence of defamation in the exhibition. Then ought we to abstain from interfering because damages might be given by the jury which would be adequate compensation for any wrong done to the plaintiff? In dealing with this we must bear in mind that, as between plaintiff and defendant, the plaintiff is to be treated as an innocent man. That being so, can it be said that it would be possible to measure by money the injury and the misery that the continuance of this exhibition would cause

[Ct. of App.] *MONSON v. MADAME TUSSAUD LIM.; MONSON v. LOUIS TUSSAUD.* [Ct. of App.]

him? I think not. All the mischief that he wants to avoid would be done if, between this and the trial, the public were to be constantly reminded that the plaintiff was a person suspected of an atrocious crime. So much for that case. In the first case, therefore, the injunction ought to be granted. The second case of *Monson v. Louis Tussaud* stands in a somewhat different position. The exhibition, like that in London, is an exhibition of famous and infamous persons. But it is small, with limited accommodation. This exhibition is in Birmingham. There is a Chamber of Horrors to which there is admission on payment of an extra fee. The figure of the plaintiff does not appear there, but it is placed close to the turnstile which admits to the Chamber of Horrors. Why is it placed there? Is it because Monson is a person honourably or dishonourably distinguished—because he is famous or infamous? We turn to the advertisements which appear in the papers, and also as I understand on sandwich-men in the district. By these the public are invited to come and see the various attractions in the exhibition. "Stop and see," says the advertisement; and then, after naming various things, it contains this paragraph: "See the Chamber of Horrors. Extra room 3d., and the instruments of torture. See Vaillant the Anarchist, and Monson of Ardlamont." Such is the company in which Monson is placed. His figure is not placed as Vaillant's is in the Chamber of Horrors, but at the turnstile leading to it. Does that make any difference? I think not. We were urged by Mr. Olitty to keep this case apart from the other, and we have tried to do so; but I can draw no distinction between them. In the course of the case it was asked if every exhibition of Monson's portrait after the trial would be actionable and liable to be restrained. Suppose, it was said, a likeness of Monson appeared in a newspaper after the trial, could the newspaper be sued for libel? The answer would clearly be No, because a newspaper is entitled to refer to a public occurrence of any sort, and describe it accurately and comment upon it fairly, just as all the Queen's subjects are. But is that case analogous to this? I can put a case which is far more analogous. Suppose a paper which was concerned in the history of criminal courts and of infamous people should think it worth its while to direct that a man acquitted of a crime, and whose case had become a notorious one, should be shadowed, and his likeness taken by kodaks from day to day, and those likenesses published in a newspaper describing him as a person who had been so tried and acquitted—would that be actionable? Is it possible to question that it would? Can it be doubted that no greater misery could be inflicted on a man presumably innocent? That is, practically, what has been done here. Counsel for the defendants admitted, under pressure, that there was no imputation upon the plaintiff, nor innuendo of any sort, and he relied upon the same ground that was taken in the former case, that notoriety alone, whether for good or evil, entitled the defendant to exhibit the figure of the plaintiff. The case, therefore, in that respect resembles the other, and there is no greater difficulty in our interfering to exercise our jurisdiction in this case than there was in the other. Here also I think the application should be granted.

COLLINS, J.—I am of the same opinion, and

have only a few words to add. The facts have been stated by Mathew, J., and it is not necessary for me to go through them again. It is clear law that a person may be as much defamed by pictures or effigies as by written or spoken words, and this case has been dealt with on the footing that the right of the plaintiff in the matter must be measured by the standard applicable to cases of libel, and I desire to test it by that standard. I am not now going to enter into the question whether there is or is not a right in a private person to restrain the publication of his picture without his licence. That is a question on which no authority has been brought before us, and on which I desire to pronounce no opinion. This case stands apart from such considerations. It is to be tested by the law applicable to the case of libel. We are invited to restrain the exhibition of the figure of Monson, and therefore we have to consider, first of all, whether a libel has been established to our satisfaction, and secondly, is it such a libel as to justify this court in interfering by injunction? Now, this case comes down after being analysed to a very small compass, and is relieved from many of the difficulties which often exist in such cases. We are told by both the learned counsel who appeared, one for Madame Tussaud Limited in London, and the other for Louis Tussaud in Birmingham, that the real point is, aye or no, is there any injurious imputation conveyed by the fact that this man's effigy is publicly exhibited for money by the defendants? They have both absolutely disclaimed any intention of justifying an injurious imputation. Their case is that there is no imputation; in other words, that what they have done is not libellous and not the subject-matter of an action in itself. That is the first question I have to deal with. Now there are unquestionably distinctions in the facts between the two cases. The case in London is perhaps more clear upon the admitted facts than the case in Birmingham, but in my judgment the facts so far as they differ are really only the fringe of the case; the substance of the matter is common to both cases, and that is, that the figure of Monson is exhibited for money in an exhibition designed for the purpose and carried out in the manner in which the London exhibition is carried out. The history and the purposes of that exhibition are described in the catalogue, and have been referred to by my learned brother. It purports to be an exhibition of persons famous and infamous. Private persons who are not before the public on any ground of notoriety or fame have no place there. Monson has been placed there, and the attention of the public has been invited to the fact that he is placed there. Why? Is it because Monson happened to be a casual spectator when somebody had the misfortune to shoot himself by accident? Is that a ground entitling such a person to admission to Madame Tussaud's exhibition? Can it be suggested that any person present at a grouse-drive where someone has the misfortune to shoot somebody else—that all persons present on such an occasion have a claim to admission to Madame Tussaud's gallery? If not, why not? Is it not obvious, therefore, that the only ground upon which it could be suggested that Monson had a claim to be in this exhibition would be by reason of the suspicion attached to him of having been present, not as a spectator

of an accident, but at the commission of a crime, and because it is suggested that he had some part or share or was in some way mixed up with a crime connected with the death of Lieutenant Hambrough? It is for that reason, and for that only, that he can be said to have been placed in this exhibition, and advertised so as to attract the public to see him. It seems to me, therefore, when we know the history and purposes of this exhibition, and when we know the circumstances of Monson's history, that to place him in that exhibition and invite the attention of the public to him, and demand their money for the privilege of seeing his effigy, is necessarily to convey a sinister imputation, not that he was the spectator of an accident, but that he was connected with the commission of a crime. Now, it seems to me that under these circumstances the inference to be drawn by a reasonable jury is inevitable, namely, that an imputation has been made. Therefore the first condition laid down by the Court of Appeal as that upon which alone an injunction will be granted is, in my judgment, fulfilled. If a jury were in either of these cases to say that there was no libel because there was no imputation, in my judgment that verdict ought to be reversed; that is, the court ought to order a new trial. But it does not stop there, because, although the libel may be clear, yet, if it be made apparent to the court that a justification is to be offered, or that the case whether justified or not is one so slight in its nature that probably only nominal damages would be recovered, in such a case the court would not interfere by injunction. But in this case, as I have said, neither counsel has suggested that there is any intention whatever to justify. They have in terms disclaimed any imputation, and therefore any intention of justifying such imputation. Therefore the second condition laid down by the Court of Appeal has been fulfilled. Then can there be any question that, if the imputation is such as I have suggested, it is a case for mere nominal damages? Such a suggestion has hardly been ventured to be made. It is obvious that such an imputation carried out by such means, namely a continuous invitation to the public to gratify their morbid curiosity, is for the personal gain of the defendants, and obviously in such a case the damages must be substantial. Under these circumstances I have no hesitation in saying that in both cases the injunction ought to go.

The defendants appealed.

At the hearing of the appeal certain additional affidavits and correspondence which had not been used in the court below were referred to. This additional evidence raised a question whether the plaintiff had not in fact agreed to the exhibition of his portrait model by the defendants and given assistance to their preparation of it.

Finlay, Q.C. (Percy Gye and Wace with him) for Madame Tussaud Limited.—There is no such evidence in this case that a reasonable jury must find the exhibition libellous, and that being so, the court ought not to grant an interim injunction:

Bonnard v. Perryman 65 L. T. Rep. N. S. 506; (1891) 2 Ch. 269.

All the cases in which an interim injunction in a libel action has been granted are cases of trade libels. There is no case where such an injunction has been granted for a libel on personal character,

which is what is complained of here. There is no innuendo which must necessarily be implied from the fact of a man's effigy being placed in this exhibition that he is either famous or infamous. The only inference that can properly be drawn is, that he is a man in whom the public take an interest. The question of what the innuendo really is, is one for the jury, and the court ought not to decide whether or not the exhibition is a libel when that question will hereafter have to be submitted to a jury. Upon the further evidence that has been read, it is submitted that in any event this is not a proper case for the granting of an interim injunction.

T. Willems Chitty and Ernest Pollock for Louis Tussaud.

Coleridge, Q.C. and Cooper Wyld for the plaintiff.—From the position and surroundings of the plaintiff's model at the exhibition, the only conclusion which any reasonable man would draw is, that the plaintiff was connected with a murder. The exhibition is therefore libellous. The only interest which the public had in the plaintiff was in connection with his trial, and that has been over for some time. The defendants have no right, after the termination of the trial, to continue their representation of the plaintiff and so to reiterate the charge against him, and moreover to do this for their own private gain. Such conduct deprives them of any privilege they may once have had in respect of the matter being one of public interest:

Macdougall v. Knight, 55 L. T. Rep. N. S. 274; 17 Q. B. Div. 636;

Stevens v. Sampson, 49 L. J. 120, Q. B.

As to the jurisdiction of the court to grant an interlocutory injunction in an action of libel, the tendency of all the decisions is to enlarge the cases in which the court will grant an injunction. It has been suggested that upon this point there is a difference between trade libels and libels on character. It is submitted that no such distinction has ever been drawn, or, if on previous occasions any such distinction has been made, the court ought now to say that there is no ground for such a distinction. If anything, libel on personal character ought to be treated more severely:

Thomas v. Williams, 43 L. T. Rep. N. S. 91; 14 Ch. Div. 864.

Bonnard v. Perryman (*ubi sup.*) was a case of personal libel, and not merely a trade libel. In *Salomons v. Knight* (64 L. T. Rep. N. S. 589; (1891) 2 Ch. 294) it is true that an interim injunction was refused, but that was done upon the facts of the case, and the jurisdiction to grant such an injunction was not denied. [*LOPES, L.J.* referred to the remarks of Kekewich J. upon *Bonnard v. Perryman* in *Lee v. Gibbins* (67 L. T. Rep. N. S. 263). Lord HALSBURY—An injunction is now granted under the Judicature Act, but that Act draws no distinction between trade libels and other libels, nor between actions for libel and other actions.] *Jessel, M.R.* draws no such distinction in the case of *The Quartz Hill Gold Mining Company v. Beall* (46 L. T. Rep. N. S. 746; 20 Ch. Div. 501).

Finlay, Q.C. replied for Madame Tussaud Limited.

Chitty replied for Louis Tussaud.

Cur. adv. vult.

CT. OF APP.] *MONSON v. MADAME TUSSAUD LIM.; MONSON v. LOUIS TUSSAUD.* [CT. OF APP.]

Jan. 29. — The following written judgments were delivered:—

LORD HALSBURY. — Although I believe there is no difference of opinion among us as to the result of this appeal, I am not so certain that the grounds upon which we act are the same, and the questions raised at the bar are of such serious general importance that I feel it necessary to explain distinctly the reasons which operate on my mind in the course to be pursued. If the case were to be argued upon the materials which alone were before the Divisional Court I should be of opinion that the judgment of the Divisional Court ought to be affirmed. I entirely agree in the reasoning of my brothers Mathew and Collins; but, for a reason I will state presently, I desire to treat separately the question of the summary intervention of the court by way of interlocutory injunction, and the question of the character of the exhibition, the continuance of which until the trial it is sought to restrain. What stands at the head of the inquiry is the character of the exhibition itself. Is it libellous or not?—and in expressing my opinion upon it I am not afraid of prejudicing any right by so doing. The jury will have upon the trial of the action to decide the question ultimately, and I have much too high an opinion of the intelligence of juries to suppose that they would be influenced in their judgment if they learned that a judge or a court had thought that the continuance of an exhibition charged as libellous ought to be restrained until the matter came before them for decision. Indeed, it is a little singular to suppose, considering the controversies which used to arise before Mr. Fox's Act, that a jury would on such a question be unduly influenced by the opinion of a judge or a court. Now this exhibition consists of a portrait model of a person recently tried for murder. The gun with which the murder was said to have been perpetrated is placed in immediate proximity to the figure, and in another part of the same establishment a model or scenic representation of the place where it was alleged the murder took place. If it stopped there I should have thought that there was enough to make it a very grave and defamatory exhibition. It seems to be thought that, because it could be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that it is no answer at all. Because the applicant was tried for murder, because the circumstances of the trial are necessarily preserved by the report of proceedings in a court of justice (privileged, be it observed, because they are such reports), this does not justify the unauthorised and unprivileged repetition or narration of circumstances of suspicion or of evidence, which certainly were urged by the proper authorities as proving that he was guilty of murder. In order to justify a libel the justification must justify in the sense attributed by the innuendo. It is not the mere words of a written statement being true, or the accuracy of fact in a model or scene, that will render it justifiable. The circumstances of time or place may raise such inferences as will render either libellous, though the words may be true and the model exact. Lord Blackburn, in giving judgment in *The Capital and Counties Bank v. Henty* (7 App. Cas. 741), deals with this very question. After expressing his reluctance to express his opinion on cases not before him, he continues at p. 786: "I think I

may safely say that in a time of panic a statement published in a city article of one of our newspapers that such a one had withdrawn his account from such a bank might have a tendency to shake the credit of the bank, and that those who publish such a statement in such a way would know or ought to know that it would be read by persons who came to the paper for information to guide them as to whom they would trust; and therefore the statement would very probably be understood by such persons as conveying an imputation upon the credit of the bank." And in the same case it was laid down that the test as to whether a writing is a libel or no is whether, under the circumstances in which the writing was published, reasonable men would be likely to understand it in a libellous sense. Now it is urged here that no meaning can be attached to this representation calculated to bring the person whose portrait model is exhibited into hatred, contempt, or ridicule, and that therefore, inasmuch as everybody, or most people, knew that Mr. Monson was tried for murder, it is justifiable to exhibit his portrait as that of the man who was so tried, with the weapon with which the murder was alleged to have been committed and the scene of its commission—that the exhibition amounts to no more than writing, "This is the man who was tried for murder said to be committed by this weapon and in this place." I will assume for the moment that that is a fair representation of what the exhibition means, but I wholly dispute that if that were the meaning it would not be libellous. Is it true that you may write with impunity that a person in the course of his career has been tried for some offence? Is it no reflection upon a man's character to say that he has been tried for murder? Will people as readily associate with and accept the companionship of a person of whom such things are said? Let it be observed I am speaking now of the character of the imputation, and not for the moment dealing with the question whether it could be justified on the ground that it was true. If I understand the argument correctly, it comes to this—that the exhibition in question is dedicated to the gratification of public curiosity concerning every person or event which may for the moment be interesting. I confess I regard such a claim with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture, every incident of a criminal or other trial be produced, and its publication justified? Not only trials but every incident which has actually happened in private life furnish material for an adventurous exhibitor, dramatised peradventure, and justified because, in truth, such and such an incident did really happen. That it is done for gain does not in itself make it unlawful if it be in other respects legitimate; but it is not altogether immaterial as excluding such a publication from the category of those which are made in the fulfilment of some moral or legal duty. It seems to be assumed that there is no alternative between an innuendo which shall charge the commission of the murder and the admission that no real imputation is conveyed. I think that is an erroneous view. Suppose the innuendo to be that he was a person of ill repute. The justification must allege, not that he was tried for murder, but must justify, if it justifies at all, that he was of ill repute. If it

were otherwise this singular result would follow: That, if a man has been convicted and undergone his punishment for crime, the law will protect his reputation (see *Leyman v. Latimer* 37 L. T. Rep. N. S. 360, 819; 3 Ex. Div. 15, 352), but if he has been acquitted his reputation is at the mercy of idle gossip for the rest of his life. I have hitherto said nothing of the associations which to my mind are almost necessarily connected with the imputation of crime. I have nothing to do with the intention of the exhibitors. It may well be that the extra 6d. was charged because Mr. Monson is for the moment the favourite object of curiosity, nay—for aught I know to the contrary—the model may have been placed where it is because it is the most convenient place for charging the extra 6d. But it is the impression which would be created on the minds of reasonable men by the juxtaposition of Mr. Monson's model, Mrs. Maybrick's, Scott's, and Pigott's. I think no answer was attempted to be given to Mr. Coleridge's question, is there any one instance of a victim of an accident or an innocent man being exhibited in this part of the establishment? It is, indeed, suggested that a recumbent figure of the Emperor Napoleon is in the same room, but the answer seems to me to be wholly insufficient. If Mr. Monson were a public character, with respect to whom it might be said his public life or his great position is calculated to create an interest, the answer might be plausible: but who knows, or ever did know, anything about Mr. Monson except his connection with the alleged murder at Ardlamont? And why then is he placed near a convicted poisoner, one fugitive from justice not yet captured, and another who escaped justice by suicide? If one adds to that that the scene of the alleged murder is also represented, and admission gained to it by the same fee, and in the place wherein are stored the effigies of many convicted criminals and some scenes of crime, it is a bold assertion to maintain that to the ordinary mind such an association of circumstances suggests no imputation of guilt. But I have now to deal with the question of the summary interposition of the court restraining the continuance of this exhibition until the trial of the action. Two points arise upon it. In the first place, it is said that the court ought not to pronounce anything to be a libel when that very question must afterwards be submitted to the judgment of a jury; and secondly, that the question has already been concluded by authority in this court. Sitting here, I quite admit that I am bound by a former decision of this court. With respect to the first point, my answer is, that the Legislature in 1873 and 1875 gave the power by the unqualified language of its enactment to do the very thing in question wherever the court should deem it "just and convenient." Had it thought right to limit the exercise of such power to cases where no question should be afterwards determined by a jury, it might have so limited the exercise of such a power to such cases. It cannot be assumed to be ignorant of the state of the law or the practice, and it has enacted in the widest terms the jurisdiction in question. It is not necessary to enumerate, but there are other examples of jurisdictions where judges must exercise, in the first instance, a judgment which must, nevertheless, afterwards be submitted to a jury. The

second objection is one with which I have more delicacy in dealing. As I have already said, I am bound by a former decision of this court, but it is by the decision of the court—by what in fact the court did decide; that is the authority to which I must submit. I have some difficulty in following the argument that a decision of the court on one set of facts is an authority upon another and a totally different set of facts. Of course, if the two sets of facts are governed by some principle of law, the principle of law affirmed by the court is equally authoritative to whatever facts the principle may be applied. But where the strength and cogency of the facts themselves, or the inference derived therefrom, is in debate, I cannot, as a matter of reasoning, compare one set of facts with another and bring them within any governing principle. Nor am I helped by a conjecture as to what a jury would then do in a supposed case, and what a court of review would do if the jury did it. In the case of *Bonnard v. Perryman*, affirming the former authority before the Master of the Rolls, it was laid down, and I cheerfully accept the proposition, that the court ought not to interfere by interlocutory injunction unless it was "a clear case." Different forms of expression are used by different judges to indicate the degree of clearness which ought to be brought home to the mind of a judge before he exercises the power now in question. But it is a canon of construction too familiar to render more than an allusion to it necessary, that expressions however general and phrases however wide are cut down and qualified by the subject-matter with respect to which they are uttered. If I were to understand the test suggested to be applicable to all cases, so that it practically excluded actions of libel from the operation of the Judicature Acts with respect to granting interlocutory injunctions, it would be to overrule the Legislature—a power which is not possessed by this or any other court. But, as I have said, I do not so understand the decisions relied upon. The last one speaks of the procedure in question as being only "just and convenient" in exceptional cases—that is, exceptionally clear cases. Something was said as to the procedure being only applicable to trade libels. I think the suggestion is quite unfounded. The Court of Chancery had no jurisdiction in libel cases; but they had jurisdiction to issue injunctions to restrain injuries to trade; and efforts were occasionally made to treat libels as injuries to trade, so as to bring them within the jurisdiction which the Court of Chancery was empowered lawfully to exercise. I should have thought the protection of a man's character was more important than the protection of his trade: (see *Hermann Loog v. Bean* (51 L. T. Rep. N. S. 442; 26 Ch. Div. 306).) But whatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the court shall think it "just and convenient" the remedy exists. I do not deny that it is a difficult task for any court to determine when the case is so clear that the remedy ought to be applied. In this case it is for the jury, and always would have been for the jury, to determine the question, libel or no libel, since in the unanimous opinion of the judges given to the House of Lords in 1792, while adhering to Lord Mansfield's opinion as to the construction of a written document, they frankly admitted that wherever the

CT. OF APP.] *MONSON v. MADAME TUSSAUD LIM.*; *MONSON v. LOUIS TUSSAUD.* [CT. OF APP.]

sense of a paper was to be collected from matter *dehors* the paper the matter was for the jury, and it need hardly be stated here that "libel or no libel" in this case must be absolutely for the jury. A rule, however, which should place the question of libel or no libel absolutely in the hands of the court so as to control the operation of an Act of Parliament would go far to revive a controversy which has now been laid to rest for upwards of a century (see the observations by Parke, B. in *Parminster v. Coupland*, 6 M. & W. 105); and for this among other reasons I cannot think that the decisions referred to are to be understood in the sense contended for. In the view, therefore, that I take of the facts, I should have thought this was a clear case of libel, and an equally clear case for the prompt interference of the court to restrain it until the trial of the action. The question, however, remains whether the new evidence adduced, and which was not before the Divisional Court at all, alters that view; and I am of opinion that it does. Of course, if the exhibition in question is made with the consent, expressed or implied, of the applicant for the injunction, there is no ground for the application. Now, the facts may be very shortly stated. The confidential friend of the applicant entered into a written bargain with the proprietors of the exhibition (Madame Tussaud's) to supply them with the clothing and the gun which Mr. Monson was using at the time of Lieutenant Hambrough's death, and an agreement to give a sitting by Mr. Monson to aid the portrait modeller. If this was done with Mr. Monson's authority, there is, of course, an end of the question. Now, in discussing this matter, I am anxious not to prejudice any inquiry which may hereafter be held into these matters. It is enough to say that upon the correspondence and the affidavits of Mr. Monson and Mr. Tottenham it is very doubtful, indeed, to my mind how a jury would find, or what further investigation might disclose. And I think that in this state of the evidence the views expressed in the two cases referred to above are binding upon me, and I think, therefore, that this injunction must be dissolved. For reasons already given the same course will be followed in the Birmingham case; since, if such an exhibition was permitted by the plaintiff in London, the Court would not restrain it by interlocutory injunction in Birmingham.

LOPES, L.J.—These are two appeals from orders of the Divisional Court granting interlocutory injunctions to restrain the defendants from respectively exhibiting or advertising the exhibition of a wax model representing the plaintiff. The facts of the Ardlamont case are too well known to require recapitulation; suffice it for the purposes of this appeal to say that the plaintiff was tried in the Ardlamont case at Edinburgh before the Lord Justice Clerk and a jury, and the jury found a verdict of "Not proven." Shortly after the trial the defendants respectively exhibited wax models representing the plaintiff at their respective establishments. I propose to deal only with the facts in the first case. The facts in the second are practically the same, and the second case must follow the decision in the first. The ground of the application for an interlocutory injunction was that the exhibition of which the plaintiff complains was calculated to disgrace him and to expose him to public obloquy

and contempt, and was, therefore, a libel upon him. The facts with regard to the exhibition of the wax model so far as material are as follows.—The figure of the plaintiff was in a room called "Napoleon-room, No. 2," within a turnstile where an extra 6d. was demanded. In this room there were five figures—a large recumbent figure of the Emperor Napoleon, a figure of Mrs. Maybrick, another of Pigott, another of Scott, and one of the plaintiff, with their respective names. There were other objects of interest in the same room—for instance, relics of the Emperor Napoleon and the Duke of Wellington. From the room you could descend a staircase, and then find yourself in what is called "The Chamber of Horrors," where there was a representation of what is called "The Scene of the Ardlamont Mystery." Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel. The plaintiff's case, therefore, is libel, and the application for an interlocutory injunction must be determined upon the principles which are applicable to the granting of injunctions in cases of libel. But it must be borne in mind that the question is not whether what is done is libellous, but whether a case for an interlocutory injunction is made out. Prior to the Common Law Procedure Act, 1854, no court could grant any injunction in libel. The Court of Chancery could grant no injunction in libel, because it could not try a libel. Neither could a court of Common Law until the Common Law Procedure Act 1854, because they had no power to grant injunctions. Whether they had power to grant an interlocutory injunction after 1854 I think doubtful. As a matter of practice they never did; the first instance of their exercising the power in a case of libel was *Saxby v. Easterbrook* (3 C. P. Div. 339), and that after trial. The Judicature Act of 1873, s. 25, sub-sect. 8, confers a larger power to grant injunctions than existed before. It says, "An injunction may be granted by interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made." It is upon this section that the plaintiff rests his case. It is not necessary to consider cases that occurred before the coming into operation of the Judicature Acts. *Coulson v. Coulson* was decided in 1887, and contains a judgment by the present Master of the Rolls which underlies every subsequent decision on the subject. It is reported in 3 Times Law Rep. 846, and the Master of the Rolls (Lord Esher) says that it could not be denied that the court had jurisdiction to grant an interim injunction before trial. "It was, however, a most delicate jurisdiction to exercise, because, though Fox's Act only applied to indictments and informations for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the court to construe the document, and to say whether it was a libel or not. To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury had decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate

CT. OF APP.] MONSON v. MADAME TUSSAUD LIM.; MONSON v. LOUIS TUSSAUD. [CT. OF APP.]

nature. It ought only to be exercised in the clearest cases where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion, that there was malice on the part of the defendant. It followed from these three rules that the court could only on the rarest occasions exercise their jurisdiction." In the same year the case of *The Liverpool Household Stores Association v. Smith* (58 L. T. Rep. N. S. 204; 37 Ch. Div. 170) came before the late Lord Justice Cotton and myself in this court, and *Coulson v. Coulson* (*ubi sup.*) was followed and approved. The matter of restraining libels on interlocutory motions for injunction was thought of such importance that the question was, in *Bonnard v. Perryman* (*ubi sup.*), argued before the full Court of Appeal, and Lord Coleridge, in delivering the considered judgment of the court, said: "We entirely approve of, and desire to adopt as our own, the language of Lord Esher in *Coulson v. Coulson*: 'To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury have decided whether it was a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.'" I cannot help thinking that a principle was laid down in this case applicable to all libels without a limitation. Comment has been made on the words "in the clearest cases," and it has been asked what those words mean. I think the criticism would be well founded, and they might be complained of as indefinite if they had not been explained, in my judgment in the most exhaustive way, by what follows: "Where any jury would say the matter was libellous, &c." This is the rule by which we are bound, and I ask myself, if the jury found a verdict for the defendants in this case, would the court set it aside as unreasonable? I propose first to deal with the case as it came before the Divisional Court, and, secondly, as it has come before this court with the additional evidence. I do not think that the Divisional Court were justified in coming to the conclusion that the libel was so clear that if a verdict passed for the defendants it must be set aside as "unreasonable." Mr. Coleridge, for the plaintiff, contended that the exhibition, under the circumstances, of the plaintiff's figure necessarily involved the imputation that he was criminally connected with the death of Lieutenant Hambrough. Mr. Finlay, for the defendant, contended that the defendant imputed nothing disgraceful or injurious to the character of Monson, and that all that the exhibition meant was "Here is the likeness of Monson, who was tried in the Ardlamont case, and was not convicted. Here is the likeness of a person who has recently excited much public attention in connection with a trial, the issue of which everyone knows." Is not the inference to be drawn from what was done a proper question for the jury? Suppose a jury came to the conclusion that what was done imputed nothing disgraceful or injurious to the character of Monson, but only that

he had become, owing to the notoriety of the case, a subject of public interest, and the defendants exhibited his likeness as likely to bring people to their exhibitions, adding nothing to what was known of him before, and not even associating him with the Ardlamont case, except so far as the scene of the "Ardlamont mystery" was in the room below and the figure in the room above. Would a court say that such a conclusion was so unreasonable that it ought not to be permitted to stand? Might not a jury without being unreasonable consider that any discredit attaching to Monson resulted from the trial, and was not affected by the exhibition of his figure at Madame Tussaud's? Might they not think, without being unreasonable, that the action was brought more in aid of his purse than his personal character? Put aside the surroundings, and what is there more in this wax figure than the publishing of Monson's likeness in a newspaper, with his name under it, or the display of his likeness in a shop window? Grotesque pictures of individuals may, I doubt not, be in certain circumstances actionable if anyone thought fit to notice them; but I should think it would require an uncommonly strong case to make them the subject of an interlocutory injunction. But it is said, Look at the surroundings. Mrs. Maybrick, Pigott, and Scott (another celebrity in the Ardlamont case), and the Chamber of Horrors below. No doubt this is important and essentially for a jury. Mr. Coleridge did not, so far as I recollect, attach much importance to the companionship, for, in answer to me, he said that if Monson's figure had been placed between royal personages it would have been the same. I am unable to agree with the decision of the Divisional Court, and think this case is not brought within the rule laid down in *Bonnard v. Perryman*. But, except for future cases that may occur, I should not have thought it necessary to express disagreement with the decision of the court below, because there is new evidence brought before us which makes it impossible to allow the injunction to issue. As the case will have to be tried, I propose to say little about the evidence. Suffice it to say that there is such a conflict of evidence with regard to Monson's conduct, one side saying he consented to the exhibition of his figure, and the other, in a not very satisfactory way, denying any consent, as to render it imperative that the facts should be investigated by a jury before any injunction is granted. It is passing strange that a man who now asserts his anxiety to bury in oblivion the circumstances of the Ardlamont case should be found writing a pamphlet on the case, and, as he says, "on the impulse of the moment" announcing himself as a public lecturer on the subject. Libel or no libel has, since Fox's Act, whether in civil or criminal cases, been always regarded as essentially a question for the jury. I was much impressed by an observation of Davey, L.J. during the argument when he said that at the Chancery Bar he had always contemplated libel with awe. I, as a member of the common law Bar, have always had the same feeling. Criticism is easier than composition, and, speaking for myself, I should deeply regret that by any subtle distinctions or ingenious criticism the authority of the case of *Bonnard v. Perryman*, decided by the full Court of Appeal, should be impaired or "whittled" away, and thus some

additional fetters be imposed on liberty of speech, and the functions of a jury, which are, in my judgment, unauthorised by that decision. The appeals, therefore, must be allowed.

DAVEY, L.J.—In *Coulson v. Coulson* (*ubi sup.*) the Master of the Rolls is reported to have used the following words: "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." I understand the Master of the Rolls to have intended the expression, "where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable," as an explanation or expansion of what he meant by the words "in the clearest cases." The Master of the Rolls was so understood by Cotton, L.J. in *The Liverpool Household Stores Association Limited v. Egerton Smith and Co. and Lovell* (*ubi sup.*); and in *Bonnard v. Perryman* (*ubi sup.*) the Lord Chief Justice, delivering the judgment of the full Court of Appeal, approved of and adopted the language of the Master of the Rolls. I understand the court in that case to have judicially laid down for themselves a rule of practice which is binding upon me with regard to the circumstances under which the court ought to grant an interlocutory injunction pending the trial in cases of libel, or, in other words, to have defined the conditions subject to which it is "just and convenient" to grant an injunction in such cases. In *Collard v. Marshall* (66 L. T. Rep. N. S. 248; (1892) 1 Ch. 571) Chitty, J. granted an interlocutory injunction in a case which appeared to him to satisfy those conditions, and it is to be observed that in that case the defendant was willing to treat the motion as the trial of the action, and therefore did not require the case to be submitted to a jury. I am of opinion that the principles laid down in the cases referred to are applicable to the present case, and the question, therefore, which the court has to answer is whether the affidavits which have been read and commented on before us disclose a case on which the jury at the trial of the action could properly find only a verdict for the plaintiff. I should have much hesitation in differing from the opinion of two judges of so much experience if the case came before us only on the same affidavits as were used in the court below. But affidavits have been used before us which raise a question of acquiescence and active consent against the plaintiff, and indeed suggest that he sold the right to exhibit his effigy with his own clothes and gun, though he afterwards changed his mind. Of course, these affidavits fall far short of proving such a case against the plaintiff, but they certainly suggest it in a manner and with circumstances which show that there is a case for consideration by a jury, and one on which I decline to speculate or express any opinion what their verdict ought to be when they have complete evidence by examination and cross-examination of the witnesses before them. I may observe that in *Bonnard v. Perryman* (*ubi sup.*), though the libellous character of the publication was, in the

language of the Lord Chief Justice, beyond dispute, the court refused to grant an injunction on a mere suggestion by affidavit, without any particulars of a case of justification. I ought to add that I see no logical distinction for this purpose between a case of libel affecting trade or property and one affecting character only. In basing my judgment on the ground which I have stated, I must not be taken to say whether I should or should not have agreed with the learned judges in the views expressed by them on the materials before them. Whether an exhibition of Mr. Monson's effigy under the circumstances in the place and with the surroundings mentioned in the affidavits suggests such innuendo as may be assigned to it in the pleadings is a question which will have to be determined by the jury on the trial of the action. This will dispose of the case against Madame Tussaud Limited. With regard to the case against Louis Tussaud, no case of consent has been brought before us on the affidavits in such a way as would oblige the court to pay attention to it. But having the affidavits in the other case before us it would be idle for the court to pretend to shut its eyes to or ignore the fact that such a case will be open to the defendant in that action also at the trial. I think, therefore, without expressing any opinion on the merits of the case or on the opinions expressed in the court below, it is not a case in which it is proper to grant an interlocutory injunction.

Appeal allowed.

Solicitors for the plaintiff, *Browne and Co.*, for *J. W. Phillips*, Birmingham.

Solicitors for the defendants, *E. F. and H. Landon*; *Blachford, Riches, and Co.*

Friday, Feb. 9.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

THE GLENDARROCH. (a)

Bill of lading—Loss by perils of the sea—Negligence—Burden of proof.

Where a bill of lading contains the customary exception of loss by perils of sea, and an action is brought by the shipper against the shipowner for damage to goods shipped thereunder, the burden will rest upon the plaintiff of proving that the damage was caused by the negligence of the defendant's servants.

The Xantho (*ubi inf.*) considered.

THIS was an appeal from a judgment of Sir Francis Jeune.

The plaintiffs, Messrs. J. C. Johnson and Co. and H. F. Currie and Co., sought to recover from the defendants, Messrs. Wainwright Brothers and Co., the sum of 387l. 16s. 1d., being the value of 2100 sacks of cement damaged by water while being conveyed by the steamship *Glendaroch* from London to Liverpool in March 1893.

The defendants had, it appeared, contracted to take the *Glendaroch* from London to Liverpool at their own risk, for repairs, and the plaintiffs' cement was taken on board as cargo, but primarily for purposes of ballast.

In the course of her voyage the *Glendaroch* stranded in Cardigan Bay, and the plaintiffs

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

cement was damaged by water, and rendered useless.

The plaintiffs sued the defendants as common carriers, but the defendants, while admitting that the goods were lost before the bills of lading were completed, contended that they were received on terms that it was agreed should be embodied in the bills of lading, which included the usual exceptions with regard to perils of the sea and a negligence clause.

The plaintiffs did not allege negligence in their pleadings, but they were taken by the President as amended in that respect. He found that the goods were carried under the bills of lading alleged by the defendants, but that the alleged negligence clause had not been made out. He considered himself bound by the dictum of Lord Herschell in *The Xantho* (55 L. T. Rep. N. S. 203; 6 Asp. Mar. Law Cas. 8; 12 App. Cas. 503), and laid it down that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading; that is, a peril not occasioned by the negligence of the defendant.

Counsel for the defendants then declined to carry the case any further, contending that it would shift a burden on the defendants which really rested on the plaintiffs, and judgment was accordingly entered for an agreed sum of 335*l*.

On appeal,

Joseph Walton, Q.C. and *W. F. Taylor* for the appellants.

Sir Walter Phillimore and *J. A. Hamilton* for the respondents.

THE MASTER OF THE ROLLS.—The contract being one on the ordinary terms of a bill of lading, the facts suggested are these, that the goods are shipped on these terms, and that the defendant undertakes to deliver the goods at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading. The exception relied upon by the defendant is that the goods were lost or damaged by the peril of the sea, and upon that it is alleged—I care not by whom—that even though that be true, yet that peril of the sea and that loss by peril of the sea was the result of negligent navigation on the part of the defendants' sailors. It is the law that if that be made out the defendant has no defence, and the plaintiff is entitled to succeed, and the real question is—how is that to be made out, if it can be made out? It is to be decided according to the practice of the law courts, and the question is, how is that result to be arrived at? The terms of the bill of lading as they stand on paper are, "except the loss be from perils of the sea." But then it is said that, nevertheless, if the perils of the sea are produced by the negligence of the defendants' seamen, then that loss cannot be relied on by the defendants. How can that be unless there be an irresistible inference that such exception does exist in the contract, though it is not written in it? Therefore it must be read into it as if it were in it. Hence we must try and see whether this stipulation as to negligence must be written in, or be considered as written in. The liabilities of ship-owners under a bill of lading are in that part which precedes the exceptions. Is this stipulation about the loss being the result of the negligence of the shipowners' servants, although within the

terms of the exception—is that to be written in before the exceptions or not? The first thing that strikes one is that in that part of the contract it is not wanted. It is immaterial. Before you come to the exceptions the liability of the shipowner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no negligence whatever he would be liable. It cannot be, therefore, that you ought to write in this irresistible inference in that part of the contract. It is not wanted there; therefore you must write it into that part which contains the exceptions. When you come to the exceptions, among others there is that one, perils of the sea. There are no words which say perils of the sea not caused by the negligence of the captain or crew. You have got to read those words in by a necessary inference. How can you read them in? You have got the plain words, in their ordinary sense, that the shipowner is relieved if the loss is a loss by perils of the sea in the ordinary sense of the word. But then you have to read in the other. You can only read it in, in my opinion, as an exception upon the exceptions. You must read in "Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the captain or sailors of the owner." That being so, I think that, according to the ordinary course of practice, each party would have to prove the part of the matter which lies upon him. The plaintiff would have to prove the contract and the non-delivery. If he leaves that in doubt, of course he fails. The defendant's answer is, "Yes, but my case was brought within the exception, within its ordinary meaning." That lies upon him. Then the plaintiff has a right to say there are exceptional circumstances—viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiff to make out that second exception. Let us see whether that seems to have been the view of the older lawyers who had to deal with these disputes as to bills of lading. The old system of pleading, so far as it is a logical exercise carried into practice, was this, that the pleading should follow the burden of proof, so as to show distinctly which part of the transaction lay upon each person to prove. There was a declaration, which showed what the plaintiff had to prove in the first instance. There was the plea, which was prepared to show what the defendant was prepared to prove in answer to that; there was the replication, which admitted the plea was sufficient answer to the plaintiff unless he could answer it. But the replication might answer the plea so as to reinforce the declaration, and show that, by reason of what was in the replication, the plea had become, although *prima facie* an answer, not a sufficient one, and that the declaration was restored. That was the system and the logical system of the old pleading, for the purpose of the conduct of the trial, to show how the evidence and the proof was to be regulated. In my opinion you find in all the books, down to the most modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and relying on the first and substantive part of the bill of lading alleged non-delivery. That was all the declaration came to state, and

strictly speaking, I am of opinion that the declaration could not properly have stated anything about negligence, because negligence was immaterial. It was what the old pleaders called "leaping before you came to the stile," and a pleader was not called upon to answer that which at that time and at that moment was an immaterial allegation. Therefore the declaration was as I say. That showed what the plaintiff had to prove in the first instance, and the moment he did prove what was in his declaration, that was his case. Then came the defendant, and he had to answer that case. Then the plea is stated: "It is true that that is the contract, but the non-delivery was the result of a peril of the sea." He followed, therefore, the terms of the exception construed in their ordinary sense, that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it showed it was no part of the proof which the defendant was bound to give. Then you have a long succession of cases, all setting out a replication, and that replication in the given case is: "Yes, it is true there was a loss by perils of the sea within the *prima facie* exception, but that was brought about by the negligence of your servants, i.e., by your captain and crew." The replication was there for the purpose of showing what the plaintiff had to prove. He could not depart from his declaration, but if he could support it by showing that the exception was not satisfied because there had been this negligence, then the case in the end was for the plaintiff. That being so, it seems to me that the course of pleading is as strong as it could be in favour of, what I think, the true construction of the contract shows, and the principles upon which such a construction was to be acted upon in the trial of the case when it came to be tried. That being the state of things, is there any case to the contrary of that constant course of pleading, and of that result of the principle of construction of a bill of lading? I know of none, but I think there are cases which distinctly show that the course of pleading did give the right view of the different shiftings of the burden of proof. I think that the case of *Grill v. General Iron Screw Collier Company Limited* (18 L. T. Rep. N. S. 485; 3 Mar. Law Cas. 77; L. Rep. 3 C. P. 476) is distinct on the point, and so also is the case of *Czech v. General Steam Navigation Company* (17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. 5; L. Rep. 3 C. P. 14). I think that the two Scotch cases (*Craig v. Rose*, 16 Scot. L. R. 750, and *Dobbie v. Williams*, 21 Scot. L. R. 667) are as distinct and clear to the very point as cases can be. I therefore think that, unless there is something which will justify us in setting aside what I think is the principle of conduct arising from the true construction of the contract, and the universal mode of treating trials up to this time, that which is said in Mr. Carver's book, which is the result of a very careful consideration of the cases, is correct, viz., that, if the loss apparently falls within the exception, the burden of

showing that the shipowner is not entitled to the benefit of the exception on the ground of negligence is upon the person so contending. Mr. Carver cites those cases in support of the proposition. Of course the proposition in his book is not to be treated as authority, but I adopt that statement of the law, and I think it is right. But it is said that a suggestion on a decision or an opinion of the greatest weight has been given to the contrary of what I think is the principle of conduct, and has been the universal practice in the conduct of trials for years and years. That is the opinion which is said to have been given by Lord Herschell in the case of *The Xantho* (*ubi sup.*). I need hardly say that I have the greatest respect and regard for the legal opinion of Lord Herschell in any mercantile case. I have reason to have that great respect, but reading what he said in the case of *The Xantho*, I am of opinion that he positively declined to give an opinion. People may say that, looking through or into his words, they may see a tendency of his mind, but that is not an opinion. The tendency of his mind when he refuses to give an opinion is not in my judgment any opinion at all. I therefore do not for the time feel hampered by a supposed view of Lord Herschell, which I feel, if the case ever goes before him for decision, and if he had that idea passing through his mind, he will not act upon. I think, therefore, that the law is clear that the burden of proving this negligence lies upon the plaintiff. If that be true, what is the result of this case? When the first part of the trial was over, Sir Walter Phillimore proceeded to open his case. Naturally he opened with, "The goods were put on board the ship," which really was not a subject of dispute, and "The goods were not delivered." That was not a subject in dispute. There he might have stopped. He had proved his *prima facie* case, but knowing that the ship had really been stranded on the rocks and broken into, and the cargo destroyed, he naturally saw that there was a loss by perils of the sea in the ordinary sense of the term, and he therefore began to prepare the mind of the judge before the time, doing that which, if he had been an old pleader, would have been jumping before he came to the stile. He began to open that which he would have to prove on a replication that the perils of the sea had been caused by the negligence of the defendants' sailors. He might have taken that to be the real issue of the case, and then have opened the negligence which he alleged, and if he had evidence of it put in his evidence. But it is too soon; it is meeting the defendant before the defendant has made any case. He puts in the answers to the interrogatories, which immediately show that there has been a loss by perils of the sea in the ordinary sense, and I think that showed evidence, perhaps strong evidence, that that was the result of negligent navigation. But he was not content. I know what the refinement of his mind is, and he seems not to have been content to rely on that, because he would not risk his client's case upon that, and he endeavoured to get from the judge a ruling which made the whole of that immaterial. He endeavoured to get from the judge a ruling before the judge was bound to give it, on what would be the ultimate question in the trial. He quoted *The Xantho* (*ubi sup.*), and endeavoured to get from the judge a ruling that the burden of proof which lay upon the defendant was that he

must not only prove loss by perils of the sea, but must prove that that was not the result of the negligence of his captain and crew. He obtained that ruling of the judge at that time. Mr. Walton at that time had not said he had nothing to answer. He had not said he would not call evidence. It is after Sir Walter Phillimore has obtained that ruling of the judge, which to my mind would increase the obligation on Mr. Walton, and put upon him the necessity of far stronger evidence than if that ruling did not exist, that Mr. Walton said: "After that ruling it is of no use for me to answer this specific allegation which you have made that my going out of my course and being out of my course was negligence." If Mr. Walton had shown that his being in Cardigan Bay was not the result of careless navigation and not keeping his course outside of Cardigan Bay, but that he had sufficient reason for going into Cardigan Bay, which would take away any real suggestion of its being carelessness to be in Cardigan Bay, that would not do. He must go on to prove that if he was in Cardigan Bay there was no negligence which conduced to the running on the rocks. It seems to me that the burden of proof thus laid upon him was greater than the law justified. Mr. Walton said, "No, I cannot undertake that burden. That is your ruling, and I must go to the Court of Appeal as you have made that ruling, and ask whether it is right or whether it is wrong, so as to enable me to continue my part of the trial, if there is to be a new trial." In my opinion Mr. Walton was bound to come here in order to get that view of the court, and he has succeeded in convincing me that the learned judge has misconstrued that which was suggested to him as the authority of Lord Herschell, and that he has given a ruling which was not according to law. I think, therefore, that as upon the point of the appeal Mr. Walton has succeeded, he ought to have the costs of the appeal; but I also think that there seems to have been considerable misfortune in the mode in which the trial was conducted, and as the result, about which I give no opinion, is yet to be determined, I think there must be a new trial, and that under the circumstances the costs of the first trial must abide the event of the second.

LOPES, L.J.—The question raised in this case is a somewhat difficult one, and the question is a question of onus of proof. As a general rule it may be said that the burden of proof lies on the person who affirms a particular thing. It appears to me in this case that the burden of proving that a loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of relying on the excepted cause lies on the person who set up that contention. That, in this case, would be the plaintiff, who is the shipper. I think that is not only the result of the authorities, but of the pleadings before the Judicature Acts. The cases which have been referred to are: *Grill v. General Iron Screw Collier Company Limited* (*ubi sup.*); *Czech v. General Steam Navigation Company* (*ubi sup.*); *Taylor v. Liverpool and Great Western Steam Company* (30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275; L. Rep. 9

Q. B. 546); *The P. and O. Steamship Company v. Shand* (12 L. T. Rep. N. S. 808; 2 Mar. Law Cas. 244; 3 Moore P. C. C. N. S. 272); and *Wylid v. Pickford* (8 M. & W. 461). These cases make good what I have stated with regard to the onus of proof, namely, that where peril of the sea is set up it is sufficient for the defendant to prove the peril relied on, and he need not go on to show that that was really not caused by him, but if the plaintiff says that it was, then he must set it up in his replication and must prove it. I have not heard a single case except one which I think is not an authority at all, which in any way negatives that proposition. But it is said there is a contrary opinion expressed by Lord Herschell in the case of *The Xantho* (*ubi sup.*). The particular passage I will read is at p. 512 (App. Cas.): "Much argument was addressed to your Lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus, and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view." It is perfectly clear, therefore, that he does not intend to decide that point. He goes on to say: "I certainly must not be understood as deciding that the mere proof of loss by collision, under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate the defendants." That is the passage which is relied upon. Probably I think, reading it strictly, it might be said that if the learned lord had an inclination of opinion at all it was in favour of that opinion which is put forward by Sir Walter Phillimore; but the materiality of the whole passage is that it is not decided at all, and is left for further decision. Therefore, to put an extra-judicial dictum of that kind against a practice which has existed for a vast number of years would be most undesirable, and would be contrary to all precedents. In the result, therefore, I come to the conclusion that the learned President was misdirecting himself. The President says: "I think Lord Herschell was rather inclined to the view that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading, that is, a peril of the sea not occasioned by the negligence of the defendant." The learned judge so ruled, and was invited so to rule by Sir Walter Phillimore. Mr. Walton then said he left the case as it was. I think that is a clear misdirection by the learned judge, and such a misdirection as before the Judicature Acts would have necessitated a new trial. But under Order XXXIX., r. 6, new trials are not granted unless there is some substantial wrong or miscarriage of justice. Speaking for myself, I do not hesitate to say that this is the matter in the case which has given me considerable trouble, but I am not prepared to say that a miscarriage of justice may not have occurred, for it makes all the difference where the onus of proof is held to be. I cannot,

CT. OF APP.]

WALLEN (app.) v. LISTER (resp.).

[Q.B. Div.]

therefore, say that some injustice, or at any rate some substantial wrong, may not have been occasioned to Mr. Walton's clients by the erroneous action which I consider the learned judge took in regard to this case.

DAVEY, L.J.—I am of opinion that Mr. Walton has successfully shown what the form of pleading was when there were pleadings in matters of this description, namely, that negligence must either be alleged in the declaration or else be specially replied. It may be doubted whether it would require to be set out in the declaration, but in either case it was a matter which must be alleged and proved by the plaintiffs. The forms of pleading were not a mere technicality, but were framed in the manner in which they were so as to carry out what is really a matter of substance, and, as the Master of the Rolls has clearly explained, that was the burden of proof followed and shifted from time to time, according to the matters alleged to have been pleaded. Nobody ever heard of a plea such as that in *Phillips v. Clark* (2 C. B. N. S. 156) being demurred on, but if Sir Walter Phillimore was right in saying that the burden of proof was on the defendant, then he ought to have alleged it in his plea, and a plea merely stating one of the excepted perils which did not go on to negative any suggestion of negligence would have been insufficient. I think the point is clearly put by Parke, B. in the case of *Wyld v. Pickford* (8 M. & W. 461). That seems to me to bear out exactly what has been said, as also do the subsequent cases of *Grill v. The General Iron Screw Collier Company Limited* (*ubi sup.*) and the *P. and O. Company v. Shand* (*ubi sup.*). [The learned Judge then proceeded to cite the judgment of Willes, J. in *Grill v. The General Iron Screw Collier Company*, and proceeded:] This appears to show that perils of the sea are excepted, but that there is an implied contract by the ship-owner that he will carry with care and caution, and his breach of that contract prevents him availing himself of the perils of the sea. As to the case of *Taylor v. The Liverpool and Great Western Steamship Company* (*ubi sup.*) the present case is distinguished from that case, which turned entirely upon the construction of the word "thieves" in the exception in the bill of lading, and the court came to the conclusion that the word "thieves" meant only as a matter of construction persons outside the vessel. That being so, of course the defendant had to bring himself within the excepted perils, and if that was not one of the excepted perils properly considered by the court, he did not bring himself within the excepted perils. Therefore, I think that case cannot be relied upon. I confess I have great doubt whether Mr. Walton had anything in substance to complain of, because there was evidence raising a *prima facie* case of negligence, and the learned judge might, it is admitted, have said to Mr. Walton, "There is a *prima facie* case of negligence raised by the plaintiff for you to answer," and Mr. Walton would have put in his evidence in answer to that. If the learned judge had taken that course, there could not have been, so far as I can see, anything to complain of. There are some subsequent words by Sir W. Phillimore, after the learned judge decided the point—words which warn Mr. Walton about the interrogatories and the evidence produced from the light-

house; but these words were subsequent to the very clear judgment delivered by the learned President, and Mr. Walton had announced the course which on that judgment he intended to take. I think that observation of Sir Walter Phillimore, though perhaps kindly meant, is not sufficient to alter or qualify the effect of the finding of the learned judge. It is to be further observed that the learned judge seems never to have found as the basis of his judgment that there was negligence in fact, but to have given judgment for the plaintiff on the ground that it was the defendants' business to negative negligence, and that he had not done so. On consideration it seems to me difficult to say that Mr. Walton might not be prejudiced by the way in which the case was decided, because the evidence might have been so evenly balanced, or the witnesses on one side or the other might not have been thoroughly believed, that the ultimate decision might finally turn on the question on whom the burden of proof lay. On these grounds I agree with the judgment which the Master of the Rolls has given.

Solicitors: for the appellants, *Waltons, Johnson, Bubb, and Whatton*, for *Norris, Allens, and Chapman*, for *J. M. Quiggin, Liverpool*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 18, 1893, and Jan. 20, 1894.

(Before HAWKINS and LAWRENCE, JJ.)

WALLEN (app.) v. LISTER (resp.). (a)

Metropolis — Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122), ss. 45, 46, 47—*District surveyor's requisition—Non-compliance—Building completed and left before magistrate's order requiring compliance—Order of magistrate made in ignorance of the facts—Refusal to enforce.*

The respondent, while engaged in erecting a building, was served with a notice under sect. 45 of the *Metropolitan Buildings Act 1855* requiring him to do certain works specified by the district surveyor. He did not comply. Subsequently a summons was taken out against him, and an order was made by the magistrate under sect. 46, requiring him to do the works. At the time that order was made the respondent had in fact completed and left the building, but the magistrate was not aware of it until, on the further non-compliance of the respondent, he was asked to impose penalties for such non-compliance. Had he known it at the time he would have refused to make the order; learning it now, he refused to enforce it.

Held, that the magistrate's decision was right. That as the respondent was not, at the time when the order was made, engaged in erecting the building, there was no jurisdiction to make the order; and even assuming that there had been jurisdiction, the magistrate exercised a sound discretion in refusing to enforce an order made in ignorance of facts which rendered it impossible that it could be obeyed.

THIS was a case stated by a metropolitan police magistrate. The appellant was the district sur-

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.]

WALLEN (app.) v. LISTER (resp.).

[Q.B. Div.]

veyor of West St. Pancras, and the respondent was a builder who, in Sept. 1892, was engaged in erecting a building within the appellant's district. On the 15th Sept. 1892, while the respondent was so engaged, the appellant served upon him a notice under sect. 45 of the Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122), requiring him, within forty-eight hours, to do certain work therein specified. The respondent did not comply with that requisition, and on the 18th Oct. (the respondent being still engaged in erecting the building) the appellant made complaint of his non-compliance before a justice of the peace, who thereupon issued a summons under sect. 46 of the Act requiring the builder in default to appear before him. The summons was not heard till the 29th Nov., at which date the respondent was no longer engaged in erecting the building, having completed and left it. This fact was, however, not brought to the knowledge of the magistrate, and in the absence of the respondent, who did not appear, he made an order upon him requiring him to comply with the requisition of the surveyors within six weeks. The respondent took no steps upon this order, he did not obey it, and he did not appeal from it; and on the 5th May 1893 the appellant took out a summons to recover the penalties provided by sect. 47 for non-compliance with the justices' order. The summons was heard on the 19th May, and then, for the first time, the magistrate learnt that at the time that he made the order upon the respondent the latter had completed and left the building, so that it was out of his power to obey it. Had the magistrate known that at the time he would have refused to make the order of the 19th Nov.; learning it at this late stage, he refused to enforce it.

Sect. 45 of the Metropolitan Buildings Act of 1855 enacts that :

If in erecting any building or in doing any work to, in, or upon any building anything is done contrary to any of the rules of this Act, or anything required by this Act is omitted to be done, or in cases where due notice has not been given, if the district surveyor on surveying or inspecting any building or work finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules of this Act, or whether anything required by the rules of this Act has been omitted to be done, in every such case the district surveyor shall give to the builder engaged in erecting such building or in doing such work notice in writing requiring such builder within forty-eight hours from the date of such notice to cause anything done contrary to the rules of this Act to be amended, or to do anything required to be done by this Act, but which has been omitted to be done, or to cause so much of any building or work as prevents such district surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be, to a sufficient extent, cut into, laid open, or pulled down.

Then by sect. 46, on the builder's non-compliance with the requisition of the district surveyor, the latter

may cause complaint of such non-compliance to be made before a justice of the peace, and such justice shall thereupon issue a summons requiring the builder so in default to appear before him; and if upon his appearance or in his absence, upon due proof of the service of such summons, it appears to such justice that the requisitions made by such notice or any of them are authorised by this Act, he shall make an order on such builder, commanding him to comply with the requisitions of such

notice or any of such requisitions that may in his opinion be authorised by the Act within a time to be named in such order.

And by sect. 47, if the magistrate's order is not complied with,

The builder on whom it is made shall incur a penalty not exceeding 20l. a day, to be recovered before a justice of the peace, during every day of the continuance of such non-compliance.

H. Avory and Daldy for the appellant.—The defendant here was in fact the builder engaged in erecting the building at the time when the surveyor's notice was served upon him, and he was therefore within the scope of the Act, and is liable to have the machinery of the subsequent sections brought to bear upon him; besides, he cannot now be heard to say that by leaving the premises he has put it out of his power to comply with this order. *Smith v. Legg* (68 L. T. Rep. N. S. 347; (1893) 1 Q. B. 398) does not apply here, for the argument there turned upon a different section (sect. 105) altogether. The magistrate having made his order cannot refuse to enforce it; he is *functus officio*, and cannot hold his own decision to be wrong.

Marshall Hall for the respondent.—It being found as a fact in the case that the respondent was not engaged in erecting the building at the time when the magistrate's order was made, *Smith v. Legg* (*ubi sup.*) is an authority conclusive in the respondent's favour. The test is not the position of the respondent at the time of the surveyor's notice, but his position at the time of the magistrate's order, which is the first and only order imperative upon him. At the time of the magistrate's order it was impossible to comply with it, and the magistrate, on discovering this fact, had a discretion to refuse to enforce it.

H. Avory replied.

Cur. adv. vult.

Jan. 20, 1894.—*HAWKINS, J.*—This appeal was argued before my brother Lawrance and myself on the 18th Dec. last. The questions involved are, whether a magistrate has jurisdiction under sect. 46 of the Metropolitan Building Act 1855 to make an order upon a builder who has been, but who before the making of such order has ceased to be, engaged in erecting a building, to comply with a requisition duly made by a district surveyor under sect. 45; and whether, if such order be inadvertently made, the magistrate may, in the exercise of his discretion, refuse to impose the penalties mentioned in sect. 47 for non-compliance with it. In Sept. 1892 the respondent, a builder, was engaged in erecting a building in the parish of St. Pancras, within the district for which the appellant was and is the district surveyor. On the 15th Sept., whilst the respondent was so engaged, the appellant duly gave him a notice in writing under sect. 45 of the Act of 1855 requiring him within forty-eight hours to do certain work therein specified. The respondent made default in complying with that requisition, whereupon the appellant on the 18th Oct., whilst the respondent was still so engaged, made complaint to a magistrate of such non-compliance, and procured a summons to be issued requiring the respondent to appear before such magistrate on the 9th Nov.; the hearing thereof was, however, adjourned until the 29th of that month, and on the last-mentioned

Q.B. Div.]

WALLEN (app.) v. LISTER (resp.).

[Q.B. Div.]

day the magistrate made the order in question directing the respondent within six weeks to comply with the requisition of the appellant. When this order was made the respondent had for some time ceased to be engaged in erecting the building, having completed and left it. This fact was not brought to the attention of the magistrate. Had it been so, he would have declined to make the order. The order was not complied with, and therefore, on the 5th April last, the appellant caused the respondent to be summoned (under sect. 47) for the recovery of eighty-six penalties in respect of eighty-six days of the continuance of such non-compliance. This summons came on for hearing on the 19th April before the same magistrate who made the order. He refused to make the order asked for, and dismissed the summons, relying upon the authority of *Smith v. Legg* (68 L. T. Rep. N. S. 347; (1893) 1 Q. B. 398). We think that the magistrate was right in refusing to impose and enforce the penalties. Having carefully considered the object of the Legislature in giving a magistrate jurisdiction to make the order authorised by sect. 46, and the language of that and the preceding section, we are of opinion that in fact the order was made without jurisdiction. It is very certain that the district surveyor has no power to make any such requisition as is mentioned in sect. 45 unless it be made whilst the builder is actually engaged in erecting the building. It stands to reason that such limitation of time should be imposed, for it is only during such time that the builder can legally comply with the requirements of the district surveyor unless by the assent of the owner who employs him. After his employment as builder has ceased and he has left the premises, he could only re-enter by the permission of the owner. To re-enter without such permission would be a trespass which could not be justified by a plea that such re-entry was made in order to fulfil the requirements of the district surveyor's notice. If the Legislature had intended to give power to the builder to enter against the will of the owner, surely it would have conferred such power in express language. But we need not labour this point, for it has been determined by express authority in *Smith v. Legg* (*ubi sup.*). Before proceeding to discuss the provisions of sect. 46, we desire to point attention to the fact that, although no doubt the requisition mentioned in sect. 45 and non-compliance with it, are essential to form the basis of an application to the magistrate under sect. 46, there is no binding obligation on the requisition itself. It cannot be enforced by any process, and no penalty is incurred by disobedience to it. The order of a magistrate under sect. 46 is the first and only order which is imperative upon the builder; and such order is not a mandate to obey the district surveyor's requisition, but is an independent order in itself, requiring judicial consideration before it is made, first as to the legality of the district surveyor's requisition, and next as to the time within which the things ordered to be done by him shall be done. In giving that time, of course he must have regard to that which is reasonable under the circumstances of the case as they exist when his order is made. No limit of time would be reasonable if during all that time compliance with his order would be practically impossible. It is difficult to imagine that the

Legislature intended to confer jurisdiction upon a magistrate to make an order which it was impossible for the builder to comply with. The object of the Legislature was to enable the magistrate to enforce the rectification of that which he had adjudged to have been done or omitted contrary to the provisions of the Building Act, but this object could not be attained by making an order upon a builder whose power to obey it had ceased before it was made. The 47th section, authorising the infliction of a penalty of 20*l.* during every day of the continuance of non-compliance, could only have been intended to apply to non-compliance by a person who had the power to obey, but had intentionally ignored the order. To punish a man for not obeying an order to which he had never the power to yield obedience would be a harsh, unjust, and tyrannical piece of legislation, revolting to reason and good sense. It would amount to this: if the full penalty of 20*l.* per day were inflicted, the unhappy builder would be mulcted in penalties amounting to no less than 7300*l.* a year so long as the non-compliance continued. The case of *Smith v. Legg* (*ubi sup.*) was relied on by the learned counsel for the respondent as an authority in point in his favour. For the appellant it was said, and truly said, that there was this difference between that case and the present—viz., that in *Smith v. Legg* (*ubi sup.*) the builder had completed his building before the district surveyor issued his forty-eight hours' requisition under sect. 45, whereas in this case both the forty-eight hours' requisition and the summons to appear before the magistrate with a view to obtaining his order were served whilst the builder was actually engaged. Although this distinction between the facts of the two cases undoubtedly exists, we are nevertheless of opinion that the considerations upon which *Smith v. Legg* (*ubi sup.*) was determined apply equally to the case before us. It is true that the 46th section in words refers to the "Builder to whom such notice is given" as the person who may be summoned, but we think the words "engaged in erecting such building," in the 45th section, govern and must be read after the word "builder" whenever that word is used in the 46th section. See the interpretation clause, sect. 3, of the Building Act; *Parsons v. Timewell* (44 J. P. 296), by Lush, J.; *Smith v. Legg* (*ubi sup.*), by Lord Coleridge, C.J. and Cave, J.; and see also *The Attorney-General v. Smith* (66 L. T. Rep. N. S. 857; (1892) 2 Q. B. 288), where it was held that executors, having completed the duties of administration, were not persons acting in the administration of the estate. We think, for the reasons we have given, that the order of the 29th Nov. was in fact made without jurisdiction, and the magistrate was right in refusing to enforce it. Assuming, however, for the sake of argument, that there was jurisdiction to make the order, we think the magistrate, when he had it brought to his attention that it was made at a time when the builder had ceased to have power to obey it, acted within his jurisdiction and exercised a sound discretion in refusing to inflict penalties upon the builder, who neither wilfully nor negligently omitted to do that which he was commanded to do by such order. It may be said, and truly, that he might have inflicted a mere nominal fine for each day's non-compliance. It would have been a farce to inflict a fine of a farthing a day for an indefinite

Q.B. Div.]

JONES (app.) v. JAMES (resp.).

[Q.B. Div.]

time with knowledge that no fine could give the builder power to obey the order. We cannot come to the conclusion that the magistrate had no discretion to refuse to go through so useless and oppressive a proceeding of inflicting nominal penalties for disobedience to an order inadvertently made under a wrong impression of the facts, and which, knowing the facts, he believed he had no jurisdiction to make. We cannot help feeling that, if by what has occurred the district surveyor feels in a position of embarrassment, this is a good deal due to his own laches; for if, instead of delaying the issue of his summons till the 18th Oct., he had issued and served it immediately after the expiration of his forty-eight hours' notice under sect. 45, he would in all probability have obtained a magistrate's order, and the time allowed for compliance would have expired before the respondent ceased to be engaged in his building operations. This, however, has not influenced us in forming the opinion we have expressed. The point that the order was not appealed against was not made the subject of discussion before us; we have not, therefore, dealt with it. Nor do we think that it would have made any difference in the result we have arrived at, assuming the order to have been in fact made without jurisdiction.

Appeal dismissed.

Solicitor for the appellant, *Blazland*.

Solicitors for the respondent, *Baker, Forder, and Uppington*.

Dec. 18, 1893 and Jan. 20, 1894.

(Before HAWKINS and LAWRENCE, JJ.)

JONES (app.) v. JAMES (resp.) (a)

Adulteration—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 2 and 3—Food, definition of—Sale of baking powder containing injurious ingredient.

Baking powder is not an article of food or an article used for food within sect. 2 of the Food and Drugs Act 1875; and the seller of a baking powder composed of bicarbonate of soda (20 per cent.), alum (40 per cent.), and powdered rice (40 per cent.) cannot be convicted under sect. 3, although one of the results of the chemical action between the alum and the bicarbonate of soda is to leave in the bread, &c., into which the baking powder has been introduced, a residue of hydrate of alumina, a substance which is injurious to the health of man.

THIS was a case stated by the justices of Glamorganshire sitting in quarter sessions at Swansea, to hear an appeal from a conviction under the Food and Drugs Act 1875.

The appellant James Jones had been convicted by four justices of the county of Glamorganshire at the instance of the respondent, an inspector, for an offence under sect. 3 of the Food and Drugs Act 1875 (38 & 39 Vict. c. 63) which provides that:

No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered under a penalty.

The appellant was charged with an offence under the latter part of this section in having sold a penny packet, containing one ounce of "Excelsior Baking Powder." The powder was sold as a cheap substitute for yeast, to be used in the making of bread and articles of confectionery, which by the generation of carbonic acid gas it tended to make light and easily digestible. The baking powder in question consisted of 20 per cent. of carbonate of soda, 40 per cent. of alum, and 40 per cent. of ground rice. The rice was added merely as a vehicle or medium to prevent injury from damp, and to prevent chemical action taking place before the powder was placed in the dough. One of the results of the chemical action of the alum and the bicarbonate was the liberation of carbonic acid gas, which permeated the mass of dough and made it light; many acid substances could be used in place of alum to bring about the result, e.g., tartaric acid, which, however, had the disadvantage of being more expensive. When alum is used as the acid re-agent, a residue of hydrate of aluminum remains in the bread, hydrate being a substance which is injurious to health.

The justices were of opinion that baking powder was an article of food within sect. 2 of the Food and Drugs Act 1875, which provides that,

The term food shall include every article used for food or drink by man, other than drugs or water.

And they also thought that, by the introduction of alum, the powder had become mixed with an ingredient or material so as to render it injurious to health. Their decision was upheld at quarter sessions, subject to the present case, in which the decision of the High Court was asked by the justices upon the two following questions, viz.: 1. Whether baking powder is an article of food, or an article used for food, within the meaning of the Food and Drugs Act 1875? 2. Whether, if baking powder is an article of food or used for food, there is evidence in the present case to support the justices' decision that the appellant sold the same to the respondent mixed with a certain ingredient, to wit, alum, injurious to health?

Sir R. E. Webster, Q.C., Brynmor Jones, Q.C., and Macmorran, for the appellant Jones, argued that baking powder was not an article of food within the definition of "food" in the Food and Drugs Act 1875. It was only an inexpensive substitute for yeast, and was not sold as food, but to assist in the manufacture of food. Secondly, there was no evidence upon which it could be found that the appellant sold the baking powder mixed with an ingredient injurious to health; for until the alum (the alleged injurious ingredient) was added to the bicarbonate of soda it was not baking powder at all. The alum was an essential element of this baking powder, which is sold pure, without being mixed with anything at all.

Finlay, Q.C. and Rhys Williams, *contra*, for James, the respondent. This baking powder was an article of food within the Act of 1875. True it was not eaten by itself, but neither are pepper and mustard, which are undoubtedly articles of food; it was intended to be used in the compounding of bread and confectionery, and some of it survived the process of manufacture and was eaten, being every bit as much an article of

Q.B. Div.]

JONES (app.) v. JAMES (resp.).

[Q.B. Div.]

food as the salt which was added to the flour; even the flour, an undoubted article of food, was not eaten as flour, but had to be first altered by cooking, and each ingredient of the bread (including the salt, the flour, and the baking powder) was an article of food. The question whether or not a particular article was an article of food is one of fact, and in this case that question was decided in the appellant's favour in the court below. Secondly, there was here a mixing with an injurious ingredient according to the ordinary meaning of the word "mix."

Sir R. E. Webster replied.—The expression "for food" was the same as "as food," and did not mean "in the preparation of food."

Cur. adv. vult.

Jan. 20, 1894.—HAWKINS, J.—James Jones, the appellant, was on the 15th Feb. 1893 convicted by four justices for the county of Glamorgan, for that he, on the 10th Dec. 1892, "unlawfully did sell to the respondent, Evan James, an inspector under the Food and Drugs Act, a certain article of food, to wit, baking powder, which was mixed with a certain ingredient, to wit, alum, injurious to health." Against this conviction Jones appealed to the general quarter sessions for the said county, when the conviction was confirmed and the appeal dismissed with costs, subject to the opinion of the Queen's Bench Division upon a special case, which was argued before us on the 18th Dec. last. The facts found on the hearing of the appeal are fully set forth in the case, but may be stated shortly as follows: On the 10th Dec. 1892 the appellant sold to the respondent a packet of baking powder, described on the outside of the wrapper, a copy of which is annexed, as "Excelsior Baking Powder, for making light and wholesome pastry, puddings, &c., without yeast." On the wrapper are also printed directions how and in what proportions to mix the powder in a dry state with flour, and then to convert the mixture so made into dough. The object of mixing the baking powder with the flour is to generate and diffuse through the dough a sufficient quantity of carbonic acid gas to cause it to expand or rise, and so render the bread, cakes, and pastry, when baked, light and digestible. The Excelsior Baking Powder is composed of 20 per cent. of bicarbonate of soda, 40 per cent. of alum, and 40 per cent. of ground rice. Carbonic acid gas is contained in the bicarbonate of soda. To liberate this gas properly, a chemical combination of an acid with the bicarbonate of soda is necessary. To effect this combination, alum is used. The ground rice is added merely for the purpose of preserving the compound from injury by damp, and thus preventing chemical combination before actual use in dough. The ground rice does not pass off with the carbonic acid gas, but remains in the bread together with the alum, which, by the mutual action between it and the bicarbonate of soda, assumes the form of hydrate of alumina, in which form it is eaten with the bread and is injurious to health. The Sale of Food and Drugs Act 1875, in its preamble, recites that it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition should be amended. The interpretation clause (sect. 2) enacts that the term "food" shall include "every article used for food or drink by man other than

drugs or water." Sect. 3 enacts that no person shall mix, or order or permit any other person to mix, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed under a penalty not exceeding 50*l.* for the first offence. We are asked by the case to say, first, whether baking powder is an article of food within the meaning of the statute; secondly, whether, assuming it to be so, there is evidence to support the finding that the appellant sold the same to the respondent mixed with an ingredient—to wit, alum—injurious to health. It will be observed that sect. 3 creates two distinct and separate offences, one the mixing or causing to be mixed any article of food with any ingredient rendering such article injurious to health, with intent that so mixed the same may be sold; the other, the actual selling of an article of food so injuriously mixed. The latter is the offence charged against the appellant. These are the only offences pointed at in sect. 3. The mere sale of an article, not itself an article of food, but which mixed with an article of food would render it injurious to health, is not an offence under sect. 3. To sell alum, the injurious drug in this case, which is clearly not an article of food, even though it be sold with the knowledge of the vendor that it is the buyer's intention to mix it with the ingredients of which an article of food—*e.g.*, bread—is to be composed, is no offence under sect. 3; and it makes no difference in a legal point of view that when sold it is mixed with other ingredients not in themselves hurtful, some or one of which in an unmixed state might be used as articles or an article of food, if the injurious and the harmless ingredients are so inseparably mixed and in such quantities as that the mixture as a whole forms an injurious compound which nobody would dream of using as food. For instance, take this Excelsior Baking Powder. Of course it could be truly said that pure ground rice is an article of food for man, but it would cease to be so if it were mixed with an equal quantity of alum and 20 per cent. of bicarbonate of soda, and sold in penny packets of an ounce each. Who would venture to describe such a mixture as food for man? With equal truth might powder composed of poison mixed with flour be called food for man because pure flour is so used. Possibly it may be said that the injurious ingredients when mixed with the other materials of which an article of food is composed become a part and parcel of such articles; but that is no argument against the vendor of such injurious ingredients, unless such ingredient can be treated as an article of food at the time of the sale. That is the moment when the test of its character is to be applied, and, if it be not then an article of food, no offence is committed by the vendor of it, though the purchaser or any other person who afterwards mixes it with an article of food intended for sale would be guilty of an offence for such mixing if that were done with intent to sell. We are clearly of opinion that the baking powder in question is not an article of food, and neither the sale of it nor the admixture of it with an article of food, unless such article is intended for sale, is an offence within the criminal provisions of the Sale of Food and Drugs Act. For his own use anybody may make use of it if he thinks

Q.B. Div.]

REIGATE UNION, &C., v. SOUTH-EASTERN RAILWAY COMPANY.

[Q.B. Div.]

fit, and it would certainly seem strong if, for selling such a mixture to a person who had a right to mix it with the ingredients forming his own bread or pastry, the vendor could be convicted of a criminal offence. We do not, however, in anything we have said, intend to convey it as our opinion that nothing can be deemed to be an article of food unless it be made up into an eatable or drinkable form and fit for immediate use, for we have no doubt that the substantial and requisite materials for making, and which are to form part of, the unadulterated article when made—e.g., flour, butter, salt, mustard, pepper, &c.—are articles of food, for though no one would ordinarily dream of eating these things alone yet they are articles intended to form substantial components of articles of food, or to be eaten as adjuncts thereto. Such, however, is not the character of baking powder. We think the court of quarter sessions was wrong in treating the baking powder in question as an article of food, or used for food. It is unnecessary to answer the second question. The order of quarter sessions and the original conviction must be quashed.

Appeal allowed. Order of quarter sessions and conviction quashed.

Solicitors for the appellant, *Flux, Leadbitter and Co.*, for *Tillett*, Norwich.

Solicitors for the respondent, *Iliffe, Henley, and Sweet*, for *W. E. R. Allen*, Cardiff.

Tuesday, Jan. 23.

(Before Lord COLERIDGE, C.J. and DAY, J.)

REIGATE UNION AND CHURCHWARDENS, &C., OF BETCHWORTH (apps.) v. SOUTH-EASTERN RAILWAY COMPANY (resps.).

SAME AND CHURCHWARDENS, &C., OF BUCKLAND v. SAME.

SAME AND CHURCHWARDENS, &C., OF CHIPSTEAD v. SAME.

SAME AND CHURCHWARDENS, &C., OF GATTON v. SAME.

SAME AND CHURCHWARDENS, &C., OF MERSTHAM v. SAME.

SAME AND CHURCHWARDENS, &C., OF REIGATE (FOREIGN) v. SAME. (a)

Rating—Approval of valuation list—Notice of objection—Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), s. 18—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1.

Sect. 18 of the Union Assessment Committee Act 1862 has not been repealed by sect. 1 of the Amendment Act of 1864, and before the valuation list can be duly approved and signed so as to be the last valuation list legally in force, twenty-eight days must be allowed from the time of the public notice of the deposit of the valuation list by the overseers, for receiving notices of objection from overseers or from persons feeling themselves aggrieved on the ground of unfairness or incorrectness or omission.

THESE were six appeals by way of case stated from decisions given at the general quarter

sessions of the peace held in and for the county of Surrey on the 27th June 1893. The facts are similar in all the cases.

On the 4th Feb. 1893 a supplemental valuation list of the parish of Merstham (to take one of the parishes as an example) duly signed was duly deposited by the overseers of the parish in the place in the parish in which rate-books are deposited or kept, and on the same day the overseers duly gave notice in writing of the deposit of such list, accompanied by a copy of the list, to the South-Eastern Railway Company. On the 5th Feb. 1893, being the Sunday next following the deposit of such list, the overseers duly gave public notice of the deposit of such list in the manner required by law.

On the 20th Feb. 1893 the overseers transmitted the same to the assessment committee, and on the same day the assessment committee gave to the company notice of such transmission, and of the sum or sums set down as the rateable value of the property purporting to be occupied by the company included in such list.

On the same 20th Feb. 1893 the assessment committee received from the rating valuer of the company a letter, dated the 18th Feb., in which he gave notice that he should object formally at the earliest moment that he was in a position to do so.

On the 28th Feb. 1893 no formal notice of any objection having then been given, the assessment committee approved the valuation list under the hands of three members of the committee present at the meeting.

On the 25th April 1893 notice of objection to the valuation list was given by the company. On the 23rd May the assessment committee held a meeting for hearing objections to the valuation list, when the company attended by counsel and surveyors, and their objections were heard and determined, and no alteration of the valuation list was made. On the 1st June notice of appeal to quarter sessions was given by the company, and when the appeal came on for hearing objection was taken by counsel for the company that by reason of the valuation list having been approved by the assessment committee before the expiration of the period of twenty-eight days mentioned in sect. 18 of the Union Assessment Committee Act 1862, the company had been aggrieved, and that the supplemental valuation list had not been duly approved and signed as required by law, and was not legally in force as a supplemental valuation list for the parish; and the Court of Quarter Sessions, upon the ground that in order to comply with the statute twenty-eight days from the date of the public notice of the deposit of the valuation list given by the overseers should have been allowed for receiving notices of objection before the valuation list could be legally approved and signed by the Union Assessment Committee, was of opinion that the valuation list was bad in point of law, and therefore that the rate or assessment made on the 29th April, and based upon the valuation list, was bad as not being made upon the last valuation list legally in force for the parish, and the Court of Quarter Sessions ordered the appeal to be allowed with costs, subject to the opinion of the court as to whether the objection urged on behalf of the company was good in law.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.]

COUNTY COUNCIL OF CORNWALL v. TOWN COUNCIL OF TRURO.

[Q.B. Div.]

By sect. 18 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), it is provided:

Any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid (sect. 17) of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid (sect. 17), give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof, and where the ground of any objection shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof to such other person.

By sect. 1 of the Amendment Act of 1864 (27 & 28 Vict. c. 39), it is provided:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing, previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal and the grounds thereof to the assessment committee of such union. Provided that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

Balfour Browne, Q.C. and *B. Muir* for the appellants.—Sect. 18 of the Act of 1862 contemplates the possibility of the overseers or any person aggrieved giving notice in twenty-eight days, and, even if that section stood alone, there is nothing in it to make it necessary for the assessment committee to wait twenty-eight days before approving the list. But, whether that is so or not, the section does not stand alone, it is amended by sect. 1 of the Act of 1864, which has been overlooked by the quarter sessions, but which abrogates the twenty-eight days' rule altogether. By the latter part of that section notice of objection can be given even after the list has been approved, and, acting upon that, the respondents gave notice on the 25th April, and their objections have been fully heard and dismissed upon their merits.

Little, Q.C. and *E. Boyle* for the respondents.—There is no repeal of the twenty-eight days' rule. Sect. 1 of the Act of 1864 makes it necessary for objection to be made to the assessment committee before the case can be taken to quarter sessions, and enables notice to be given to the assessment committee at any time, but it does not cover the same ground as sect. 18 of the Act of 1862. It does not provide for the cases where objection is taken to the unfairness of the rate

(by lowness or omission) in respect of other people's hereditaments, and in the proceedings, which were actually taken on the notice of the 25th April, and which were under the Act of 1864, the railway company were restricted to the question of the correctness of their own rate, and were unable to discuss, as in fact they wished to do, the rates of some of their neighbours. To do this, they must proceed under the Act of 1862, which provides (sect. 18) a cheap and simple way of bringing other persons before the assessment committee; for this purpose they are allowed a period of twenty-eight days, and the assessment committee in approving the list before the expiration of that period have deprived them of their rights. The list, therefore, was not duly approved and signed as required by law, and was not the last valuation list legally in force for the parish, upon which alone the rate can be properly made.

Balfour Browne, Q.C., in reply, referred to

Reg. v. Ingall, 35 L. T. Rep. N. S. 552; 2 Q. B. Div. 199.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the justices at quarter sessions was a right one, and that this appeal must be dismissed on the ground that the 1st section of the Act of 1864 has not repealed the 18th section of the Act of 1862. Twenty-eight days ought to have been allowed after the notice of deposit, and as that was not done, the list was not a proper list so as to be the last valuation list legally in force for the parish in question.

DAY, J. concurred.

Appeal dismissed. Decision of the justices affirmed.

Solicitor for the appellants, *F. C. Morrison*.
Solicitor for the respondents, *A. Willis*.

Thursday, Jan. 25.

(Before *LORD COLERIDGE, C.J.* and *DAY, J.*)
COUNTY COUNCIL OF CORNWALL v. TOWN COUNCIL OF TRURO. (a)

Local government—Clerk to the justices in non-quarter sessions borough, with a separate commission of the peace—Payment of clerk's salary—*Local Government Act 1888* (51 & 52 Vict. c. 41), s. 84.

The city of T. is a non-quarter sessions borough, with a population of over 10,000, and having a separate commission of the peace and a justices' clerk.

Held, that the clerk's salary is payable by the county council of C. by virtue of sect. 84 of the Local Government Act 1888, which is not restricted in its application, but affects alike petty sessional divisions in counties and boroughs which have a separate commission of the peace, but no separate court of quarter sessions.

THIS was a case stated under sect. 29 of the Local Government Act 1888, and was in the following terms:—

1. The city of Truro is a non-quarter sessions borough, with a population over 10,000, having a separate commission of the peace and a justices' clerk.

2. Previously to the passing of the Local

(c) Reported by *HENRY LEIGH, Esq., Barrister-at-Law.*

Q.B. Div.]

MIDLAND RAILWAY COMPANY v. EDMONTON UNION.

[Q.B. Div.]

Government Act 1888 and since that date the clerk of the city justices had paid all fines levied in the city and all fees to the city treasurer and not to the county treasurer, and the salary of the justices' clerk has been paid out of the city fund.

3. The County Council of Cornwall now demand that all fines levied by the city justices since the 1st April 1889 are to be paid to their treasurer under the authority of *Winn v. Mossman*, 20 L. T. Rep. N. S. 672; L. Rep. 4 Ex. 292).

4. The city council, as against this claim for fines, claims from the county council payment of the salary of the city justices' clerk since the 1st April 1889, and are, if such claim is admitted, willing to pay all fees as well as fines to the county treasurer, and they base their said claim on sect. 84 of the Local Government Act 1888 (51 & 52 Vict. c. 41) and sect. 1 of 12 Vict. c. 18.

The question for the decision of the court is, whether the county is liable to pay the salary of the justices' clerk for the city of Truro.

By sect. 84 of the Local Government Act 1888 (51 & 52 Vict. c. 41) it is provided as follows:

(1) The salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore.

(2) The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to these clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local authority respectively.

Sect. 1 of 12 Vict. c. 18, declares what shall be deemed petty sessional divisions in boroughs having separate commissions of the peace.

E. U. Bullen for the County Council of Cornwall.—The county council is not liable for the salary of the justices' clerk in a non-quarter sessions borough which has a separate commission of the peace. Sect. 84 of the Local Government Act 1888 refers only to petty sessional divisions in counties, and has no application to a borough. Sects. 5 and 7 of the Justices' Clerks Act 1877 (40 & 41 Vict. c. 43), which regulate the appointment and qualification of justices' clerks, show the existence of this distinction. It was not the intention of the Legislature to bring boroughs which have a separate commission of the peace within the scope of sect. 84, and they have not in terms, nor have they by necessary implication, done so.

Macmorran (contra), for the Town Council of Truro, was not called upon.

Lord COLERIDGE, C.J.—Mr. Bullen in the course of his argument admitted that his case was not a strong one. He was quite right, and we have no doubt whatever that the County Council of Cornwall is liable to pay this clerk's salary.

DAY, J. concurred.

County Council of Cornwall liable to pay salary of clerk to justices of Truro.

Solicitors for the County Council of Cornwall *Busk and Mellor*, for *H. S. Stokes*, Bodmin.

Solicitor for the Town Council of Truro, *Barton*, Truro.

Monday, Nov. 27, 1893.

(Before WILLS and WRIGHT, JJ.)

MIDLAND RAILWAY COMPANY v. EDMONTON UNION. (a)

Quarter sessions — Continuing court — Practice — Consent to tax costs out of sessions.

A court of quarter sessions is a continuing court, and may determine the effect of an order made at a previous sessions.

Where nothing has been said to the contrary, consent to tax the costs of an appeal to quarter sessions out of sessions may be implied from the universal custom so to do.

THIS was a rule to quash an order of the Quarter Sessions of Middlesex, removed into court by an order of Wills, J., dated the 29th June 1893.

On the 9th April 1892 the Midland Railway Company entered an appeal against a poor rate made on the 12th Nov. 1891. The appeal was heard by quarter sessions on the 13th July 1892, and judgment was given for the appellants with costs. Nothing was said at the time of the hearing about taxing costs out of court; but in November the company's solicitor sent in a bill of costs to the clerk of the peace, who gave an appointment to tax on the 5th Dec. On that day the solicitor for the Edmonton Union objected that no consent had been given to tax out of court, and the deputy clerk of the peace upheld the objection, and decided that he would not proceed with the taxation. On the 7th Jan. 1893 the Court of Quarter Sessions was moved on behalf of the company for leave to tax the costs of the appeal. The court allowed the motion, and amended the order made at the hearing on the 13th July of the previous year so as to direct that the respondents, the Edmonton Union, should pay to the clerk of the peace for the appellants 206l. 17s. 7d. costs within fourteen days of service of the order on them. Of this sum 16l. 18s. 6d. were for the costs of the motion at the sessions of Jan. 1893. The order of quarter sessions was moved into the High Court to be enforced under sect. 18 of Baines' Act (12 & 13 Vict. c. 45), and on the 7th Aug. 1893 the rule nisi was obtained on behalf of the Edmonton Union, on the grounds that the order was not the order made by the Quarter Sessions in the said appeal, and that it was in excess of the jurisdiction of the Court of Quarter Sessions.

Balfour-Browne, Q.C. and *E. Page* against the rule.—In the first place, the rule obtained by the other side is too wide. To quash the order of quarter sessions would not only enable the Edmonton Union to escape paying us our costs, but would also get rid of the decision of the appeal, against which there is nothing alleged. It is admitted to be the general practice to tax costs out of court as has here been done, and this practice is not only highly convenient, but in some cases necessary, as, otherwise, the costs of the last case tried at sessions could never be taxed at all. From this universal custom the consent of the other side may be implied. The brief of counsel for the Edmonton Union was actually by mistake indorsed "costs to be taxed out of court," so much was it considered a matter of course that the application would be made and granted. This indorsement is of course no evidence of any

(a) Reported by MERVYN LL. PHEL, Esq., Barrister-at-Law.

[Q.B. Div.]

MIDLAND RAILWAY COMPANY v. EDMONTON UNION.

[Q.B. Div.]

express consent, as it is admitted that there was none; but it is sufficient to show that consent was implied, and therefore to support the order of quarter sessions, who, having considered the facts, have come to the conclusion that there was evidence of consent. *Southampton Gaslight and Coke Company v. Guardians of the Southampton Union* (36 L. T. Rep. N. S. 548; 2 Q. B. Div. 371; 46 L. J. 238, M. C.) shows that costs may be taxed out of court without express consent.

Poland, Q.C. and *R. Cunningham Glen* for the rule.—The order of quarter sessions is bad. The legal proposition is, that the power of quarter sessions is limited to the period of sessions. The clerk of the peace has no power to tax after the court has ceased to sit. The parties have a right to have a chairman of the court in existence at the time of taxation for them to appeal to in case of necessity. The only thing that can take them out of this rule is an express consent to tax out of court. If this consent was not given, the order of quarter sessions cannot be valid. It is said consent may be implied; but it is not a matter of course that there should be consent. The client might not have confidence in the clerk of the peace. He might wish to be able to appeal to the chairman. *Southampton Gaslight and Coke Company v. Guardians of the Southampton Union* (*ubi sup.*) is really in our favour. During the argument, Lush, J. said: "There is nothing irregular or illegal in taxing out of sessions when the parties agree to it;" and in giving judgment he said: "If the costs had been given by the Court of Quarter Sessions under 12 & 13 Vict. c. 45, s. 5, I think the taxation of costs out of sessions would have been invalid, unless there had been consent of the parties to such taxation." [WILLS, J.—But he says further on, "If the appellants intended to make this stipulation, I think they ought to have said so."] If the contention of the other side is right, it would be necessary to hold that, where nothing is said, consent may be implied. The case does not go as far as that in any view of it. Then the order made at the January sessions of 1893, amending the previous order, is a nullity. The court is differently constituted, and it might well be that the chairman would be different. The order to pay the extra 16l., the costs of those proceedings, is therefore, of course, also *ultra vires*. Our objection to the order is like that taken in *Reg. v. Hellier* (21 L. J. 3, M. C.; 17 Q. B. 229), and must prevail for the reasons there given. [WRIGHT, J.—Both in that case, and in *Reg. v. Goodall* (L. Rep. 9 Q. B. 557; 43 L. J. 119, M. C.), the order objected to was bad on the face of it.] At all events the order made in Jan. 1893 is bad, and the order of July 1892, which is really the order in the case, can no longer be enforced, as the quarter sessions which made it are no longer sitting. It cannot be said that the clerk of the peace is the officer of quarter sessions. He holds an office under the Lord Lieutenant. The order now before the court does not represent the true order of quarter sessions, and should be set aside.

WILLS, J.—I am clearly of opinion that our decision ought to be in favour of the appellants at quarter sessions. I confess I have serious doubts whether an objection like the present can be taken at this stage of the proceedings at all. Certainly, in deference to what Patteson, J. says

in *Reg. v. Hellier* (*ubi sup.*), I should say that the objection must be confined to the order itself. Both in that case and in *Reg. v. Goodall* (*ubi sup.*) the objection was to the order as it stood. However, it is not necessary for us to decide that question. It will be sufficient if we deal with the point that has been raised. It is, that there was no express consent to tax the costs of the appeal out of sessions. But there may be consent without there being express consent. Consent means the concurrence of two minds. This does not mean a concurrence expressed in words only. In many cases a man's consent is implied, and rightly implied, from his actions or merely from his silence. So here, it seems to be admitted that the universal practice is to tax out of court by consent. It appears that the leading counsel for the respondents knew so well that this was the practice that he wrote on his brief beforehand, when he saw that judgment must be against him, "Costs to be taxed out of sessions." No one suggests that this indorsement binds the respondents. But it shows that it was felt that this was the usual practice. We have also affidavits from the solicitors on the other side to the effect that it is so; and it was doubtless for the same reason that counsel for the appellants did not think it necessary to say anything about it. But we are not without authority on the subject—I trust I should have had courage to decide the point if there had been none, for the ordinary business of litigation could not be carried on in the absence of an understanding between counsel. The view taken by Lush, J. in *Southampton Gaslight and Coke Company v. Southampton Union* (*ubi sup.*) supports me in my opinion. The facts in that case are doubtless different, but, even giving to what Lush, J. says the meaning contended for by the counsel for the respondents, it is clear that the true effect of the case is, that, in view of the regular custom to tax out of court, the consent of counsel might be implied. Then there is the further question as to the power of the Court of Quarter Sessions to make the order as to the payment of costs, and also as to the subordinate amount of 16l., the costs of the hearing at which the order was made. The respondents say the court had no jurisdiction to make an order relating to a previous session. I do not think there was any want of jurisdiction. The case of *Campbell v. The Queen* (11 Q. B. Rep. 799; 15 L. J. 76, M. C.) shows that in criminal matters the Court of Quarter Sessions is a continuing court. If the court had not power to make this order, is it to be said that, if a copying clerk in the clerk of the peace's office were to make a manifest error, there would be no opportunity of setting it right? It is argued for the respondents that in that case the party aggrieved might come to the Queen's Bench Division of the High Court for a *mandamus* to the clerk of the peace. But this court would have no jurisdiction to set the order aside if regular on the face of it, and a *mandamus* would not lie to the clerk of the peace. Is it then to be said that there is not power anywhere to rectify an error? I am of opinion that there is such power, that the Court of Quarter Sessions has power to make such necessary alteration in an order, and to say that there has been an error. So I have come to the conclusion that the order made at the January sessions was the order of the Midsummer sessions, and that it was not made

in excess of jurisdiction, but properly made, and in my opinion the Court of Quarter Sessions was the only court to which an application could be made for an order to the clerk of the peace to tax.

WRIGHT, J.—I am of the same opinion for three reasons. First, because the Court of Quarter Sessions is a tribunal constituted by a commission of the peace which has itself a continuous existence. The court is required by the statutes to sit four times a year, but it is always the same court which sits. No doubt there are particular matters which, by the requirements of particular statutes, must be terminated at a particular session, but in other cases things are done at different sessions which are necessarily considered to be done by the same court. There is no such limitation to any particular sessions in the section (sect. 5 of 12 & 13 Vict. c. 45) giving the Court of Quarter Sessions discretion to order the payment of the costs of appeals. Here, the court has simply carried out the intention of this section. It has made no fresh order, but has simply said at the January sessions what the order made at the previous Midsummer sessions was. I think we could not quash such an order; the High Court has no jurisdiction to quash an order of quarter sessions, made in accordance with practice and within their jurisdiction. My second ground is this: we are asked to quash this order on the ground that no consent was given that there should be taxation out of sessions. I think that, in taking such a course, we should exercise our discretion wrongly and against good faith; for I am of opinion that there was here a consent, though not an express consent, to tax out of sessions. Thirdly, though it is not necessary for us to decide the point, I must add that I share the doubt whether, when an order of quarter sessions comes up before us to be enforced, we can do anything except to see if it is wrong on the face of it. Power to go into the merits of such an order would, for one thing, interfere with the rules as to the time within which a writ of *certiorari* must be applied for. *Rule discharged.*

Solicitors against the rule, *Beale and Co.*
Solicitor for the rule, *F. Shelton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 26, 27, and March 5.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

HARBIN v. MASTERMAN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Will—Accumulations—Income—Charities—Thellusson Act (39 & 40 Geo. 3, c. 98).

A testator, who died in 1865, by his will dated in 1860, after bequeathing several annuities, and directing that they should be paid out of the income of his personal estate, and that the surplus income, after providing for the annuities, should be invested and accumulated until the death of the surviving annuitant, bequeathed the

residue of his personal estate "in trust to pay and divide the same unto the several public charities hereinafter named, according to the amounts set opposite to their respective names, that is to say;" and then followed the names of five charities with the sum of 100l. against each. After provision had been made for the annuities there remained a large surplus. In 1865 a suit was instituted for the administration of the testator's estate, which came on upon further consideration in 1871, when it was decided (25 L. T. Rep. N. S. 200; L. Rep. 12 Eq. 559) that the charities were entitled to the whole of the surplus; but, without any decision as to the future rights of anyone to the accumulations, the accumulations were directed to continue until further order. Two of the annuitants subsequently died. A petition was then presented by the next of kin of the testator asking for payment to them of so much of the surplus income as had accumulated since the expiration of twenty-one years from the death of the testator.

Held, that the principle of Saunders v. Vautier (Cr. & Ph. 240) was applicable; and that the charities were entitled to the whole of the accumulations of income.

Decision of Stirling, J. (69 L. T. Rep. N. S. 788) affirmed.

JOHN FRANCIS DUNCAN by his will dated the 5th July 1860, after making certain dispositions not material to be mentioned, bequeathed all the residue of his personal estate unto trustees upon trust that they should either permit the moneys, stocks, funds, and securities constituting the same, to remain in their then state of investment, or to vary them, and to pay certain annuities therein mentioned.

The testator then directed that, in case the annual income of the trust funds should not be sufficient for the payment of the whole amount of the annuities, the trustees, when and as often as the same should happen, should apportion the deficiency between and amongst the annuitants according to the amount of their respective annuities, and so as that the same should rateably abate accordingly.

The testator then directed that the trustees should, in every year after his decease, invest the surplus income, if any, of the trust funds whether such surplus should arise from the falling in or determination of any annuity or annuities thereinbefore given or otherwise, and from and after the decease of the survivor of the annuitants, should sell, dispose of, and convert into money all such part of the trust funds (and the accumulations thereof respectively as should not actually consist of cash) and stand possessed of the moneys to arise from such sale, disposition, and conversion, and also of such part of the trust funds and the accumulations thereof respectively as should not consist of actual cash,

In trust, to pay and divide the same into the several public charities hereinafter named, according to the amount set opposite their respective names; that is to say, to the treasurer for the time being of an institution known by the name of the London Orphan Asylum for the Reception and Education of Destitute Orphans, established in London, 100l.; to the Public Dispensary, Carey-street, near Lincoln's-inn, 100l.; to the Royal Free Hospital, Gray's-inn-road, 100l.; to the King's College Hospital in Carey-street, Lincoln's-inn, 100l.; and to an institution called (here followed a blank in the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.
Vol. LXX., N. S., 1890.

CT. OF APP.]

HARBIN v. MASTERMAN.

[CT. OF APP.]

will), under the patronage of the late Lord Mayor of London, Alderman Wire, the sum of 100*l.* for the benefit of persons afflicted with paralysis.

The testator died in Jan. 1865, possessed of considerable personal estate, the pure personality amounting to about 25,000*l.*, the impure to about 3500*l.*

In April 1865 a bill was filed by his executors for the administration of his estate. The chief clerk had certified (*inter alia*) that there were no next of kin, and that the Hospital for Paralytics was the one referred to, but not named by the testator.

The annuities had all been provided for by the appropriation of an adequate portion of the property, and there remained a surplus of about 8000*l.* to be disposed of.

The suit came on upon further consideration before Wickens, V.C. on the 12th and 14th July 1871, and the questions then raised were: (1) whether the five charities took 100*l.* each, or the whole of the testator's residuary estate in fifths, viz., one-fifth to each of them, subject to the annuities; and, (2) whether, if the charities were entitled to the whole of the residue, they could, as the annuities had been provided for, stop the accumulations directed by the will, and call for the immediate payment to them of the 8000*l.*

The Vice-Chancellor, without deciding as to the future rights of anyone to the accumulations, decided (25 L. T. Rep. N. S. 200; L. Rep. 12 Eq. 559) that the charities were entitled to the whole of the surplus, in equal shares, but that the accumulations, as directed by the will, must continue until further order.

In July 1892, on a motion made in the suit by persons claiming to be the next of kin of the testator, it was ordered that the inquiry directed by the original decree, viz., who were the next of kin of the testator living at his death according to the statutes for the distribution of the estates of intestates, and whether any of them had since died, and, if so, who was or were then the legal personal representatives, should be prosecuted.

In answer to this inquiry the chief clerk certified that the next of kin were Mary D. Wharton and J. H. Warwick, who died in Feb. 1884, and that Elizabeth Warwick was his legal personal representative.

A petition was subsequently presented by Mary D. Wharton and Elizabeth Warwick, which raised the following questions: (1) Whether they were entitled as the next of kin of the testator to the accumulations which had arisen since the expiration of twenty-one years from the death of the testator, and (2) if so, whether they were entitled to require immediate payment thereof.

On the 28th Nov. 1893 the petition came on to be heard before Stirling, J., when his Lordship decided (69 L. T. Rep. N. S. 788) that the principle of *Saunders v. Vautier* (Cr. & Ph. 240) was applicable; and that the charities were entitled to the whole of the accumulations of income.

The petitioners now appealed, not only from the decision of Stirling, J., but also, by leave, from the decision of Wickens, V.C., they not having been parties to the proceedings before the learned Vice-Chancellor.

After hearing arguments in the appeal from the decision of Wickens, V.C. the Lords Justices delivered judgment as follows:—

LINDLEY, L.J.—I do not think that there is any difficulty in the point raised by the first appeal. I adopt what was said by Wickens, V.C. in his judgment (see L. Rep. 12 Eq. 559). The question seems to me too clear for argument. The testator has given all his residue to charities.

KAY and SMITH, L.JJ. agreed.

The appeal from the decision of Stirling, J. was then argued.

Crackanthorpe, Q.C. and *Hopkinson*, Q.C. (*Theodore Ribton* with them) for the appellant Mary D. Wharton.—By the *Thellusson* Act accumulations of income directed by a testator must be discontinued at the expiration of twenty-one years from the date of his death. That being so, the question in the present case is, what is to be done with the accumulations after the twenty-one years. The gift of the residue here being insufficient to catch up the accumulations, they are consequently undisposed of during the period between the expiration of the twenty-one years from the death of the testator and the death of the last surviving annuitant. We submit that the accumulations pass to the next of kin of the testator:

Talbot v. Jevors, L. Rep. 20 Eq. 255;

Weatherall v. Thornburgh, 39 L. T. Rep. N. S. 9; 8 Ch. Div. 261.

The accumulations cannot be added to the capital and pass to the charities:

Jones v. Maggs, 9 Hare, 605.

There are numerous cases which show that a testator, disregarding the *Thellusson* Act, has directed accumulations, and the court has always held that the void accumulations go to the heir-at-law or next of kin according to the nature of the property. For example, see

Elborne v. Goode, 14 Sim. 165, 176;

Green v. Gascoigne, 4 De G. J. & Sm. 565.

In *Saunders v. Vautier* (Cr. & Ph. 240), where a testator bequeathed certain stock to trustees upon trust to accumulate the dividends until A. should attain the age of twenty-five years, and then to transfer the principal with the accumulated dividends to A. absolutely, Lord Cottenham held that the legacy was vested and ordered payment to A. when he was twenty-one years of age. We submit, however, that the decision in *Saunders v. Vautier* (*ubi sup.*) does not apply, as here the next of kin are claiming outside the will, whereas the charities are claiming under it, and therefore subject to the conditions thereby imposed. Stirling, J.'s decision was founded on *Saunders v. Vautier* (*ubi sup.*), but his Lordship apparently overlooked the true effect of the *Thellusson* Act and the decisions thereon which involve the principle that that statute was designed to establish. Other cases illustrating the view which the court entertains of the policy of the *Thellusson* Act are the following:

Josselyn v. Josselyn, 9 Sim. 63;

Roake v. Roake, 9 Beav. 66;

Gosling v. Gosling, Johns. 265;

Re Wrey; *Stuart v. Wrey*, 53 L. T. Rep. N. S. 334; 30 Ch. Div. 507.

Graham Hastings, Q.C. (*B. F. Costelloe* with him), for the appellant, Elizabeth Warwick, supported the argument adduced on behalf of the other appellant, and read the observations of

Lord Langdale in his judgment in *Eyre v. Marsden* (2 Keen, 564, 573). He referred also to

Oddie v. Brown, 4 De G. & J. 179.

Cozens-Hardy, Q.C. (*S. Dickinson* with him) for the London Orphan Asylum.—The Thellusson Act applies to the accumulations here. The charities are entitled to say that they will have the surpluses paid to them instead of being accumulated. In *Weatherall v. Thornburgh* (*ubi sup.*) the ratio decidendi was that there was no residuary gift. Had there been one the decision of the Court of Appeal would have been otherwise. No distinction can be drawn between a residuary gift to an individual and a residuary gift to a charity, and therefore the doctrine of *Saunders v. Vautier* (*ubi sup.*) is applicable to both. [LINDLEY, L.J.—If you are right in your contention it will be carrying the doctrine of *Saunders v. Vautier* (*ubi sup.*) somewhat further than it has ever been carried before.] There is no ground for distinction between income and capital. If a person is entitled to the whole income of a fund he can claim the capital absolutely. The object of the Thellusson Act is to prevent the indefinite postponement of the enjoyment of property. Directions for accumulations cannot therefore take effect after twenty-one years from the date of the death of a testator. But the other provisions of his will remain unaffected. The charities are therefore entitled to claim the accumulations in this case.

Buckley, Q.C. (*Bateman Napier* with him) for the National Hospital of the Paralyzed and Epileptic.—The annuitants have no recourse under any circumstances to the accumulations. The accumulations are distinctly given to the residuary legatees. The charities, therefore, take the accumulations themselves by the acceleration of the period of payment, as in the case of individuals at the expiration of twenty-one years from the death of the testator.

Haldane, Q.C. and *Hadley* for King's College Hospital and the Public Dispensary.

Haldane, Q.C. and *H. Fellows* for the Royal Free Hospital.

Crackanthorpe, Q.C., in reply, referred to further cases dealing with the question of accumulations, viz.:

Hodgson v. Bective, 10 H. L. Cas. 656;

Re Parry; Powell v. Parry, 60 L. T. Rep. N. S. 489.

Cur. adv. vult.

March 5.—The following judgments were delivered:—

LINDLEY, L.J.—This is an appeal from a decision of Stirling, J., and it turns upon the provisions of a will, which I will read. [His Lordship read the material provisions of the will as above set forth, and continued:] Now, the testator died many years ago, and the case has been before Wickens, V.C., and the hearing before him will be found reported in the Law Reports, 12 Eq. 559. The Vice-Chancellor then decided that the residuary legatees took the residue in equal shares, and we have already stated that upon that point, in our opinion, he was correct. The effect of this will is as follows: (1) The residue is given absolutely to the five charities in equal shares. (2) The residue is not to be paid to them until all the annuities have

come to an end. (3) The annuities are all charged on the income of the trust estate, and are to be paid annually out of the annual income of that estate. (4) The surplus, if any, of such income in any year is given to the charities absolutely. (5) Such surplus is to be accumulated until all the annuities have come to an end, and the accumulations are then to be divided between the charities; but the annuitants have no claim to the accumulations and have no right to have any deficiencies in any year paid out of the accumulations arising from the surpluses of previous years. (6) The accumulations are directed to be made for a period which might exceed, and which has in fact exceeded, twenty-one years from the testator's death. Now, the question is, who is entitled to the accumulations which have been made already since the expiration of that period, and which may be made in future until all the annuities cease? The next of kin claim the accumulations under the Thellusson Act. The charities claim them on the ground that they, being the only persons entitled to the annual surpluses as they arise, were and are entitled to have them paid over to them every year; and that the trust for accumulation is invalid and may be disregarded. Stirling, J. has decided in favour of the charities, and I am of opinion that he is right. I will first consider the claim of the next of kin. The Thellusson Act runs thus: I will read it shortly. It is set out in Jarman on Wills (5th edit., vol. 1, p. 272), from which I am reading. It recites that it was expedient that all dispositions of real or personal estate whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to the restrictions therein-after contained. Then it enacted that no person should settle or dispose of any real or personal property in such a manner that the rents, issues, profits, or produce thereof should be wholly or partially accumulated for certain periods, one of which is the term of twenty-one years from the death of any such grantor, settlor, or testator. Then passing over other portions of the Act, which are immaterial, it goes on thus: "And in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed." The accumulations prohibited are accumulations of income by which the beneficial enjoyment thereof is postponed; and the funds accumulated contrary to the provisions of the Act are to go to the persons who would have been entitled thereto if the accumulations had not been directed. Who, then, would take the surpluses if the accumulations in this case had not been directed? If the charities, then they are entitled to the accumulations. The Thellusson Act itself gives it them. Again, if the trust to accumulate is invalid apart from the Act, and can be properly disregarded, the direction to accumulate the annual surpluses does not postpone the beneficial enjoyment of them, and the Act has no application to the case. Now, notwithstanding the general principle that

CT. OF APP.]

HARBIN v. MASTERMAN.

[CT. OF APP.]

a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders v. Vautier* (*ubi sup.*) and enunciated with great clearness by Wood, V.C. in *Gosling v. Gosling* (*ubi sup.*). Wood, V.C. says this (at p. 272): "The principle of this court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age; unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years." Now, applying this doctrine to the present case, the charities are not entitled to the capital of the trust estate before the annuities cease, because the annuitants are interested in the income of such capital, and that income is not the sole and exclusive property of the charities. Nor would the charities be entitled to the annual surpluses which there might be before all the annuities ceased, if in any event the annuitants could have recourse to them. But, inasmuch as the terms of the will preclude any such recourse, and the accumulations are directed to be made for the benefit of the charities, and for their benefit only, it follows that each yearly surplus as it arises is their absolute property, and that the direction to accumulate is invalid, and may be properly disregarded, not only after, but during the period of twenty-one years from the death of the testator. This certainly will be so if the charities can be regarded as ordinary individuals not under any personal disability. Wickens, V.C. (before whom the case came in 1871, upon the construction of the will, but who did not then decide who was entitled to the accumulations) evidently was of this opinion; but he had some doubts about the propriety of so regarding them. As regards that charity which is a corporation, there is, in my opinion, no legal ground for this doubt. As regards the other charities there is more room for hesitation. But here again their trustees are, in my opinion, absolutely entitled to the annual surpluses as against the testator's executors, and the trustees of the will, and the annuitants who are his legatees. On this point I agree with Stirling, J., and I do not regard Wickens, V.C. as dissenting or doing more than expressing a doubt, and leaving the point open for decision. The fact that accumulations

have been made since the expiration of twenty-one years from the testator's death will not avail the next of kin. If the surplus income accumulated was the property of the charities, the unnecessary accumulation of that surplus cannot deprive them of their right to it. The above view of the construction of the testator's will, and of the law applicable to it, renders it unnecessary to comment on *Weatherall v. Thornburgh* (*ubi sup.*) and *Talbot v. Jevers* (*ubi sup.*), except by observing that the directions to accumulate in those cases were only invalidated by the Thellusson Act itself, which is not the case here. The appeal must, therefore, be dismissed.

KAY, L.J.—I entirely agree. It seems to me that the case may be shortly stated in this way: The direction to accumulate in this will is altogether futile. The charities have a right to say: "We are entitled to the income; no one else has, or can have, any interest in it; we do not desire to have it accumulated. We prefer to receive the surplus income as it arises." That right of theirs prevents any accumulation being made, and therefore the Thellusson Act does not apply to the case. It is not within the mischief that the Act was intended to obviate, which was, that an accumulation should not go on for more than the period specified by the Act so as to take the income away from everybody during the time of that accumulation. Here the right of the charities is to prevent the income from being taken away from them at all. They have a right to receive it just as it arises. I come to that conclusion because, having studied the will very carefully, I think the effect of it is this: The annuities are to be paid out of the annual income of this residuary fund, and the provision that they are to abate when that annual income is not enough to satisfy them shows that the annuitants have no claim whatever for an arrear of one year upon any income that was received in previous years. Therefore the surplus income of each year which is directed to be accumulated is a surplus income upon which the annuitants could have no kind of claim. No one else can assert any claim upon it, and, seeing that the fund is given as residue to the charities including these accumulations, the charities take a present vested interest in that residue. And if no accumulations whatever had been directed, and whether any accumulations are directed or not, all the surplus income of that residue, after satisfying the annuities year by year, belongs as a present vested interest to the charities. I will try the case again in this way: Suppose there had been no gift to the charities at all except of this surplus income, and that the surplus income had been given to the charities, and then that there was a direction to accumulate the surplus income until the death of the last annuitant, and then to pay it to the charities, the charities would have the same right that the legatees had in *Saunders v. Vautier* (*ubi sup.*) to come and say: "We do not desire any accumulation of that to be made; it is given absolutely to us, and therefore we say we would rather take it at once, and the postponement of payment not being for any purpose of the estate, not being for the benefit of the annuitants or anyone else at all, we say we would rather not let it accumulate; we will take the income from year to year as it arises." Now, does it make any difference that, besides the surplus income, the capital from

CT. OF APP.]

Re HALLETT; *Ex parte* THE TRUSTEE.

[CT. OF APP.]

which that surplus income is to be derived is also given to the charities, and that, as to the capital, they cannot take that until the death of the last annuitant? I do not see why it should. It is quite plain that, as to the capital, they have no right to receive that until the death of the last annuitant. But then there is a reason for that, because the capital was meant to secure all these annuities, and the testator did not choose to give the capital over to the charities until the last of these annuities was satisfied. He has dealt, as I am pointed out, otherwise with the surplus income in which the annuitants have no interest whatever. Therefore, for the reasons I have given, because it seems to me that this surplus income as vested in the charities from the death of the testator, and that no one else has the least interest in or claim upon it, the charities have a right to say that the direction for accumulation was altogether a futile thing; that they would rather receive the income at once and treat the direction for accumulation as a matter which they have a right to disregard. That seems to me to come entirely within the principle of *Saunders v. Autier* (*ubi sup.*); and accordingly I think that the learned judge in the court below was right, and that this appeal must be dismissed.

SMITH, L.J.—I agree. I have nothing to add.

Appeal dismissed.

Solicitors for the appellants, Hood Barrs and Co.

Solicitors for the respondents, Winter and Co.; Adden and Treherne; Hyde, Tandy, Mahon, and Ayer; Bower, Cotton, and Bower.

Friday, Feb. 16.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

Re HALLETT; *Ex parte* THE TRUSTEE. (a)

APPEAL IN BANKRUPTCY.

Trust—Trust money—Following trust money—Money received by bankers as bankers.

Trustees kept a banking account for the trust at the bank of H. and Co. Debentures forming part of the trust estate became payable, and the trustees authorised H. and Co. to receive the amount 1600*l.* on their behalf as bankers. H. and Co. had to pay to the company, which was paying off the debentures, a larger sum than 1600*l.*, and, on a settlement of accounts with the company, received no money, but paid 300*l.* The account of the trustees with H. and Co. was credited with 1600*l.* One of the trustees was a partner in H. and Co., and knew that the bank was not in a sound financial position.

H. and Co. shortly afterwards failed, and the partners were adjudicated bankrupts. The solvent trustee applied in the bankruptcy for a declaration that the sum of 1600*l.*, being trust money, did not form part of the assets of H. and Co.

Held (reversing the decision of Williams, J.), that the trust money could not be followed, inasmuch as H. and Co. had not in fact received it, and, even assuming that they had received it, had received it only as bankers.

THIS was an appeal by the trustee in bankruptcy from a judgment of Williams, J., sitting in bankruptcy, declaring that certain money standing to the credit of the bankrupts was not part of the bankrupts' estate.

By his will Captain Blane left certain property to trustees upon trust for his widow, Mrs. Blane. The trustees were R. A. Blane and C. W. Hallett, who were also the executors of his will.

C. W. Hallett was a partner in the firm of bankers of Hallett and Co.

The trustees had an account at the bank of Hallett and Co., and the dividends and income of the trust property were received by Hallett and Co., and the account of the trustees was credited with the amount.

Part of the trust property consisted of debentures in Hewitt and Co. Limited. These debentures became payable in Jan. 1893, and the trustees signed an authority, in the form of a receipt, for Hallett and Co. to receive the amount of 1600*l.* payable in respect of these debentures. This sum was to be placed to the credit of the account of the trustees with Hallett and Co. until they had decided how to re-invest the money.

When the 1600*l.* became payable from Hewitt and Co., Hallett and Co. had to pay moneys to Hewitt and Co. on account of customers. The amount payable by Hallett and Co. to Hewitt and Co. was 300*l.* more than the amount which they had to receive from Hewitt and Co., and the result was that Hallett and Co. did not receive any money, but paid 300*l.*, by cheque upon themselves, to Hewitt and Co.

Hallett and Co. had a banking account at the bank of Messrs. Cocks and Biddulph, and at the date of their bankruptcy had a sum of more than 4000*l.* standing to their credit at Messrs. Cocks and Biddulph's bank.

Hallett and Co. failed on the 11th March 1893, and the three partners, including C. W. Hallett, the trustee, were adjudicated bankrupts.

In Feb. 1893 the financial position of the bank was most unsatisfactory, as was known by the trustee C. W. Hallett.

R. A. Blane, the other trustee, moved for a declaration that a certain sum of money forming part of the trust estate under the will of Captain Blane, vested in the applicant and in the debtor W. C. Hallett, which was received by W. C. Hallett and his firm for the specific purpose of application in accordance with the terms of the will, and with knowledge that the same was part of such trust estate and of the purposes for which the same were applicable, did not form part of the property of the bankrupts divisible among the creditors or subject to the Bankruptcy Act; and also for a declaration that the said trust estate was entitled, out of the funds and property now or hereafter in the hands of the official receiver or trustee (if appointed) representing the assets of or in the hands of the debtors as bankers at the date when they suspended payment, to be paid the said sum of 1600*l.*

Muir Mackenzie in support of the application.—The *cestui que trust* is entitled to be paid her money out of the funds in the hands of the official receiver, which represent the assets of the debtor. The debtor was trustee and member of the firm of Hallett and Co. They were agents, and received this money to apply in a particular way, but

(a) Reported by J. H. WILLIAMS and WALTER B. YATES, Esqrs., Barristers-at-Law.

CT. OF APP.]

Re HALLETT; *Es parte* THE TRUSTEE.

[CT. OF APP.]

instead of carrying out their instructions they mixed the money with their own :

Frith v. Carliland, 15 L. T. Rep. N. S. 175; 2 Hem. & M. 417.

I wish to extend the doctrine of that case to the case of an agent receiving trust money with knowledge of its character. They knew this was trust money, as the debtor was both trustee and a member of the firm, and was the partner who superintended this part of the firm's business. [WILLIAMS, J.—Even so; but where is the evidence that this money was received for any specified purpose?] One active member of the firm knew that this money ought to be re-invested, but he mixed it with the ordinary funds of the firm :

Re West of England Bank; Es parte Dale, 40 L. T. Rep. N. S. 712; 11 Ch. Div. 772.

See too

Re Hallett's Estate, 42 L. T. Rep. N. S. 421; 13 Ch. Div. 696.

Why cannot this money be followed? It was not received in the ordinary way of business; they were agents to get in these securities and invest the proceeds, and they did not do so. [WILLIAMS, J. referred to *Es parte Cooke*; *Re Strachan*, 35 L. T. Rep. N. S. 649; 4 Ch. Div. 123.] In any case, if C. W. Hallett had committed a breach of trust in lending this money to his own firm, and the firm knew he had committed a breach of trust and received the moneys, and allowed them to remain in their hands, then those moneys are not distributable amongst the ordinary body of creditors. Now, (1) C. W. Hallett must have known his firm were insolvent: he was the active partner three or four weeks before the firm stopped payment on the 25th May; he admits the firm felt financial pressure, and in the February preceding, this money was lent to them by himself. I submit he knew they were insolvent, and committed a breach of trust by lending to an insolvent firm money which as trustee he ought to have re-invested. (2) All the members of the firm must be taken to have the same knowledge in this matter as the active member had. (3) It is not disputed that the moneys were received and allowed to remain with them. These three conditions being fulfilled, we are entitled to receive these moneys back again.

Herbert Reed, Q.C. and *Carrington* for the trustee.—Messrs. Hallett and Co. were bankers. Clearly the accounts were kept in the ordinary way, and no charge was made for commission. That being so, this money belongs to the general body of creditors, and a person cannot follow trust property by getting a charge on the general estate; this would be extending the doctrine of *Re Hallett's Estate* (42 L. T. Rep. N. S. 421; 13 Ch. Div. 696) too far. The bankers never received this money at all. [WILLIAMS, J.—Yes, they did, as in their pass-book they say: "By Hewitt and Co. debentures paid off 1600l."] Even if so, there was no breach of trust in the executors in paying the money to the bank, both capital and interest. If they had a current account it would be lawful to pay the money into it. [WILLIAMS, J.—The word used is "responsible" bankers. Suppose Mr. Hallett had been the sole partner.] He would have been lending then, no doubt, to

himself, but this bank was a responsible bank as the testator himself trusted it. Here our partner knew nothing about this, and another is not shown to have known anything. We say there was no breach of trust; the bankers had authority to receive the money, and that money would have come home but for the accident that the bankers had money to pay out. [WILLIAMS, J.—If the trustee appreciated the true position of his bank his plain duty was to say, We ought not to receive this money. If there was a breach of trust, can you impute to the firm the knowledge of the individual partner? Next, trust money can only be followed when (a) the money is actually there; (b) when it can be identified if converted into something else; (c) when mixed, and, though it cannot be picked out, yet it is clearly there; here you cannot say what is to be followed, or where it came from, and further, in this case everything was on three occasions drawn out of the account.

Muir Mackenzie in reply.—The lending of the money to the bank was a breach of trust for which the three partners are liable, and this money was received in such a way that it can be followed, and is there. (1) The trustee was not justified in placing the money in a bank that he must have known was insolvent; this was a breach of trust. (2) The other partners knew it was there, and the account is actually headed, "Executors of Captain R. A. Blane."

WILLIAMS, J.—This was a motion for a declaration (1) that a certain sum of money, amounting to 1600l. 4s. 2d., being a balance of money forming part of the trust estate under the will of Robert Arthur Blane, vested in the applicant, Mr. Robert Arthur Blane, the co-trustee, and the debtor, W. C. Hallett, and which was received by W. C. Hallett and his firm for the specific purpose of application in accordance with the trusts of the will, and with knowledge that the same were part of such trust estate and of the purposes for which the same were applicable, did not form part of the property of the bankrupt divisible amongst the creditors or subject to administration under the Bankruptcy Act. (2) For a declaration that the said trust estate is entitled, out of the funds of property now or hereafter in the hands of the official receiver or trustee (if appointed) representing the assets of or in the hands of the debtor as bankers at the date when the suspended payment, to be paid the said sum of 1600l. In this case the question is whether Miss May Georgina Blane, the *cestui que trust* entitled to certain capital moneys left to trustees by the will of Captain Blane, can follow those moneys and claim to have them paid to her on the bankruptcy of the trustee, W. C. Hallett, and the banking partnership in which such trustee was partner, and into which bank the moneys in question were paid. The facts of the case seem to be, that Captain Blane, by his will, left certain funds to trustees, such trustees being Robert Arthur Blane and the bankrupt, W. C. Hallett, in trust for Mrs. Blane. The trustees were the executors of the will. The trustees signed on the 13th April 1892 an authority witnessed by Messrs. Hallett and Co., bankers, in which W. C. Hallett, the trustee, was a partner. The authority was as follows: [His Lordship read the authority.] The partnership consisted of

[CT. OF APP.]

Re HALLETT; *Ex parte* THE TRUSTEE.

[CT. OF APP.]

three persons, Mr. Hallett the elder, and his two sons, of whom Mr. W. C. Hallett, the trustee, was one. The business of the bank had for some years been actively managed by the sons. The financial position of the bank on the 7th Feb. 1893 was most unsatisfactory, as the two active partners must have perfectly well known, and I find I did not know. Part of the trust funds consisted of debentures in a company of the name of Hewitt and Co. Limited. Some of these debentures were paid off at the beginning of the year 1893. The trustee signed an authority to the bank of Hallett and Co. to collect the money when paid off. The authority was asked for in a letter of the 27th Jan. 1893, and runs as follows: "We inclose debentures for 1600*l.* in Messrs. Hewitt and Co. Limited, maturing on the 3rd inst., and shall be obliged by your signing receipts indorsed on each of them, and by your returning them to us." And thereon the two trustees, Colonel Blane and Hallett, each of them signed the receipt referred to in the letter. The letter was prepared by the clerks of the bank in the ordinary course of business. Before the money was paid a correspondence had passed between the two trustees as to the re-investment of the money resulting from the payment off of the debentures, and it was determined to postpone the choice of re-investments until the debentures should in fact have been paid off. When the time came for paying off the debentures Messrs. Hallett and Co. had both moneys to receive on account of customers holders of debentures, and moneys to pay to Hewitt and Co. Limited on behalf of customers who chose to re-invest. The moneys payable exceeded by 300*l.* the moneys receivable. The result was, that Messrs. Hallett never received the 1600*l.*, the amount paid for the trust debentures, at all, but were only allowed that amount in the settlement of the transactions with Hewitt and Co. Messrs. Hallett banked with the National and Provincial Bank and with Cocks, Biddulph, and Co. In my judgment the current account of Hallett and Co. with Cocks, Biddulph, and Co. became on the 3rd Feb. 1893 in credit to the extent of 1700*l.* and odd more than it would have been but for the payment off of the debentures. Messrs. Hallett failed on the 11th May 1893, with a large amount of unsecured debts, a sum of 97,000*l.* I think. From the time of the receipt of the 1600*l.* down to the failure of Messrs. Hallett, the account of Messrs. Hallett was never in debit, and never in credit for a less sum than the 1600*l.* It seems to me, therefore, that if Mr. Hallett, the trustee, had banked with Cocks, Biddulph, and Co., and mixed his trust money with his own moneys in the banking account, and then become bankrupt, the decision in *Hallett's case* (*ubi sup.*) shows that this 1600*l.* could have been identified and followed as his trust money, and further shows that the rule in *Clayton's case* (1 Mer. 572) could not apply; but, by reason of the paramount rule, that a man must be supposed to have drawn out money which he is honestly entitled to draw out rather than trust money which he is not entitled to use, 1600*l.* of the 4000*l.* standing to the credit of Hallett and Co. with Cocks, Biddulph, and Co. at the date of failure must have been deemed to be 1600*l.* of trust money. Now, that being so, how is the matter affected by the fact that Mr. Hallett was one of the two co-trustees, that the co-trustees,

both of them, paid the money into a bank in which Mr. Hallett was a partner, and that that bank, in which Mr. Hallett was a partner, paid the money into their account with Cocks, Biddulph, and Co.? The answer to this question seems to me to depend on whether the money when received by Messrs. Hallett's bank was received by them as trust money, or as a loan simply. If it was received as trust money, then by the very terms of sect. 44 of the Bankruptcy Act 1883, this money, being trust money, would not pass to the creditors in the bankruptcy. It was contended by Mr. Mackenzie that the money in question was received by Messrs. Hallett as agents, and not as bankers. I am, however, clearly of opinion that Messrs. Hallett received the money as bankers, and it seems to me that the money must be held to be part of the general assets of Messrs. Hallett distributable amongst their creditors, unless it can be shown that the money was received by Messrs. Hallett with notice of the breach of trust. If it was received with such notice, it remained trust money in the hands of the bank, notwithstanding the fact that they received it as bankers. Now, a trustee is entitled, pending investment, to pay money into a bank for safe custody; that is, he is entitled temporarily to lend the money to the bank, provided he identifies the money as trust money, and pays it to a trust account, but the bank must be a responsible bank. A trustee paying money into a bank which he knows or ought to know not to be responsible, is guilty of a breach of trust. In my opinion Mr. Hallett, the trustee, was guilty of a breach of trust when he ordered this money to be collected by Messrs. Hallett's bank, and I think that all the partners of the bank had notice of the breach of trust, because they all must be taken to have known that the money was trust money, and to have known of the financial condition of the bank. Under these circumstances I think the applicant is entitled to the declaration asked for, that, of the money standing to the credit of Messrs. Hallett and Co. with Messrs. Cocks, Biddulph, and Co., 1600*l.* can be identified as trust money, and as such will not pass to the general estate of the creditors of Messrs. Hallett. I limit my declaration to that. I make no order that the money shall be paid out to the applicant, because it is manifest that I ought not to make any such order till it has been ascertained for certain whether there are or are not other persons who have an equally good claim to that of the applicant. I have only to add that here I treat the applicant as representing the *cestui que trust*, and accordingly think it unnecessary to make any statement as to what may be the position of the other trustee. I only say, assuming he is responsible with Mr. Hallett for the breach of trust, it does not seem to me that that prevents him from successfully making this motion in his representative character of trustee. I desire to say nothing about the account at the National Provincial Bank, as my attention has not been drawn to that.

The trustee in bankruptcy appealed.

Herbert Reed, Q.C. and *Carrington* for the appellant.—In this case the proceeds of the trust estate could not be followed. They never were in fact received by Hallett and Co., and therefore, there was nothing to follow. Even if Hallett and Co. had received it, it could not have been followed,

[CT. OF APP.]

Re HALLETT; *Ex parte* THE TRUSTEE.

[CT. OF APP.]

because it was received by them as bankers only in the ordinary course of business, and became part of their assets; they were not in any way bound to keep that money separate, or to put it apart as trust money; they did not in fact in any sense do so; and nothing representing that sum was ever paid into their account with Cocks and Biddulph. Williams, J. sought to apply the rule laid down in *Re Hallett's Estate*; *Knatchbull v. Hallett* (42 L. T. Rep. N. S. 421; 13 Ch. Div. 696) to this case; but the decision in that case was only that if a trustee mixed trust money with his own in his own banking account it could be followed, and that it would be presumed that he had drawn upon his own money and not upon the trust money. Here it is sought to follow money into the hands of the bankers. If that could be done, no banker could safely receive trust money in the ordinary way of banking. Trust money can only be followed in the hands of trustees, or where there is any specific property which represents it:

Frith v. Cartland, 12 L. T. Rep. N. S. 175; 2 H. & M. 417.

If the bankers received this money as bankers, notice that there was a breach of trust in paying to them, if the fact that one of the trustees was a partner affected them with such notice, would make no difference.

Muir Mackenzie for the respondent.—This sum of 1600*l.* can be traced and followed. It was paid to Hallett and Co. by Hewitt and Co.; the settlement of accounts between them was the same as if the money had actually been paid over to each party; the set-off was equivalent to payment. This sum of 1600*l.* did go to the account of Hallett and Co. with Cocks and Biddulph, and formed part of the 4000*l.* standing to the credit of Hallett and Co. If the 1600*l.* had not been used to pay Hewitt and Co., an equal sum must have been drawn by Hallett and Co. from their account with Cocks and Biddulph. When Hallett and Co. were authorised to receive this money, one of the trustees knew that they were in an unsatisfactory financial position, and it was therefore a breach of trust to allow them to receive it; and Hallett and Co. had notice of that breach of trust through their partner who was one of the trustees; the money, therefore, can be followed into their hands.

Reed, Q.C. was not heard in reply.

Lord ESHER, M.R.—When we carefully follow the steps of the transaction in this case, the conclusion is quite clear. The real question is, whether the trustees of *Mrs. Blane* are only creditors of the estate of Hallett and Co. who are entitled to prove, or whether they are in a better position. The trustees had the legal interest in certain debentures of Hewitt and Co. Limited; they were trustees of those debentures for *Mrs. Blane*; they had an account as trustees at the bank of Hallett and Co., and as customers of that bank authorised Hallett and Co. to receive the proceeds of the trust investments and to pay them into their account. The moment such money, the proceeds of the trust investments, was received by Hallett and Co. they credited the account of the trustees with the amount, and the money became the property of the bankers to do with it as they liked. The time arrived when these debentures were to be paid off. The trustees signed certain papers, in the form of receipts,

which authorised Hallett and Co., their bankers, to receive the proceeds of the debentures, i.e., the capital money invested in them. In the court below *Williams, J.* has found as a fact that the authority was given to Hallett and Co. as the bankers of the trustees. Hallett and Co., therefore, had the same authority to receive the capital money as they had to receive the income of the trust investments. Their authority was to receive the capital of the debentures from Hewitt and Co. for the trustees as their bankers. What is the result? The result is the same as when Hallett and Co. received the dividends upon the trust investments. Hallett and Co. were to receive the money, and credit the account of the trustees with a similar sum; the money received became theirs, and they became the debtors of the trustees, as their customers, for that amount. Hallett and Co., therefore, had a right to use that money in any way they pleased, and they made use of it in the transaction between themselves and Hewitt and Co. If Hallett and Co. knew that this was trust money, and if they received it, and if it could in fact be followed, then I daresay that the equitable doctrine of following trust money might apply. In this case, however, can the trustees show that Hallett and Co. ever did receive the money? and, even if they could, can they show where that money is to be followed? In truth Hallett and Co. did not receive the money at all; no money passed between them and Hewitt and Co. If, then, Hallett and Co. did not receive any money, there was nothing tangible which could be followed. Therefore, although the trustees might have been able to follow if there had been anything tangible to follow, yet if nothing tangible passed to Hallett and Co. there was nothing for the trustees to follow. That seems to me to be the result in this case, and I think that the position of the trustees is only that of creditors of the estate of Hallett and Co. the same as other creditors. They cannot show that they are more than ordinary creditors, and that they are entitled to follow any money. The decision of *Williams, J.* was wrong, and this appeal must be allowed.

LOPES, L.J.—I am of the same opinion. So far as the claim to follow the money in this case is concerned, the attempt fails at the very first step, because the money never was received at all by Hallett and Co.; there was a mere settlement of accounts between them and Hewitt and Co., and no money passed to them at all. Again, as to the next stage, the money never went into the hands of Messrs. Cocks and Biddulph. The result is, that it follows that the money is not ear-marked, and cannot be identified, and that the trustees are, therefore, only ordinary creditors.

DAVEY, L.J.—Nothing that we decide in this case will infringe upon the judgment in *Knatchbull v. Hallett* (*ubi sup.*); but it must be observed that, in order to follow trust money, the person claiming to follow must show some specific property capable of identification into which the trust money has gone. In *Knatchbull v. Hallett* (*ubi sup.*) the rule was applied thus: If a person who holds money pays it into his own account at his bankers, the *cestui que trust* can follow it, and if the money is mixed with the trustee's own money, the rule in *Clayton's case* (1 Mer. 572)

does not apply, and the trustee must be taken to have drawn out his own money in preference to the trust money. That case does not affect the rule that, in order to follow trust money the person seeking to follow must show some specific fund or thing into which the trust property has gone. It is said in this case that Hallett and Co. received 1600*l.* trust money, and paid it into their account at Messrs. Cocks and Biddulph, and that the money is still there. Assuming that, if that were so, the trustees could succeed, yet both propositions are wrong. Nothing existing in specie passed to Hallett and Co. from Hewitt and Co., and there was nothing at all which could be followed; there was only a transaction of set-off. I will, however, assume that Hallett and Co. did receive the 1600*l.* in sovereigns, or in bank-notes. Into what was that money converted? Was it lent by Hallett and Co. to Messrs. Cocks and Biddulph so as to be part of the debt now due from the latter to the former? No. It was applied in paying Hewitt and Co. on behalf of other customers of Hallett and Co. In any case I do not see how the assets of Hallett and Co. were in any way increased by means of this 1600*l.* In fact Hallett and Co. never did pay the 1600*l.* into Messrs. Cocks and Biddulph in any way; they never lent that money to Messrs. Cocks and Biddulph at all, and they never got credit for that amount from Messrs. Cocks and Biddulph. It is manifest to me that the account of Hallett and Co. at Messrs. Cocks and Biddulph was never increased by reason of this 1600*l.* The second proposition of the trustees is, therefore, absolutely unfounded. The question whether there was or was not a breach of trust in permitting Hallett and Co. to receive this money as bankers does not in the least affect the question now before the court, and I do not express any opinion whether there was a breach of trust or not. I think that this appeal must succeed.

Appeal allowed.

Solicitors: for the appellant, *Rooper and Whateley*; for the respondent, *Norton, Rose, and Norton*.

Tuesday, Feb. 20.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

HUGHES v. JUSTIN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Irregular judgment—Setting aside—Default of appearance—Judgment signed for more than due when judgment signed—Order XIII., r. 3.

Under Order XIII., r. 3, which provides that, where the writ is indorsed for a liquidated demand and the defendant fails to appear, the plaintiff "may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest . . . and costs," judgment in default of appearance must be signed only for the amount actually due at the time of signing judgment. A judgment signed for more than the amount actually due is an irregular judgment, which the defendant is entitled to have set aside ex debito justitiæ.

APPEAL of the defendant from an order of the Divisional Court (Mathew and Collins, JJ.) reversing an order of Kennedy, J. at chambers, setting aside the judgment signed in the action.

The plaintiff had a claim against the defendant, in respect of goods sold and delivered for 25*l.*, and he instructed his solicitor to recover the same. The defendant asserted that he had a counter-claim for delay in delivering the goods.

On the 4th Sept., in the morning, the plaintiff's solicitor issued a writ against the defendant for 25*l.*

On the same day, in the afternoon, the plaintiff and defendant met and discussed the matter. Neither of them then knew that the writ had been issued. It was arranged that the defendant should pay 25*l.* 10*s.* to the plaintiff in settlement of his claims. The defendant paid this sum, and got a receipt, stating that it was in settlement of account to date. Nothing was said as to costs.

The writ was served upon the defendant on the 8th Sept., and he was told he would have to pay the costs. He refused to do so, and did not enter an appearance.

Judgment was signed, in default of appearance, for 25*l.* and costs; execution was issued and levied for the amount of the costs only, and the execution was paid out by the defendant.

The defendant applied at chambers to have the judgment and execution set aside, and the master made an order to that effect, which was affirmed by Kennedy, J. at chambers.

Upon appeal to the Divisional Court, the Court (Mathew and Collins, JJ.) held that the judgment was properly signed, and reversed the order of the judge and of the master.

The defendant appealed.

Colam (Morton Smith with him) for the appellant.—The plaintiff accepted the sum paid by the defendant in discharge of all liabilities then existing, whether as to costs or otherwise, and he could not proceed with the action for the purpose of obtaining the costs of the writ. The judgment was clearly wrong and irregular. The plaintiff having been paid the amount due to him could not sign judgment for that amount. He could only sign judgment for the amount due at the time of signing judgment, that is, for costs:

Hodges v. Callaghan, 2 C. B. N. S. 306;

Order XIII., r. 3.

Channell, Q.C. and Gregson Ellis for the respondent.—Though judgment was signed for 25*l.* and costs, execution was issued for the costs only. The case of *Hodges v. Callaghan (ubi sup.)* was considered in *Huffer v. Allen* (15 L. T. Rep. N. S. 225; L. Rep. 2 Ex. 15), and the latter case shows that the proper course is only to amend the judgment, and not to set it aside. In *Hodges v. Callaghan (ubi sup.)* the judgment was corrected and the amount reduced to the proper sum. In *McCormack v. Melton* (1 A. & E. 331) it was held that the proper practice was to amend the writ of execution when it was issued for too much. That case followed the earlier case of *Laroche v. Washbrough* (2 T. R. 737), in which Lord Kenyon said: "The justice of the case requires that we should permit the plaintiff to amend. If the defendant had indeed suffered by the excess in the execution, that might have varied the case; but here he has not sustained any damage." In this case the defendant has not sustained any damage, because

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

CT. OF APP.]

BAKER v. CARRICK.

[CT. OF APP.]

execution was issued only for the right amount. There was merely a mistake in signing judgment, which ought to be corrected by amending the judgment.

Colam in reply.—The defendant is entitled as of right to have the judgment set aside:

Anlaby v. Praetorius, 58 L. T. Rep. N. S. 671; 20 Q. B. Div. 764.

LORD ESHER, M.R.—In this case the plaintiff issued a writ against the defendant for a debt of 25*l.* He was justified in issuing that writ because the debt was then due to him from the defendant, and the writ, therefore, was regularly issued. Before the writ was served the plaintiff and the defendant met together. Neither of them then knew that the plaintiff's solicitor had issued the writ. The plaintiff of course knew that he had instructed his solicitor to proceed; but he did not know what had been done. At the interview there was a discussion between the parties, and it was settled that the defendant should pay 25*l.* 10*s.* That was a settlement of the dispute between the parties, but the costs of issuing the writ, if the plaintiff was entitled to such costs, were not included in the settlement, but were left outside of it. What were the plaintiff's rights then? He had been paid all the debt which was due to him from the defendant. According to the true construction of Order XIII., r. 3, which is in the same terms as sect. 27 of the Common Law Procedure Act 1852, the result is that the plaintiff was right in issuing his writ, but was wrong in signing judgment for more than was due to him at the time when judgment was being signed. Judgment ought to have been signed only for such costs as were then due. In fact, judgment was signed for 25*l.* and costs. According to the true construction of Order XIII., r. 3, that was a wrong and irregular judgment. Thereupon the defendant took out a summons at chambers and asked to have the judgment set aside. If the judgment was irregular, the defendant was entitled as of right to have it set aside. That is decided in *Anlaby v. Praetorius* (*ubi sup.*). The master did set aside the judgment. If he had been asked by the plaintiff to impose terms, perhaps he would have done so; but he was not asked to do so. The master set aside the judgment, and was right in so doing. Then, upon an appeal by the plaintiff, the judge at chambers came to the same conclusion as the master that the judgment must be set aside. The plaintiff then appealed to the Divisional Court asserting that the judgment had been rightly signed, and the decision of the Divisional Court was that the judgment ought to stand and ought not to have been set aside, and the defendant was ordered to pay all the costs. The decision of the Divisional Court was that the judgment for 25*l.* must stand, and the plaintiff was obliged to come to this court to get that set right. Upon the true construction of Order XIII., r. 3, I think that the defendant had a right to have the judgment set aside, and that he was therefore right all through these proceedings. We must therefore, in the first place, hold that this judgment must be set aside, and that the appeal must succeed. Upon what terms ought we to give costs to the appellant? The proper judgment for the plaintiff to sign would have been a judgment for costs only up to the

time of signing judgment, i.e., the costs of issuing the writ and of serving it and of signing a proper judgment. The plaintiff cannot be entitled to the costs of signing the irregular judgment. We will say, then, that the plaintiff is entitled to the costs of issuing and serving the writ and no more, and that he may retain so much out of the money paid to him, but must repay the balance. The plaintiff must pay all costs both here and below, and the defendant must undertake not to bring any action.

LOPES, L.J.—I am of opinion that this judgment ought to be set aside. It was irregular and cannot stand. I do not think that the Divisional Court would have decided the case as they did in the case of *Hodges v. Callaghan* (*ubi sup.*) had been brought to their notice. That case is, I think, distinctly in point. It was decided under sect. 27 of the Common Law Procedure Act 1852, which was in much the same terms as Order XIII., r. 3. In that case Willes, J. says: "But when we come to deal with sect. 27 (C. L. P. Act 1852) the case is stripped of all technical difficulties arising from the rules of pleading. Under that section there are no pleadings; the plaintiff having indorsed on the writ of summons the amount he seeks to recover, is empowered, in case of non-appearance by the defendant, to sign judgment for any sum not exceeding the sum indorsed on the writ, with interest and costs. The sum indorsed may have been reduced by payment; and that is the case in which it was necessary to give the plaintiff the option of signing judgment for the sum indorsed or any less sum, so as to represent the amount actually due at the time the judgment is signed. It is absurd to suppose that the statute intended to give an option to be exercised at the mere caprice of the plaintiff. The plaintiff ought to represent the court as pronouncing judgment in his favour only for the sum which is really due to him." The same words are used in Order XIII., r. 3; and, upon the authority of the above case, the defendant had a right, *ex debito justitiae*, to have this judgment set aside; and the case of *Anlaby v. Praetorius* (*ubi sup.*) also shows that the defendant had such a right. That being so, it follows, as the Master of the Rolls has stated, that the judgment must be set aside and the appeal allowed, the plaintiff paying the costs both here and below, but retaining the amount of costs properly incurred before the judgment was signed, and the defendant undertaking not to bring any action.

DAVEY, L.J.—I am entirely of the same opinion.

Appeal allowed.

Solicitors: for the appellant, Stanley Evans and Co.; for the respondent, George Castle.

Feb. 21 and 22.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

BAKER v. CARRICK. (a)

APPLICATION FOR A NEW TRIAL.

Defamation—Libel—Privileged occasion—Statement by solicitor to protect client's interests—Evidence of express malice.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

CT. OF APP.]

BAKER v. CARRICK.

[CT. OF APP.]

When a solicitor has been instructed by a client to recover a debt alleged to be due to him, a letter containing defamatory statements written by the solicitor for the purpose of protecting his client's interests in respect of the alleged debt is published upon a privileged occasion.

When defamatory statements are published upon a privileged occasion, the plaintiff does not satisfy the onus which lies upon him of proving malice in fact, if the evidence is as consistent with the absence of, as with the existence of, malice in fact.

THIS was an application by the defendant for judgment, or for a new trial, on appeal from the verdict and judgment at the trial before Cave, J. and a jury, at Cambridge.

This action was brought by the plaintiff to recover damages from the defendant for an alleged libel.

The defendant was a solicitor, and had been instructed by clients to recover from the plaintiff debt alleged by the clients to be due to them from the plaintiff.

The plaintiff had instructed an auctioneer to sell his furniture and effects for him, and the auctioneer was about to sell the same.

The defendant wrote the auctioneer a letter as follows:

As solicitors for William Henry Copley and Arthur William Clark, of Wisbech, surgeons, we give you notice that an action has been commenced in the High Court of Justice, Queen's Bench Division, against John Thomas Baker, late of Leverington, near Wisbech, implement manufacturer, for the recovery of the sum of £21. 6s., and to the said William Henry Copley and Arthur William Clark, and that the said John Thomas Baker has committed an act of bankruptcy upon which an order of bankruptcy may be made against him; and we give you further notice that you are not to part with or pay over to any person, pending the trial of the said action or of any proceedings in bankruptcy which may be instituted against the said John Thomas Baker, any moneys which you may receive as the proceeds of sale of the goods and effects of the said John Thomas Baker, advertised to be sold by you on the second day of October next; and hereof fail not at your peril.

The action was tried before Cave, J. and a jury at Cambridge, and the learned judge held that the occasion was privileged, but that there was evidence of malice in fact. The jury found a verdict for the plaintiff.

The facts proved at the trial either showed that the defendant honestly and *bonâ fide* believed in the truth of the statements made in the letter, or were, at any rate, equally consistent with that view as with the view that he had no such honest and *bonâ fide* belief.

The defendant appealed, asking for judgment for a new trial.

Murphy, Q.C. and Horace Browne for the appellant.—The occasion upon which this letter was written was a privileged occasion. It was written by a solicitor for the purpose of protecting the interests of his client. If written by the client himself it would clearly have been a privileged occasion, and the occasion is none the less privileged because the letter is written by the solicitor on behalf of his client:

Blackham v. Pugh, 2 C. B. 611.

There was no evidence of malice in fact. The onus of proving malice in fact was upon the plaintiff, and all the facts proved were perfectly

consistent with an honest and *bonâ fide* belief by the defendant in the statements which he made. If the facts are equally consistent with the absence of malice as with the existence of malice, the plaintiff has not proved malice:

Spill v. Maule, 20 L. T. Rep. N. S. 675; L. Rep. 4 Ex. 232.

Kemp, Q.C. and A. G. McIntyre for the respondent.—The occasion was not privileged. A solicitor's duty to his client in such a case as this is to conduct the action from writ to judgment and execution, but not to write any such letter as was written by the defendant. It was entirely beyond the duty and the employment of the solicitor to write such a letter and give such a notice. The solicitor was instructed to sue for the alleged debt and not to give notice to a third person as to money which his client might never become entitled to get hold of in any way. It is admitted that, if the client had written this letter, the occasion would have been privileged, but the solicitor did not write it upon a privileged occasion. There was ample evidence of malice in fact, for the defendant made these statements, which were untrue, recklessly and without any *bonâ fide* belief in their truth.

Lord ESHER, M.R.—The plaintiff brought this action to recover damages from the defendant, a solicitor, for an alleged libel. The alleged libel was contained in a letter which the solicitor, acting for a client, wrote, when the plaintiff's property was being put up for sale, giving notice to the auctioneer that the plaintiff had committed an act of bankruptcy, and warning him not to part with the proceeds of the sale. The first matter in dispute is, whether the letter was written upon a privileged occasion as regards the solicitor. The solicitor was acting on behalf of Mr. Copley, who said he was a creditor of the plaintiff, and he was instructed by Mr. Copley to see that the debt due to him was not put into jeopardy of being lost. That would be within the ordinary duties of a solicitor. It has been suggested on behalf of the plaintiff that a solicitor who is instructed to recover a debt only has authority from his client to act in the conduct of litigation; that is, to serve a writ and proceed upon it. In my opinion the ordinary duty of a solicitor goes beyond that, and it is his duty to see that nothing happens according to law which may make legal process futile. This solicitor, therefore, was acting in the ordinary course of his duty as a solicitor in writing that letter. If, therefore, the occasion would have been privileged in respect of his client, it is also privileged in respect of the solicitor. That being so, the judge was bound to direct the jury to find a verdict for the defendant, unless there was evidence before the jury which would destroy the privilege; that is to say, evidence that the solicitor had abused, as it is said, the occasion. A person abuses the occasion if he uses it, not fairly for the purpose of the occasion, but in order to gratify some malicious feeling or from some indirect motive. Now, was the defendant actuated by malice? Malice is a question of fact, and malice in fact must be proved in order to rebut the defence of privilege. One way in which such malice may be proved is by showing that the defendant stated that which he knew to be untrue; it can also be proved by showing that the defendant used the

CT. OF APP.]

BOXSIUS v. GOBLET FRÈRES AND OTHERS.

[CT. OF APP.]

occasion to gratify his own spite or malicious feelings. What reason is there to suppose that this solicitor did either of those things? It is said that there was evidence of malice in this case, because the defendant stated that which was not true, reckless whether it was true or false. Is there any evidence of that? If the evidence is equally consistent with either view, that the defendant acted honestly or not, then there is no case to go to the jury, because the onus of proof is on the plaintiff. I think that in this case the evidence is at any rate quite consistent with an honest belief by the defendant that he was stating what was true, and that there was, therefore, no evidence of malice. If the defendant honestly believed what he wrote that is sufficient: (*Spill v. Maule (ubi sup.)*) Upon the facts of this case I am of opinion that there was no evidence to go to the jury of malice in fact, and that the judge ought to have directed the jury to find a verdict for the defendant. This appeal, therefore, must be allowed, and judgment entered for the defendant.

LOPES, L.J.—I am of the same opinion. It is the duty of a solicitor to do everything lawful to protect the interests of his client, and the defendant therefore stands in the same position in this respect, as Copley would have done. It is clear to me, therefore, that this occasion was privileged. That being so, if there was no evidence of express malice on the part of the defendant, the defendant was entitled to a verdict. The burden of proof as to express malice is upon the plaintiff. The plaintiff must show that the occasion was abused. By "abused" I mean that the occasion was used for an indirect purpose, such as gratifying spite. The occasion is "used" when the statement is fairly made with respect to the occasion. That being so, the question arises whether there was any evidence of any indirect purpose on the part of the defendant. That comes to this: did the defendant honestly believe what he stated in the letter? I think that he did, and that the facts proved show that he did. There is nothing whatever to show that he did not honestly believe that his client's debt was in jeopardy, whether it was reasonable or not so to believe, and that the statements he made were true. Assuming, therefore, that there was no reasonable ground for his belief, yet the honest belief is sufficient. Even if the evidence is as consistent with no honest belief as with an honest belief, the defendant is entitled to a verdict, for the plaintiff has not discharged the burden of proof which lies upon him. I think that judgment must be entered for the defendant, and the appeal be allowed.

DAVEY, L.J.—I am of the same opinion. The plaintiff has raised two points: first, that the occasion was not privileged; second, that there was evidence of malice in fact. It is not disputed that, if the statements had been made by Copley, the occasion would be privileged, but it is said that because the statements were made by Copley's solicitor the occasion was not privileged. No authority or principle has been adduced in support of that proposition, and in the absence of such authority or principle it appears to me that, on principle, in a case of this kind the solicitor is the agent of his client to make such a statement in the ordinary course of his employment on behalf

of his client. It is contended that there was evidence of malice in fact. If there was malice in fact the defence of privilege is rebutted. The plaintiff must show that there was malice in fact. In *Spill v. Maule (ubi sup.)* Cockburn, C.J. says: "If implied malice is rebutted by the existence of privilege, actual malice may be set up by the circumstances of the case compared with the language used; and this is a question of degree to be judged of in each case by seeing whether, under the circumstances proved, the language could have been used honestly and *bona fide*." The burden of proving that the statements were not made honestly and *bona fide* is upon the plaintiff. The question, therefore, is whether the plaintiff has given such evidence as to show that the statements were not made honestly and *bona fide*. Looking at the whole of the circumstances of this case, I think that there is no ground for saying that these statements were not made honestly and *bona fide* for the purpose of protecting the interests of the client. If the evidence is equally consistent with either view, that is not enough to prove malice in fact: (*Spill v. Maule (ubi sup.)*) There was then in this case no evidence upon which the jury could find malice in fact, and judgment must be entered for the defendant.

Appeal allowed. Judgment entered for defendant.

Solicitors for the appellant, *Smiles, Ollard, and Yates, for Welchman and Carrick, Wisbech.*

Solicitors for the respondent, *Meredith, Roberts, and Mills, for Arthur Smith, Wisbech.*

Wednesday, Feb. 28.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

BOXSIUS v. GOBLET FRÈRES AND OTHERS. (a)

APPLICATION FOR A NEW TRIAL.

Defamation—Libel—Privileged occasion—Defamatory statements by solicitor in interests of client—Publication to clerks.

If a solicitor, in the discharge of his duty to, and in the interests of, his client, dictates a defamatory letter to one clerk which is copied by another clerk, the publication to the clerks is upon a privileged occasion, because it is reasonably necessary and usual in the course of a solicitor's business.

Pullman v. Hill (64 L. T. Rep. N. S. 691; (1891) 1 Q. B. 524) distinguished.

THIS was an application by the defendants for judgment on appeal from the verdict and judgment at the trial before Lawrance, J. and a jury in Middlesex, the defendants not asking for a new trial.

This was an action brought against Messrs. Goblet Frères and their solicitors to recover damages for an alleged libel.

Messrs. Goblet Frères alleged that a debt was due to them from the plaintiff, and instructed their solicitors to take steps to obtain payment of that debt.

The solicitors wrote a letter to the plaintiff demanding payment of the alleged debt, and making statements defamatory of the plaintiff.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

This letter was dictated by the solicitors to a shorthand clerk by whom it was transcribed; it was then copied by another clerk into the letter-book.

At the trial before Lawrance, J. and a jury, the jury found that the defendants honestly and *bonâ fide* believed in the truth of the statements made in the letter.

A verdict was found for the plaintiff with damages, and judgment entered accordingly.

The defendants applied for judgment, not asking for a new trial.

Montague Lush and *R. J. McNeill* for the appellants.—The decision in *Pullman v. Hill* (64 L. T. Rep. N. S. 691; (1891) 1 Q. B. 524) is relied upon in this case by the plaintiff to show that there was publication, and that the publication was not privileged. That was a case in which a firm of merchants wrote a letter containing defamatory statements, which was dictated to a shorthand clerk and copied by another clerk. A solicitor, however, is very different from a merchant. In the course of a solicitor's business he must constantly make statements which reflect upon the character of other persons when acting on behalf of his clients. He could not carry on his business, and do his duty to his clients, unless he employed clerks in the writing and copying of such statements. The occasion of the publication of the letter in this case to the solicitor's clerks was, therefore, a privileged occasion. If occasions of this kind were not privileged a solicitor could not dictate instructions for counsel, or for drawing a brief, to his clerks; and counsel could not obtain assistance from other counsel in getting up their briefs. In *Lawless v. Anglo-Egyptian Cotton Company* (L. Rep. 4 Q. B. 262) it was held that the printing of a report by directors to shareholders, which was published to the shareholders upon a privileged occasion, was not a publication to the printers which would make the directors liable in an action for libel. In that case Mellor, J. said: "I think we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged." In *Lake v. King* (1 Levinz. 240) it was held that it was justifiable to have printed a circular which would be privileged in regard to the persons to whom it was sent, upon the ground that it would have been justifiable to have it copied by clerks. Printing, dictating, and having copied are reasonably necessary modes of performing his duty on the part of a solicitor, and are therefore privileged. In several cases it has been held that statements made upon a privileged occasion are none the less privileged because made in the presence of third parties who have no interest in the matter:

Toogood v. Spyring, 1 C. M. & R. 181;

Henwood v. Harrison, 26 L. T. Rep. N. S. 938; L. Rep. 7 C. P. 606.

Blake Odgers, Q.C. and *H. A. Forman* for the respondent.—The principle of the decision in *Pullman v. Hill* (*ubi sup.*) applies to and governs this case, and that case is binding upon this court. That case related to merchants, but there can be no distinction in principle between the business of solicitors and the business of merchants. In

Pullman v. Hill, Kay, L.J. says: "The consequence of such an alteration in the law would be this, that any merchant or any solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law." The occasion was not privileged, because the letter which was written was too strong and said too much:

Tuson v. Evans, 12 A. & E. 733;

Dickson v. Wilton, 1 F. & F. 419.

[Lord ESHER, M.R.—The first of those cases would not be so decided in these days.] The publication to the clerks was not upon a privileged occasion. The solicitor could have performed his duty to his client by writing the letter himself. It is no more necessary for a solicitor than for a merchant to have this letter written or copied by clerks. A libel may be published to the clerks in a solicitor's office, and the publication not be privileged:

Bruton v. Downs, 1 F. & F. 668.

Lord ESHER, M.R.—In this action for libel we have to consider whether there has been a miscarriage of justice, and whether there ought not to have been a verdict and judgment for the defendants. In the case of *Pullman v. Hill* (*ubi sup.*) we held in this court that, if a merchant writes about a customer or other person a libel which if sent to the customer himself would be sent upon a privileged occasion, and dictates it to a clerk in his office, or gives it to a clerk to copy, that is a publication to the clerk, and is not written on a privileged occasion at all. We so held upon the ground that it is not within the ordinary course of the business of a merchant to write defamatory letters, and that, if he does write defamatory letters, it is not reasonably necessary in so doing, and is not in the ordinary course of his business, to dictate the letters to, and get them copied by, a clerk in his office. That we laid down in the case of a merchant. The question now arises in the case of a solicitor. In this case a solicitor was instructed by a client to obtain payment of an account for him, and to press for payment of that account to the extent of telling the debtor that he is seeking to evade payment by a shabby or criminal trick, and he wrote to the debtor to that effect. Now, the first point taken is, that doing this was not part of the ordinary business of a solicitor. We overruled that objection a few days ago in the case of *Baker v. Carrick* (*ante*, p. 366) because of the knowledge of business which we possess, especially as to legal practice. We said that it was part of the ordinary business of a solicitor before action to endeavour to obtain payment for his client by threatening to take proceedings of some kind. That being so, this solicitor was instructed to do that very thing, to obtain payment and to threaten legal proceedings. What he did, then, was in the ordinary course of his business. It is a usual and frequent part of the ordinary business of a solicitor to write defamatory matter relating to those persons to whom the letters are written. Everyone knows that it is so, and that a solicitor could not perform his duty to his clients without doing it. That distinguishes the case of a solicitor from that of a merchant who has no such duty to perform. We held in the case which I have mentioned, *Baker*

CT. OF APP.]

BOXSIOUS v. GOBLET FRÈRES AND OTHERS.

[CT. OF APP.]

v. Carrick (ubi sup.) that, if what is written by the solicitor would, if written by the client, be written upon a privileged occasion, then the occasion is privileged on the part of the solicitor. This solicitor, therefore, being instructed by the client to obtain payment of his account by pressure, if the letter if written by the client would have been written on a privileged occasion, it was written by the solicitor upon a privileged occasion. In this case, therefore, the letter was written to the plaintiff upon a privileged occasion on the part of the solicitor because, if Goblet Frères had written it, it would have been written on a privileged occasion. This letter, then, was written by the solicitor upon a privileged occasion. It is said, however, that the solicitor could not claim the privilege as between himself and the shorthand and copying clerk, in his office. Upon consideration that point seems to come to this: It was the duty of the solicitor to write this letter. Does it not follow that it was his duty to do so in the ordinary reasonably necessary way of performing that duty? A solicitor has duties to perform for many clients, and he has to perform all those duties with due diligence. The court, knowing what is the usual and necessary practice of a solicitor's office, is prepared to say, even without the assistance of the jury, that the court can hold that a solicitor, who had been instructed to write defamatory matter on behalf of a client, is allowed to do so in the ordinary and reasonably necessary manner of performing his duty to his client, and that that involves having such communications copied by a clerk. It has often been held that it is the proper mode of doing business in a solicitor's office to have letters copied. This case, therefore, is distinguishable from that of a merchant. When a merchant writes his own letters, it is no part of his business as a merchant to write libels at all, and not, therefore, to have them dictated to or copied by a clerk. If he does so, he does it at his risk. A solicitor, however, is bound to do so in performing his duty to his client. It is consonant with justice and good sense to hold that, in doing what he is obliged to do in the ordinary course of business for the purpose of performing his duty to his client, he is doing it on a privileged occasion. I think that where he is doing what would be done on a privileged occasion for him as regards the person written to, it being his duty to do it for his client, and it being a reasonable and necessary manner of carrying out his duty to his client to dictate the letter and have it copied, if he does it in that way, the occasion is clearly privileged, and he is not liable in an action for libel unless malice in fact is proved. In this case the jury found that there was no malice in fact, and the defendants are therefore entitled to judgment.

LOPES, L.J.—I am of the same opinion. Two questions are raised in this case. The first is, whether there was any evidence of the publication of the libel; and the second is, whether the occasion of publication was a privileged occasion. As to publication, it appears to me that there was evidence of publication of the defamatory matter to third persons; that is, to the clerks in the solicitor's office. The libel, therefore, was published by the defendants. The other question is one of more importance and difficulty. It is difficult to define in a general way what is a privileged occasion, and to say what

kind or amount of duty or interest is necessary in all cases to make an occasion privileged. For the purposes of the present case I am prepared to lay down this rule: that, if a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of his client, the occasion is privileged. Now, there would be no doubt in this case if the publication had been directly to the plaintiff, but the difficulty arises because the communication was not made directly by the solicitor to the plaintiff, but through a clerk. It is said that there was no privileged occasion as between the solicitor and his clerks. In my opinion that occasion was privileged. I think that it was reasonably necessary for the solicitor to make the communication to his clerk, and that it was usual for him to do so in discharge of his duty to his client, and in the interest of his client. We have been much pressed in argument with the case of *Pullman v. Hill (ubi sup.)*, which to some extent was a novel decision. That case, however, is clearly distinguishable. The whole ground of the decision in that case was that it was not in the usual course of a merchant's business to write defamatory matter and to communicate it to his clerks. I adhere to what I said in that case, as follows: "It is said that business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences." I venture to think that there is nothing wrong in that statement. The course of business in a solicitor's office is entirely different. It would be impossible to carry on the business of a solicitor unless defamatory matter was sometimes communicated to clerks in the office. That is the usual course of business in a solicitor's office. I am of opinion, therefore, that this occasion was privileged. If the occasion was privileged, the plaintiff must fail unless there is evidence of malice in fact. The jury have found that there was no malice in fact. The communication, therefore, was privileged, and the defendants are entitled to verdict and judgment.

DAVEY, L.J.—I am of the same opinion. This case is distinguishable from *Pullman v. Hill (ubi sup.)* upon the grounds which have been stated, and I think that our decision in this case is justified by the earlier authorities, and by good sense.

Appeal allowed. Judgment entered for defendants.

Solicitors for the appellants, *Wrensted and Sharp*.

Solicitors for the respondent, *Skipper and Tucker*.

CHAN. DIV.] MAYOR, ALDERMEN, AND CITIZENS OF BIRMINGHAM v. FOSTER. [CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 21, 22, and 23.

(Before ROMER, J.)

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BIRMINGHAM v. FOSTER. (a)

Statutory market—Private sale-yard—Disturbance—Injunction.

By virtue of a consolidating statute of 1883 the corporation of Birmingham had the sole right to establish, and had in fact, a market for pigs.

Under sect. 90 of this Act penalties were imposed upon any person selling, or exposing for sale within the borough, any animals or articles (in respect of which tolls were authorised to be taken) "except in some market or fair lawfully authorised, or in his own dwelling-place, shop, or place of business, . . . or on any farm or land in his occupation."

The defendants were an association of six individuals who had set up within the borough a sale-yard, or private market for pigs, to which the public had access during market hours, and at which the pigs of anyone might be sold. In this sale-yard there were common ways, and a common room provided for the frequenters of the market. All the sales of pigs were, however, effected through the individual members of the association, to whom alone the various stalls were let as yearly tenants; and a charge of 2d. had to be paid by them to the association for every pig sold, whether on the premises or not. There was evidence that sales took place on portions of the yard not let to the individual defendants.

Held, that what the defendants were doing as an association and as individuals was not within the exceptions in the Act of 1883, but amounted to a disturbance of the market rights of the plaintiffs, which must be restrained by an injunction.

THE defendants in this case were Daniel John Foster, and five others, who carried on business in partnership together at Birmingham, as the Birmingham Pig Salesmen's Association. The corporation of Birmingham claimed to have vested in them certain ancient manorial rights of market, and also statutory rights for holding markets for neat cattle, horses, sheep, pigs, and other goods and commodities, under the Birmingham Corporation (Consolidation) Act 1883.

By sect. 89 of this Act it was provided that the property, rights, powers, and privileges of the corporation in relation to markets and fairs should continue vested in and might be exercised by the corporation, and that they should have power to continue and provide market places for the sale of marketable articles and places for fairs.

By sect. 90 of the same Act it was enacted that every person who should sell or expose for sale within the borough of Birmingham, except in some market or fair lawfully authorised, or in his own dwelling-place, shop, or place of business, or the dwelling-place, shop, or place of business of the buyer, or intended buyer, or on any farm or land in his occupation, or in the occupation of a buyer or intended buyer, any animal, article, or thing, in respect of which tolls, rents, stallages,

or charges were by that Act authorised to be taken, should for every such offence be liable to a penalty not exceeding forty shillings; and in addition to pay all the tolls, rents, stallages, or charges which he would have been liable to pay if the animal, article, or thing had been sold in a market or fair of the corporation.

By the 91st section the corporation were authorised to demand and receive tolls. The market for neat cattle, horses, sheep, and pigs had been held in Birmingham, at a place called the Moat or Moat House, from 1824 until the 27th Oct. 1892. On this 27th Oct. 1892 the market, so far as concerned the sale of pigs, was, under the provisions of the Act of 1883, removed to a market place duly opened in Montagu-street, Birmingham. Soon after this removal, the defendants, acting together, opened an establishment in Bordesley-street, Allison-street, and Menden-street, in the town of Birmingham, for the sale of pigs, and occasionally other animals. They carried on business under a partnership deed of the 14th Oct. 1891, which provided (*inter alia*) that, upon the completion of the contemplated buildings, the partners should allocate the premises among themselves, so that the portion to be taken by each partner should be for his own exclusive occupation, and for the transaction thereof of his own *bonâ fide* business as a salesman of pigs. Each partner was under the same deed to pay to the partnership funds 2d. in respect of each pig so sold, whether sold on the partnership premises or not. The business premises consisted of a large covered yard, divided into pens with a glass roof, a caretaker's house, and a room for the use of the public, who were admitted at all times during hours of business. Portions of the said sale-yard were demised by the defendants, as an association, to the individual defendants as separate tenants, on yearly tenancies, to be held by each tenant in his separate exclusive occupation, and for his own private and separate business. In each agreement of tenancy the tenant had parts of the land granted to him with full right of way over and along paths and ways shown upon a plan, together with the joint user, in common with the other tenants, of adjoining offices and corridor, and together with the joint use of a weighing machine erected on part of the land. Each tenancy was from year to year at a fixed rent, and the tenant was to pay all rates and taxes, and the landlords were to keep the premises in repair.

The new pig market of the corporation in Montagu-street was practically deserted, and the defendants alleged that it was in an unsuitable place. In the defendants' own sale-yard all sales were conducted through one of the tenants of the stalls, but when the market was open any person might come in. Sales were sometimes effected on parts of the premises not leased to any of the individual tenants.

The plaintiffs alleged damage from loss of tolls by reason of the infringement of their rights, and claimed an injunction restraining the defendants and each of them from establishing or maintaining the sale-yard or private market for the sale of pigs upon their premises, and an account of all pigs sold.

In their statement of defence the defendants alleged that no animals were exposed for sale in their yard, nor was any business done except by each separate tenant in his own shop or separate

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

CHAN. DIV.] MAYOR, ALDERMEN, AND CITIZENS OF BIRMINGHAM v. FOSTER. [CHAN. DIV.]

place of business, &c., as authorised by sect. 90 of the Birmingham Corporation Consolidation Act 1883. In the alternative, if the different portions of the said yard should not be held to be the shops or places of business, or in the occupation of the defendants severally, then the defendants said that no person other than some or one of them had ever been allowed to sell animals upon the premises, and that the same was their shop or place of business within the meaning of the 90th section.

Sir Richard Webster, Q.C., Neville, Q.C., and R. J. Parker for the plaintiffs.—As regards the defendants as an association, what they have done is practically to set up a rival market to that of the corporation, even if it is not in the strict sense a public market. By the receipt of 2d. for every pig sold, the association are clearly disturbing the market rights of the plaintiffs. Sales also take place on parts of the premises in the possession of the association, and not of the individuals. Nor has there been any failure on the part of the corporation to provide a market for pigs. Even if there had been, that would not be a defence to this action:

Goldsmid v. Great Eastern Railway Company, 49 L. T. Rep. N. S. 717; 25 Ch. Div. 511; 52 L. T. Rep. N. S. 270; 9 App. Cas. 927.

The mere taking of rent for stalls from the individuals, apart from the taking of a toll, is sufficient to make the action of the association a disturbance of the plaintiffs' rights, and to support this claim for an injunction:

Mosley v. Chadwick, 7 B. & C. 47, note (a); *The Mayor, Aldermen, and Burgesses of Dorchester v. Ensor*, 21 L. T. Rep. N. S. 145; L. Rep. 4 Ex. 335;

The Mayor and Commonalty of the City of London v. Low, 42 L. T. Rep. N. S. 16; 49 L. J. 144, Q. B.

As against the defendants individually, they cannot say that the sales take place in their shops or places of business, as the bargains are often struck in parts not leased to them. The case of *Pope v. Whalley* (11 L. T. Rep. N. S. 769; 6 B. & S. 303) shows how the term "dwelling-place or shop" is to be construed, having regard to all the circumstances. There are cases where, on the balance of convenience, the court will not interfere by interlocutory injunction, as in *Elwes v. Payne* (41 L. T. Rep. N. S. 118; 12 Ch. Div. 468). That does not apply here.

Cozens-Hardy, Q.C., *Haldane*, Q.C., and *Hugo Young* for the defendants.—There is no disturbance of a manorial market here. The plaintiffs have lost their common law rights by getting statutory powers:

The Mayor, Aldermen, and Citizens of Manchester v. Lyons, 47 L. T. Rep. N. S. 677; 22 Ch. Div. 287.

What was done here by the defendants amounted to sales in the ordinary course of business, in their own places of business, and is within the exception in sect. 90 of the Act of 1883. The case of *Abergavenny Improvement Commissioners v. Straker* (60 L. T. Rep. N. S. 756; 42 Ch. Div. 83) gives an illustration of what was held to be an exception within a similar Act. The essential ingredients of a market are absent here:

The Duke of Bedford v. Overseers of St. Paul's, Covent Garden, 45 L. T. Rep. N. S. 616; 51 L. J. N. S. 41, M. C.

A market is a place where everybody has a right to sell his goods. Here that is not so. The "place of business" referred to in sect. 90 of the Act is the place where the occupant has a right of possession. The association has a right to the possession of the whole of this area. The partnership deed shows that. Then, by the agreement for a tenancy with the individual members of the association, each had exclusive occupation of his stall or stalls, and was rated separately in respect of his holding, as in

The Mutual Tontine Westminster Chambers Association Limited v. The Assessment Commissioners of St. George's Union, 25 L. T. Rep. N. S. 696; 7 Q. B. 90.

There is thus separate occupation by each individual tenant, and we submit that the action must fail as against the association, and the individual members of it.

ROMER, J.—I think that the plaintiffs in this case are entitled to an injunction. I shall assume in this case that, in accordance with the principle laid down in the case of the *Mayor of Manchester v. Lyons* (47 L. T. Rep. N. S. 677; 22 Ch. Div. 287), the plaintiffs here must, in respect of their market, rely upon their statutory market rights, and not rely upon any special privileges or rights, if there were any, attached to the old manorial market which has been referred to. But, under the statute, the plaintiffs have undoubtedly market rights. They alone have the right to establish a market, and seeing that this case deals solely with pigs, I shall hereafter refer to the market as a pig market. They alone have the right to establish and keep up a pig market in the town of Birmingham. They have a pig market in Birmingham, and the plaintiffs have the right to say that no one shall hold another pig market in the town, or disturb the plaintiffs' market, subject of course to any statutory rights given to persons dwelling in or using that town. Now I agree that, treating, as I do, the plaintiffs' market as a statutory market, having regard to sect. 90 of the Birmingham Corporation Consolidation Act 1883, the plaintiffs cannot be heard to say that their market rights are infringed, or their market disturbed, merely because any person is selling or exposing for sale within the borough "in his own dwelling-place, shop, or place of business, or on any farm or land in his occupation," pigs or other things. But, subject to those statutory provisions, no person, as I have said, within the plaintiffs' borough has a right to attempt to set up a rival market, or to disturb the plaintiffs' statutory market. Now, on the facts, I think that the defendants are disturbing the plaintiffs' market, and infringing the plaintiffs' rights. First, I will consider what the defendants are doing regarded as an association, and apart from what each is doing as an individual renter of stalls, or an individual seller or buyer. Now, in substance, in my opinion, what the defendants have done in this case is to establish a market for the sale of pigs, a market that shall be a rival market to the plaintiffs' market, and a market that has been successful in its object, and has practically destroyed the plaintiffs' pig market. What they did was this: They have acquired a large site, and erected a large building and premises on that site, and they have laid out that site and their buildings as and for a market—and I need not

CHAN. DIV.] REG. v. HORACE SMITH, ESQ., AND THE AERATED BREAD COMPANY. [Q.B. DIV.]

say that I use the term "market" in this context in its popular and substantial sense, and not in its strict legal sense. They let out stalls and offices, part of their buildings and premises, to the individual members of the association. They earned profits by reason of the establishment of their market, and of the way in which their premises were used for the sale and offering for sale of pigs. At market hours the premises are thrown open, and any person who likes may come in as a buyer. Any person's pigs can be sent to be sold at this market. The only restriction practically to the sale is this, that the actual sales must be effected through one of the stall renters, who sells on commission. There is on the premises every convenience and every arrangement made for a public market. There are common ways, down which and along which the public can go. There are lairs provided for the bedding and feeding of the pigs, there are two common weighing machines, and there is a common room for the frequenters of the market, and by frequenters I mean those other than the defendants individually. There are considerable parts of the defendants' premises which are not let to the individual defendants, and there are places which are used occasionally for pens for pigs, which are not included in any of the individual lettings to the defendants. The fact is, that the whole scheme under which this market and these premises have been established by the defendants is one to enable, as it appears to me, the defendants to oust the plaintiffs' marketable rights. It is true that in this case the pigs cannot be sold in the defendants' market except through the medium of one of the defendants. I need scarcely say that in itself clearly makes no difference, and does not prevent what the defendants are doing from being a disturbance of the plaintiffs' market. Indeed, looking at the circumstances of this case, if it is not a disturbance of the plaintiffs' market, I do not know what would amount to such a disturbance. The circumstances are, to my mind, stronger than those which occurred in the case of *Goldsmid v. Great Eastern Railway Company* (49 L. T. Rep. N. S. 717; 25 Ch. Div. 511), to which my attention has been called. Then, when I turn to consider not what the association as a whole are doing, but what each individual tenant is doing, what do I find? In my opinion it is not a case where, regarding each individual defendant, he is selling at a "shop or at a place of business, or on any farm or land in his occupation" within the meaning of those terms as used in sect. 90 of the Act. Of course, in one sense everyone selling at a market, who habitually attends the market in the course of business, might be said to be selling at his place of business. But the term "place of business" in sect. 90 is certainly not used in such a broad sense as that, and when I look at the sales which are taking place on these premises, as a matter of substance and fact I think they are not even taking place exclusively on the premises which are occupied by each defendant as a lessee or tenant of the association. The association may be said to be, in one sense, in possession of the whole premises as owners, but as an association they are not selling at all, or offering for sale. It is each individual defendant who is selling, and each individual who is selling has certainly not confined his buying and selling to sales effected on the parts of the premises leased to him as

tenant. He may, in many cases, effect sales when he or the purchaser, or both, are at the pens, or in the office rented and occupied by each individual; but knowing how business is carried on in a market like this, and indeed seeing how the business is carried on from the evidence before me, I am satisfied that this is not a case where it can be said that the usual sales effected by each defendant are effected by him in any shop of his, or any place of business of his, or on any land occupied by him. For these reasons I hold, as I have said, that the plaintiffs are entitled to an injunction, and the form of injunction which it appears to me they are entitled to, and which will be sufficient to protect their rights is this: I restrain the defendants and each of them from using or permitting to be used the premises in question for the sale of pigs as the premises have been hitherto used, or in any way so as to be a disturbance of the plaintiffs' pig market, or so as to infringe the plaintiffs' market rights. I then grant an inquiry as to damages, and order the defendants to pay the costs of the action up to and including judgment.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchard, and Barham*, for *Ed. O. Smith*, Birmingham.

Solicitor for the defendants, *C. E. Beal*, for *Horton and Redfern*, Birmingham.

QUEEN'S BENCH DIVISION.

Saturday, Jan. 27.

(Before Lord COLERIDGE, C.J., and DAY, J.)

REG. v. HORACE SMITH, ESQ., AND THE AERATED BREAD COMPANY. (a)

Summary jurisdiction—Statutory direction to provide and fix weights and scales in baker's shop—Absence of penalty—Proceedings for breach not cognisable in court of summary jurisdiction—3 Geo. 4, c. cvi., s. 8—6 & 7 Will. 4, c. 37, s. 6.

Sect. 8 of 3 Geo. 4, c. cvi. (and therefore sect. 6 of 6 & 7 Will. 4, c. 37, which is in the same terms), though directing that every baker, &c., shall fix in his shop proper weights and scales, &c., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a court of summary jurisdiction.

THIS was a rule nisi calling upon Horace Smith, Esq., a metropolitan police magistrate, sitting at Clerkenwell, to show cause why a writ of *mandamus* should not issue to compel him to hear and determine a certain summons which had been taken out against the Aerated Bread Company. The charge made against the company was for not causing to be fixed in a certain shop of theirs, on or near the counter, a beam and scales, with proper weights, as provided by 3 Geo. 4, c. cvi., s. 8.

The magistrate declined jurisdiction on the ground that, though the section enacted that every baker should fix such weights and scales, it provided no penalty for the breach of this direction.

Poland, Q.C. and Courtenay Fooks showed cause against the rule.—The statute does not provide any penalty for the offence charged here, and the magistrate was right in declining

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.] HIETT v. WARD—NEUWIRTH v. OVER DARWEN INDUST. CO-OP. SOC. [Q.B. Div.]

jurisdiction. The only remedy is by indictment. See

Stone's Justice's Manual, 27th edit. p. 177, note c; Reg. v. Kingsley, 16 L. T. Rep. O. S. 408; 15 J. P. 65.

R. Isaacs in support of the rule.

Lord COLERIDGE, C.J.—I am of opinion that the learned magistrate was right in his view of this case. We cannot import into sect. 8 penalties for anything beyond the offences for which in terms they are provided, viz., "for every such false beam and scales and balance or false weight." There is no suggestion of such offences here, and it is enough to say that the statute means what it says. True, it says that scales are to be fixed, but it does not impose a penalty for non-compliance with that requirement, and the magistrate rightly declined jurisdiction to investigate a summons for such non-compliance.

DAY, J. concurred.

Rule discharged.

Solicitor for the prosecutors, the Master Bakers' Protection Society, Arthur Eves.

Solicitors for the Aerated Bread Company, Wilson, Bristows, and Carpmal.

Wednesday, Feb. 14.

(Before MATHEW and COLLINS, JJ.)

HIETT (app.) v. WARD (resp.). (a)

Adulteration—Milk—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6 and 14—Sale of Food and Drugs Amendment Act 1879 (42 & 43 Vict. c. 30), s. 3—Amendment of summons—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 1.

A consignor of milk having been summoned under sect. 6 of the Sale of Food and Drugs Act 1875, the evidence against him disclosed an offence under sect. 3 of the Amendment Act 1879.

Held, that the variance was curable by sect. 1 of the Summary Jurisdiction Act 1848, and that the appellant was rightly convicted.

THIS was an appeal by way of case stated from a decision of magistrates.

R. Neville for the appellant.—The summons alleges a purchaser, and the case finds a procurement as inspector, so that there is a material difference between the offence charged and that which has been proved. He also referred to

Rouch v. Hall, 44 L. T. Rep. N. S. 183; 6 Q. B. Div. 17.

Gore Browne for the respondent.—The variance is curable under sect. 1 of the Summary Jurisdiction Act 1848.

MATHEW, J.—The only question here is that which arises with regard to the form of the summons, for there is a good old-fashioned variance between the offence charged in the summons and that which is proved by the evidence; but the Summary Jurisdiction Act was framed to get rid of this very difficulty. The magistrates find that no injury has been done to the appellant, and no application was made for adjournment; therefore they had jurisdiction to convict, and their decision,

with which on the merits we agree, must be affirmed.

COLLINS, J. concurred.

Appeal dismissed.

Solicitor for the appellant, Frank Ridley.

Solicitor for the respondent, Bevir, for Bevir, Wootton Bassett.

Wednesday, Feb. 14.

(Before MATHEW and COLLINS, JJ.)

NEUWIRTH v. OVER DARWEN INDUSTRIAL CO-OPERATIVE SOCIETY. (a)

Master and servant—Scope of servant's authority—Duty of concert-hall keeper—Care of musical instrument—Evidence of negligence—Bailment—Bare licensee.

A concert-hall having been hired for an evening performance, a rehearsal was held there in the afternoon without opposition from the proprietors, or the keeper of the hall. After the rehearsal, one of the performers left his double-bass fiddle in an ante-room, in such a position that when the hall-keeper, whose duty it was to turn on the gas, came to turn on the gas in the ante-room, it was impossible for him to reach the tap without first moving the fiddle. Immediately after he had moved it, the fiddle fell, and was badly damaged.

Held, that there was no contract of bailment between the parties; that the care of musical instruments was outside the scope of the hall-keeper's authority, and that there was no evidence that he had been guilty of any negligence in the course of his employment.

THIS was the defendants' appeal from a decision of his Honour the judge of the County Court of Cheshire.

The facts are stated in the head-note.

Bousfield, Q.C. and Sparrow for the appellants.—There was no duty on the part of the hall-keeper to take care of this instrument, and the plaintiff was at most a bare licensee. There was no evidence of any negligence on the part of the hall-keeper, and the care of musical instruments was beyond the scope of his authority. The bare fact that the fiddle fell is not evidence of negligence, and indeed the only evidence on the subject is the hall-keeper's own testimony that he was as careful as possible. The plaintiff could not look for the exercise of care by him. [COLLINS, J.—At most he was entitled to only the care and skill which an ordinary gaslighter can be expected to bring to bear upon a double-bass fiddle.] Neither was there here a contract of bailment. The case of Ulken v. Nicols (1894) 1 Q. B. 92 shows that there must be an acceptance of the bailment, so that here it would be necessary that there should be an intention on the part of the hall-keeper to take charge of the fiddle. Bailment is not the same as deposit with consent or licence; the plaintiff himself was a mere licensee, and the defendants have no higher duty in respect of the care of his property than of his person:

Batchelor v. Fortescue, 49 L. T. Rep. N. S. 644; 11 Q. B. Div. 474.

They also referred to

Lethbridge v. Phillips, 2 Stark. 544.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Lewis Thomas for the plaintiff.—This is a case in which *res ipsa loquitur* applies. The hall-keeper admits that he moved the fiddle, and that immediately after doing so it fell forwards, so that it must have been negligently placed against the wall. It is reasonable to infer that the defendant company provided the hall-keeper for the purpose of taking care of these things; the deposit of the fiddle was an incident to the letting of the hall, and the company are responsible for the hall-keeper's negligence. [MATHEW, J.—Without consulting anybody, the fiddle is put where it embarrasses the hall-keeper.] The rooms of which the hall-keeper had charge included this ante-room, and the rehearsal was incident to the concert for which the rooms were let. He referred to

Strauss v. The County Hotel Company, 49 L. T. Rep. N. S. 601; 12 Q. B. Div. 27.

MATHEW, J.—I am unable to agree with the decision of the learned County Court judge. He has arrived at various conclusions of fact from which I do not dissent, but I differ from him with regard to his conclusion that the care of this instrument was within the scope of the hall-keeper's authority, and that the latter acted negligently. We must look at the evidence. The hall-keeper himself was necessarily called by the plaintiff, and he says that he did not know that the fiddle was in the ante-room until he came to light the gas, and that he moved it as carefully as he could, and there is no evidence to the contrary, and nothing to support a charge of negligence. Even if he was negligent, I cannot see that the society was liable, as they did not enter into any contract with regard to the instrument, or undertake the charge of it. The plaintiff asks us to discard the County Court judge's conclusion that there was no contract, and to treat the case as one of bailment; that is, to imply that there was a contract to take charge of this instrument between the rehearsal and the performance. I cannot find any evidence from which a contract can be implied on the part of the defendants to provide a person possessed of the proper skill and knowledge for taking care of instruments of this kind; and in the absence of proof of any such contract our judgment must be for the defendants.

COLLINS, J.—I am of the same opinion. The learned County Court judge has in terms negatived the idea of a contractual relation between the plaintiff and the defendants. The hall-keeper says that the rehearsal was an indulgence which was taken by the performers without asking the defendants. Then the plaintiff without the knowledge of the hall-keeper leaves his fiddle in the lavatory, and the first intimation that it is there takes place when the hall-keeper goes to turn on the gas. I agree with the County Court judge that under such circumstances there is no bailment. The case is analogous to that which has been cited from *Starkie (Lethbridge v. Phillips, 2 Starkie, 544)*, where a defendant was held not to be liable for not keeping a picture safely, not being under any contract to do so. So, here the defendants were not under any contractual relation with regard to this fiddle, and are not responsible for its safe keeping. The hall-keeper says that he moved the instrument about two feet, leaning it up against a piano case, and doing it as

carefully as he could; that was the whole and only evidence on the subject, and I cannot see how we can as a necessary inference arrive at the conclusion that it was otherwise. Here there was no such duty on the part of the hall-keeper, as the plaintiff must allege, to make the defendants liable, and no evidence of negligence.

Appeal allowed.

Solicitors for the plaintiff, *Cunlifes and Davenport*, for *Wallis, Lee, Scott, and Co.*, Manchester.

Solicitors for the defendants, *Aston, Harwood, and Somers*, for *Broadbent*, Over Darwen.

Thursday, Feb. 15.

(Before MATHEW and COLLINS, JJ.)

ALABASTER AND OTHERS v. HARNESS. (a)

Practice—Discovery—Action for maintenance—Interrogatories—Refusal to answer.

Maintenance is an indictable offence at common law, and the defendant in an action in which he is charged with supporting a previous plaintiff in litigation in which he had no common interest is entitled to refuse to answer interrogatories on the ground that they may criminate him.

THIS was an appeal from an order of Grantham, J. confirming an order of the master, and dismissing an application for further and better answers to interrogatories.

The action was one of maintenance, and the statement of claim alleged that the present defendant, Harness, having no common interest with a certain Dr. Tibbitts, had maintained the latter in an action which he had brought against the present plaintiff, Alabaster, in respect of statements which had appeared in the *Electrical Review*. In the present action it was sought to administer interrogatories to the defendant touching proceedings taken and payments made in the action brought by Dr. Tibbitts. Objection was taken on behalf of Harness, the defendant, that maintenance being an indictable offence at common law his answers might tend to criminate him. The defendant refused to answer all or any of the interrogatories, and in that refusal he was upheld by both the master and the learned judge on the ground that the plaintiffs' statement of claim disclosed all the elements of an offence indictable at common law, and that they were therefore not entitled to discovery.

The plaintiffs appealed to the Divisional Court.

Bankes for the appellant plaintiffs.

Dodd for the respondent.

MATHEW, J.—This appeal must be dismissed. We cannot say that these answers could not be used for prosecution. It is clear that the claim is made in respect of maintenance, and it is alleged that there is an absence of common interest between the present defendant and Dr. Tibbitts, who was the plaintiff in the action brought against the present plaintiffs. It is clear that the claim involves all the elements necessary for an indictment at common law, and the authorities and cases cited to us show that an indictment at common law could be presented for maintenance such as is alleged here.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.]

NASSAU STEAM PRESS v. TYLER AND OTHERS.

[Q.B. Div.]

COLLINS, J.—I am of the same opinion, and upon the same grounds.

Appeal dismissed.

Solicitors for the plaintiffs, *Lewis and Lewis*.
Solicitor for the defendant, *Richard Furber*.

Tuesday, Feb. 20.

(Before MATHEW and CAVE, JJ.)

NASSAU STEAM PRESS v. TYLER AND OTHERS. (a)

Bill of exchange—Company—Name of company in bill of exchange—Addition—Liability of directors—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 41, 42.

The defendants, who were two directors and the secretary of a company, the registered name of which was the Bastille Syndicate Limited, accepted a bill of exchange on behalf of the company, giving the name of the company as "The Old Paris and Bastille Syndicate Limited."

Held, that the name of the company was not "mentioned" in the acceptance in accordance with the requirements of sect. 41 of the Companies Act 1862, and that the company not having paid the bill, the defendants were under sect. 42 personally liable thereon.

APPEAL of the defendants from an order of the judge in chambers giving the plaintiff leave to sign judgment under Order XIV.

The defendants were the two directors and the secretary of a company, the registered name of which was "The Bastille Syndicate Limited." The action was brought upon two bills of exchange which had been accepted by the defendants on behalf of the company. The acceptance was stated on the bills to be on behalf of "Old Paris and Bastille Syndicate Limited." The bills not having been paid by the company, this action was brought against the defendants.

The Companies Act 1862, s. 41:

Every limited company under this Act, whether limited by shares or guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position in letters easily legible, and shall have its name engraved in legible characters on its seal, and shall have its name mentioned in legible characters on all notices and advertisements and other official publications of such company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

Sect. 42. . . . if any director, manager, or officer of such company, or any person on its behalf . . . signs or authorises to be signed on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, order for money or goods . . . wherein its name is not mentioned in manner aforesaid . . . he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Radcliffe for the defendants.—The provisions of sects. 41 and 42 have been complied with, and

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

therefore the defendants are not personally liable on these bills of exchange. It cannot be denied that the name of the company, the Bastille Syndicate Limited, is "mentioned" in the acceptance, and it is none the less so because there has been an addition of the words "Old Paris and." The judge in chambers thought that the case was covered by *Penrose v. Martyr* (E. B. & E. 499) and *Atkin v. Wardle* (61 L. T. Rep. N. S. 23). In both of these cases, however, the word "limited" was omitted, and on that ground are distinguishable.

Witt, Q.C. and Ashton for the plaintiff.

MATHEW, J.—The language of sects. 41 and 42 of the Companies Act 1862 is perfectly distinct. [His Lordship read those sections.] The sole question in this case is, whether the name of the company as inserted in the bills of exchange was the correct name of the company. I have come to the conclusion that it was not. For some reason or other it was deemed advisable to add to the real name of the company the words "Old Paris," and the acceptance adopts that misdescription. I agree with the learned judge in chambers that the statute has not been complied with, and that the defendants are liable. The appeal must be dismissed.

CAVE, J.—I agree. The only way in which the defendants can get out of the difficulty is by saying that the name of the company appears in the acceptances, but with the addition of something else. That, however, is not what the Act requires.

Appeal dismissed.

Solicitors for the plaintiff, *Sprent and Bullivant*.
Solicitors for the defendants, *Dangerfield and Blythe*.

Tuesday, Feb. 20.

(Before MATHEW and CAVE, JJ.)

HOLLAND AND ANOTHER v. WALLEN. (a)

Metropolis—"Building used either wholly or in part for the purposes of trade or manufacture"—Party wall—Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), s. 27, r. 4.

Sect. 27, rule 4, of the Metropolitan Building Act 1855, which provides that every warehouse or other building used either wholly or in part for the purposes of trade or manufacture, containing more than 216,000 cubic feet, shall be divided by party walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet, is not confined to warehouses and buildings ejusdem generis with warehouses.

The appellants erected a building consisting of eight floors. The basement was intended to be used for the packing of goods, the ground floor as a retail shop, and the floors above for dining-rooms and kitchens. The two upper storeys were supported by a concrete floor 9½ inches thick, with four openings in it for the purposes of lifts. The cubical contents of the whole building were 289,456 feet, including a staircase which was 16,636 cubic feet, and the cubical contents above the concrete floor were 62,087 feet.

Held, that the building was a building used partly for the purposes of trade, and that the provisions

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

of rule 4 of sect. 27 of the Metropolitan Building Act 1855 had not been complied with.

SPECIAL CASE stated by a metropolitan magistrate under 42 & 43 Vict. c. 49.

The respondent was a district surveyor, appointed in pursuance of the Metropolitan Building Act 1855, for the district of St. Pancras West in the county of London, and the appellants were the builders of certain premises in Grafton-street, Tottenham Court-road.

On the 17th March 1892 the appellants, in conformity with sect. 38 of the Metropolitan Building Act 1855, gave notice to the respondent of the intended commencement of the works, that the intended use of the building was a shop and dwelling-house, and under the head of additions to buildings stated the following:

To or upon dwelling-house. Erection of building in accordance with drawings.

In accordance with the notice the works were duly commenced, and on the 11th Aug. 1892 the respondent served the appellants with a notice under sect. 45 of the Metropolitan Building Act 1855, that the works were not conformable to the rules of the Metropolitan Building Act. The particulars of the work done contrary to the Act, and which was required by the notice to be amended, were as follows:

The additional building exceeds 216,000 cubic feet, and is not divided by party walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet, the premises to which the addition is made being used wholly or in part for the purposes of trade.

Default having been made by the appellants, on the 31st Aug. 1892 a summons was issued on the complaint of the respondent for an offence against the provisions of rule 4 of sect. 27 of the Metropolitan Building Act 1855.

Sect. 27 of that Act is as follows:

The following rules shall be observed as to the separation of buildings and limitations of their areas.

Rule 4. Every warehouse or other building used wholly or in part for the purposes of trade or manufacture, containing more than 216,000 cubic feet, shall be divided by party walls in such manner that the contents of each division thereof shall not exceed the above-mentioned number of cubic feet.

At the hearing of the summons it was proved that the building in question consisted of eight floors, and was 87ft. in height, and was being erected by the appellants, and was contiguous to and intended to form an extension of the premises of Messrs. Shoolbred and Co. in Grafton-street, and when completed was to be used in the following manner, viz., the basement was to be used for the purpose of packing goods, the ground floor as an ordinary retail shop for the sale of goods, and the floors above as dining-rooms, sculleries, and kitchens. It was not intended to be used as a dwelling-house. The floor which supported the kitchen had iron beams 6in. deep, 5in. wide, and 4ft. apart, with steel cross beams 3½in. deep, 2in. wide, and 2ft. apart, was filled in with concrete composed of coal breeze and Portland cement, and was of a thickness of 7in., and was increased by a tile pavement at the top and a ceiling at the bottom to a total thickness of 9½in. There were four openings, intended for lifts, running through the concrete formation. A staircase led from the street to the top of the building, and on each floor

was a fireproof landing from which there was an entrance to the several floors closed by two iron doors. The cubical contents of the whole building were 289,456ft., inclusive of the staircase, which was 16,656ft. The cubical contents above the concrete floor were 62,087ft. It was contended on behalf of the appellants, (1) that the building was not a warehouse or other building used either wholly or in part for the purpose of trade or manufacture within the meaning of the Act, and that the words "other building used either wholly or in part for the purposes of trade or manufacture" referred to other buildings *ejusdem generis* with warehouses, and that that was the interpretation which rule 4 ought to bear in law. (2) That the concrete floor was within the meaning of the Building Acts a party wall, and that the divisions of the building above and below the concrete floor did not separately contain more than 216,000 cubic feet, and therefore the provisions of rule 4 had been complied with.

The magistrate held, that the building was a building used in part for the purposes of trade, and also that it was not divided by a party wall so as to bring each division within the prescribed limit of 216,000 cubic feet, the concrete floor which separated the two upper floors from those below not being in accordance with the statutory requirements of a party wall, and having openings which, except under certain conditions which did not exist in this case, were forbidden in a party wall. The magistrate ordered the appellants, subject to this case, to comply with the requirements of the notice of the 11th Aug.

The questions of law for the opinion of the court were: (1) Was the building "a warehouse or other building used either wholly or in part for the purpose of trade or manufacture"? (2) Did the concrete floor which separated the two upper floors from the lower floors of the building form a party wall within the terms and provisions of the Metropolitan Building Act 1855.

The case originally came on for argument in April 1893, when a question was raised on behalf of the appellants as to whether the building was a new building within the meaning of the Metropolitan Building Act 1855.

The court sent the case back on this point to the magistrate, who, after hearing counsel for the appellants, but without hearing any further evidence, found, as a fact, that the building was a new building within the meaning of the Act, and stated that, if the question had been raised at the original hearing before him, he should have so found in the case stated by him. The Court upheld this finding of the magistrate, but, as the question turned solely on the particular facts of this case, so much of the arguments and judgments as dealt with this question have been omitted from this report.

Finlay, Q.C. and Grain for the appellants.—The magistrate was wrong in holding that this building comes within sect. 27, rule 4 of the Metropolitan Building Act 1855. The Act deals with three classes of buildings—public buildings, dwelling-houses, and buildings of the warehouse class. Schedule 1, part 1, deals with the thickness of walls of dwelling-houses, which by rule 8 are to include all buildings except public buildings and buildings of the warehouse class. Buildings of the warehouse class are dealt with in part 2 of

Q.B. Div.]

POLLOCK v. MOSES.

[Q.B. Div.]

schedule 1, and the warehouse class comprises all warehouses, manufactories, breweries, and distilleries. The building in question is clearly not within the warehouse class, and it is obvious from the rules in the two parts of schedule 1 that it is intended in the Act to draw a distinction between buildings comprised in the dwelling-house class and the warehouse class. Sect. 27 must be read in connection with the schedule and the words of rule 4 in sect. 27, "other building used either wholly or in part for the purposes of trade or manufacture," must be taken to mean buildings *ejusdem generis* with a warehouse, such as breweries or distilleries, otherwise any large building one part of which happened to be used as a shop, or even a hotel, would come within the rule. Secondly, if this building is within the rule, the building has been divided by the concrete floor so as comply with the provisions of the rule.

Cripps, Q.C. and Daldy for the respondents.—The building is within sect. 27, rule 4, which is not confined to warehouses and buildings *ejusdem generis*. A floor is not a party wall for the purposes of this Act: see sect. 3, where "party wall" is defined, and also "party structure," the latter of which includes party walls and floors.

Finlay, Q.C. replied.

MATHEW, J.—It appears to me clear that in this case the judgment of the court must be for the respondent. The point raised by the appellants turns on sect. 27, rule 4, of the Metropolitan Building Act 1855. That section applies to "every warehouse or other building used either wholly or in part for the purpose of trade or manufacture containing more than two hundred and sixteen thousand cubic feet shall be divided by party walls in such manner that the contents of each division thereof shall not exceed the above mentioned number of cubic feet." That is perfectly plain. It is language admitting of no doubt or misgiving whatever; but it has been argued that the word "building" ought to be construed to mean warehouse buildings; and that, if other sections in the Act are looked at, it will be seen that sect. 27, rule 4, cannot apply to this case. I decline to do so. The language of the rule is perfectly clear and distinct, and we are bound to give effect to it. To pass away from it to another section would have the effect of giving the go-by to the intention of that section. The case is within the mischief of the Act and within the language of the section, and therefore there ought to be no doubt about how our judgment should be given. The other points need not be dwelt upon at length. I agree with the finding of the learned magistrate that the structure, which the appellants contend to be a party wall, is not a party wall within the meaning of the Act. Our judgment must therefore be for the respondent with costs.

CAVE, J.—I am of the same opinion. The case was originally stated for the purpose of raising two points under sect. 27, clause 4. The first point was, that this was not a warehouse or other building used either wholly or in part for the purposes of trade or manufacture. That is attempted to be supported by a reference in another part of the Act to the use of the words "buildings of the warehouse class" as designating certain manufactories. The effect of the appellants' conten-

tion would be to give no effect to the words "buildings used either wholly or in part for the purpose of trade" in sect. 27, rule 4. It is impossible to say that this is not a building used either wholly or in part for the purpose of trade. Therefore, it seems to me the first point fails. The second point also fails. Rule 4 of sect. 27 requires that the division shall be by a party wall. If you refer to rule 2 of the same section it becomes apparent that a distinction is drawn between vertical and horizontal divisions, and it is stated there that separate sets of chambers are to be deemed under certain circumstances to be separate buildings, "and to be divided accordingly, so far as they adjoin vertically by party walls, and so far as they adjoin horizontally by party arches and fireproof floors." Now, rule 4 refers to a division by party wall only, and consequently it is obvious that the division which is there referred to is a vertical division and not a horizontal division.

Appeal dismissed.

Solicitors for the appellants, *G. H. Barber and Son.*

Solicitor for the respondent, *W. A. Blazland.*

Wednesday, March 7.

(Before *MATHEW and CAVE, JJ.*)

POLLOCK v. MOSES. (a)

Fishery Acts—Freshwater fishery—Water bailiff—Right to prosecute without the authority of board of conservators—Salmon Fisheries Act 1861 (24 & 25 Vict. c. 109), s. 8—Fisheries Act 1891 (54 & 55 Vict. c. 37), s. 13.

The Fisheries Act 1891, s. 13, provides that the powers conferred by the Fisheries Acts upon any authorities or officers to enforce them shall not limit or take away the power of any other person to take legal proceedings for their enforcement.

Held, that, under this section, a water bailiff can institute proceedings for an offence against the Fisheries Acts without being authorised so to do by the board of conservators of the district.

Anderson v. Hamlin (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) is overruled by sect. 13 of the Fisheries Act 1891.

SPECIAL CASE stated by justices of Cumberland.

The appellant was summoned for fishing for salmon with a "snatch" in the river Derwent, which is a fishery district subject to a board of conservators, contrary to sect. 8 of the Salmon Fishery Act 1861. The respondent, upon whose information the complaint was laid, was a duly appointed water bailiff in the employment of the board of conservators for the district. The respondent admitted in cross-examination that he prosecuted in his capacity as water bailiff, but that he was not authorised by the board to institute the proceedings. The justices convicted the appellant and inflicted a fine, subject to this case.

The question for the opinion of the court was, whether it was necessary that the respondent should have received express authority from the board of conservators to institute the proceedings.

The Salmon Fisheries Act 1861, s. 8:

No person shall do the following things or any of

(a) Reported by *F. O. ROBINSON, Esq., Barrister-at-Law.*

Q.B. Div.]

REG. v. BRADLEY.

[Q.B. Div.]

them; that is to say, (2) use any spear, gaff, strikehall, smatch, or other like instrument for catching salmon; and any person acting in contravention of this section shall incur a penalty not exceeding 5l., and shall forfeit any instruments used by him or found in his possession in contravention of this section; but this section shall not apply to any person using a gaff as auxiliary to angling with a rod and line.

Fisheries Act 1891, s. 13:

The powers conferred by the Sea Fisheries Act 1883, or this Act, or any other Act relating to salmon and freshwater fisheries upon any authorities or officers to enforce any such Act shall not be construed as limiting or taking away the power of any other person to take legal proceedings for the enforcement of any such Act or of any bye-law made thereunder.

Sylvain Mayer for the appellant.—The conviction was wrong. It was held in *Anderson v. Hamlin* (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) that in the absence of express authority from the board of conservators a water bailiff could not institute proceedings against a person for fishing without a licence in a fishery district. That decision is not affected by sect. 13 of the Fisheries Act 1891. The words "any other person" in that section were not intended to include a water bailiff, for the previous part of the section refers to the powers conferred by the Fisheries Acts upon any "authorities or officers," i.e., a water bailiff acting upon instructions given to him by the board of conservators, and the section then goes on to enact that those powers shall not limit the right of any other persons other than "authorities or officers" to institute proceedings.

Willis Bund, for the respondent, was not called upon.

MATHEW, J.—I am of opinion that this conviction was right, and that the appeal must therefore be dismissed. The case of *Anderson v. Hamlin* was decided in 1890, and the court there held that, before prosecuting for an offence against the Fisheries Acts, a water bailiff must have received authority from his board of conservators to do so. Then in 1891 the Fisheries Act is passed, sect. 13 of which provides that any person may take proceedings to enforce the Fisheries Acts. It is therefore no longer necessary for a water bailiff to obtain the authority of the conservators before instituting proceedings.

CAVE, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Nicholson, Nicholson, and Graham*, for *Errington, Carlisle*.

Solicitor for the respondent, *T. Cuthbert Burn*, *Cockermouth*.

Wednesday, March 7.

(Before CAVE and MATHEW, JJ.)

REG. v. BRADLEY. (a)

Highway—Encroachment—Conviction—Defect—11 & 12 Vict. c. 43—Question of title—Certiorari—Highway Act 1864 (27 & 28 Vict. c. 101), s. 51.

By sect. 51 of the Highway Act 1864, if any person shall encroach by making any fence on the side of any carriage-way, within fifteen feet of the centre thereof, he shall on conviction be liable

to a penalty. The defendant was convicted under this section. The conviction did not state that the defendant had "encroached" on the highway.

A writ of certiorari having been granted in chambers in vacation, and a rule nisi to quash the conviction having been drawn up on motion to make it absolute:

Held, that there was power to amend the conviction, if necessary, under 12 & 13 Vict. c. 45, s. 7, but that, certiorari having been taken away by sect. 107 of the Highway Act 1835, which Act by sect. 42 of the Highway Act of 1862, and sect. 2 of the Highway Act of 1864, is to be read as one with the Act of 1864, the omission of the word "encroach" did not render the conviction bad, and that certiorari would not lie for such a defect, and therefore the court would not quash the conviction on that ground.

Ex parte Bradlaugh (38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509) considered.

The defendant, being charged with an offence under sect. 51 of the Highway Act 1864, contended that he was the owner of the land on which a fence had been erected, and that it did not form part of the highway, and that the justices had no jurisdiction to adjudicate in the matter, on the ground that title to land came in question.

Held, that the justices had jurisdiction, the question for them being whether or not the land in question formed part of the highway.

Rule nisi to quash the conviction accordingly discharged.

MOTION for rule absolute for an order to quash two convictions by justices.

The defendant was the secretary of a company called the Combined Estates Company, owning certain property at Hampton. A summons was issued against the defendant on the information of the surveyor to the local board for the district of Hampton, being the urban sanitary authority for the district, charging the defendant that he did, "contrary to sect. 51 of the Highways Act 1864, cause a fence to be erected on the side of a carriage-way or cartway known as Hanworth-road, Hampton, being a public highway within the district of the Hampton Local Board, within fifteen feet of the centre thereof, and did thereby cause such carriage-way or cartway to be reduced in width to less than thirty feet between the fences on each side thereof."

The defendant was charged with a similar offence in connection with another highway called the Mill-road, Hampton, but the facts were practically the same in both cases.

At the hearing before the justices it was proved that the Combined Estates Company had been since 1879 the freeholders of the land adjoining one side of the Hanworth-road, which was a public highway. At the side of the road there was a ditch about two feet wide, uninclosed from the road. The servants of the company erected a fence upon the side of the road, and within fifteen feet from the centre, so as to inclose the ditch. The defendant claimed that the ditch was the property of the company, and had never formed part of the highway, and an objection was taken that the case involved a question of title, and that the jurisdiction of the justices was thereby ousted. This objection was overruled. The local board

(a) Reported by F. O. ROBINSON, Esq., Barrister at-Law.

Q.B. Div.]

REG. v. BRADLEY.

[Q.B. Div.]

did not dispute that the company, being the freeholders of the adjoining land, were also the owners of the soil of the ditch and of the land immediately adjoining the ditch, upon which the fence had been erected, but contended that the ditch and the land had always formed part of the highway. After hearing evidence on both sides the justices held that the offence had been proved, and imposed a penalty. The record of the conviction stated the offence in the same form as used in the information.

The defendant applied in Vacation to the judge in chambers for a summons to show cause why a writ of *certiorari* should not issue to bring up the conviction. On a return to the summons the judge ordered the writ to issue. Subsequently a rule *nisi* was drawn up under the Crown Office Rules 1886, r. 257, to show cause why the conviction should not be quashed.

The Highway Act 1864, s. 51:

From and after the passing of this Act, if any person shall encroach by making or causing to be made any building, or pit, or hedge, ditch, or other fence, or by planting any dung, compost, or other materials for dressing land, or any rubbish, on the sides or side of any carriage-way or cartway within fifteen feet of the centre thereof, or by removing any soil or turf from the side or sides of any carriage-way or cartway except for the purpose of improving the road, and by order of the highway board, or where there is no highway board of the surveyor, he shall be subject on conviction for every offence to any sum not exceeding forty shillings, notwithstanding that the whole space of fifteen feet from the centre of such carriage-way or cartway has not been maintained with stones or other materials used in forming highways, and it shall be lawful for the justices assembled at petty sessions, upon proof made to them upon oath, to levy the expenses of taking down such building, hedge, or fence, or filling up such ditch or pit, or removing such dung, compost, materials, or rubbish as aforesaid, or restoring the injury caused by the removal of such soil or turf upon the person offended. Provided always that, where any carriage-way or cartway is fenced on both sides, no encroachment as aforesaid shall be allowed whereby such carriage-way or cartway shall be reduced in width to less than thirty feet between the fences.

Bosanquet, Q.C. and *H. Terrell* in support of the rule *nisi*.—Although by sect. 107 of the Highway Act 1835 (with which the Highway Act 1864 is to be read as one) *certiorari* has been taken away, it will still lie if it can be shown that the justices had no jurisdiction to act. They had no jurisdiction to make an order in this case, first, because in order to constitute an offence under sect. 51 of the Highway Act 1864 it must be proved that the defendant encroached on the highway by placing a fence or other obstacle thereon. There is no such finding by the justices in this case. The conviction, which follows the form of the information, merely states that the defendant did unlawfully cause a fence to be erected, &c. It is therefore bad and ought to be quashed:

Reg. v. Bolton, 1 Q. B. 66;

Ex parte Bradlaugh, 38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509.

Secondly, the jurisdiction of the justices was ousted because a question of title to land was involved. The defendant has not encroached on the highway at all, but has inclosed a ditch which was his own property, and which has never

formed, and could not form, part of the carriage-way or cartway. The same question arose in *Field v. Thorne* (20 L. T. Rep. N. S. 563), where the court held that the erection of a fence upon the side of an open ditch which was within fifteen feet of the centre of the carriage-way was not an encroachment. *Easton v. Richmond Highway Board* (25 L. T. Rep. N. S. 586; L. Rep. 7 Q. B. 69), *Evans v. Oakley* (1 Car. & Kir. 125) were also referred to.

Channell, Q.C. and *H. Courthope-Munroe*, for the local board, were not called upon.

MATHEW, J.—We are not called upon to say, and ought not to say, whether the magistrates were right or wrong in their decision in this case. The sole question for us to decide is, whether they had any jurisdiction, because by the Highway Act 1835 *certiorari* has been taken away. Now, was there any point upon which it can be shown that the magistrates were bound to hold their hands? The matter came properly before them under sect. 51 of the Highway Act 1864. The matter having come before them, and there being no objection to the form of the information, they were bound to hear the evidence. They did hear the evidence on both sides, and they came to the conclusion that an offence had been committed within the meaning of the Act. They may have come to a wrong conclusion, but that does not show that they had no jurisdiction. It is perfectly clear that they had jurisdiction. Although this court has no jurisdiction to say whether or not the decision of the magistrates was right, nevertheless I think that it is only proper, having looked through the evidence, to express my opinion extrajudicially, that the magistrates were perfectly right in the decision to which they came. They were quite justified in regarding this ditch as dedicated to the public and as part of the highway. The fence unquestionably is an encroachment upon ground over which the public have a right.

CAVE, J.—I am of the same opinion. To my mind, this is an extremely clear case upon the subject of magisterial jurisdiction, which is a subject not apparently thoroughly understood, and upon which there are a good many fallacies which can be urged and which have been urged before us to-day. According to the law as it originally stood, the Court of Queen's Bench had a jurisdiction over magistrates, not by way of appeal on the merits, but by way of seeing whether the proceedings were correct in form. Orders of magistrates were brought up before the court by *certiorari*, and the court proceeded to examine into the form of the order or conviction in order to see if it was correct in point of form. The court held that all the circumstances which were necessary to warrant the conviction or order must be set out on the face of the order or conviction, and that included, where there was not a statutory form of conviction or order, a statement of all the points which the magistrate had to go through in order to arrive at such conviction or order. The consequence was, that the court had to exercise an indirect kind of jurisdiction over almost every order made or conviction by a magistrate. That became so burdensome that the Legislature interfered, and did so in two ways. One way was by taking away the *certiorari* altogether, and that put an end to all questions whether or not the

Q.B. Div.]

Re JOHNSON; *Ex parte* BLACKETT.

[IN BANK.]

order or conviction was right in point of form. The other way was by framing a statutory form of conviction, and by providing that, if the order or conviction was in the statutory form, it was to be taken to be perfectly good. By one or other of these ways the jurisdiction of this court in these matters has been almost put an end to, but attempts are sometimes made to bring it into force again, and that is done by means of the suggestion that the magistrates have exceeded their jurisdiction, because it has been held that a statutory provision taking away *certiorari* does not apply where there has been an excess of jurisdiction on the part of the magistrate, and that may be shown (*aliunde*) by affidavit, although it may not appear on the face of the conviction or order. Excess of jurisdiction may either exist at the time when the summons comes on to be heard, and in that case there is no jurisdiction to hear the case at all, or it may in some cases crop up in the course of the hearing, as, for example, where the question of title to land comes in question, and in such a case the jurisdiction of the magistrates is ousted. Whenever either of these two things happens, if the magistrates proceed to hear and determine the case, their decision must be brought up by *certiorari* for the purpose of being quashed as being in excess of jurisdiction. A good deal of misconception prevails as to what is and what is not excess of jurisdiction. If the magistrates have no jurisdiction they cannot proceed with the case, either to convict or to acquit; they have no jurisdiction to do either; they must stop short. That is the meaning of the expression want of jurisdiction, and that is what is meant by saying that magistrates have exceeded their jurisdiction. In this case it is clear that there was never a point at which the magistrates were bound to stop. The summons was taken out under sect. 51 of the Highway Act of 1864. If there was any objection to it in point of form, the objection ought to have been made before the magistrates, and they would have dealt with it. That is provided for in Jervis' Act (11 & 12 Vict. c. 43). If the magistrates think that a mistake in form has in any way misled or embarrassed the defendant, the magistrates will allow the case to be adjourned, in order that the defendant may not be damnified. But where the defendant has not been misled the magistrates will rightly refuse to attach any importance to a technical objection upon the ground of form, and in so doing they are acting within their jurisdiction, and this court has no power to interfere. This case was therefore properly heard by the magistrates. They had evidence given by both sides as to whether this strip of land was or was not part of the highway, and having heard the evidence, were they bound to hold their hands and say that it was a matter with which they could not deal? Certainly not. It was the very thing which they were bound to decide. In the case of *Williams v. Adams* (5 L. T. Rep. N. S. 790) the court held that the magistrates were intended to decide in a case such as this whether or not the piece of land inclosed was a highway, and that the jurisdiction of the magistrates was not ousted by the defendant's claiming the land as owner of the freehold. The magistrates were bound to give their decision, and it is therefore impossible to say that they had no jurisdiction. Having jurisdiction, they are bound to exercise it. One test for ascertaining whether a matter is within

the jurisdiction of magistrates or not is to consider the nature of the arguments used against the magistrates. If there was no jurisdiction, the magistrates ought not to have decided the case at all; but, if the contention is that the magistrates ought to have come to a different decision on the merits, it is quite clear that they had jurisdiction. Only one case of modern times has been relied on by the appellants, that is *Ex parte Bradlaugh* (38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509). Now, to my mind it is clear that the conclusion to which I have referred did take place in that case. In the first place, it was admitted that the *certiorari* was taken away; and, secondly, no objection could be made to that order except on the ground of want of jurisdiction. It was said that there was a want of jurisdiction. How? Because it was said that the order for the destruction of the books did not contain a recital that the magistrate came to the conclusion that the publication of them was a misdemeanour which was to be prosecuted. But there was no evidence that the magistrate did not come to that decision in that case. The fact that it was not recited in the order does not prove that the magistrate did not come to that conclusion; and if he did come to that conclusion, then his order was perfectly right and he had jurisdiction to make it. If he did not come to the conclusion that the publication was a misdemeanour he would not thereby be deprived of jurisdiction; he would still have a jurisdiction, but he would be bound to decide in favour of the defendant and dismiss the summons. Where a magistrate decides one way when he ought to have decided another way, that is not absence of jurisdiction. Absence of jurisdiction only arises when he has no power to decide in the matter at all. On these grounds it is quite clear that the *certiorari* having been taken away here the conviction cannot be dealt with by this court. The magistrates had jurisdiction, and consequently the rule must be discharged. I agree with what Mathew, J. has said with reference to the finding of the magistrates on the facts proved before them.

Rule nisi discharged with costs and the costs of the certiorari.

Solicitors for the defendant, *Rooke and Sons*.

Solicitors for the Hampton Local Board, *Kent and Son*.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Friday, Feb. 23.

(Before WILLIAMS, J.)

Re JOHNSON; *Ex parte* BLACKETT. (a)

Bankruptcy—Lease—Covenant not to assign—Assignment by trustee in bankruptcy—Liability of trustee for rent due.

A lessee covenanted with his lessor that neither he himself, his executors, administrators, or assigns, nor any person who might thereafter claim any estate in the premises, would assign without licence. On the bankruptcy of the lessee his trustee assigned the lease. The lessor claimed as against the trustee the rent due.

Held, that, as the trustee's liability was based on privity of estate, he ceased on the assignment

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

[IN BANK.]

Re BATSON; Ex parte HASTIE.

[IN BANK.]

over to be liable for rent accrued due after the date of the assignment.

THIS was a motion by Spencer Blackett for an order that the official receiver might be ordered to pay over 111l. 11s. 3d. rent due for 35, Bride-street, and to declare that the official receiver was personally responsible for the rent and covenants in the lease of the premises and that he should deliver up the premises for breach of covenant.

Spencer Blackett, by licence from Christ's Hospital, his lessors, leased 35, Bride-street, to Johnson and Stephens to be used as a coffee and cocoa house, subject to certain covenants (identical in terms with those contained in the superior lease), one of which was that the bankrupts, their executors, administrators, or assigns, or any person or persons who should or might thereafter claim any estate or interest in the premises by and from or under any assignment or underlease to be made by virtue of any lease or by operation of law, should not and would not assign or set over or otherwise dispose of their interest without the licence of the lessors.

In April 1893 a receiving order was made against the lessees Johnson and Stephens, on which they were adjudicated bankrupts, and the official receiver was appointed trustee.

The trustee did not disclaim the lease, but assigned the bankrupt's interest in the premises to H. J. Creer, without the consent of Spencer Blackett or the superior landlords, the governors of Christ's Hospital.

At the date of the receiving order there was rent due from the 25th March 1893, and there was now due 111l. 11s. 3d. for rent to the 29th Sept.

John A. Hamilton for the applicant.—The official receiver is liable here; he might have disclaimed the lease; he did not do so, but dealt with it, and he thus must be taken to have assumed the responsibilities under it. He has the opportunity of disclaiming, and he acts as lessee. Hence it must be inferred that he contracted, and that there is between him and the lessors privity of contract and not merely of estate. The covenant in the lease includes an assignment by operation of law, which is what happened on the bankruptcy, and was intended to make the trustee, as assignee by operation of law, liable if he assigns the lease. The trustee ought to have disclaimed.

Muir Mackenzie, for the official receiver, was not called upon.

WILLIAMS, J.—This lease contained a curious covenant, binding not only the bankrupt not to assign, but also any assignee by virtue of any licence or by operation of law, and provides for re-entry in case of breach of the covenant. Under these circumstances, the covenant was so far effective and operative, that, on its taking effect, the right of entry accrued, and the landlord had a right of forfeiture; he did not, however, forfeit. The official receiver takes the lease and did not disclaim it, but executed an act of ownership by selling it to Creer, and according to the ordinary law the liability of the official receiver being simply based on privity of estate, directly he got rid of the lease his liability ceased. It was said that the covenant was expressly intended to prevent the official receiver from getting rid of this liability, but it has not succeeded in doing

so. However true that may be in the case of contract, no such result can follow where the liability depends solely on privity of estate. By assignment the liability of the official receiver came to an end, and therefore this motion must fail, except in so far as it asks for the rent between the date of the bankruptcy and the assignment; as to that it should succeed.

Motion dismissed.

Solicitors for the applicant, *Arnold Williams and Co.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Tuesday, Feb. 27

(Before **WILLIAMS and WRIGHT, JJ.**)

Re BATSON; Ex parte HASTIE. (a)

Bankruptcy—Refusal to obey subpoena to attend court—Insufficient sum tendered for expenses—Contempt of court—Refusal to commit for—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 27—Bankruptcy Rules 1886, rr. 70, 71.

A person subpoenaed to attend in court and refusing to obey the subpoena cannot be committed for wilful contempt until a reasonable sum has been tendered to him to cover the cost of coming to the court and expenses.

THIS was an appeal from the decision of the judge of the King's Lynn County Court.

The debtor was the rector of Great Winsted, and in 1890 he borrowed from the British Empire Life Insurance Society a sum of money. The appellant was the solicitor to the company, and was retained by them to collect the tithes and apply them to meet the interest on the loan by the company.

In May 1892 a receiving order was made against the debtor, on which he was adjudicated bankrupt, and the official receiver became trustee.

In June 1892 a correspondence took place between the official receiver and the appellant's firm, in which the official receiver asked for information as to the tithes collected by the appellant. The appellant refused to give the information unless his charges were first paid, and refused for the same reason to answer a certain list of questions submitted to him by the official receiver.

On the 1st July 1893 a summons was issued requiring the appellant to attend at the King's Lynn County Court and to produce his ledger and other books, &c., which contained anything relating to the bankruptcy. The official receiver applied to the court to fix the proper conduct money, which the registrar fixed at 17. 10s. The summons was served, and the 30s. conduct money tendered. The appellant refused to attend on the ground that the conduct money was insufficient.

The official receiver moved in the King's Lynn County Court for an order to commit the appellant for contempt of court for disobedience to the order to attend.

The appellant took the objection that the conduct money tendered was insufficient, and that therefore he could not be guilty of wilful contempt.

The railway fare and other expenses of the journey to King's Lynn alone would have come

(a) Reported by **WALTER B. YATES, Esq., Barrister-at-Law.**

IN BANK.]

Re CHARLWOOD; *Ex parte* THE TRUSTEE.

[IN BANK.]

to 11. 10s., and no tender had been made of allowances for loss of time and expenses. The books refused to be produced alone weighed 365lb., and this would necessitate the payment of 11. for excess luggage.

The County Court judge made the order to commit, but directed the same to lie in the court for one month.

The solicitor appealed.

By sect. 27 of the Bankruptcy Act 1883:

The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may by warrant cause him to be apprehended and brought up for examination.

Hansell for the appellant.—The learned County Court judge was wrong. He purported to deal with this case under sect. 27. He did not do so, but in reality he dealt with it under rule 70 of the Bankruptcy Rules 1886. That rule is as follows: "Any person wilfully disobeying any subpoena or order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court and may be dealt with accordingly." And he omitted to act according to rule 71: "Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court." There are three things which must be paid for under this rule—conduct money, expenses, and loss of time—and the allowance to professional men for attendance in court is always from 15s. to 11. a day. [WILLIAMS, J.—Do you say that he ought to be prepaid for loss of time?] I say you cannot commit unless he is prepaid:

Re Working Men's Mutual Society, 21 Ch. Div. 831.

A sufficient sum has not been tendered, and therefore the appellant cannot be committed for wilful contempt.

Muir Mackenzie.—This was a case of deliberate disobedience. The registrar was the proper person to decide what was the proper amount of conduct money, and he did so. This sum was tendered and the appellant declined to attend the court. He first of all refused to answer the questions sent to him by the official receiver, and then he refused to come to the court. I do not dispute that he is entitled to be paid his expenses of getting to the court. These were offered him, and his refusal to attend the court after this was wilful contempt.

WILLIAMS, J.—I am of opinion that this appeal must be allowed. The statute says that: [Reads sect. 27.] In addition, the court has power to commit for contempt a person wilfully disobeying its orders. This power is not new; it

has been in force for over 100 years, and was in the Act of 1869, but a regular practice grew up not to move at once to commit for contempt as a punishment when a person does not attend, but to issue a warrant to ensure the attendance of the person; and it is a pity this practice was departed from here. I do not say that you cannot commit for non-attendance, but the practice under the Act of 1869, and in London under the subsequent Acts, was as I have stated. The warrant, however, cannot be issued unless a reasonable sum has been tendered. The question here is, has a reasonable sum been tendered? Mr. Mackenzie says it has been, and that the amount can be fixed by the court that issues the summons; but, though Mr. Registrar Hope says this is occasionally done in London, it is not an established practice, and the registrars used to refuse to fix the amount, as they had not before them the materials for doing so. But even assuming that the court had power to fix the sum beforehand, then, if it does so, but fixes the amount too low, inasmuch as you cannot commit a man for wilful contempt for not putting his hand in his pocket to pay his own expenses, no order of committal can be made. Here the sum fixed and tendered was clearly insufficient, and I think, therefore, the learned judge was wrong, and that this appeal must be allowed.

WRIGHT, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Hasties*.

Solicitors for the respondent, *Tower and Sherlock*, for *Blyth*, Norwich.

Feb. 20 and 26.

(Before WILLIAMS and WRIGHT, JJ.)

Re CHARLWOOD; Ex parte THE TRUSTEE. (a)

Bankruptcy — Solicitor's costs — Defence of debtor for murder — Agreement in writing between debtor and his solicitor — Payment of lump sum — The Attorneys and Solicitors' Remuneration Act 1870, s. 4.

A debtor by an agreement in writing with his solicitor paid a lump sum to his solicitor in return for certain definite services rendered and to be rendered by his solicitor in the defence of the debtor on a charge of murder. The debtor subsequently committed an act of bankruptcy, and was adjudicated bankrupt.

The County Court judge refused to order the solicitor to pay over any part of the sum so received to the trustee in bankruptcy. On appeal:

Held (dismissing the appeal), that, inasmuch as the money had been paid over for certain definite services under a bonâ fide agreement in writing before an act of bankruptcy had been committed, the solicitor could not be ordered to refund the same.

Per Wright, J.: The defence of a man for his life was a matter for which the official receiver could probably make an allowance to the debtor out of the property in the hands of the official receiver under the provisions of rule 325 of the Bankruptcy Rules 1886.

THIS was an appeal by the trustee in bankruptcy

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re CHARLWOOD; *Ex parte* THE TRUSTEE.

[IN BANK.]

of the debtor from the decision of the judge of the Tunbridge Wells County Court.

On Nov. 1892 the debtor, a builder, retained Mr. Cripps, a solicitor, to act for him in all matters arising out of a charge made against him for being privy to the death of a woman named Franklin, who died from the effects of an illegal operation.

On the 24th Nov. 1892 a sum of 25*l.* was paid to the solicitor by Charlwood, and on the 3rd Dec. an agreement in writing was made between Charlwood and the solicitor by which, after reciting the verdict of wilful murder against Charlwood by the coroner's jury, on the 30th Nov. 1892, the committal of the accused for trial, the fact that Mr. Cripps was retained and did attend before the coroner, that Mr. Cripps had prior to the agreement rendered services and paid fees to counsel for Charlwood, and that Charlwood wished to retain Mr. Cripps to defend him on his trial, and Mr. Cripps accepted the retainer, it was agreed that Mr. Cripps should obtain all necessary advice and assistance from counsel, and attend before the magistrates and at the trial of Charlwood, and should brief two counsel to defend Charlwood, and pay all fees, charges, and generally conduct Charlwood's defence, and that Charlwood having already paid 25*l.* should pay Mr. Cripps within seven days a further sum of 250*l.*, making in all 275*l.*, which should be received by Mr. Cripps "in full satisfaction of the costs, charges, and expenses of the said W. C. Cripps incurred and to be incurred in the matters mentioned in this agreement." The agreement was signed by Charlwood and Mr. Cripps; and on the 10th Dec. 1892 a receipt was given by Mr. Cripps for the agreed sum of 250*l.*

On the 20th Dec. the debtor committed an act of bankruptcy, of which, on the 21st Dec., the solicitor had notice. The debtor was tried at the Old Bailey for murder on the 16th Jan., and was defended by counsel; the trial lasted until the 20th Jan., when the prisoner was convicted of manslaughter. The defence was conducted by Mr. Cripps.

A motion was made by the trustee in bankruptcy in the County Court of Tunbridge Wells for an order that Mr. Cripps should be directed to pay to the trustee the sum of 250*l.* received from the bankrupt, or such other sum as represented the difference between the sum mentioned in the agreement of the 2nd Dec. and the costs of the solicitor prior to the 21st Dec., the date the solicitor had notice of the act of bankruptcy.

The County Court judge refused the application, and the trustee appealed.

Herbert Reed, Q.C. and *G. Spencer Bower* for the appellant.—The decision of the County Court judge was wrong. A person about to commit an act of bankruptcy cannot be allowed to retain the services of a solicitor. In *Re Pollitt*; *Ex parte Minor* (67 L. T. Rep. N. S. 715; (1893) 1 Q. B. 175) the solicitor was not allowed to retain the money. The commission of the act of bankruptcy destroyed any rights he might have against the bankrupt. [WRIGHT, J.—Does not the 275*l.* here seem rather like a lump sum down to meet specified services, while in *Re Pollitt* the money was paid to meet future costs.] There is no doubt the solicitor acted very well here, and did the best that could be done, but the trustee's duty was plainly to

inquire into the transaction. *Re Sinclair*; *Ex parte Payne* (53 L. T. Rep. N. S. 767; 15 Q. B. Div. 616), lays down no new principle at all; there the money was paid down by a debtor to his solicitor to oppose bankruptcy proceedings, but in *Re Spackman*; *Ex parte May* (62 L. T. Rep. N. S. 266; 24 Q. B. Div. 728) it was expressly stated that the doctrine was not to be extended. [WILLIAMS, J.—The effect is, these payments to a solicitor may be supported on the ground of necessity.] No such rule was necessary for the decision in *Sinclair's* case. [WRIGHT, J.—If such a rule exists, the defence of a man for murder is surely a case of necessity.] The rule of necessity is very difficult to apply, as, if a man can pay away all his estate to get legal assistance, he will probably do so.

Dickens, Q.C. and *Upjohn*.—On the 21st Dec., the date the solicitor had notice of the act of bankruptcy, the money had been parted with by the bankrupt, and the only right left him was to call on the solicitor to perform the contract. The agreement was a perfectly valid one. Sect. 4 of the Attorneys and Solicitors' Remuneration Act 1870 allows a solicitor to make an agreement in writing with his client for payment of past or future services by a gross sum. And the court will enforce that agreement, and the court does not recognise the right of the client to go behind the agreement except in special cases, and will not set the agreement aside unless it is an improper one, so that, as no neglect is proved against the solicitor, he is entitled to retain the money. The case is not governed by *Re Pollitt*. The property divisible amongst the creditor, which vests in the trustee is "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy" (sect. 44 of the Bankruptcy Act 1883), but by the agreement this money vested, as soon as it was paid, in Mr. Cripps, and was not any longer in the bankrupt. The solicitor could make what agreement he pleased, and the bankrupt, having paid this money for a perfectly good consideration, was thereby entitled to Mr. Cripps' services. The fact that the agreement and payment was made just before the act of bankruptcy does not affect the question. In *Re Pollitt* there was no written agreement; here there was. In *Re Goldsmid* (18 Q. B. Div. 295) the court said that, if a payment was made *bona fide* by a debtor within three months before petition to prevent exposure or to avoid a criminal prosecution, the payment was not a fraudulent preference. No suggestion of a fraudulent preference can be made here.

Reed, Q.C. in reply.—The question is really, did the agreement aim at doing indirectly what could not be done directly? If Mr. Dickens's suggestion is adopted, then I admit there is an end of the case. [WILLIAMS, J.—Is not the occurrence of the bankruptcy a special case within the meaning of sect. 10 of the Solicitors Act 1870, so as to enable the court to reopen the agreement?] This is an attempt to get out of *Re Pollitt*, and ought not to be allowed to prevail.

WILLIAMS, J.—I think this appeal must fail. I thought on Mr. Reed's opening that he was going to raise an interesting point as to the exact rights of a person to whom money is paid under a contract, and bankruptcy follows. No such question arises here. On the 3rd Dec., being a

IN BANK.]

Re BURNETT; *Ex parte* THE OFFICIAL RECEIVER.

[IN BANK.]

date prior to any act of bankruptcy having been committed by Charlwood, an agreement was made in writing between Charlwood and his solicitor, under which a lump sum was to be paid by him to the solicitor in return for services rendered and to be rendered by that solicitor in the defence of Charlwood. In my view of the terms of the agreement it is plain that the solicitor would in no case have been entitled to demand anything beyond the 275*l.* paid, and also in no case would he have been accountable for any portion of it, or liable to restore any portion of it to Charlwood; if that is the true construction it was admitted that there was no question left to inquire into. The cases of *Re Pollitt* and *Re Sinclair* have nothing to do with the matter. Those cases are applicable when money is paid over to secure the payment for services to be rendered by the person to whom the money is paid, and do not apply where a lump sum is paid down for certain definite services. Mr. Reed then said that, if Mr. Dickens's construction of the agreement was right, the substance of the agreement was different from the form. In the present case there was no evidence which would entitle us to say that the substance was different from the form. Nor yet in the court below did the trustee make that case at all; he might even now have adduced evidence to that effect with leave, but he has not done so. The case made in the County Court was that this case came within the terms of *Re Pollitt*, but it is clear that it does not; therefore the agreement is not bad.

WRIGHT, J.—In the case of *Re Pollitt* the money was the money of the debtor in the hands of his solicitor to be employed by him according to a certain authority. That authority ceased on bankruptcy, and the money then belonged to the trustee. Here the agreement was to pay 275*l.*; that money was no longer the money of the debtor, it belonged to the solicitor in return for rendering certain services. There was no evidence that the agreement was not *bonâ fide*, and we cannot order the return of the money. I am inclined to think that the sections of the Solicitors Act 1870 which allow agreements such as this to be reopened or rescinded would probably be sufficient to prevent any danger which might arise by reason of these agreements, while I should also think that any such rights of this kind that might exist would pass to the trustee in bankruptcy. In view of the inhuman state of the law I think that rule 325 of the Bankruptcy Rules 1886 would probably enable the official receiver to do what was right, subject to any regulation of the Board of Trade in a case of this kind, by making an allowance to the debtor, and that the defence of a man for his life would probably come within that rule; at all events rule 334 says that in case of any doubt or difficulty the official receiver may apply to the court.

Appeal dismissed.

Solicitor for the appellant, C. T. Wilkinson.
Solicitors for the respondent, *Sole, Turner, and Knight*, for J. H. Daish, Tunbridge Wells.

Tuesday, March 6.

(Before WILLIAMS and WRIGHT, JJ.)

Re BURNETT; *Ex parte* THE OFFICIAL RECEIVER. (a)

*Bankruptcy—Power to annul adjudication—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 35. The debts of a bankrupt, amounting to 1600*l.*, were purchased from the creditors by a lady for 144*l.*, and the creditors withdrew their proofs. The debts were then assigned to the bankrupt for 1600*l.*, which sum was provided by a third person. The deputy registrar of the County Court annulled the adjudication, on the ground that the debts had been paid in full. On appeal:*

Held (allowing the appeal), that the adjudication ought not to be annulled, as the debts had not been paid in full within the meaning of sect. 35 of the Bankruptcy Act 1883.

THIS was an appeal from the deputy registrar of the Croydon County Court.

On the 26th April 1892 a receiving order was made against the debtor. The public examination was fixed for June 2, and was adjourned from time to time up to Feb. 8, but the debtor was unable to attend, and never did attend, owing to ill-health. The debtor filed no statement of affairs.

On the 2nd July the debtor was adjudicated bankrupt.

On the 22nd Sept. 1893 a Miss Watson purchased from the creditors for the sum of 144*l.* their debts, which amounted to 1600*l.*, and the creditors withdrew their proofs.

On the 17th Oct. 1893 these debts were assigned to the debtor on payment by him of 1600*l.*, which sum was provided for the debtor by a Miss Clifford. An application was then made by the debtor to the deputy registrar of the Croydon County Court to have the bankruptcy annulled, on the ground that the debts had been paid in full. The deputy registrar annulled the adjudication, and the Board of Trade appealed.

By sect. 35 of the Bankruptcy Act 1883:

Where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order, annul the adjudication.

Muir Mackenzie for the appellant.—The learned deputy registrar was wrong. No order to annul can be made unless one of two conditions has been fulfilled: (1) that the debtor ought not to have been adjudged bankrupt; or (2) unless it is proved that his debts have been paid in full. Neither of these conditions was fulfilled here. The money was provided expressly for the purpose of getting the adjudication annulled, and by this means the bankrupt hoped to get rid of his bankruptcy on paying a very small composition to the creditors. The transaction was not in the interests of the creditors; they were not paid at all, and the contrivance was merely adopted for the purpose of getting rid of the bankruptcy. In *Re Dixon and Cardus* (59 L. T. Rep. N. S. 776) it was suggested that there was a scheme which it was desirable should be carried out in the interests of creditors, but the court refused to rescind the

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

THE HUNTSMAN.

[ADM.]

receiving order; and in *Re Gyll; Ex parte The Board of Trade* (59 L. T. Rep. N. S. 778), the debtor's brother bought up all the debts except one at 7s. 6d. in the pound, the object being to get the debtor back into his club, but the court refused to annul the adjudication.

F. C. Willis.—The deputy registrar was right. It is competent for anyone to buy up the debts, and then prove for the whole amount: here the creditors have withdrawn their proofs. [WRIGHT, J.—And that is a release.] Under the Act of 1869 bankruptcies were frequently annulled. The creditors have a perfect right, if they think fit, to entertain proposals for a scheme or composition under sect. 23 of the Act of 1883, and the court can, if it approves, annul the adjudication. This adjudication ought to be annulled; the creditors are satisfied, and there is therefore no reason for the debtor being made a bankrupt. He referred to

Re Hester; Ex parte Hester, 60 L. T. Rep. N. S. 943; 22 Q. B. Div. 632.

Muir Mackenzie in reply.

WILLIAMS, J.—So far as this appeal is concerned, we think the appeal ought to be allowed. It seems, on the authorities that have been cited, that, so far as sect. 35 is concerned, there can be no order made unless it be upon the ground that the debtor ought not to have been adjudged bankrupt, or unless it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, and the suggestion here is that the debts have been paid in full. In my opinion the payment of the debts may be a payment not necessarily to the person who was entitled to prove under the provisions of sect. 31 of the Bankruptcy Act 1883, at the time of the making of the receiving order, and also may be a payment made to the person beneficially entitled to receive the debt at the moment when the payment was made: at all events, in cases where there is no proof on the file by the person whom I will call for short, the original creditor. But, assuming that point in favour of the respondent here, there yet remains the question, had or had not the debts been paid in full? It was said that the deputy registrar came to the conclusion here that the debts had been paid in full, and that this was clear from the evidence; I do not agree with this. The evidence, taken as a whole, comes to this: here is a man who owes some 1600*l.*, and then a lady comes forward and provides the money to buy up the whole of the debts, and she buys them up for a very small sum. It was admitted that the purchase, although she may have generously provided the money, was for the purpose of getting the adjudication annulled. The bankrupt and his friends are then apparently advised that this will not do; and then, admittedly for the same purpose—that is, for the purpose of getting annulment of the adjudication—another friend of the bankrupt comes forward and provides 1600*l.*, and then we are told that that 1600*l.* is paid to the lady who provided the money with which the debts were bought up from the original creditors, and we are asked to treat that as being payment in full. In my opinion we ought not so to treat it. It is perfectly obvious that the whole of those payments were made in the interests of or on account of the bankrupt, and that, if we were to allow this transaction to go through and this adjudication to be annulled, it would be obvious

that the bankrupt would be really getting rid of his bankruptcy on the terms of paying a very small composition to each of the creditors. In my judgment, sect. 35 has no application in such a case, and it is not pretended here that the order for the annulment can be supported under any other section, or on any other principle of law than sect. 35. Under these circumstances I think we must allow this appeal, and discharge the order of the learned deputy registrar.

WRIGHT, J.—I am of the same opinion. It is clear here that what was done was not really done in the interests of the creditors, or by way of payment to the creditors at all. The bankrupt never filed any statement of his affairs, and never attended for examination. The second ground is, that I do not think there is proof enough that all the creditors have been paid anything in point of fact; and the third is, I very much doubt whether they have all been paid in full in law. When the original creditors were paid they were certainly not paid in full. When Miss Watson became the assignee, she did not pay in full. Then it was found the whole thing was futile, and a friend paid Miss Watson. Is that a payment of the creditors in full? It might be, I agree, but a great deal of further evidence is wanted; they have been bought up in small sums, not as a business matter at all, but as a contrivance for annulment. A further contrivance has been added, which I do not think alters the substance of the case at all.

Order of deputy registrar discharged.

Solicitor for respondent, *R. Free*.

Solicitor for appellant, *The Solicitor to the Board of Trade*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 3 and 4.

(Before BARNES, J.)

THE HUNTSMAN. (a)

Ship—Managing owner—Authority to order repairs—Liability of co-owners.

Where the co-owners of a vessel depute the managing owner or ship's husband to employ the vessel for their benefit he has authority to give orders for the necessary repair, fitting and outfit of the vessel, and the fact that the vessel is insured does not limit such authority.

Semble, those who execute the repairs to the vessel do not discharge any claim they may have against the co-owners by reason of the fact that, they being unable to get cash, they have taken and renewed bills on account in their dealings with the managing owner in respect of such repairs.

ACTION to recover the balance of an account for repairs.

The plaintiffs were the Smith's Dock Company Limited, and they made a claim against Messrs. J. H. W. Culliford, J. L. Clark, and T. E. Jobling, part owners of the steamship *Huntsman* for repairs executed in the early part of 1892.

In January 1892 the vessel got on the south pier of the Tyne, and the plaintiffs undertook salvage operations for an agreed amount of 2000*l.*,

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

ADM.]

THE HUNTSMAN.

[ADM.]

with an extra 200*l.* for despatch on the principle of "no cure no pay."

They got her off on the 30th Jan., and brought her into their own dry dock, and they were duly paid the agreed sum.

The vessel had sustained injuries to her bottom, engine-room, and elsewhere, and on the 9th Feb. W. J. Jobling, the managing owner, began to give the plaintiffs instructions for the necessary repairs to put the vessel in a seaworthy condition. She was taken out of dock on the 9th March, and the repairs were completed outside by the 20th March.

On the 14th April the plaintiffs delivered a detailed bill to W. J. Jobling, amounting to 451*l.* 6*s.* 11*d.* The plaintiffs took on account from W. J. Jobling four bills for 1000*l.*, dated the 20th July 1892, at three, four, six, and six months respectively, and later on a bill for 185*l.* at three months, which made up the balance of the account, which had been somewhat reduced.

It appeared that the first bill was borrowed, the second partially paid and partially renewed, the third and fourth renewed, and the 185*l.* dishonoured. There was a further renewal of the balance of the second renewed bill, which was dishonoured, as also were the renewals of the third and fourth. In the result the amounts paid on the bills, together with the allowances, reduced the plaintiffs' account to 2534*l.* 14*s.* 10*d.*, which was the amount now claimed.

On the 15th March 1893 W. J. Jobling became insolvent, and consequently failed to meet the renewed bills, the last of which fell due on the 28th May 1893.

The plaintiffs therefore issued their writ on the 14th June against the three owners above mentioned, who together owned three sixty-fourths of the vessel.

Moulton, Q.C. and *Boyd*, for the plaintiffs, referred to

Davidson v. Donaldson, 47 L. T. Rep. N. S. 564; 4 Asp. Mar. Law Cas. 601; 9 Q. B. Div. 623;
Robinson v. Read, 9 B. & C. 449;
Bottomley v. Nuttall, 28 L. J. 110, C. P.;
Whitwell v. Perrin, 4 C. B. N. S. 412.

Sir *Walter Phillimore* and *Laing*, for the defendants, referred to

Mitcheson v. Oliver, 5 E. & B. 419; 25 L. J. 39, Q. B.;
Brodie v. Howard, 17 C. B. O. S. 109;
Chappell v. Bray, 3 L. T. Rep. N. S. 278; 30 L. J. 24, Ex.;
Frazer v. Cuthbertson, 6 Q. B. Div. 93; 50 L. J. 277 Q. B.;
Steele v. Dickson, Scotch Sess. Cas. 4th series, vol. 3, p. 1003.

BARNES, J., having dealt with the facts as above set out, continued:—The points taken on behalf of the defendants are these: The first is, that although Mr. W. J. Jobling was the managing owner, or in other words the ship's husband, of the *Huntsman*, he had no authority to order these repairs upon the credit of the co-owners. When Sir Walter Phillimore argued this point it was put, not on any cases which have really decided it at all in his favour, but principally in this way, that a managing owner or ship's husband has no authority to order repairs for a ship, although they are absolutely necessary for her proper employment as a seaworthy ship, if

that ship is insured, and if in the ordinary course the managing owner would be able to collect from the underwriters enough to pay the amount of the repairs ordered, and by those monies so received discharge the bills. Dealing first with the suggestion as to the authority, it seems to me that, so far as they have been referred to before me, the authorities and the language of the text writers are entirely in favour of the proposition maintained by the plaintiffs' counsel, that the managing owner has authority to give orders for the necessary repairing of the vessel. It seems to me that Mr. Moulton's contention on this point is correct if it is looked at by the light of the manner in which the question arises. The managing owner is deputed by the co-owners to employ the vessel for their benefit, and that can only be done by employing her in the ordinary course of trade suitable for such a vessel. It must follow as a necessary consequence that he has authority to conduct and manage on shore whatever concerns the employment of the ship, and for that purpose has authority to give orders for the necessary repair, fitting, and outfit of the vessel, in addition to seeing that she is properly manned, properly sent to sea, and properly chartered for a voyage. Without that power he would be unable to send the ship to sea, even if there were trifling repairs rendered necessary for that purpose, without again obtaining a fresh mandate from the various co-owners, and I cannot see that there is any authority for the proposition that the managing owner's authority is limited in cases where the ship is insured. No case or even dictum has been cited to that effect, and the true relationship seems to me to be that the co-owners, in deputing to the managing owner the power to manage the vessel on their behalf, depute to him power to do what is necessary to repair her for the proper purpose of performing her engagements in the ordinary course of her employ. Of course, if the vessel is insured, they will afterwards get the benefit of any money paid by the underwriters, collected by the managing owner, and applied by him, if so applied, to discharge the accounts for repairs. But then it is said that the plaintiffs looked to Mr. W. J. Jobling in this case as the channel through whom the money would come from the underwriters; in other words, I take it that means that they acted in this case only on the credit of Mr. W. J. Jobling. I see no ground for that contention. On the contrary, I think that the plaintiffs acted in the ordinary way by treating Mr. Jobling as managing owner, acting on behalf of the various co-owners. The plaintiffs' representative, Mr. Eustace Smith, said, "I believed he was solvent, and I knew we were safe in any case, because we had the co-owners; Culliford and Clark we knew were good enough." They sent in their bill to the managing owner and owners of the steamship *Huntsman* in the ordinary course. But then comes the point that has been very fully argued before me, that the plaintiffs so dealt with Mr. W. J. Jobling by taking and renewing the bills as to discharge any claim they may have had on the co-owners. If it could be shown that the plaintiffs could have had cash from Mr. Jobling, and, instead of taking it, elected to take bills from him, they would then be in a position of practically having had, so far as the other owners are concerned, not what is really payment, but what

ADM.]

THE PRINCESS.

[ADM.]

is tantamount to it. But where they have not had the power to get cash, but have tried to get it and failed, and have merely taken bills on account, it seems to me there is no election whatever on their part to renounce any right they had which would in any way discharge the claim made upon the present defendants. I think that is in accordance with the views expressed in the cases of *Robinson v. Reed* (*ubi sup.*) and *Davison v. Donaldson* (*ubi sup.*) which have been cited to me. The further point which was taken by the defendants was that the plaintiffs have so acted as to mislead the co-owners and raise an equity against themselves. I understand that to be based upon this contention, that as the vessel was supposed by the plaintiffs to be insured, and as they might suppose that the money from the underwriters was paid to Mr. Jobling, if they renewed the bills, or allowed the time to go by for payment, without finding out why he did not pay them, and if he had got the money, then they cannot look to the defendants for payment. I understand that is the way it is put on behalf of the defendants. But the answer again seems to be, that the plaintiffs did what they could to get the cash, and were told, as I have already said, by Mr. Jobling that he had not got it, and that he had not received the money from the underwriters. I cannot see any ground on which it can be said that the plaintiffs have so acted as to mislead the defendants, and thereby prejudice them, as is suggested on the part of the defendants. If one turns to the form of pleading in this case, which raises that, and probably also the point which I mentioned before it, really it will be seen, I think, that the allegations contained in the defence on these points are not established. For those reasons I am of opinion that the plaintiffs are entitled to make their present claim against the defendants, to be assessed by the registrar and merchants.

Solicitors for the plaintiffs, *King, Wigg, and Co.*, for Clayton and Gibson, Newcastle-on-Tyne.

Solicitors for the defendants, *Botterell and Roche*.

April 9 and 10.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PRINCESS. (a)

Charter-party—Construction—Captain's signature to bills of lading—Penalty.

A charter-party entered into between plaintiffs and defendants contained a clause in the following terms: "Captain to sign bills of lading (at plaintiffs' office) without responsibility as to weight, and as presented to him, without prejudice to the tenor of this charter-party, within twenty-four hours after the cargo is on board, or pay 4d. per register ton per day (the first day's payment being due on the expiration of the said twenty-four hours) for each day's delay."

The captain refused to sign for seventeen days, but the owners offered to sign on his behalf within twenty-four hours.

In an action by the charterers against the owners: Held, that the signature of the owners was not sufficient to satisfy the provision in the charter-party.

Also (following Jones v. Hough, 42 L. T. Rep.

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

N. S. 108; 4 Asp. Mar. Law Cas. 248; 5 Ex. Div. 115), that the clause was one for a penalty, and not for liquidated damages.

ACTION to recover damages for alleged breach of a charter-party.

The plaintiffs in this case were Messrs. Bryant and Co., of Newcastle-on-Tyne, and the defendants were Messrs. Taylor and Sanderson, of Sunderland.

The plaintiffs alleged that they had suffered damage by breach of a charter-party, dated the 25th Jan. 1893, between the plaintiffs and defendants, whereby it was agreed that the defendants' steamer *Princess* should load a full and complete cargo of coals and coke in the South Dock, Sunderland, and therewith proceed to Barcelona and deliver the same at the freights therein mentioned, and that the captain of the said vessel should sign bills of lading at the plaintiffs' office without responsibility as to the weight and as presented to him without prejudice to the tenor of the said charter-party within twenty-four hours after the cargo was on board, or pay 4d. per ton per day (the first day's payment being due on the expiration of the twenty-four hours) for each day's delay. The captain refused to sign the bills of lading for seventeen days after the cargo was on board.

The registered tonnage of the *Princess* being 1370 tons, the plaintiffs claimed 22l. 16s. 8d. per day for the seventeen days, making a total of 388l. 3s. 4d. with interest.

The defendants alleged that the clause in the charter-party referring to the captain signing bills of lading is a printed form, which, by the well-known custom of merchants and shipowners, was only to become operative if and when the charterers used the vessel as a general ship. They maintained that the vessel was not so used, but if the clause did become operative, then the plaintiffs waived a compliance therewith by tendering what purported to be bills of lading at a place other than their office, and waived any right to insist upon the captain attending at their office; and the plaintiffs agreed with the defendants on the 28th Jan. 1893 that the captain need not attend at their office to sign any bills of lading, but should sail with all despatch as soon as the loading of the cargo had been completed, and they thereby relieved the captain of that duty.

On the 27th Jan., prior to the agreement, and before the vessel had finished loading, the plaintiffs, it was alleged, presented inaccurate bills of lading for the captain's signature, and he therefore refused to sign them. The defendants then offered to hold the captain's signed bills of lading in blank until the amount of cargo could be ascertained and inserted, and then hand them to the plaintiffs, but this was refused.

On the 28th Jan. the plaintiffs agreed that the captain need not attend at their office but should sail with all despatch, and also agreed that they would accept bills of lading prepared by them and signed by the defendants' authorised agents and to be exchanged on the 30th Jan. for duplicates signed by the captain, but the plaintiffs without notice to the defendants left their office and prevented the defendants' agents from signing the bills of lading or obtaining the captain's signature to duplicates, and did not present such bills of lading or duplicates for signature, and the captain

[ADM.]

THE PRINCESS.

[ADM.]

sailed on the 28th Jan. in accordance with the plaintiffs' request.

On the 30th Jan. the defendants' agents offered to sign bills of lading as agents for the captain and (or) owners, but the plaintiffs refused. The managing owner of the vessel, a member of the defendant's firm, thereupon prepared and signed a set of bills of lading which were tendered to the plaintiffs but were refused.

The defendants denied that the captain did not sign bills of lading in accordance with the charter-party, or that, save as aforesaid, he refused to sign the same for the seventeen days after the cargo was on board. They paid 5*l.* into court.

By way of counter-claim they alleged, that by the above charter-party it was agreed, that the plaintiffs were empowered to draw on the captain on demand for their commission and certain charges and deduct from freight at port of discharge the amount due to the plaintiffs in this respect was 37*l.* 3*s.*, but the plaintiffs drew on the captain for 39*l.* 12*s.* 4*d.* and the amount was deducted from the freight, whereby the plaintiffs had 2*l.* 9*s.* 4*d.* to the use of the defendants which they had not paid. They therefore counter-claimed for the latter sum.

Joseph Walton, Q.C. and Hollams for the plaintiffs.

Aspinall, Q.C. and J. Strachan for the defendants.—We have complied with the terms of the charter-party within its meaning as a mercantile document. The words "captain to sign bills of lading" mean that he is to sign as owners' agent. He must sign or pay unless he is acting as agent. In *Jones v. Hough* (*ubi sup.*) it was the same kind of charter-party and in the same terms. This is a penalty and not liquidated damages. In *Jones v. Hough*, where the bill of lading was not signed at all, it was held that, whereas there was a technical breach of the charter-party and the plaintiffs were entitled to nominal damages, it was not liquidated damages. There is a strong distinction to be drawn between signing after delay and not signing at all. The offer of the owners' signature was equivalent to an offer of the captain's signature within the charter-party, and such signature would make them liable for everything in the charter-party, the captain being only an agent:

Hermann v. Royal Exchange Company, 1 C. & E. 413.

Hollams in reply.—There was a clear contract for the captain's signature, and we are therefore entitled to have it. As to the question of penalty, there are some very strong cases where penal damages were held to be liquidated:

Sparrow v. Paris, 5 L. T. Rep. N. S. 799; 7 H. & N. 594.

I have some difficulty in following the decision in *Jones v. Hough* (*ubi sup.*). Bramwell, L.J. limits his judgment to the particular case before him in which there were no termini. In the present case he would have held that where bills of lading have been signed penalties would accrue. Delay would continue until the actual signature by the captain of the bills of lading, or the cargo delivered.

The PRESIDENT.—The first point raised is as to the construction of the contract. It is said that the provision that the captain is to sign the bills of lading is satisfied by the owners being

willing to do so. There is no doubt that the owners were willing, but I confess I cannot bring myself to think that the contract would be satisfied by the owners signing, or being willing to sign, the bills of lading. It is impossible, it seems to me, to maintain as a broad proposition that when a person stipulates that a named agent of his is to do a particular thing, that is satisfied by his doing it himself; and, although I quite agree that it is difficult in most cases to see why the signature of the owner will not do as well as that of the captain, I do not think that exhausts the matter, because there may be cases, and I am inclined to think this is one, where the signature of the captain was more convenient in the course of business than the signature of the owner would be if there was a provision in the charter-party that the captain should sign. In this particular case it seems clear that, after this charter-party had been entered into, the bankers in London, acting no doubt according to the wishes of their correspondent in Spain, refused to allow the signature of the owners to be taken as the signature of the captain. I dare say it may be that in some branches of business it would not matter, but in the Spanish trade, it is suggested, there is a reason why the captain's name should be put in the bills of lading, and it seems to me if it is so put in, it is impossible to say that the provision is satisfied by the signature of the owners. The second question is one of fact, and that is whether there was a waiver. [The learned President dealt with the facts on this point, and continued:] Then there comes the last point, as to whether this is a penalty or liquidated damages. That appears to me to be not a very easy question, but it is a very narrow question, as to which there is no clearer authority than the case of *Jones v. Hough* (*ubi sup.*). I think I am bound by that decision, because I cannot see any real distinction between that case and the present. The terms of the charter-party are the same. The only suggestion that can be made is that there was a distinct refusal to give bills of lading, and the whole thing went off, and no bills of lading ever were given, because the captain refused to give them. But I cannot help thinking that that cannot be the *ratio decidendi* in that case. I think the judges who decided it must have looked at the matter according to what the true view of the contract was at the time it was made. What one has to consider is, whether the contract is one for liquidated damages or one for a penalty. I think that is the view of Bramwell, L.J., for he says: "One reason might be that the penalty clause does not apply. One reason might be that there is no basis on which the amount of the penalty might be measured." I think what that means is this, that when one looks at the nature of the transaction, and the nature of the contract, it is obvious that it is one in which, in many cases, it would be very difficult, perhaps impossible, to fix the time up to which the penalty should run, and also that it is a clause which might work very great hardship indeed if it was pushed to its extreme limits. In these circumstances I think that the view of the judges must have been that this was a penalty clause, because that must be understood to have been the intention of the parties. I therefore feel bound to hold that this is not a clause for liquidated damages, but is a clause for a penalty. If that is so the result follows easily enough. There

[CT. OF APP.]

UNDERWOOD v. UNDERWOOD.

[CT. OF APP.]

have been no damages proved in the case, and that being so I shall follow the case of *Jones v. Hough* (*ubi sup.*), and say that 1s. nominal damages should be given.

Aspinall, Q.C. urged that, as the defendants had paid 5l. into court, and their counter-claim for 2l. 9s. 4d. had been admitted, they were entitled to some consideration in the matter of costs.

The PRESIDENT.—I think one ought to look at this question of costs a little more broadly than by the light of the question of 5l. or 2l. 9s. 4d. Substantially this question was fought on a good deal more than a mere point of law, and I think the observation in *Jones v. Hough* (*ubi sup.*), which governs the decision of the case, that there were faults on both sides, applies equally to this case. Therefore I shall make no order as to costs.

Solicitors for the plaintiffs, *Hollams. Sons, Coward, and Hawksley.*

Solicitors for the defendants, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 28 and March 8.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

UNDERWOOD v. UNDERWOOD. (a)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Divorce—Order for permanent alimony—Agreement for compromise of such order—Payment of smaller sum in satisfaction of larger sum—Matrimonial Causes Act 1866 (29 & 30 Vict. c. 32), s. 1.

*After a decree of dissolution was granted on a wife's petition, an order was made, under the Matrimonial Causes Act 1866, s. 1, for payment by the respondent of permanent alimony. Some years afterwards an agreement was entered into between the petitioner and the respondent, whereby the former agreed to take 10l. in full satisfaction of all present and future claims under the order. At that time a sum was owing for arrears of alimony. The 10l. was duly that paid, but subsequently the petitioner put in an execution under a writ of *fi. fa.* for the arrears due to her in pursuance of the order.*

*Held, that the agreement must be treated as invalid for want of consideration, according to the decisions in Cumber v. Wane (1 Str. 426; 1 Sm. L. Cas., 8th edit., p. 367) and Foakes v. Beer (51 L. T. Rep. N. S. 833; 9 App. Cas. 605); and that, therefore, the writ of *fi. fa.* was legally issued.*

Decision of Sir Francis Jeune reversed.

In 1887 a divorce was granted upon the petition of Mary Ann Underwood, and an order was made, under sect. 1 of the Matrimonial Causes Act 1866, that her husband, Daniel Underwood, should pay alimony during her life at the rate of 40l. per annum.

A few months after the decree was made absolute Mrs. Underwood married William Bates. Daniel Underwood also married again about two years later.

Underwood subsequently became impoverished, and was unable to continue to pay the alimony.

On the 11th Nov. 1891, there being then the sum of 16l. 13s. 4d. in arrear in respect of the alimony, an agreement in writing, but not under seal, was entered into between Mr. and Mrs. Bates of the one part, and Underwood of the other part, by which (after reciting the decree made in the divorce proceedings and the order for payment of alimony during the life of Mrs. Bates), in consideration of 10l. then paid to Mr. and Mrs. Bates, it was agreed between the parties thereto that Mr. and Mrs. Bates would not, nor would either of them, at any time thereafter make any claim or demand upon Underwood, or sue or institute any proceedings whatever against him in respect of any sum of money, claim, or demand, decree or order, made in relation to the alimony so ordered to be paid. And for the same consideration Mr. and Mrs. Bates did thereby undertake to release Underwood from all claims and demands, suits and actions, in respect thereof.

Notwithstanding this agreement, Mrs. Bates subsequently issued a *fi. fa.* upon the order for payment of alimony, under which the sheriff levied execution on the goods of Underwood for the sum of 86l. 13s. 4d. arrears of alimony then due under the order.

Sect. 1 of the Matrimonial Causes Act 1866, after giving the court power (under certain circumstances) to order a husband against whom a decree of dissolution of marriage has been pronounced to make such "monthly or weekly payments" for the maintenance of the wife as it shall think right, enacts as follows:

Provided always, that if the husband shall afterwards, from any cause, become unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the court may seem fit.

On the 5th Feb. 1894 an application was made before Sir Francis Jeune that the writ of *fi. fa.* might be set aside, when the following judgment was delivered:

SIR FRANCIS JEUNE.—Fortunately, I do not think it is necessary to investigate very closely the old authorities of *Pinnel's case* (5 Rep. 117a) or *Cumber v. Wane* (1 Str. 426), which were so much discussed in the case of *Foakes v. Beer* (51 L. T. Rep. N. S. 833; 9 App. Cas. 605). It may well be that, where you have a liquidated and undisputed money demand, not founded on a bill of exchange or promissory note, it cannot be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole. That is the way the principle is stated in *Smith's Leading Cases* (8th edit. p. 367). I do not profess to understand, any more than Lord Blackburn professed to understand, what the exact justice or reason of such a law is. It is quite enough to say that that is the law as it stands. But there is no reason for extending it beyond what the strict rule is. And the strict rule is, that the sum of money must be a liquidated and undisputed money demand. Now, how does the matter stand here? This agreement recites what the fact is—namely, that this alimony was due under an order of the court, pointing therefore to

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

what its real nature was. And that leads us to look to the Act of Parliament, namely, the Matrimonial Causes Act 1866, s. 1. That is sufficiently referred to in the agreement. The Act of Parliament is clear. The 1st section of the Act of 1866 enacts that an order may be made for payment to the wife during their joint lives of weekly or monthly sums; but there follows the remarkable proviso that, if the husband shall afterwards, from any cause, be unable to make such payment, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revise the same order, wholly or in part, as to the court may seem fit. That, to my mind, means that these payments are liable to be modified or suspended by application to the court under circumstances of poverty of the person against whom the order was made. Now, in this case the agreement is made in view of that peculiar nature of the debt. It is not a common debt. Not only is it not a judgment debt, but it is a debt of a very peculiar kind—namely, a debt which on application to the court might be made less, or might be altogether destroyed. Under certain circumstances the parties in this case came together, and they agreed that the wife should take 10*l.* to be paid down in discharge of the sum that was due in respect of her future claims under the alimony order. In other words, she agreed to take 10*l.* certain, in place of her chance of getting 16*l.* odd and future amounts; or, on the other hand, her chance of her former husband going to the court and getting the whole of the order wiped out. Whether that was a good bargain or not, it is not for me to say. But it appears to me to be a bargain for which there was consideration, and which does not fall within the rule of law to which I have referred. I think I need not go beyond that. This case does not fall within that rule of law as to the impossibility of the release of one sum by the payment of a smaller. I think, therefore, that this agreement is good; and under these circumstances the execution was bad. I think I must say that the order for the discharge of the *fi. fa.* will be made with costs.

From that decision Mrs. Bates now appealed.

W. H. Stevenson (T. L. Gilmour with him) for the appellant.—The agreement in this case was *in alim pactum*, at any rate so far as the sum of 16*l.* 13*s.* 4*d.* was concerned, as a liquidated and undisputed sum of money cannot be compounded for by the acceptance of a smaller sum in satisfaction thereof:

Cumber v. Wane, 1 Str. 426; 1 Sm. L. Cas. 8th edit., p. 367;

Foakes v. Beer, 51 L. T. Rep. N. S. 833; 9 App. Cas. 605.

It was decided by Sir Francis Jeune that, having regard to the latter portion of sect. 1. of the Matrimonial Causes Act 1866, a sum of money payable in pursuance of an order made under that section was not such a "liquidated and undisputed" sum as came within the principle of *Cumber v. Wane (ubi sup.)*, and that, therefore, the writ of *fi. fa.* must be discharged. But I submit that permanent alimony, which is not alienable, cannot be released as was attempted to be done here, the agreement not being under seal. In

Foakes v. Beer (ubi sup.) Lord Selborne said: "What is called 'any benefit, or even any legal possibility of benefit,' in Mr. Smith's notes to *Cumber v. Wane* (1 Sm. L. C.), is not, as I conceive, that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent; but is some independent benefit, actual or contingent, of a kind which in law might be a good and valuable consideration for any other sort of agreement not under seal." This case is really governed by the decisions in

Re Robinson, 51 L. T. Rep. N. S. 737; 27 Ch. Div. 160;

Re Linton; Ex parte Linton, 52 L. T. Rep. N. S. 782; 15 Q. B. Div. 239.

Bucknill, Q.C. and *Searle* for the respondent.—The writ of *fi. fa.* was rightly discharged as being in violation of the agreement between the parties. Under the Act of 1866, if the respondent had applied to the court to discharge or modify the order for permanent alimony on the ground that his financial circumstances were such as to render him unable to continue payment of it, the court would have had power to do so. The order is not a final judgment. It is only an interlocutory order of the court. The court has power to discharge, modify, or suspend the order. [*KAY, L.J.*—The learned judge in the court below does not appear to have based his judgment on that ground at all.] A claim for arrears of alimony is not a claim for a "debt or liquidated demand in money" within the meaning of Order III., r. 6, so as to entitle the plaintiff to apply for judgment under Order XIV., r. 1:

Bailey v. Bailey, 50 L. T. Rep. N. S. 722; 13 Q. B. Div. 855.

It is not a judgment debt; it is not even a liquidated debt. We submit, therefore, that the payment of a sum in cash was a perfectly good consideration for this bargain to release the respondent from the claim for alimony. It is not the very same thing as the original debt, and the *fi. fa.* was improperly issued, having regard to the agreement entered into. Although possibly *Cumber v. Wane (ubi sup.)* might apply to the sum of arrears of alimony, the agreement is valid as to the future payments, and is not affected by the rule established by that case. Instalments of alimony which have accrued due as a sum certain since the date of a receiving order and before proof are not provable in bankruptcy:

Re Hawkins; Ex parte Hawkins, 69 L. T. Rep. N. S. 769; (1894) 1 Q. B. 25.

W. H. Stevenson in reply.—The arrears of alimony are property. They are recognised as such in *Re Robinson (ubi sup.)* and *Re Linton; Ex parte Linton (ubi sup.)*, and a wife can prove for arrears of alimony in bankruptcy although not for future alimony. I do not deny the correctness of the decision in *Re Hawkins; Ex parte Hawkins (ubi sup.)*, but I say that it does not affect the present case. A case very analogous to the case of *Foakes v. Beer (ubi sup.)* is

Prescott v. Prescott, 20 L. T. Rep. N. S. 331.

He referred also to

Harrison v. Harrison, 60 L. T. Rep. N. S. 39; 13 P. Div. 180.

Cur. adv. vult.

CT. OF APP.]

UNDERWOOD v. UNDERWOOD.

[CT. OF APP.]

March 8.—The following written judgments were delivered:—

LINDLEY, L.J. stated the facts of the case and read the agreement, and continued:—When this agreement was entered into Underwood owed his former wife 16*l.* 13*s.* 4*d.* for arrears of the allowance of 40*l.* which he had been ordered to pay. He might have applied to have the order discharged or varied on the ground of his inability to comply with it; but he made no such application, and the 16*l.* 13*s.* 4*d.* was therefore a liquidated sum due from him to his former wife. A payment by him to her of 10*l.* could therefore not discharge it. If so, the same sum cannot be a sufficient consideration for a promise to release it; and still less can the same sum be a sufficient consideration to release both the 16*l.* 13*s.* 4*d.* and also all future demands in respect of the 40*l.* a year ordered to be paid. Nor is it possible to treat the 10*l.* as the consideration for the promise to release the future demands, and so make the promise as binding as to them, although not as to the 16*l.* 13*s.* 4*d.* In short, turn the agreement about as one will, it is, in my opinion, impossible to avoid the conclusion that it is invalid for want of consideration. To hold it valid is impossible consistently with *Cumber v. Wane* (*ubi sup.*) and *Foakes v. Beer* (*ubi sup.*). Being invalid, arrears of the allowance ordered to be paid went on accumulating. They ultimately amounted to 86*l.* 13*s.* 4*d.* The former wife was entitled to issue a *fi. fa.* for that amount, and she issued a *fi. fa.* accordingly. Underwood sought to set this aside. But again no attempt was made by him to discharge or vary the order for the payment of the 40*l.* a year; nor, when we asked his counsel whether he desired to make an application to discharge it, did he express any such desire. Under these circumstances I am of opinion that the *fi. fa.* was legally issued; and that the agreement relied upon by Underwood as entitling him to set the *fi. fa.* aside is not sufficient for the purpose. The appeal, therefore, must be allowed, and Underwood's application must be refused with costs here and below, and the money paid into court by him must be paid to his former wife.

KAY, L.J.—The appeal is from an order of the Divorce Court setting aside a *fi. fa.* which was issued to enforce an order of the same court for permanent alimony. That order was made upon a former husband whose marriage with the appellant was dissolved. The alimony was in the form of an annuity of 40*l.* to be paid in monthly payments. The ground for setting the *fi. fa.* aside is, that the appellant, who had married again, and her present husband, by an agreement in writing dated the 11th Nov. 1891 agreed to release all arrears and future payments of the alimony. The appellant says that this agreement was without consideration, and was therefore *nudum pactum*. The nominal consideration was 10*l.*, but the arrears due at the time of the agreement amounted to 16*l.* 13*s.* 4*d.* This was a liquidated debt, and consequently the agreement to release it for 10*l.* was by the rule of law an agreement without consideration. But it is suggested that the release of the future payments makes some difference. If there was no consideration for agreeing to release the 16*l.* 13*s.* 4*d.*, the agreement to release something more cannot make a consideration. It renders the agreement more un-

reasonable. It is suggested that, if there had been no arrears, the 10*l.* might have been sufficient consideration for the agreement to release the future payments. But then the 10*l.*, though scarcely more than a nominal consideration, would not have been wiped out by the arrears as the case is now. The 10*l.* being so absorbed, there was no consideration whatever for the rest of the agreement. Then it is suggested that possibly a case might have been made under sect. 1 of the Act, 29 & 30 Vict. c. 32, for discharging the order for alimony altogether by reason of the liability of the divorced husband to pay. We asked his counsel whether he wished to have an opportunity of raising this question, but he declined. The doctrine exemplified in *Cumber v. Wane* (*ubi sup.*), that an agreement to release a debt actually due in consideration of the payment of a smaller sum is *nudum pactum* has been recently recognised in the House of Lords in *Foakes v. Beer* (*ubi sup.*). I am not inclined to depart from a well-settled rule of law by inventing some fine distinction to exempt a particular case from its operation. I confess I am totally unable, having regard to that rule, to see any ground for holding that there was any valuable consideration for this agreement. And I therefore think, with deference to the learned President, that the *fi. fa.* in this case ought not to be set aside. I must add that I am not much impressed by the argument that this conclusion is hard upon the divorced husband. That, if it were so, would not be a reason for departing from the law. But, on the other hand, to give up 16*l.* 13*s.* 4*d.* actually due and 40*l.* a year during the rest of the appellant's life for a present payment of 10*l.* was an agreement so improvident that I cannot feel regret that it should not be enforceable.

SMITH, L.J.—In this case Sir F. Jeune has set aside a writ of *fi. fa.* issued by a divorced wife to recover the sum of 86*l.* 13*s.* 4*d.* arrears of alimony due to her from her divorced husband under an order of the Divorce Court dated the 10th July 1888, and he did so upon the ground that, by a contract in writing dated the 11th Nov. 1891, but not under seal, the divorced wife, in consideration of 10*l.* then paid to her, had agreed to release the divorced husband from all alimony payable to her. At the date of the agreement the sum of 16*l.* 13*s.* 4*d.* was due and unpaid to the wife for alimony. It is contended upon this appeal by the wife that this agreement affords no answer, for it cannot be enforced in a court of law by reason of it being made without consideration. And the well-known rule of law was brought out, viz., that payment of a lesser sum cannot support an accord to forego a larger sum then due. It has been decided ever since the days of *Cumber v. Wane* (*ubi sup.*), in the year 1718, approved in the House of Lords as late as 1884, in the case of *Foakes v. Beer* (*ubi sup.*), that a debtor does not establish the defence of payment or accord and satisfaction upon proof that his creditor has agreed to forego his debt then due in consideration of payment of part only of the debt, because payment of part only of what is due can constitute no consideration moving from the debtor to the creditor to uphold the promise of the creditor to forego the residue of his debt. It was, however, argued that alimony was not a debt to which the doctrine laid down in *Cumber v. Wane* (*ubi sup.*) applied, for it was said that it was a debt which there was a

CHAN. DIV.]

Re HEWETT; HEWETT v. HALLETT.

[CHAN. DIV.]

possibility of getting rid of, by obtaining an order vacating the order for the alimony, and that upon application made upon proper materials the judge of the Divorce Court might do so, and that such materials existed in the present case upon which the husband could have founded such an application, and that, if successful, the wife's right to the 16l. 13s. 4d., as well as to the residue of the alimony, might have gone. Sir F. Jeune took this view, and held that, as there was this possibility, the 16l. 13s. 4d. was not an ascertained debt due to which *Cumber v. Wane* (*ubi sup.*) would apply. It is here that my difficulty arises. How can the possibility of getting the order for alimony set aside render the 16l. 13s. 4d. not an ascertained debt then due? Till set aside the 16l. 13s. 4d. is an ascertained debt due, and if the application fails the debt remains just what it was before. I would point out that there is always the possibility of a debtor becoming bankrupt; yet this surely cannot render an ascertained debt due before the bankruptcy not to be such a debt. In either of these cases there is a possibility of the debt being got rid of, but until it is got rid of I cannot see how I can hold that it is not an ascertained debt due *in presenti*. If such a possibility sufficed to alter an ascertained debt into what is not an ascertained debt, it seems to me that it would really eat up the decision of *Cumber v. Wane* (*ubi sup.*). I agree that, if the divorced husband had agreed not to take any proceedings to, if possible, vacate the order for alimony, then a new consideration over and above the payment of the 10l. would have existed, and would have sufficed to uphold the promise of the divorced wife not to further insist upon the alimony ordered. But there has been no such agreement in this case, and, twist and turn it as you will all that has taken place as regards a consideration moving from the debtor is a payment by the debtor to his creditor of a less sum than the debt then due, and this, as before pointed out, will not uphold an *assumpsit*. We offered the divorced husband time to make an application to the learned judge to see if he could get relief from the alimony, but this was refused. And, in my judgment, for the reasons given above, this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, Law and Worssam, agents for R. H. Buckby, Leicester.

Solicitors for the respondent, Preston, Stow, and Preston, agents for Pilgrims and Preston, Hinckley.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Dec. 6, 1893.

(Before NORTH, J.)

Re HEWETT; HEWETT v. HALLETT. (a)

Joint tenancy — Severance — Covenant to settle after-acquired property.

A covenant in a marriage settlement to settle after-acquired property of the wife will sever the joint tenancy in personal property to which the wife

becomes entitled jointly with others under an instrument executed after the date of the settlement.

By their marriage settlement, dated in Oct. 1880, M. and her husband covenanted to settle all after-acquired property of M. above the value of 300l. By a voluntary settlement executed in 1883 P. settled certain personal property upon the trusts therein mentioned, with an ultimate trust for his own next of kin. P. died in 1891, leaving M. and her sister and H. his next of kin. H. died within a few months of P. without having severed the joint tenancy of the next of kin under the voluntary settlement, and on his death all the trusts prior to that for the next of kin determined.

Held, that the joint interest of M. and her sister was severed by the covenant in M.'s marriage settlement.

In Aug. 1883 Sir Prescott Gardiner Hewett executed a voluntary settlement of certain personal estate upon the trusts therein declared, the ultimate trust being "for the next of kin of the said Prescott Gardiner Hewett," without any words to create a tenancy in common.

Sir P. G. Hewett died on the 9th June 1891, leaving Sir Harry Hammerton Hewett, Agnes Sarah Prescott Hewett, and Maud Sandys Hallett his next of kin.

Sir H. H. Hewett died on the 22nd July 1891 without having severed his joint tenancy as one of the next of kin under the voluntary settlement. On his death all the trusts declared by the voluntary settlement prior to the trust for the next of kin failed.

Agnes Sarah Prescott Hewett and Maud Sandys Hallett took out an originating summons for the execution of the trusts of the voluntary settlement, the trustees of Mrs. M. S. Hallett's marriage settlement being joined as plaintiffs, and the trustees of the voluntary settlement made defendants.

This summons now came on for further consideration. Miss Agnes Sarah Prescott Hewett claimed against the other plaintiffs that the joint tenancy created by the trust in the voluntary settlement contained in favour of the next of kin of Sir P. G. Hewett was severed by a covenant to settle after-acquired property contained in the settlement made on the marriage of Mrs. Hallett, and therefore Miss Hewett became entitled on the death of Sir H. H. Hewett to two-thirds of the property.

This covenant was entered into by Mrs. Hallett (then M. S. Prescott Hewett) and her husband with the trustees, and was in the following words:

That if the said Maud Sandys Hewett now is or if at any time or times during the said intended coverture she or the said William Charles Hallett in her right shall at one time and from one source become entitled by descent, devise, bequest, gift, representation, purchase, or otherwise to any real or personal property over and above the value of 300l. for any estate or interest whatsoever (except trinkets, jewels, ornaments, plate, plated goods, pictures, water colour and other drawings, furniture, prints, engravings, china and books, which it is hereby agreed shall belong to the said Maud Sandys Hewett for her separate use), then and in every such case the said William Charles Hallett and M. S. Hewett and all other necessary parties shall at the cost of the trust estate and as soon as circumstances will admit convey,

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

[CHAN. DIV.]

Re HEWETT; HEWETT v. HALLETT.

[CHAN. DIV.]

assign, surrender, and assure the said real or personal property to the said trustees or trustee upon trust that they or he shall with all convenient speed and in such manner as they or he shall think fit sell or convert into money the said real or personal property, except such parts thereof as shall consist of money or of an annuity or annuities or other real or personal property to which the said Maud Sandys Hewett now is or she or the said William Charles Hallett in her right shall become so entitled as aforesaid for the life of the said Maud Sandys Hewett only, or for a term of years determinable on her death, and shall stand possessed of the moneys to arise from such sale, calling in, or conversion into money, and of such parts of the said property as shall consist of money, and of the securities upon which the said moneys respectively may be invested and of the interest, dividends, and annual produce thereof, upon the trusts therein mentioned, which were declared by reference to the trusts previously declared of the property of Maud Sandys Hewett for the benefit of herself, her husband, and children.

S. Hall, Q.C. and Rowden for Miss Hewett.—A covenant to settle after-acquired property in a marriage settlement severs a joint tenancy in property to which the wife was at the date of the settlement entitled, whether in possession or reversion, and even though the title was contingent. That point was decided in *Caldwell v. Fellowes* (22 L. T. Rep. N. S. 225; L. Rep. 9 Eq. 410), and was treated as settled law in

Burnaby v. The Equitable Reversionary Interest Society, 52 L. T. Rep. N. S. 350; 28 Ch. Div. 416.

Caldwell v. Fellowes (*ubi sup.*) was also followed in *Baillie v. Treharne* (44 L. T. Rep. N. S. 247; 17 Ch. Div. 388), a case which has been disapproved in so far as it decided that marriage in itself was a severance of the joint tenancy, but not as to the effect of the covenant:

Re Butler's Trusts, 59 L. T. Rep. N. S. 386; 38 Ch. Div. 286.

The covenant operates as an actual severance of the tenancy in equity, not as a contract to sever at some future time:

Brown v. Raindle, 3 Ves. 256.

The only possible distinction in this case is that the property here comes to the wife under an instrument executed after the settlement, but that can make no difference. Such property is unquestionably bound by the covenant, and an equitable interest in property not yet in existence can be dealt with without any special form of conveyance:

Holroyd v. Marshall, 7 L. T. Rep. N. S. 172; 10 H. of L. Cas. 191.

Capron for Mrs. Hallett and the trustees of her settlement.—In all the cases cited the joint interest which was held to be severed was in existence at the time the covenant was executed. Nothing which is done before the execution of an instrument which creates a joint tenancy can possibly sever such a tenancy. But in this case Mrs. Hallett's joint interest was not affected at all. A covenant to settle after-acquired property does not include property to which from its nature the trusts cannot apply:

Scholfield v. Spooner, 51 L. T. Rep. N. S. 138; 26 Ch. Div. 94.

Here the trusts are for immediate sale, and therefore cannot apply to an interest which has not

come into existence. That contention was recognised in *Re Mackenzie's Settlement* (L. Rep. 2 Ch. 345) and in *Re Jackson's Will* (41 L. T. Rep. N. S. 494; 13 Ch. Div. 189), though in both those cases it was held that the trusts were not for immediate sale.

NORTH, J.—The conclusion I come to is that this covenant to settle after-acquired property has the effect of severing the joint tenancy, although there was no interest in it existing in 1880, when the settlement was made. That settlement was made with the intention to provide for every case. [His Lordship read the covenant set out above, and proceeded:] The words are that William Charles Hallett and Maud Sandys Hewett and all other necessary parties shall—not “will, if they think fit,” but “shall”; they are bound to do it—at the cost of the trust estate and as soon as circumstances will admit,” assign the property to the trustees to hold upon the trusts of the settlement. The trusts were declared in respect of certain property belonging to the lady which she had at the time, which had first been settled. This covenant was made by the deliberate act of the parties for the purpose of catching any other property in which at the time she had any estate or interest whatever, not being less than 300*l.*, or being within the excepted items; and also any such other property as she might at any time acquire during the continuance of the coverture, whether anticipated or not, and it would apply to everything that came as an entire novelty from a perfect stranger, just as well as to property which was in the expectation of the parties at the time at which the settlement was made. Then what happens is this: Three years after that marriage settlement a voluntary settlement is made by Sir Prescott Hewett, in which there is an ultimate trust, if certain prior trusts fail, for his next of kin. That, as soon as the settlement was executed, did give a contingent interest to any person who might prove to be entitled under those words. Of course, it could not be ascertained that these parties could take anything under it, because the persons contingently entitled were the next of kin of Sir Prescott Hewett, and they could only be ascertained at the time at which he died. I do not, therefore, agree in the view that the settlement did affect this particular property at the time at which the voluntary settlement was made in 1883, though, no doubt, a possibility of succeeding to that property as one of the next of kin might thenceforward have been in the contemplation of the parties. But when Sir Prescott Hewett died, it was known who his three next of kin were, and those persons at once had an immediate interest. I do not say an interest in possession, but they had a clear interest in the property, although, no doubt, it might be a very remote interest, and possibly might fail; but there was an interest which vested in the next of kin at that time, and Mrs. Hallett's share in which, according to my view of the covenant, the partners had bound themselves to convey and assure when circumstances should permit. Then the only question is whether the covenant had the effect of severing the joint tenancy. In my opinion it had, and I think the case comes within *Caldwell v. Fellowes* (*ubi sup.*). I quite admit that the facts were somewhat different there; but I mean it comes within the principle of the decision. In that case the recited agree-

ment was to settle the property "to which the wife is entitled or may be entitled," and then the covenant was to settle all the estate and effects, both real and personal, "of which the wife is now seised or possessed, or of which she shall hereafter become seised or possessed." In that case there was a reversionary interest existing at the time at which the settlement was made. That, of course, admits a distinction from the present case; but, in my opinion, it makes no difference whatever in principle, because it was intended to catch what the parties did not know of at the time, whether the wife had it at the time, or whether she should afterwards get it. The observations of James, L.J., who as Vice-Chancellor decided that case, point to what the intention of the parties was, and that intention seems to me to be precisely the same intention as there is in this covenant, namely, that it should apply to property which was not included in the settlement, whether the interest then existed, or was acquired subsequently. As he says there: "Is there anything else to say that we are not in this instance to take the literal meaning of the words? The mere fact that she recites certain specific funds, but does not recite this particular property, is not sufficient to indicate an intention that any property which she did not happen to think of, or which was unknown to her, should not be included in the settlement." Then he points out from the words used that it was the intention and agreement of all parties that the whole of the property should be so settled. What property? The property which comes within the scope of the covenant, whether it is property which the wife is possessed of at the time, or which she acquires during the coverture. Then he says: "If that be so, if upon taking the whole instrument together it appears to have been part of the agreement and intention of all parties that the whole of the property should be settled, *cadit questio*." It is quite clear that Mrs. Hallett's interest in the joint property does come within the covenant in the present case. Then the next point is whether, if the interest of Mrs. Hallett is included in the covenant, the covenant does operate as a severance or not. In my opinion it does, because it is quite clear that any agreement to sever made by a joint tenant, if it binds the parties, if it is made for value, is just as effectual as if the intention of the parties expressed in the agreement had actually been carried out by a conveyance of the property. There are many cases in the books in which an agreement without an actual completion of the assurance has been held to bind the property; and in particular there is the case, which Mr. Hall referred to, of *Brown v. Raindle* (*ubi sup.*), which seems to me exactly in point. That was a case of a copyholder having power to bar the widow's freebench by surrender, and it was held that any act by him for valuable consideration would bar her in equity—that such act was just as good as if it had been completed by a surrender; and the Master of the Rolls says in the judgment: "A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it. Therefore let her convey all her estate and interest in the copyhold premises according to the deed of the 2nd July 1792, subject to

redemption." In my opinion, therefore, the agreement to settle has just the same effect as if it had been completed by a settlement being executed. See also *Baillie v. Treharne* (*ubi sup.*). Then another point was suggested: that this property was hardly within the scope of the settlement, because the purposes to which the property was to be conveyed to be held under the settlement do not fit in. Reliance was placed upon Bowen, L.J.'s observations in *Scholfield v. Spooner* (*ubi sup.*), but I think that the argument is answered by the facts. There is no difficulty whatever in making the trusts fit in, as the Master of the Rolls pointed out in the judgment he gave on behalf of the Court of Appeal in *Re Jackson's Will* (*ubi sup.*). I think, therefore, that point does not come to anything. The result is, in my opinion, that the settlement made in 1880 did operate as a severance of this property upon the death of Sir Prescott Hewett in 1891. Therefore at that time, when the next of kin came in as joint tenants, there was an agreement which, immediately after the property vested in them as joint tenants, had the effect of severing that joint tenancy. The result will be that, Mrs. Hallett having severed her share, the rest of the property remained subject to the joint tenancy of the other two; and upon the death of the son without severing the joint tenancy, Miss Hewett then became entitled to the son's share as well as her own, and became solely entitled to these two-thirds.

Solicitors for all parties, *Currey, Holland, and Currey*.

Feb. 10, 16, and 17.

(Before NORTH, J.)

Re PICKARD; ELMSLEY v. MITCHELL. (a)

Mortmain—Corporation bond—Charge on rents of real estate—Borough fund—Pure personality.

H. P. by will gave her residuary estate to charities. Part of her residue consisted of bonds of the Leeds Corporation Debenture Stock. This stock was by the Act under which it was created charged on the borough fund account and also on the revenues of all real estates belonging to the corporation.

Held, that, as the holder of the stock could not in any case enforce his charge against the land, but could only appoint a receiver to receive the rents after they were due, the bonds were pure personality, and passed to the charities.

HANNAH PICKARD by her will dated the 19th Jan. 1891 gave her residuary estate to certain charities. This gift of residue operated as an exercise of a power of appointment given to her by her brother's will over the proceeds of his residuary estate, and by virtue of the exercise of this power a bond of the Leeds Corporation for 800*l.* on the proceeds thereof formed part of her residuary estate.

Hannah Pickard died on the 29th Jan. 1891, before the passing of the Mortmain Act 1891.

This was an originating summons taken out for the determination, together with other questions not requiring a report, of the question whether those bonds were pure or impure personality.

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.]

Re PICKARD; ELMSLEY v. MITCHELL.

[CHAN. DIV.]

The bonds in question were issued under the Leeds Improvement Act 1877, which provided (sect. 67) that the stock created under the Act should be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which might be acquired by them, but that such stock should be distributable, transmissible, and transferable as and in other respects have the incidents of personal estate.

The bonds were in the form of certificates that the holder was entitled to the sum named of the stock created under the above Act, and it was indorsed with conditions of issue, of which the second was in these terms:

The security for the stock and the due payment of the interest thereon is the borough fund and borough rates, the waterworks and gasworks undertakings, the improvement rates, and the revenues respectively derived therefrom and from all landed and other property vested in or belonging to the corporation, and any other revenues which may be acquired by them. A further security for the redemption of the stock is a sinking fund which is established and invested under Government supervision.

The Municipal Corporations Act 1882, s. 39, provides that

The rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable to a municipal corporation, or to any member or officer thereof in his corporate capacity . . . shall go to the borough fund.

Cozens-Hardy, Q.C. and Warrington for the charities interested in the residue.—The case is governed by the principles laid down by the Court of Appeal in

Re Thompson; Bedford v. Teal, 63 L. T. Rep. N. S. 471; 45 Ch. Div. 161.

It is true that case dealt with a charge upon the borough fund only, and that here there is an express charge on the revenues of the real property of the corporation. But that does not carry the case any further, for under the Municipal Corporations Act 1882 these rents must go into the borough fund, and they can only be charged as part of it. And according to *Re Thompson* the real question is, could the stockholder in any case enforce his security against the land itself? It is plain he could not, for by the Local Loans Act 1875 (38 & 39 Vict. c. 83, s. 6) it is provided that, where corporation debenture stock is a charge upon property other than the local rate, and it is intended that the property should be sold for raising the money, a declaration to that effect should be made by the local authority at the time of the issue of the stock. This was not done. It is true that the stockholders could obtain the appointment of a receiver, but he could only receive the rents due and in arrear, and they are pure personality. *Re David; Buckley v. The Royal National Lifeboat Institution* (60 L. T. Rep. N. S. 786; 41 Ch. Div. 168) was not a case of a municipal corporation, and is therefore distinguishable, but, if not, it must be taken to be overruled. In the case of *Re Yerbury's Estate; Ker v. Dent* (62 L. T. Rep. N. S. 55) the stock in question was distinguished from ordinary railway stock in the same way as the stock here is distinguished from ordinary corporation stock, but it was held that the distinction

made no difference. Moreover, in this case the first testator directed all his property to be converted, and Hannah Pickard had only power to deal with the proceeds.

H. M. Humphry for the next of kin.—There is nothing in the argument that Hannah Pickard could only deal with the proceeds of sale. That point was expressly decided by *Brook v. Badley* (L. Rep. 3 Ch. 672). A charge upon the rents and profits of land is always a charge upon the corpus, and here the bondholder has a right to intercept the rents and profits before they go into the borough fund. *Re Thompson (ubi sup.)* does not apply, because there is an express charge upon the rents as well as on the borough fund. That distinction was relied on by Kay, J. in *Re Holmes; Holmes v. Holmes* (63 L. T. Rep. N. S. 477; 60 L. J. 267, Ch.), and his decision is exactly in point here.

S. Hall, Q.C. and Baker for the heir-at-law.

Swinfen Eady, Q.C. and Peterson for other parties.

Cozens-Hardy, Q.C., in reply, referred to

Re Parker; Wignall v. Park, 64 L. T. Rep. N. S. 257; (1891) 1 Ch. 682.

NORTH, J. (after reading the section of the Act and the condition on the bond set out above) proceeded:—Excepting those last words that I have read, the certificate follows precisely the language of the section authorising the creation of the debenture stock. Now, the question is, what is charged by that? The first argument addressed to me is that it is the borough fund and nothing else. Looking at the words again, the first thing charged is the borough fund, and if there is a charge on the borough fund and nothing else, why should the section go further—there is no reason why it should not stop there; but I think it is clear that the words were intended to apply to something which is not part of the borough fund, because the words go on to charge the borough rate, the waterworks and gasworks undertakings, and the improvement rate, and the revenues respectively derived therefrom—those are things which are not part of the borough fund—and then they proceed, “and from all landed and other property vested in or belonging to the corporation.” Now, that property certainly is not part of the borough fund, and the revenue derived from it is not part of the borough fund at the moment it issues from it. The revenues have eventually to go into the borough fund; but that seems to me to be a different thing from saying that they are part of it, and are described as part of the borough fund at the commencement of this string of words, when the revenues derived from landed property are expressly and separately mentioned afterwards. It is said that the case of *Bedford v. Teal (ubi sup.)* is in point here, and that I am bound to hold that, because the revenues of the land and other property of the corporation are to go into the borough fund, this is a charge on the borough fund only. But this seems to me to be a question of construction, and, although Kay, J. thought that *Bedford v. Teal* had nothing whatever to do with the language of the securities he had to consider in *Re Holmes (ubi sup.)*, in which view I very much agree with him, yet I cannot quite throw overboard the decision in *Bedford v. Teal* when I

CHAN. DIV.]

Re FITTON'S ESTATE; HARDY v. FITTON.

[CHAN. DIV.]

have a debenture so similar to the debenture there as I have in the present case. The conclusion I come to in this case is, that I cannot say that all these revenues are pure personalty because a part of them are included in the borough fund. I think it would be putting too strained a construction upon the words of the charge; and I do not know why, after first mentioning the borough fund, and afterwards passing away to other things, and then passing on to revenue of land, we should be taken to have gone back to what we began with, and to have described unnecessarily what was merely one of the constituents of the borough fund, and as such was already described by the first words used in the section. I am not satisfied that the construction of these words is what Mr. Cozens-Hardy contends, and I do not think that the case of *Bedford v. Teal* binds me in any way to come to that conclusion. I think the words here are so distinguishable that I am not satisfied that no part of the property charged here is to be treated as a separate thing from the borough fund. Then there is a charge on something beyond the borough fund. What is it? It is a charge on the revenues derived from the property. That seems to me to be a very different thing from a charge upon the property itself. It is a charge upon the revenues to be derived from it; and that charge, if it is enforced directly against the corporation, can only be enforced against them in respect of the sums they have received and carried to the borough fund. Then it is suggested that a receiver may be appointed of the rents; and by virtue of this charge the rents may be arrested before they ever become part of the borough fund. Assuming that to be so, still I do not think that it makes the charge a charge upon land. That clearly is not a charge upon land as distinguished from a charge upon the revenues of the land, because it is expressly confined to the revenues of the land, and that can only be enforced against the land, at the utmost, by the appointment of a receiver, and that receiver can do nothing but collect the revenues of the land after they have become arrears. He cannot anticipate growing payments of rent. He can only ask for the rent, or whatever other payments there may be, after they are due; and it is settled that arrears of rent are not property which is so much connected with land that it cannot be given for charitable purposes. So in the same way here, supposing that a receiver is appointed who cannot enter upon the land or do anything but receive the revenues of the land, he can only receive them when they are paid, and, in my opinion, receiving them in that way, he is not receiving anything which was incapable of being charged for charitable purposes. Of course what I have said proceeds upon the assumption that the recent Acts had not been passed, because I am dealing with a charge which was created before those Acts took effect. That being so, I come to the conclusion that this bond is entirely pure personalty.

Solicitors: *Torr and Co.*, agents for *Stewart, Son, and Chalker*, Wakefield; *Stevenson and Coudwell*, agents for *Piercy*, Leeds; *Paterson, Snow, Bloxam, and Kinder*; *Pitman and Sons*.

Dec. 13 and 14, 1893.

(Before STIRLING, J.)

Re FITTON'S ESTATE; HARDY v. FITTON. (a)

Practice—Further consideration—Report of official referee—No motion to vary report—Evidence on which referee based report—Rules of the Supreme Court 1883, Order XXXVI., r. 54.

If, upon the further consideration of an action, one of the parties asks the court to adopt the report of the official referee made in the action, the court will not, at the request of the opposite party, go behind the report and vary it by looking into the evidence on which the referee based it, where that party has given no notice of motion to vary the report or remit the cause or matter for rehearing.

THIS was the further consideration of an action brought by a legatee under the will of Samuel Fitton, who died on the 21st Feb. 1883. The plaintiff asked that the legacy bequeathed to her by the will might be paid by the executors, as the will provided. She also asked that the partnership business carried on by the testator, so far as subsisting, might be disposed of, and the partnership affairs wound-up, and, so far as was necessary, administration by the court of the real and personal estate of the testator.

The writ in the action was issued on the 12th Nov. 1888, and judgment was delivered on the 8th Aug. 1890, by which the trusts of the will were ordered to be performed and carried into execution, and certain accounts and inquiries were directed to be taken and made. An order was made on the 11th July 1892, when those accounts and inquiries had not been completed, that, pursuant to the Arbitration Act 1889, the inquiries and accounts under the judgment of the 8th Aug. 1890 should be referred to the official referee in rotation to inquire and report upon them. The official referee made his report on the 24th July 1893, and it was filed on the 30th Oct. 1893.

The action now coming on, on further consideration the defendant asked the judge to adopt the report in accordance with Order XXXVI., r. 54. This rule provides that, where the report of the referee has been made

in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, without notice of motion or summons, to apply to the court or a judge to adopt the report, or without leave of the court or a judge, to give not less than four days' notice of motion to come on with the further consideration to vary the report or to remit the cause or matter, or any part thereof, for rehearing or further consideration to the same or any other referee.

No notice of motion to vary the report or remit the matter for rehearing had been given by the plaintiff, but she now asked the court to go behind the report and vary it by looking into the evidence upon which the referee based it.

Phipson Beale, Q.C. and *J. Bradford*, for the plaintiff, argued that the report of an official referee was different from the finding of a chief clerk, and was not binding until the court adopted it at the request of one of the parties, and it could not be adopted until it appeared on what evidence it was founded.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

CHAN. DIV.] *Re J. & J. COLMAN'S APPLICATION TO REGISTER A TRADE MARK.* [CHAN. DIV.]

Graham Hastings, Q.C. and A. Whitaker for the defendant.

STIRLING, J.—The point with which I have to deal is, whether I ought, under the circumstances to which I will presently refer, to go into the evidence which was before the official referee and which led to the making of his report. The writ in the action was issued on the 12th Nov. 1888. Judgment was given on the 8th Aug. 1890, and thereby a series of accounts and inquiries were directed to be taken and made. On the 11th July 1892 an order was made directing that the accounts and inquiries should be referred to the official referee in rotation. His report was made on the 24th July 1893, and filed on the 30th Oct., so that the different stages of the action from its commencement to the filing of the official referee's report occupied nearly five years. The action now comes on for further consideration. The defendant asks me to adopt the report of the official referee. The practice is regulated under Order XXXVI., r. 54, of the Rules of 1883. [His Lordship then read the rule and proceeded:] The plaintiff has given no notice of motion to vary the report or remit the cause or matter for rehearing. She asks me to go behind the report and vary it by looking into the evidence upon which the referee based it. It seems to me that I should be consenting to a practice of the worst kind if I were to do so. The result would be that, when the case is before the court upon the report, and no notice of motion has been given to vary it, each party might come and ask the court to go behind it, if he objected to the finding of the referee. That would be defeating the object of the rules which enable the court to refer matters to the official referee, and I cannot assent to its being done. I therefore hold that, as matters now stand, the evidence cannot be gone into at the instance of the plaintiff, who has given no notice of motion to vary the report. What I may do upon reading the report is another matter, as I have power to adopt it either in whole or in part. [His Lordship then considered the report and in the result referred back to the official referee three of the inquiries for further report.]

Solicitor for the plaintiff, *H. E. Moojen*.
Solicitors for the defendants, *Stephens and Stephens*, for *J. Reed May, Macclesfield*.

Feb. 14 and 15.

(Before STIRLING, J.)

Re J. AND J. COLMAN'S APPLICATION TO REGISTER A TRADE MARK. (a)

Trade mark—Registration—Sufficiency of disclaimer—Costs—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 64—Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), s. 10.

J. J. Colman and Co., manufacturers of mustard and other goods, applied to register as a trade mark a label containing the words "Colman's Mustard." In their application they stated the essential particulars, and disclaimed any right to the exclusive use of the word "mustard." The Comptroller required the applicants to amend their application and disclaimer in a specified

manner, but they declined to do so on the ground that such amendment would involve a disclaimer of the name "Colman."

Held, that the applicants were not bound to disclaim "Colman's," it being their name within the meaning of proviso 3 (i.) of sect. 64 of the Patents, Designs, and Trade Marks Act 1883, altered by sect. 10 of the Patents, Designs, and Trade Marks Act 1888. No costs.

THE facts of the case sufficiently appear from the judgment of Stirling, J.

Sir *R. Webster, Q.C., Cozens-Hardy, Q.C., and Sebastian* for the motion.—The name of "Colman" is both the name of the firm and of every member of it, and under sect. 64 (3) (i.) need not be disclaimed. The registration of the label as a whole does not give an exclusive right to the added parts:

Re Smokeless Powder Company's Trade Mark, 66 L. T. Rep. N. S. 467; 9 E. P. C. 109; (1892) 1 Ch. 590;

Pinto v. Badman, 8 E. P. C. 181, 191;

Re Hudson, 55 L. T. Rep. N. S. 228; 3 E. P. C. 155; 32 Ch. Div. 311;

Re Atkins, 3 E. P. C. 164.

Messrs. Colman will be prejudiced by such a disclaimer as is required:

Rosenthal v. Reynolds, 67 L. T. Rep. N. S. 162; 61 L. J. 508, Ch.; (1892) 2 Ch. 301; 9 E. P. C. 189.

Sir *J. Rigby (S.-G.) and Ingle-Joyce* for the Comptroller-General.—We say that words and names used with a mark ought to be claimed or disclaimed unless they come within sect. 64 (3) (i.) "Persons" there includes a firm, but in this case we have not J. and J. Colman but "Colman's," in the possessive case, which is not the name of an individual nor of a firm:

Pirie v. Goodall, 65 L. T. Rep. N. S. 640; 9 E. P. C. 17; (1892) 1 Ch. 35.

If a person not bearing the name of Colman were taken into the firm, how could he help disclaiming? *Rosenthal v. Reynolds* does not show that Messrs. Colman would be prejudiced by the disclaimer:

Mitchell v. Henry, 43 L. T. Rep. N. S. 186; 15 Ch. Div. 181.

Webster in reply.—A person's "own name" does not necessarily mean his whole name. This is the firm's name, using the word in an ordinary business sense.

STIRLING, J.—This is an appeal from the decision of the Comptroller of Trade Marks brought before me by the direction of the Board of Trade. The question which is raised may be very shortly stated from the documents which I have before me. There are five gentlemen all named Colman, who carry on in partnership the business, amongst other things, of manufacturers of mustard, at Norwich, under the name, or style, or firm, of J. and J. Colman. They, in the beginning of 1893, applied to the Comptroller of Trade Marks to register a new label, of which I have a copy before me. The form of the application is: "You are hereby requested to register the accompanying trade mark in Class 42, in respect of mustard, in the name of J. and J. Colman, of 108, Cannon-street, London," and so forth, "who claim to be the proprietors thereof; the essential particulars of the trade mark are the entire distinctive label and the words 'Bull's Head,' and we disclaim any

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

right to the exclusive use of the word 'Mustard.' I have heard the history of this peculiar form of application as regards the essential particulars, and it appears to have been adopted from a form which had been sanctioned by the Comptroller on a previous occasion. It does not seem to me, if I may be allowed to make the criticism, to be a very happy one, because it leaves at large the question What is meant by the entire distinctive label? But it is to be inferred, I think, from the form of the application, that the entire distinctive label did not include everything which appeared on the label; that some of the words at any rate were not essential parts of it, because there is a separate claim for the words "Bull's Head," and there is disclaimer of the exclusive use of the word "Mustard." On the 7th March 1893 the Comptroller writes: "With reference to your application, I am directed to return the form in order that it may be so amended as to contain the statement and disclaimer in accordance with sub-sect. 2 of sect. 64 of the Trade Marks Acts 1883 to 1888 in the following terms: "The essential particulars of the trade mark are the combination of 'Bull's Head' and flag devices, and the words 'Bull's Head,' and the applicants disclaim any right to the exclusive use of the added matter." Here again, if I may make the criticism, that appears to me to be a much better statement of the essential particulars of the trade mark than that which is contained in the application, because it defines the essential particulars by reference to certain particulars there stated; but it is to be observed that the applicants are required to disclaim any right to the exclusive use of the added matter, without any exception whatever, and to that the applicants took exception on the ground that part of the added matter, according to that statement of the essential particulars, consisted of the word "Colman's," which is a part of, and the most essential part of, the trade name of the firm and the names of the individual partners. I shall call attention in a moment to the passage in the Act of Parliament on which that objection is based; in the meantime I may shortly state that what they desired to add to the form of statement which the Comptroller required them to sign was an exception in these terms, "Except so far as it consists of our name," an exception which had been sanctioned, as I understand, by the Comptroller on a previous occasion, when some of the trade marks of the same firm were before him. The matter was argued before him, and in the judgment which has been read to me he ultimately decided that he could not allow that exception; and in that state of things the matter comes before me. Now, the material section of the Act of Parliament with which I have to deal is the 64th section as settled by the Act of 1888. It runs thus: "For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars: (a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (b) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or (c) a distinctive device, mark, brand, heading, label, or ticket; or (d) an invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Then the 2nd sub-section is: "There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register. (3) Provided as follows: (1) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business; but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof." Now, two points upon that section have been argued before me. In the first place, it is contended on behalf of the applicants that this is a distinctive label entitled to registration under sub-sect. 1 (c), that it is a distinctive label consisting of everything that appears on the face of it, including the words "Colman's Mustard," and that there is nothing which in the language of sub-sect. 2 ought to be regarded as additional matter. I do not propose to decide anything on that question; it does not seem to me to be in strictness open upon the form of the applicant's application, or, having regard to the decision of the Comptroller, requiring them to state the essential particulars in the form mentioned in his letter of the 7th March 1893. I have not heard Sir Richard Webster in reply upon it. I would only say that at present, not having heard him in reply, but having heard the argument of the Solicitor-General upon it, I am not satisfied that the argument of the Solicitor-General may not be well founded. However, I decide nothing in respect of that, but leave the matter to be decided on a future occasion if necessary. The applicants, however, object, secondly, that the Comptroller is requiring them to disclaim additional matter which the Act does not compel the applicant to disclaim, on the ground that there is an express proviso that a person need not under the section in question disclaim his own name, and the word "Colman" or "Colman's" which appears on the label is stated to be the name of the applicants. That is really the question which, it seems to me. I have got to decide on the present occasion, and the Comptroller has held that the word "Colman" is not the name of the applicants for registration, mainly, I think, on the ground of a decision of the Court of Appeal in the case of *Pirie v. Goodall* (*ubi sup.*), to which I shall call attention presently. Now, before I deal with it, let me look at the language of the section, and the object which the Legislature appears to have had in view in the various enactments which are contained in it. I may perhaps begin usefully by referring back to sect. 62, which relates to the application for registration, and begins thus: "The Comptroller may on application by or on behalf of any person claiming to be the proprietor of a trade mark register the trade mark." "Person" there, though used in the singular, may, according to the provisions of the Interpretation Act of 1889, or the statutes which that Act recites, be treated as used in the plural number, but beyond that it is expressly enacted by sect. 117 that "person" includes "body cor-

CHAN. DIV.] *Re J. & J. COLMAN'S APPLICATION TO REGISTER A TRADE MARK.* [CHAN. DIV.]

porate." Then sect. 63 is immaterial, but it is observable when we come to sect. 64 that the Legislature, in sub-sect. 1, for no doubt special reasons, has departed from the language of sect. 62, and no longer uses the word "person:" "For the purposes of this Act a trade mark must consist and contain at least one of the following essential particulars: (a) a name of an individual or firm, printed, impressed, or woven, in some particular and distinctive manner, or (b) a written signature, or copy of a written signature, of the individual or firm applying for registration thereof as a trade mark." Instead of using the general word "person," for some reason the Legislature has thought fit to speak there of the name of an individual or firm. Upon that it is possible that some day a question may arise whether the name "body corporate" is to be included. It is not necessary for me to say anything upon that. Whether a body corporate can be treated as an individual may hereafter be a question which may come up for decision. I say nothing on that. I simply call attention to the variation in the language in the 62nd section, and the language which occurs later, because in the 3rd sub-section of the same section we find this: "A person need not, under this section, disclaim his own name." The Legislature, for some reason or other, has there reverted to the language of sect. 62, and no longer speaks of individuals or firms. Now, in sub-sect. 1 of sect. 64 the Legislature is engaged in defining the essential particulars of a trade mark. In sub-sect. 2 the Legislature goes on to provide that to any one or more of the essential particulars mentioned in this section, any letters, words, or figures, or combination of letters, words, or figures, may be added. Therefore a person registering a trade mark is not confined to the essential particulars as defined by sub-sect. 1, but there is upon that imposed this proviso, that the applicant for registration of any such additional matter must state the essential particulars, and must disclaim the added matter. Then upon that comes the further proviso or qualification that a person need not under the section disclaim his own name, or the foreign equivalent thereof, or his place of business. Now, the object of that seems to have been this, that the persons who are owners of trade marks, or desire to have them registered, were to be entitled to register them, not, so to speak, as bare trade marks, consisting of the essential particulars defined by sub-sect. 1, but were to be allowed to make statements with reference to any matters which might occur to them in reference to the goods themselves—obviously with reference to those who manufactured them, obviously also with reference to the place where they were manufactured; and it seems to me to have been the object, having regard to the proviso contained in sub-sect. 3, to enable the owner of a trade mark to state on the face of the mark who was the owner, that is to say, the manufacturer of the goods to which the mark applied and the place at which they were manufactured, so as to identify the goods denoted by that mark with that particular manufacturer and that particular place of manufacture. Now, the first objection which is raised to the contention on behalf of the applicants with reference to this disclaimer is, that the word "Colman's" is not the name of the person registering within the meaning of this sub-section. I shall begin,

for the purpose of explaining my view, with what seems to be a simpler case than the present. I shall take simply this case: I shall take as a subject of manufacture the article in question, namely, mustard. I shall suppose that one John Smith desires to register a trade mark containing all the essential particulars with this addition, "Mustard manufactured by John Smith." Now, I cannot see why that addition should not be made. It seems to me to fall strictly within such additions as are mentioned in sub-sect. 2, being a combination of words. Under sub-sect. 2 John Smith desiring to register is required to disclaim the additional matter with the exception of his own name. John Smith is his name, and therefore he is not required to disclaim the words "John Smith" upon the mark so intended to be registered. That so far seems to me to be clear upon the very language of the Act. But, if I understand the contention rightly, it is said that, although he might register a trade mark with the words "Mustard manufactured by John Smith," he must not register a trade mark with the words "Mustard manufactured by Smith" without a disclaimer of the name "Smith," the whole additional matter. That does seem to me to be a very extraordinary contention; but, of course, I am bound by authority if such exists, and it is said that an authority to that effect does exist in the decision of the Court of Appeal in the case of *Pirie v. Goodall*, to which I have been referring. Now, in that case there had been registered a mark, of which I am kindly furnished with a copy. "Pirie's Parchment Bank" were the words sought to be registered, and on the side there is this disclaimer: "The applicants do not claim any right to the exclusive use of the word 'parchment' or the word 'bank' appearing in connection with this mark;" so that all that remained as the essential part of the mark, if it were well registered, was the word "Pirie's." In an action for an infringement of the mark brought by Messrs. Pirie against Messrs. Goodall, Williams, J. decided that the mark was not a good one, and the point which was afterwards raised does not appear to have been made before him; but in the Court of Appeal it was contended that the mark might be supported as being under sect. 64, sub-sect. 1 (a), a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner. Now, Lindley, L.J., in delivering the judgment of the Court of Appeal, says this (I read from the report at page 20 of the 9th volume of the Reports of Patent Cases): "Mr. Willis Bund started a point which had been started in the court below, but which his leader had not the courage to start here. He says the trade mark is 'Pirie's,' and that these words 'Parchment Bank' are mere additions to that." Well, to dispose of that point we have to read the section, which is sect. 64, and to ask ourselves whether "Pirie's" as printed here in the genitive, with a comma, is "a name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner." Well, it is not the name of an individual, it is not the name of a firm. I cannot say, of course, off-hand whether it is printed in any particular or distinctive manner. All that is shown upon the register is that the letters are printed in outline. That is common enough, but the true answer to this is, that it is an ingenious suggestion, and "Pirie's"

is not the name of an individual, and is not the name of a firm. I, of course, entirely bow to that decision. I am not quite sure how far it goes, because the Lord Justice is careful to point out that the trade mark is "Pirie's" printed in the genitive, with a comma, and I am not sure that he was not really dealing with that in saying that the name as it there appeared could not be the name either of an individual or of a firm. I am not sure that he meant to treat the case as if the name of Pirie alone had appeared in the trade mark; but, however, for the purpose of my decision, I desire to adopt the view that was there held, that the word "Pirie" alone being merely part of a name could not be the name of an individual, or the name of a firm within sect. 64, sub-sect. 1 (a). Does it follow that I ought to extend that doctrine, if it was thus laid down, to the case of a person who seeks to justify the retainer of such a word as "Colman's" upon a trade mark under the proviso contained in sub-sect. 3? It seems to me that I am not bound so to hold. As I have already pointed out, sect. 64, sub-sect. 1, defines the essential particulars of a trade mark. The Legislature has limited in various ways and in various directions those essential particulars. If it is to be held that "individual" or "firm" does not include "body corporate," not every name will fit into the definition in sub-sect. 1 (a); and as regards words other than names, they are limited very carefully by sub-sect. 1 (d) and (e). Therefore it may be that, when a person comes to register a trade mark and has to make out that he has placed on his mark one of the essential particulars mentioned in the Act, the Act ought to be strictly enforced and read in the strictest manner against him, and he ought not to be allowed to register a mark unless he makes out clearly that he falls within one of the essential particulars named there. But when we come to the added matter which is to be disclaimed, except always his own name or his own place of business, it seems to me that there is no necessity for reading the Act so strictly; that the object being, as it seems to me, that the goods to which the mark is affixed might be pointed out as being those of a particular manufacturer carrying on business at a particular place, then, so long as the manufacturer fairly uses his name, or a part of his name, upon a mark which complies in other respects with the Act; and so long as he is not, by suppressing part of his name, guilty of any misrepresentation so that the mark ought to be treated as being calculated to deceive, I cannot see why he may not use a part of his name. I have a little difficulty in seeing otherwise what is to be laid down, because, if nothing short of the whole name will do, then, even the use of an initial to denote the Christian name would seem to call for a disclaimer. I cannot believe that that was intended, and it seems to me that, if John Smith, of whom I spoke before, desired to register his trade mark with reference to mustard as mustard manufactured by Smith, he ought not to be called upon to disclaim "Smith," which forms a leading part of his own name. Having got so far, does it make any difference that he registers "Smith's Mustard" or seeks to register a label with "Smith's Mustard" upon it? I cannot see why it should. He could register "Mustard manufactured by Smith," as it appears to me; he could register "Mustard the manu-

facture of Smith," and if he chooses to abbreviate and put "Smith's Mustard," why he should not do it I cannot see. It was suggested that it was a description of the mustard and not a real use of his own name, but I cannot attach any other meaning to "Smith's Mustard" upon a trade mark than as *prima facie* denoting that Smith is the owner of the trade mark and the manufacturer of the mustard. So far for a person trading in his own name. I have next to consider the case of a firm. There is a little difficulty in construing the section with reference to the case of a firm. In this particular case the partners are all named Colman. It was contended by the Solicitor-General—and I am far from saying that there is not a great deal in his argument—that sub-sect. 1 ought, for the purpose of trade marks belonging to the firm, to be read, "A firm need not under this section disclaim their own name." In that case, the firm name being J. and J. Colman, if they put J. and J. Colman as the trade mark they do not require to disclaim it. Another suggestion is, that I am simply to adopt the language of the Interpretation Act and read the words "a person" as in the plural, and say that persons need not under the section disclaim their own name, and treat the five applicants as a group of persons all bearing the name of "Colman" who apply for the registration of a trade mark. I think there is very great force in the argument of the Solicitor-General that the fair and business-like way of reading it would be, where persons apply as a firm, to read it in the first way, namely, "A firm need not," or "persons trading as a firm need not, under this section disclaim their own name," and treat the name of the firm as the name of the group of persons for this purpose. The same question might arise, I conceive, with reference to a single individual, because the John Smith whom I have mentioned might for good and sufficient reasons trade under the name of John Jones, and if he saw fit to make an application in his business name of "John Jones," and to put John Jones on his trade mark instead of "John Smith," it might very well be that the court or the Comptroller would treat John Jones as the name of John Smith for the purpose of an application within the meaning of the proviso. I have not to decide between the various constructions of that proviso as applied to firms. I have held that the whole name in the case of a single person need not be placed on the trade mark. Equally the whole name of each partner, or the whole name of the firm, need not appear on the trade mark, and it is sufficient if we find that the name is used fairly and *bona fide* on the face of the trade mark in such a way that it cannot be mistaken for anything else than the name of the owner of the trade mark and the manufacturer of the goods to which that mark relates. In my judgment, therefore, the form which was settled and adopted by the Comptroller on the former occasion was the proper one, namely, that the disclaimer ought to run thus: "And the owners disclaim any right to the exclusive use of the added matter in so far as it consists of their name." It seems to me that on that ground, and on the grounds which I have stated, the decision of the Comptroller ought to be varied.

After some discussion as to the costs of the case, in which reference was made to *Re "White*

CHAN. DIV.] THE BOGNOR WATER COMPANY v. THE BOGNOR LOCAL BOARD. [CHAN. DIV.]

Rose Trade Mark (53 L. T. Rep. N. S. 33; 30 Ch. Div. 505), STIRLING, J. said:—I will express my opinion in this case without prejudice to the general right of the Comptroller to receive his costs, if such be the rule; this is a case in which he might very fairly waive such right, and the proper order will be no costs.

Solicitors for the motion, *F. Flux, Leadbitter*, and *Paterson*, for *W. H. Tillett and Co.*, Norwich.

Solicitor for the Comptroller-General of Patents, *The Solicitor to the Board of Trade*.

Friday, March 2.

(Before STIRLING, J.)

THE BOGNOR WATER COMPANY v. THE BOGNOR LOCAL BOARD. (a)

Water company—Notice by local board—Arbitration—Action to restrain local board from constructing works and from proceeding to arbitration—Costs—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 51, 52, 179, 180—The Bognor Water Act 1891, s. 5.

Under the plaintiff company's special Act of 1891 (modifying sect. 52 of the Public Health Act 1875), it was, as the court construed the provision, unlawful for the defendant local board to construct waterworks within the plaintiffs' limits of supply during four years from the passing of the special Act, so long as the plaintiffs were able and willing to supply water proper and sufficient. The plaintiffs made some unsuccessful attempts to find water, and before they succeeded in doing so the defendant board served them on the 20th May 1893 with notice of the board's desire to supply water within their own district, and their intention of constructing waterworks under the provisions of the Public Health Act 1875. The notice further stated that, if not informed within a month of the plaintiffs' ability and willingness the board would construct works. The matter was referred to arbitration, but the company becoming aware that the board were still forwarding a scheme of water supply, moved in an action to restrain the board from commencing or threatening to construct works and from proceeding to arbitration. The motion stood over on terms to await the award. The arbitrators found that the company were "able and willing," and that the water was proper and sufficient.

Held, that the defendants must pay the costs of the action, setting off any costs incurred by the defendants by reason of the plaintiffs seeking an injunction to restrain the arbitration.

THIS was the further hearing of a motion which had stood over to await the award of arbitrators.

The action was brought to restrain the defendants, the Bognor Local Board, from commencing or threatening to construct, and from constructing, any waterworks within the limits of supply of the plaintiff company . . . (2) from doing or committing any act or thing, or publishing or permitting to be published any statement or report intended or calculated to hinder or impede the plaintiff in the prosecution and completion of its undertaking as authorised by "the Bognor Water Act 1891;" and (3) from proceeding with or taking any further step in the pending refer-

ence to arbitration initiated by the defendant local board, and from incurring expense therein or otherwise in connection with the water supply of Bognor.

The plaintiff company was incorporated in 1870.

By the Bognor Water Act 1891 the company obtained power to supply with water the town of Bognor and its neighbourhood within certain limits.

Sect. 5 of that Act provided that the limits for the supply of water should be as therein mentioned and continued:

Provided . . . that if in any parish or part of a parish within the limits of this Act the company shall not have made adequate provision for the supply of water for domestic purposes within four years from the date of the passing of this Act, the restriction on the construction of waterworks by a local authority imposed by sect. 52 of the Public Health Act 1875 shall not in respect of the company apply to or be binding on the local authority as defined by that Act of any such parish, so far as regards the whole or part of such parish, as the case may be.

Sect. 52 of the Public Health Act 1875 provides that, before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament to supply water, the local authority shall give a written notice to such company; and it shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority, and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, shall be settled by arbitration.

The period of four years specified in the Act had not expired. The plaintiff company in 1882 and 1893 made two unsuccessful attempts to find water within their limits. The defendant board on the 20th May 1893, and before the plaintiff company had succeeded in finding a sufficient supply of water, served the plaintiffs with notice that the defendant board were desirous of providing the whole of their district with a supply of water, and that for the purposes of that supply and in pursuance of the powers and provisions in that behalf of the Public Health Act 1875 they intended to construct waterworks at Slindon (within the plaintiffs' limits); the notice further stated,

If you do not within one calendar month from the service upon you of this notice inform us that you are able and willing to supply water proper and sufficient for all the aforesaid purposes for which it is required by us, then we shall under the said powers proceed to construct waterworks and provide a supply of water as aforesaid.

After some correspondence the plaintiffs and defendants agreed to submit their differences to arbitration.

While this correspondence was in progress the defendant board, as the plaintiffs alleged, were actively engaged in making borings and analysing water and advancing an alternative scheme at the Slindon site. The plaintiff company, therefore, issued the writ in the present action.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

COCKS (app.) v. MAYNER (resp.).

[Q.B. DIV.]

The case first came on on motion on the 21st Dec. 1893, and the motion was ordered to stand over until the next motion day but one after the arbitrators had made their award, the defendant board undertaking not to proceed with any works till after that day.

His Lordship did not then express any opinion as to whether the arbitrators ought to go into the question of the plaintiff company's "ability and willingness" to supply.

The award in the arbitration was published on the 9th Feb. 1894, the arbitrators finding in favour of the plaintiffs:

1. That the company are able and willing to supply the water required by the notice of the local board, dated the 20th May 1893.

2. That the water which the company are able and willing to lay on is proper and sufficient for the purposes for which it is required, and that the purposes for which it is required are reasonable.

The motion now came on principally to have it determined how the costs of the action should be borne.

Graham Hastings, Q.C. and Henry Fellows for the plaintiff company.—The defendant board were threatening to construct waterworks, and we were justified in bringing the action. Having regard to the decision of Hall, V.C., in *Newhaven and Seaford Water Company v. The Local Board of the District of Newhaven* (72 L. T. 226), the question whether the plaintiffs were "able and willing" is for the court to decide, but the question whether the water is proper and sufficient is within the authority of the arbitrators, and possibly the claim to restrain the defendants from proceeding with the arbitration could therefore not be maintained. We ask for a perpetual injunction and the costs of the action.

A. Macmorran (Channell, Q.C. with him) for the defendant board.—We have acted strictly under the local Act and the Public Health Act. During four years the restriction remains, but we could still proceed under sects. 51 and 52 of the Public Health Act 1875. The defendants had no intention of constructing waterworks pending the arbitration:

Re An Arbitration between the Yeadon Local Board and the Yeadon Waterworks Company, 59 L. T. Rep. N. S. 844 (reported on appeal, 60 L. T. Rep. N. S. 550; 41 Ch. Div. 52).

The plaintiffs had no right to interfere with the arbitration, and their action is premature and misconceived.

Hastings in reply.—The decision of Kay, J. in *Re An Arbitration between the Yeadon Local Board and the Yeadon Waterworks Company* was on motion, and *Newhaven and Seaford Water Company v. The Local Board of the District of Newhaven* was not cited. The decisions conflict, and the matter is still open. The notice of the 20th May 1893 goes beyond the Act, and the threat contained in it was not justified by the Act.

STIELING, J. (after referring to sect. 5 of the local Act and sects. 51 and 52 of the Public Health Act 1875), said that during the four years mentioned in sect. 5 the restriction was applicable to the local authority; it was therefore not lawful for the local authority to construct waterworks within the plaintiff company's limits of supply if and so long as the water company were able and willing to supply water proper and sufficient for

all reasonable purposes for which it was required by the local authority. The water company's powers had not expired. The latter clause of the notice of the local board of the 20th May 1893 was not authorised by the Act. The prohibition under sect. 52 was absolute, but, notwithstanding this, the local board had taken steps with a view to the construction of works, made borings, procured water, and analysed it. The third paragraph of the notice of motion, which sought to restrain arbitration, had been abandoned, for it was clearly within the arbitrators' power to decide as to the quality of the water, though it was doubtful whether the "ability and willingness" of the plaintiff company was a question coming within the arbitrators' authority. On the first paragraph of the notice of motion the plaintiffs had a right to have the judgment of the court. It was said that the defendants' threats and intentions to construct were only made subject to the reference to arbitration, but his Lordship thought on the evidence that the defendants had gone beyond that and were trying to influence public opinion. The defendants consenting to treat the motion as the trial of the action were, therefore, ordered to pay the plaintiff company's costs of the action, setting off any costs incurred by the defendants by reason of the plaintiffs seeking an injunction to restrain the arbitration. No order was made except as to costs.

Solicitors: for the plaintiff company, *Ravenscroft, Hills, and Woodward*; for the defendant local board, *Talbot and Tasker*, for *H. L. Staffurth, Bognor*.

QUEEN'S BENCH DIVISION.

Monday, Dec. 4, 1893.

(Before Lord COLERIDGE, C.J. and COLLINS, J.)

COCKS (app.) v. MAYNER (resp.). (a)

Hackney carriage—Omnibus—Licence—"Plying for hire"—No charge for carriage of passengers—Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89), s. 45—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 171—Towns Police Clauses Act 1889 (52 & 53 Vict. c. 14), s. 4.

Sect. 45 of the Towns Police Clauses Act 1847, incorporated in the Public Health Act 1875, provides that if the proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within a prescribed distance without obtaining a licence he shall be liable to a penalty. By sect. 4 of the Towns Police Clauses Act of 1889, "hackney carriage" is to include an omnibus.

Two ordinary omnibuses were run in the following way: It was intimated by several notices upon the omnibuses that the omnibuses were placed at the disposal of the public free of charge, and also notices stating that voluntary contributions to support the omnibuses would be welcomed. There was a conductor on each of the omnibuses to supply change. Many persons using the omnibuses placed money in the boxes, but some did not.

The magistrates, upon an information laid before them, held that this was not a "plying for hire" within the meaning of the statute under which the proceedings were taken.

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

COCKS (app.) v. MAYNEE (resp.).

[Q.B. Div.]

Held, that this was an attempt to evade the statute, that there was a "plying for hire" within the meaning of the statute, and that the case must be remitted to the magistrates to rehear and convict.

THIS was an appeal from the magistrates by a special case as follows:—

1. A case was stated by three of the justices for the county of Sussex acting for the Petty Sessional Division of Hove under the statutes 20 & 21 Vict. c. 43 and the Acts amending the same.

2. At a petty sessions holden at Hove, in the county of Sussex, an information was preferred by the appellant against the respondent, under sect. 45 of the Towns Police Clauses Act 1847, charging that the respondent had in the town and district of Hove in the said county, being the proprietors of a certain carriage (to wit), an omnibus, permitted the same to be used as a hackney carriage plying for hire within the town and district of Hove aforesaid without having previously obtained a licence for such carriage. The said information and complaint was heard and determined.

3. The appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid for the opinion of the High Court.

4. (a) Sect. 45 of the Towns Police Clauses Act 1847, which is incorporated with the Public Health Act 1875, and is in force in the district hereinafter referred to, provides that, "If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage," he shall be liable to a penalty not exceeding 40s. (b) By sect. 51 of the Hove Commissioners Act 1873 it is provided that the prescribed distance shall be the limits of the district—that is, the town of Hove. (c) Under the provisions of sect. 38 of the Towns Police Clauses Act 1847, and sect. 11 of the Hove Commissioners Act 1877, and sect. 4 of the Towns Police Clauses Act 1889 the meaning of the word hackney carriage is extended to include an omnibus. (d) It was proved that the respondent applied to the Hove Commissioners for licences for three omnibuses to ply for hire within the said district, and a report of the police committee of the Hove Commissioners was put in. (e) On the 10th July the respondent commenced to run an omnibus over the route mentioned in his application—that was, along the main thoroughfare of the town of Hove. (f) The two omnibuses so run by the respondent were two of the vehicles for which he had sought to obtain licences, and were ordinary omnibuses used for street traffic. The respondent's name as proprietor was painted both on the near and off side of each omnibus. The omnibuses were painted white, and their starting point and destination, and the names of various places on the said route, were painted in conspicuous positions upon them. There were two horses and a driver and conductor to each omnibus. (g) These two omnibuses passed with regularity from Osbourne-street, Hove, to Queen's-

square, Brighton, and back. Passengers were carried and taken up and set down again when and where requested along the said route (a large part of which is within the Hove district), and the said two omnibuses were extensively made use of by the public along the said route. (h) Except as hereinafter mentioned, the said two omnibuses seeking custom and carrying passengers along the said route in the ordinary way. (i) On an advertisement board on each side of the omnibus the following words were printed on a card: "The buses are placed at the disposal of the public free of charge; any voluntary contributions towards their maintenance will be welcomed." Similar notices were placed inside the omnibus. At the top of the stairs leading to the roof of the omnibus there was a box with glass sides for the reception of money, and on each of the glass sides was printed the words "Voluntary contributions." There were other notices upon the omnibuses relating to the same, and the number of persons that the omnibus would hold was also printed. (j) The said omnibuses were seen passing along the route, and using the stands in the roads which are used for hackney carriages. (k) It was proved that passengers did ride on the omnibuses without putting any money in the boxes. It was not proved that the respondents had ever been heard to remonstrate with any passenger for not putting any money into the collecting boxes. (l) It was proved that the respondents refused to allow certain persons to ride on the omnibus. (m) One of the conductors admitted that he offered the passengers change in order that they might put money into the collecting boxes, and he admitted that the passengers could see what was put into the boxes by other passengers, and that they did generally pay money into the boxes placed for that purpose in the omnibuses, &c. (n) It was contended for the respondent that the respondent's omnibuses were not plying for hire because the passengers carried by him were under no legal liability to make any payment to the respondent for the use of his omnibus; and it was contended for the appellant that the respondent was seeking the custom of passengers, whom he carried on his omnibus for a consideration, and that he was in law permitting his omnibus to ply for hire within the said district. (o) Upon these facts the magistrates held that the term "hire" implied a contract under which a liability arises to pay a sum of money legally recoverable for the use of the thing hired, or for services rendered, and that the evidence in this case fails to establish any such legal liability on the part of the persons using this omnibus, and for the above reason the magistrates held that the defendant was not permitting the said omnibus to ply for hire under the Towns Police Clauses Act 1847, and therefore dismissed the information and complaint.

The questions of law arising in the above statement for the opinion of the higher court are: 1. Whether, in order to prove a plying for hire within sect. 45 of the Towns Police Clauses Act 1847, it is necessary to prove a contract, or an attempt to enter into a contract, for the use of the thing hired, or for services rendered, under which a sum of money is legally recoverable. 2. Whether, upon the facts above set forth, the respondent did in law permit his said omnibus to ply for hire within the said district.

Q.B. Div.]

BOND (app.) v. PLUMB (resp.).

[Q.B. Div.]

If the High Court should be of opinion that the said order dismissing the said information and complaint was legally and properly made, and that the respondent did not in law permit his said omnibus to ply for hire within the said district, then the said order is to stand; but if the court should be of the contrary opinion, then the court is solicited, according to 20 & 21 Vict. c. 43, to remit the case to the magistrates with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Boxall (with him *Finlay*, Q.C.) for the appellant.—The magistrates were wrong in not convicting the respondent. The act of the respondent in running these omnibuses as the respondent did was clearly an act which brought him within the 45th section of the Towns Police Clauses Act 1847. Although the respondent purported to run these omnibuses free of charge, he nevertheless was willing to receive money, and did so receive it. There was a sufficient plying for hire to bring the respondent within the meaning of the Act, which provides that, if the proprietor of any carriage permits the same to be used as a hackney carriage "plying for hire" within a prescribed distance without obtaining a licence, he shall be liable to a penalty. The definition of the word "hire," taken from Wharton's Law Lexicon, is stated to be "a bailment for reward or compensation." This was so here, and I submit, therefore, that the respondent has brought himself within the meaning of the 45th section, and this was an attempt to evade the provisions of the Act.

Winch, Q.C. and *F. C. Gore* for the respondent.—There was no "plying for hire" here to bring the case within sect. 45. The passengers who used these omnibuses contracted no debt of a legal character; the debt incurred was merely a debt of honour. A hackney carriage, whilst on the premises of a railway company by the leave of the railway company, is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts. This was decided in *Case v. Storey* (20 L. T. Rep. N. S. 618; 38 L. J. 113, M. C., and 168, Ex.; L. Rep. 4 Ex. 319). There was no fixed rate of charge; in fact, there was no charge at all made. What was received was a mere voluntary contribution. [Lord COLERIDGE, C.J.—Is it less a "hire" because the hire is voluntary?] *Storey* on Bailments, 9th edition, paragraph 368, gives the following definition: A bailment for hire is a contract "whereby the use of a thing, or services and labour of a person, are stipulated to be given for a certain reward."

Lord COLERIDGE, C.J.—Everything that could have been said has been said on behalf of the respondent, but what has taken place has been an attempt to evade the statute. There has undoubtedly been a plying for hire by the respondent. The respondent says as much as this: "I will place my omnibuses at the disposal of the public if they will put into the boxes provided their money." The object of the sections of the Acts of Parliament which have been cited, and which apply in this case, is to give a control to the local authorities over public carriages which ply for hire. These omnibuses were plying for hire. The appellant was right in laying this information, and his appeal must be allowed, and this case

must be remitted to the magistrates to rehear and convict.

COLLINS, J.—I am of the same opinion.

Appeal allowed.

Solicitors: for the appellant, *Harwood*, for C. A. Woolley, Town Clerk of Hove; for the respondent, *Snell, Son, and Greenip*, for Lamb and Gates, Brighton.

Monday, Dec. 4, 1893.

(Before Lord COLERIDGE, C.J. and COLLINS, J.)

BOND (app.) v. PLUMB (resp.). (a)

Gaming and betting—Place kept or used for purposes of—Conviction—Stakes not deposited—Preamble of Act—Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.

Sect. 1 of the Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119) provides that "no office, room, or other place shall be open, kept, or used for the purposes of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business there of betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Sect. 3 provides for the penalty for such offence as aforesaid if committed.

An information was laid before the magistrates charging the appellant under the above sections with keeping a room (he being the occupier) for the purpose of betting with persons resorting thereto, and the magistrates so found; but it was not shown that the appellant kept the room for the purpose of receiving deposits on bets.

Held, that sect. 1 creates two separate and distinct offences: first, keeping a house, office, room, or other place for the purpose of betting with persons resorting thereto; and, secondly, keeping a house, office, room, or other place for the purpose of receiving deposits on bets.

THIS was a case stated by the magistrates.

An information was laid charging the appellant that he, being the occupier of a certain office or room in a certain house, unlawfully did open and keep the said office for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-races, contrary to the form of the statute.

The proceedings were taken under and by virtue of the first part of sect. 1, and under sect. 3 of the Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119).

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

BOND (app.) v. PLUMB (resp.).

[Q.B. Div.]

The following facts were proved before the magistrates:—

That the appellant had issued and published an advertisement as follows:

W. Bond and Co., turf accountants, 6, Colonnade-gardens, Eastbourne.—The Derby, Oaks, Ascot Stakes, and all future events. Terms on application. Business personally conducted.—Telegraph address "Common," Eastbourne.

In consequence thereof, betting had taken place with the appellant, or with some person procured by him, at the said premises, and certain telegrams and letters had been received by the appellant at the premises from persons making bets on certain horse-races with the appellant and persons procured by him, and having reference to betting transactions, and requesting that certain stakes should be made, the settlement of which should depend upon the result of horse-races.

Similar papers were found upon the premises, and also books having reference to betting transactions.

On behalf of the appellant it was contended that the words of the first portion of sect. 1 of the Betting Houses Act 1853 (16 & 17 Vict. c. 119) did not constitute an offence, and consequently that none was disclosed by the information; and that only an offence was constituted by the whole of the section, whereas the information had been laid under the first portion of it only.

The magistrates were of opinion that the room had been kept by the appellant for the purpose of the occupier (being the appellant) using the same for betting with persons resorting thereto; and that this was an offence within the meaning of the first portion of sect. 1, and convicted the appellant.

The question for the opinion of the High Court was: Does the first portion of the section (sect. 1) constitute an offence, and was it sufficient that the justices should have been satisfied (as they were) that the room was kept for the purpose of the appellant betting with persons resorting thereto?

The following is the preamble and the two sections of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119) referred to.

The preamble says:

Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance, by the owners or occupiers of such houses, or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races, &c.

Sect. 1 says:

No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law.

Sect. 3 provides for the penalty for such offence as aforesaid, if committed.

A second case was stated by the magistrates, upon an information under the second part of sect. 1, viz., being such house, room, or other place for the purpose of receiving deposits on bets—the magistrates found "that it was a condition of business that cover should be deposited for the business that was done—namely, that the money should be actually received before the bet was made." This finding was considered to bring the case clearly within the exact words of the section. The magistrates having convicted, the court affirmed their conviction. Both cases were taken together.

Dale Hart for the appellant.—This conviction was wrong, because it is not shown that any deposit was received by the appellant. The preamble of the Betting Houses Act 1853 shows that the gaming sought to be prohibited by the Act was the gaming "by the opening of places called betting-houses or offices," and the preamble goes on to say, "and the receiving of money in advance by the owners or occupiers of such houses or offices, &c." And sect. 1 of the Act does not go any further than what the preamble says. The offence is not merely the keeping open of a room or office for the purpose of betting, but there must be also the receiving of a deposit by the owners or occupiers of such room or office. Here there was no evidence of any such deposit having been made. In the case of *Bous v. Fenwick* (30 L. T. Rep. N. S. 524; 9 C. P. 339; 43 L. J. 107 M. C. 160, C. P.), Brett, J., after referring to the preamble of this Act, says, on p. 526 (L. T. Rep.), "The kind of betting there described it (the Legislature) had determined ought to be suppressed, and the first section shows against what sort of proceeding the Act is directed, viz., the opening of places for betting purposes, with persons resorting thereto." The judgments of Lush, J. in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (31 L. T. Rep. N. S. 536; 10 Q. B. 102; 44 L. J. 17 M. C. and 333 Q. B.), and of Hawkins, J., in *Reg. v. Cooke* (51 L. T. Rep. N. S. 21; 13 Q. B. Div. 377), show that the Betting Houses Act is not aimed at betting and gaming generally, but at a particular kind of betting. There is, however, no decision directly in point. Blackburn, J. said, in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (*ubi sup.*), on p. 538 (L. T. Rep.), "While it is quite plain that the latter part of sect. 1 is confined to the kind of betting mentioned in the preamble, I think it is not so clear that the first part of the section may not extend further," but Blackburn, J. does not decide the point, and in all the cases the receipt of a deposit has been proved. The question is not affected by the preamble of the Betting Houses Act 1853 (16 & 17 Vict. c. 119) being repealed by the Statute Law Revision Act 1892 (55 & 56 Vict. c. 19), for that repeal was only for the purpose of convenience, and was not intended to alter the effect of the statute. The preamble of the Act for the Suppression of Betting Houses, although no doubt repealed, may still be looked at for the purpose of construction of that statute. In Coke's Institutes, part 4, c. 74, on p. 330, it is stated that "the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and mischiefs which they intend to remedy."

Q.B. Div.]

PALMER (app.) v. WADE (resp.); WADE (app.) v. PALMER (resp.).

[Q.B. Div.]

Boxall for the respondent.—Sect. 1 is disjunctive, and deals with two separate and distinct offences. First, opening, keeping, or using houses, &c., for the purpose of betting with persons resorting thereto; secondly, using such places for the purpose of receiving deposits on bets. [He was stopped by the Court.]

Lord COLERIDGE, C.J.—The preamble of the Act for the suppression of betting-houses is as follows: [Reads it.] These words clearly point to two separate and distinct evils, which it was the object of the Legislature to suppress: first, the opening of betting-houses; secondly, the receiving of money in advance. I will assume that sect. 1 of the Act does not go beyond the preamble, though if it did, I am clear that the words of the section ought to prevail. But sect. 1 of the Act, as well as the preamble, deals with separate offences, and, as has been pointed out by Mr. Boxall, is a disjunctive provision. The first part of the section, which corresponds with the first part of the preamble, prohibits the opening, keeping, or using of any house, office, room, or other place for the purpose of the owner, occupier, keeper, &c., or any person using the same, &c., betting with persons resorting thereto; and in the second part of the section, which corresponds with the second part of the preamble, continues: "or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race &c. Therefore, the two parts of the section, as well as the two parts of the preamble, deal with separate and distinct offences. I do not think I need go into all the cases on the subject, for Mr. Hart has frankly admitted that the point is left open by the decisions. I think the passage which has been cited from the judgment of Brett, J. in *Bows v. Fenwick* (30 L. T. Rep. N. S. 524; 9 C. P. 339; 43 L. J. 107, M. C. 160, C. P.) is not so important with regard to the point now raised as it appears to have been considered in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (31 L. T. Rep. N. S. 536; 10 Q. B. 102; 44 L. J. 17 M. C. and 333 Q. B.), for in the latter case Blackburn, J. appears to have thought that *Bows v. Fenwick* (*ubi sup.*) was a case on this point; but it was not so, for the whole judgment turned on the question whether the appellant was using a "place" within the meaning of the Act. The receipt of money was proved and was not in dispute, and therefore the contention now raised was not available in that case, and the court had not the point to decide. For these reasons I am of opinion that the appellant was rightly convicted.

COLLINS, J. concurred.

Judgment for the respondent.

Solicitor for the appellant, F. Lawson Lewis, Eastbourne, Sussex.

Solicitors for the respondent, Sharpe, Parker, Pritchards, and Barham, for H. W. Fovargue, Town Clerk of Eastbourne, Sussex.

Tuesday, Dec. 5, 1893.

(Before COLERIDGE, C.J., LAWRENCE, and COLLINS, JJ.)

PALMER (app.) v. WADE (resp.); WADE (app.) v. PALMER (resp.). (a)

Election — Parliamentary elector — Municipal elector—Registration—Occupation of unrated but rateable premises—Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 3, sub-sects. 2 and 3, and sect. 26—*Poor Rate Assessment and Collection Act 1869* (32 & 33 Vict. c. 41), s. 19—*Municipal Corporations Act 1882* (45 & 46 Vict. c. 50), s. 9, sub-sect. 2 (d) and sect. 32—*Representation of the People Act 1884* (48 Vict. c. 3), s. 9, sub-sect. 9.

The revising barrister placed the appellant P. upon the Parliamentary franchise (No. 2 list) but excluded him from the municipal franchise (No. 3 list), and so removed him from No. 1 list, which consists of Parliamentary and municipal voters. On the revision of No. 1 list the appellant's name appeared as occupier, "place of abode G.-street," dwelling-house, successive description of qualifying property, N.-street. P. was inhabitant occupier of N.-street from July to Dec. 1892, when he went to G.-street, and remained inhabitant occupier there until July 1893. The poor rate was made by the guardians and allowed by the justices between Aug. 1892 and Aug. 1893. The owner of N.-street compounded for and was duly rated as owner during P.'s occupancy. The name of P. remained as occupier. The house in G.-street, where P. had gone to, had been newly built on vacant land; there had been no previous occupation by the owner, and neither the site nor house had been included in any poor rate made during the qualifying period, nor any claim by the owner or P. to be rated, and no tender or payment of rates made by them.

Held, that, without overruling the case of *M'Gaffigan v. Riddall* (28 L. Rep. Ireland, 257), it would be impossible to hold that the appellant P. was entitled to the Parliamentary franchise, therefore the barrister was wrong in placing appellant on that franchise, but that the barrister was right in excluding the appellant P. from the municipal franchise.

THESE were two cross appeals from the decision of a revising barrister.

At the revision of the list No. 1, i.e., of voters entitled to Parliamentary and municipal franchise for the city of Norwich, the name of Palmer appeared on that list as occupier.

Place of abode, Gloucester-street, dwelling-house, successive description of qualifying property, 4, New-market-street, Gloucester-street.

An objection was raised by Wade at the revision of this list on the ground that the qualifying property had not been rated to the poor, or for any other purpose, during the whole of the qualifying period.

By certain local Acts, the Norwich Poor Act 1863 (26 & 27 Vict. c. xciii.), and the Norwich Corporation Act 1889 (52 & 53 Vict. c. clxxvii.), the board of guardians have the power of overseers of the poor, and by sect. 93 of the Norwich Corporation Act 1889 all municipal rates, as well as poor rates, are to be levied by the board of guardians. On the 24th Aug. 1892 the board of

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

PALMER (app.) v. WADE (resp.); WADE (app.) v. PALMER (resp.).

[Q.B. D.]

guardians made a poor rate, and on the following day the rate was allowed by the justices of the City of Norwich. On the 8th Feb. 1893 the board of guardians made another similar rate for expenses required before the 30th June 1893, and it was allowed by the justices on the following day. On the 23rd Aug. 1893 the board of guardians made another similar rate for expenses required before the 31st Dec. 1893, and the rate was allowed by the justices on the 25th Aug. 1893. Palmer was the inhabitant occupier of the dwelling-house, No. 4, Newmarket-street, from before the 15th July 1892 until the 15th Dec. 1892, when he removed to the house described as Gloucester-street, of which he remained an inhabitant occupier until the 15th July 1893. The owner of the dwelling-house, No. 4, Newmarket-street, compounded for the rates of the house, and was duly rated as owner of the house to all rates made during the occupation of Palmer, and paid the rates. The name, however, of Palmer continued to appear as occupier. The dwelling-house in Gloucester-street had been newly built on a piece of vacant land, of which the owner of the land had not had previously any beneficial occupation, and neither the site nor the dwelling-house was comprised in any poor rate made prior to the rate allowed in Aug. 1893, nor was Palmer or the owner of the house rated for the house prior to that rate being made.

It was not the practice of the board of guardians to insert a new house in an existing rate or make a supplementary rate for such house, and for this reason alone the dwelling-house in Gloucester-street was not rated prior to Aug. 1893, and neither Palmer or the owner made any claim to be rated, nor was there any payment or tender of rates. The dwelling-house in Gloucester-street was only of the value of 9l. a year, and the rates would, when made, have been compounded for by the owner under the Norwich Poor Act 1863.

It was contended before the revising barrister by the objector (Wade) that by reason of the Gloucester-street house not having been rated, Palmer was not entitled either to the Parliamentary or to the municipal franchise.

The revising barrister decided that, as to the Parliamentary franchise, it was not necessary that the voter or owner should have been rated for the house, but that, as to the municipal franchise, by reason of the Municipal Corporation Act 1882, as Palmer had not been rated he was not entitled to vote at a municipal election, and so he removed the name of Palmer from the Revision List No. 3 (municipal voters), but inserted it in the Revision List No. 2 (Parliamentary voters), and stated a case. Both the voter and the objector appealed, the former (Palmer) on the ground that he ought to have been placed on both lists, Nos. 3 and 2, while the objector (Wade) appealed on the ground that the voter (Palmer) ought not to have been placed on either of the lists.

It was contended before the revising barrister on behalf of the respondent Wade, that by reason of the dwelling-house in Gloucester-street not having been rated from the time of the occupation thereof by the said appellant Palmer until the rate of the 25th Aug. 1893, he, Palmer, was not entitled to either the Parliamentary or municipal franchise in respect of such his inhabitant occupation of the said two dwelling-houses in succession.

It was contended before the revising barrister on behalf of the appellant Palmer, that by reason of the proviso in the Poor Rate and Collection Act 1869 (32 & 33 Vict. c. 41), extended by the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), his right to both franchises was preserved, although the house in Gloucester-street had not been rated and also that, as no rate was made during the occupation thereof until the 25th Aug. 1893, it was not necessary that the said house should have been rated during the qualifying period in which that Palmer might acquire both franchises.

The revising barrister decided with respect to the Parliamentary franchise that under the provisions of the Reform Act 1832 (2 & 3 Wm. IV. c. 45), s. 28, and the Representation of the People Act 1867 (30 & 31 Vict. c. 102), ss. 26 and 59, and also the Representation of the People Act 1884 (48 Vict. c. 3), s. 9 (9), it was not necessary that Palmer or the owner of the house should have been rated or have claimed to be rated in respect of the dwelling-house in Gloucester-street occupied by him in succession, and so far as the objection related to the right to vote at a Parliamentary election that the objection was bad; but he decided with respect to the municipal franchise, that by reason of the provisions of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 9 (2) and (2), and notwithstanding the proviso in the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41, s. 19, and the statute 41 & 42 Vict. c. 26, s. 14, as Palmer had not, nor had any other person, been rated in respect of the dwelling-house, Palmer was not entitled to vote at a municipal election, and so far as the objection related to the right to vote at a municipal election that the objection was good.

The revising barrister held that the vote should be placed on a Parliamentary but not a municipal franchise, and transferred his name and the names of twenty-six other persons whose appeals were consolidated to No. 2 list, but excluded them from No. 3 list.

Both the voter and objector appealed.

Edward Morten for the appellant Palmer. The voter is entitled to the Parliamentary franchise as to the municipal franchise. It is contended that the case falls within sub-sect. 9 of sect. 19 of the Representation Act 1884, and sect. 19 of the Poor Rate Assessment and Collection Act 1869. [LAWRENCE, J. referred to the cases of *Lewis* (app.) v. *Lewis* (resp.) (7 C. B. N. S. 299), *Moger* (app.) v. *Escott* (resp.) (26 L. T. Rep. 99; L. Rep. 7 C. P. 158; 41 L. J. 86 C. P.)]

Germaine for the respondent Wade.—The objection has been decided adversely to the appellant in a case which was decided in the Court of Appeal in Ireland, *M'Gaffigan v. Riddell* (L. R. Ir. 257), where the inhabitant occupier of a rateable dwelling-house, but which was not held not to be entitled to the Parliamentary franchise.

Lord COLERIDGE, C.J.—The sections are conflicting. At first I was inclined to think that the revising barrister was right as to both these franchises. But as to his decision on the Parliamentary franchise, it appears by the case decided in the Court of Appeal in Ireland, *M'Gaffigan v. Riddell* (supra), cited to us, that he was wrong. That seems to be a clear authority. The head-note

Q.B. DIV.] REG. v. ROPER AND OTHERS (Justices) AND J. H. ELLIS; *Ex parte* PRICE. [Q.B. DIV.]

that case is as follows: "The inhabitant occupier, during the whole or part of the qualifying period, of a dwelling-house which was rateable, and ought to have been rated, but was not rated for the relief of the poor, to a rate which was made during the qualifying period, and during his occupation, is not entitled to the franchise." That is the same as the present case. Fitzgibbon, L.J. in his able and careful judgment, says of sect. 9, sub-sect. 9, of the Representation of the People Act 1884 (on page 264): "This enactment seems to me to imply that, except in the case of exempt premises, no one is entitled to be registered in respect of any dwelling-house for which no one is rated and no rates are paid; and it would be unmeaning to require the name of the 'inhabitant occupiers' of 'exempt' premises to be entered on the rate book, if rating was not in all other cases essential to that franchise." This sentence is directly in point. We cannot say, therefore, that the revising barrister was right as to the Parliamentary franchise without distinctly overruling this decision. We think that, as to the municipal franchise, the revising barrister was right in excluding the votes.

LAWRANCE, J.—I am of the same opinion, though, but for the view taken by the Court of Appeal in Ireland in the case which has been cited, *M'Gaffigan v. Riddall* (*ubi sup.*), I should have been inclined to have agreed with the revising barrister.

COLLINS, J.—I am of the same opinion and for the same reason.

First appeal dismissed. Second appeal allowed.

Solicitors: *Gover and Chiles; English, Norwich.*

Friday, Jan. 12.

(Before DAY, J. and KENNEDY, J.)

REG. v. ROPER AND OTHERS (Justices) and J. H. ELLIS; *Ex parte* PRICE. (a)

Licensing—Licensee formerly convicted of selling spirits without licence—Disqualifications—Full publican's licence granted—Jurisdiction of justices—The Beer House Act 1840 (3 & 4 Vict. c. 61), s. 7—The Wine (Refreshment) Act 1860 (23 Vict. c. 27), s. 22—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 50—The Inland Revenue Act 1880 (43 & 44 Vict. c. 20), s. 43, sub-sect. 2.

An application was made before the licensing justices, under sect. 50 of the Licensing Act 1872 (35 & 36 Vict. c. 94) for an order for a full publican's licence to sell beer, wine, and spirits. The applicant had formerly been convicted of selling spirits without a licence.

The licensing justices, notwithstanding this admitted fact, granted the applicant an order "to apply for and hold any excise licences that may be held by a publican."

The applicant took out an excise spirit licence, under which he might also sell beer or wine by retail.

The appellant, the objector, having applied for and obtained a rule nisi for a writ of certiorari to quash the order granted by the justices, on the ground that the applicant was disqualified from ever selling beer or wine by retail under the pro-

visions of sect. 7 of the Beer House Act 1840, and sect. 22 of the Wine (Refreshment) Act 1860.

The respondent, the licensee, showed cause against the rule nisi.

Held (discharging the rule), that the justices had not exceeded their discretionary jurisdiction, inasmuch as there was nothing in the earlier acts to disqualify the applicant from holding a spirit licence, and that the order of the justices merely authorised the applicant to obtain any licence which as a publican he was entitled to hold.

A RULE nisi for a writ of certiorari having been obtained *ex parte* by the appellant Price to quash an order of the justices of Flintshire granting a publican's licence to one John Hughes Ellis, the respondent, he now showed cause against the rule being made absolute.

Ellis, at the general licensing sessions, held on the 11th Sept. 1893, applied for a removal licence for the purpose of transferring a publican's business, formerly carried on by his brother, to some other premises, to be used as an hotel and to be carried on by the applicant.

The grant of his licence was opposed by Price, the present appellant.

The justices refused to hear Price, on the ground that he was not an aggrieved person within the meaning of sect. 50 of the Licensing Act 1872, and granted the application, which was confirmed by the licensing committee, who also refused to hear Price's objections.

The order of the justices granting to Ellis the licence was in the following form:

We, being two of the justices acting for the division of Prestatyn, in the county of Flint, and being the majority of those at the said general annual licensing meeting held at Rhyl in the said county, do by this order sanction the removal of the within licence now in force, and authorise one William Ellis, of the Castle Hotel, Rhyl, &c., licensed victualler, to apply for and hold any excise licences that may be held by a publican for the sale by retail at a house at Rhyl, in the said county, known by the sign of the Castle Hotel, of intoxicating liquor to be consumed either on or off the premises, from the Castle Hotel premises to certain premises situate and being No. 12, Water-street aforesaid, within the licensing district for which we act. The said licence to be held by John Hughes Ellis, of No. 12, Water-street, aforesaid, licensed victualler.

The justices further granted to John Hughes Ellis a renewal licence, authorising him

To apply for and hold any excise licences that may be held by a publican for the sale by retail at the Water-street premises.

Both these orders were confirmed by the licensing committee, accompanied by a memorandum that,

This licence is granted in lieu of the licence formerly granted by transfer to William Ellis in respect of the Castle Hotel, situate in Kennel-street, Rhyl, and removed by order of the justices dated the 11th Sept. 1893 to No. 12, Water-street. The justices' order sanctioning such removal being annexed hereto.

Poland, Q.C. and E. H. Lloyd, for the respondent Ellis, showed cause against the rule.—The justices have here granted a full publican's licence under the Licensing Acts of 1872 and 1874 to sell beer, wine, and spirits. The disqualification is imposed by sect. 7 of the Beer House Act 1840 (3 & 4 Vict. c. 61), and sect. 22 of the Wine (Refreshment) Act 1860 (23 Vict. c. 27), whereby a

(a) Reported by T. E. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.] REG. v. ROPER AND OTHERS (Justices) AND J. H. ELLIS; *Ex parte* PRICE. [Q.B. Div.]

person having been convicted of selling spirits without a licence forfeits or is disqualified from holding a licence to sell beer or wine, but there is no such disqualification attached to the sale of spirits. The disqualification applies to certificates or licences held under those Acts respectively. By sect. 14 of the Wine and Beer House Act 1870 (33 & 34 Vict. c. 29), a conviction for felony is the sole ground for a disqualification from selling spirits by retail. The only question here is whether the applicant is disqualified from holding a spirit licence. He is merely capable, under the justices' order, of applying for and holding any excise licences which as a publican he is entitled to hold:

Reg. v. Sylvester, 5 L. T. Rep. N. S. 794; 31 L. J. 93, M. C.

Candy, Q.C. and *J. Paterson*, for the appellant Price, in support of the rule *nisi* for a *certiorari*.—Any disqualification imposed by the Beer House Act 1840 and the Wine (Refreshment) Act 1860 still remains. These Acts have not been repealed by the subsequent Licensing Acts of 1872 and 1874. Both by sect. 7 of the Beer House Act 1840, and by sect. 22 of the Wine (Refreshment) Act 1860, the sale of beer or wine "in any manner whatsoever" by the disqualified person is provided against. The holder of a spirit licence can, under sect. 43 of the Inland Revenue Act 1880, dispense with any other licences for the sale of beer or wine by retail.

DAY, J.—I am clearly of opinion that this rule must be discharged. The application was one to bring up and quash an order made by the licensing justices, and confirmed by the licensing committee, authorising the transfer of a certain licence from one holder to another, and for its removal from former licensed premises to new premises occupied by the applicant, the present licensee. The order is in effect an authorisation to the applicant, the licensed victualler, to apply for and hold any excise licences to which a publican is lawfully entitled. He is entitled to these as of right, if he chooses to ask for them, when once he has obtained the authorising order from the justices, and on payment of the excise duties. Now, the person obtaining this authorisation here is said to be disqualified from obtaining any such authorisation on the ground that he has been previously convicted of selling spirits without a licence, and no doubt under the sections cited in the Beer Act 1840 and the Wine (Refreshment) Act 1860 no licence to sell beer or wine by retail is to be granted to any person so convicted, and he is apparently to be for ever disqualified from so selling. But here we have primarily to deal with Acts relating to the sale of spirits. That is the only licence which the person in question here holds or professes to have applied for. There is no such penalising proviso in any of the subsequent Acts relating to the sale of spirits as those cited in relation to the sale of beer or wine. The only permanent disqualification from the sale of spirits under these subsequent Acts is a conviction for felony: (the Wine and Beer House Act 1870 (33 & 34 Vict. c. 29), s. 14.) So far as the excise duties are concerned, the licences for the sale of these several intoxicating liquors is rolled into one licence termed the spirit licence. A man who has paid for the latter can lawfully, unless otherwise disqualified, sell beer or wine by virtue of his

holding the one spirit licence. It is said that if the present licensee holds any licence at all it is that called a full publican's licence, which enables him to sell beer and wine as well as spirits; but that he is disqualified from selling the two first liquors, and that therefore a licence empowering him to do what he cannot lawfully do is an illegal licence. But, in the first place, all that the justices' order does, which we are asked to quash, is to authorise the applicant to apply for and hold any excise licences which he as a publican is entitled to hold. The applicant, who has obtained this order, goes to the excise officer and asks for whatever licences he wants. The order only authorises him to hold any licence which he may lawfully hold. That is in effect what it means. The justices by such an order do not override or qualify any Act of the Legislature. Here the applicant asks for a spirit licence from the excise authority, and of course obtains it on payment. That is admittedly a valid licence, sufficient to protect his sale of spirits by retail, and he is admittedly competent to hold a spirit licence. No doubt, if he goes and asks for a beer or wine licence separately, or if he sells beer or wine now under the authority of his holding a spirit licence, he may find himself subjected to penalties. It is unnecessary for us to decide the law in regard to such action on this application. No doubt he applies to the justices for a general licence to sell intoxicating liquors, and a general licence would entitle him to sell all three liquors if he chose. What would be the consequence should he now sell wine or beer, I am not prepared to say. It is enough that the authorisation of the justices' order is effective so far as it applies to the sale of spirits, which is all that the respondent is now attempting to do. It is argued that an order which is bad in part is bad altogether. I give no opinion on that point, because it is unnecessary to our decision. The order authorises him to apply for such licences as a publican may lawfully hold. So far it is perfectly valid, and it is not for this court to limit the rights of a subject in lawful trading. Assuming that he is in fact incapacitated from holding certain particular licences authorised by particular statutes, no such incapacity extends to the sale by him of spirits, nor is he penalised for so doing. If so, the order of the justices was within their discretionary jurisdiction, and this rule to quash such an order, as beyond their jurisdiction, must be discharged.

KENNEDY, J.—I am of the same opinion. There seems to me to be nothing to justify our coming to the conclusion that there has been an excess of jurisdiction by the justices in making this order. The difficulty really only arises from the fact that under the Inland Revenue Act 1880 (43 & 44 Vict. c. 20), sect. 43, sub-sect. 2, it is permissible for persons taking out the spirit licence to sell beer or wine by retail without taking out any further licence. It is not suggested that this person is disqualified from selling spirits, but under the Beerhouse Act 1840 and the Wine (Refreshment) Act 1860 a person who had acted illegally in selling spirits without a licence is thereby disqualified from selling beer or wine, or from ever holding a licence for such sale thereafter. The justices gave the applicant a right to apply for and hold any excise licence that a publican may hold for the sale of liquor by retail.

Q.B. Div.]

NORBURN v. NORBURN.

[Q.B. Div.]

The applicant obtains from the Excise a spirit licence, and the difficulty arises under the Inland Revenue practice whereby a person holding a spirit licence has apparently a right to sell beer and wine, which he might not be entitled to do under the other earlier Acts if subject to this disqualification. But I cannot see that there is anything in the act of the justices, who give an applicant this authority to apply for any licence to which he may be legally entitled, to warrant us in issuing a writ of *certiorari* for the purpose of quashing their order. The fact that the revenue authorities think it right to give a person the power of selling beer and wine under a spirit licence does not to my mind, though I do not now express any decided opinion to this effect, make it clear that such a person might not still be disqualified under the provisions of the other Acts of 1840 or 1860 from any such sale of wine or beer; the sections in those Acts seem to me to contemplate a person taking out a general or larger licence, and to enact that that was not to be a protection to a disqualified person in selling wine or beer; there is, however, nothing in the section cited to prevent the justices from properly granting to the applicant a right to apply for and to hold such excise licences as he individually might be entitled to.

Rule discharged.

Solicitors for the appellant, in support of the rule *nisi*, Lloyd, George, and Co., agents for A. Lloyd, Rhyl, N. Wales.

Solicitors for the respondent, showing cause against the rule *nisi*, Hamlin, Grammer, and Hamlin, agents for F. J. Gamlin, Rhyl, N. Wales.

Saturday, Oct. 28, 1893.

(Before WILLS and GRANTHAM, JJ.)

NORBURN v. NORBURN. (a)

Practice—Judgment—Application by executors of deceased judgment creditor for a receiver and an injunction—"Parties entitled to execution"—Order XLII., rr. 8 and 23.

The executors of a deceased judgment creditor applied for the appointment of a receiver of the judgment debtor's property, and for an injunction against the judgment debtor dealing with his property.

Held, that the executors of a deceased judgment creditor cannot obtain an order for the appointment of a receiver of the judgment debtor's property and an injunction against the judgment debtor dealing with it.

The appointment of a receiver of the property or interest of the judgment debtor is not "execution" within the meaning of Order XLII., rr. 8 and 23.

APPEAL FROM CHAMBERS.

In May 1880 the plaintiff, one Mary Norburn, had recovered a judgment for 1400*l.* against the defendant, who was plaintiff's son.

In Aug. 1886 the plaintiff in the action died, having appointed by her will William and Mary Elizabeth Norburn to be executor and executrix. The executor and executrix were the present applicants.

In 1893 the defendant, who had not satisfied the judgment of 1400*l.* recovered against him, became entitled to certain interests under the wills of two deceased relatives.

In October the plaintiff's executor and executrix, who had taken no steps to revive the action, took out a summons in the original action. The summons taken out was entitled "Mary Norburn, widow (since deceased), plaintiff v. Henry Norburn, defendant."

The summons asked for a receiver to be appointed of the defendant's interests under the wills, and for an injunction to restrain him from dealing with those interests.

The summons was first heard *ex parte* before Kennedy, J., who refused the application for the appointment of a receiver, but gave the applicants leave to issue a fresh summons to be served upon the defendant, and granted an interim injunction until the hearing of the fresh summons.

On the 24th Oct. the new summons came on for hearing before Bruce, J., who held that the executors were not entitled to an order for the appointment of a receiver, but continued the interim injunction until the hearing of the appeal of the executors against the refusal of the order.

The defendant now appealed against so much of the order as continued the interim injunction.

Banks for the defendant, appealing against the part of the order for the interim injunction.—If the executors to the deceased judgment creditor had no right to the appointment of a receiver there was no jurisdiction to grant or to continue this injunction. The executor to the deceased judgment creditor should have revived the action by obtaining an order to carry on proceedings under Order XVII., r. 4; as they have not done this, they can only enforce the judgment by bringing themselves within the operation of Order XLII., r. 23, which allows execution to issue in certain cases, including the death of one of the parties, by leave. The appointment of a receiver is not one of the modes of execution which come under the meaning of the term "writ of execution" as defined in Order XLII., r. 8. The case of *Re Shephard*; *Atkins v. Shephard* (62 L. T. Rep. N. S. 337; 43 Ch. Div. 131) shows that the appointment of a receiver is not a form of execution. The executors have no right to obtain the appointment of a receiver under Order XLII., r. 23.

Lacey Smith for the applicants, the executor and executrix of the deceased judgment creditor.—There was jurisdiction to make this order. Under sect. 25, sub-sect. 8, of the Judicature Act 1873, an injunction may be granted, or a receiver appointed, by an interlocutory order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made. This is a case where it is just and convenient to make the order. If the executors were in a position to obtain an order for the appointment of a receiver, they were parties in whose favour an injunction could be granted.

WILLS, J.—This appeal from chambers must, I think, be allowed. Perhaps it may be desirable that the rules should be altered; but, as the rules now stand, this seems a very clear case. Upon the death of a plaintiff before judgment a personal action abates. Should the plaintiff's death take place after judgment obtained, it is the

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. DIV.] REG. v. LUSHINGTON, Esq. (Met. Police Magistrate); *Ex parte* OTTO. [Q.B. DIV.]

judgment and not the action which has to be considered. The old method of dealing with such a case was for the executors to issue a writ of *scire facias*, or a writ of revivor, to enforce the judgment in favour of the executors. For this cumbrous process the method provided by Order XLII., r. 23, has been substituted. There is no provision in the orders entitling the executors to be heard. Rule 23 gives to executors a right to ask for leave to issue execution upon a judgment obtained by their testator. In the present case the executors have not done this; what they have asked for is a receivership. Order XLII., r. 23, does not stand by itself apart from the other rules of the same order. Rule 23 must be read in conjunction with rule 8 of the same order, in which "issuing execution" is defined as the issuing of any such process as under the preceding rules of the order are applicable to the case. The preceding rules of the order deal with various matters and methods of enforcing judgments, but they are wholly silent as to a receivership. I entirely concur, therefore, with the decisions of my brothers Bruce and Kennedy, JJ. at chambers, that they had no jurisdiction to make an order for the appointment of a receiver. As to the injunction it may be (I will not go further) that an injunction will be granted in cases where it is ancillary to some other substantive remedy; but there can be no jurisdiction to grant it if there is no person entitled to be heard as an applicant. Unless it can be shown that the application for a receiver was an application for leave to issue execution, the applicants had no *locus standi*. This objection goes as deep as any objection possibly can go; it cuts away the right of the applicants to be heard. I have no doubt, therefore, that the refusal by the two learned judges in chambers to appoint a receiver was right, and that the order granted for the injunction cannot be sustained.

GRANTHAM, J.—I am of the same opinion.

Appeal allowed.

Solicitor for the applicants, *Alex. Pope*, for *H. R. Jones*, Wandsworth.

Solicitors for the defendant, *Warriner and Kinch*.

Monday, Nov. 13, 1893.

(Before WRIGHT and KENNEDY, JJ.)

REG. v. LUSHINGTON, Esq. (Metropolitan Police Magistrate); *Ex parte* OTTO. (a)

Criminal law—*Extradition warrant*—*Alleged stolen articles produced by purchaser of them under subpoena duces tecum*—*Power of magistrate to retain articles to send abroad*—*Application for rule under 11 & 12 Vict. c. 44, s. 5, for delivery up of articles*—*Extradition Act 1870 (33 & 34 Vict. c. 52), s. 9*—*Extradition Amendment Act 1873 (36 & 37 Vict. c. 60)*—*Extradition Treaty with France 1874*.

Upon an application to a magistrate for the extradition of a fugitive criminal upon a charge of stealing certain articles in France, a purchaser of the articles in England produced under a subpoena duces tecum before the magistrate the articles alleged to have been stolen in France. The police magistrate, after committing the

accused to prison to await the Secretary of State's warrant for his extradition, directed the articles to be retained by the police for the purposes of the prosecution, but made no order. Sect. 9 of the Extradition Treaty 1870 (33 & 34 Vict. c. 52) says: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." The person who produced the articles under the subpoena applied under 11 & 12 Vict. c. 44, s. 5, for an order directing the police magistrate to order the articles to be delivered to him.

Held, that under 11 & 12 Vict. c. 44, s. 5, the High Court had no jurisdiction to make the order asked for, the section only enabling the court to order the police magistrate to perform his duty. He was functus officio as soon as the person accused was committed.

Held, further, that, assuming there was jurisdiction to make the order, the purchaser's possessory title (if any) to the articles had lawfully passed out of his possession under the subpoena duces tecum, and therefore the purchaser of these articles was not entitled to the relief asked.

THIS was an application under 11 & 12 Vict. c. 44, s. 5, for a rule *nisi* calling on a metropolitan police magistrate to show cause why he should not make an order for the delivery up of certain articles to the applicant, produced by him on the hearing of certain proceedings for the extradition of one Emil Ebstein.

From the affidavits it appeared that a theft of jewellery and other articles had been committed in France, and that Ebstein was arrested in England on suspicion of having been concerned in the robbery.

Some of the jewellery was discovered to be in the possession of the applicant, who had an office in the city of London, and who stated that he had bought the articles for 50*l.* from Ebstein, and produced Ebstein's receipt for the same.

Upon the hearing before the magistrate for Ebstein's extradition, the applicant produced under a subpoena duces tecum the articles sold to him, and which were identified by the prosecutrix.

Ebstein was committed by the magistrate to await a warrant for his surrender to take his trial in France upon the charge of theft, and the police magistrate told a police officer in the court that he had better take charge of the articles of jewellery produced by the applicant, in order that they might be produced upon the trial of Ebstein in France, but the police magistrate made no order to that effect.

He further stated that the right to the property in the goods was entirely unaffected by his direction, and was fully reserved to all parties. The police magistrate, in giving this direction, considered that he had jurisdiction to do so under sect. 9 of the Extradition Act 1870 (33 & 34 Vict. c. 52).

A rule *nisi* was obtained by the applicant to bring up the learned police magistrate's order by *certiorari* for the purpose of its being quashed, but that rule was turned into the present one when it was discovered that no order in

(a) Reported by T. K. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.] REG. v. LUSHINGTON, Esq. (Met. Police Magistrate); *Ex parte* OTTO. [Q.B. Div.]

writing had been drawn up by the police magistrate.

Sect. 5 of 11 & 12 Vict. c. 44, enacts that,

In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with such rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

Sect. 9 of the Extradition Act 1870 (33 & 34 Vict. c. 52) enacts that,

When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

The *Attorney-General* (Sir Charles Russell, Q.C.), the *Solicitor-General* (Sir John Rigby, Q.C.), and *H. Sutton*, for the metropolitan police magistrate, showed cause against the rule obtained.—The present application on which this rule has been obtained is not to quash the learned magistrate's order, but to direct him to hand over these alleged stolen articles to the applicant. There is no authority to show that the magistrate can be ordered to direct these articles to be given to any particular person. There is no direct authority to show that the police are allowed to retain in their custody articles required for the purpose of criminal justice, but it is the invariable custom for them to do so. There is very little authority to show that magistrates have or have not jurisdiction to order articles to be either handed over or detained. *Davis v. Roe* (10 J. P. 385), decided (28th June 1846) that an unwritten order by a magistrate for impounding goods in order that they may be produced in evidence is good; and in *Re v. Clifford* (1 C. & P. 521), which decided (30th Nov. 1824) that a judge at the trial of a case cannot order any paper to be impounded which is not given in evidence, even if it be in court in the possession of a witness. *Abbott, C.J.* in that case said that if it be in evidence he could order it to be detained. These articles were in evidence, so that the learned magistrate had jurisdiction to make an order for the detention of these goods. The applicant never had more than a possessory title to these articles, and when he produced them before the magistrate under the *subpœna duces tecum*, he became lawfully divested of the articles.

Edward Turner on behalf of the applicant in support of the rule.—The only order the learned police magistrate could make was for the mere detention of these articles by the police; he could make no order for their production in France, because the Extradition Act 1870 gives him jurisdiction only as to the surrender of fugitive criminals, and no jurisdiction over goods or articles. After the magistrate has committed the fugitive criminal to prison, he becomes *functus officio*. Every

other proceeding is then taken by the Secretary of State. Under art. 14 of the Extradition Treaty between France and this country, dated the 14th Aug. 1876, which relates to the delivery up of property in the possession of fugitive criminals, only the Secretary of State can act, and not the police magistrate. Sect. 5 of the Extradition Amendment Act 1873 (amending the Act of 1870) merely provides power for the magistrates, by an order of the Secretary of State, to take evidence in the absence of the person charged. These articles having been produced before the police magistrate under a *subpœna duces tecum* are virtually in the possession of the police magistrate, and therefore this court can make an order upon the magistrate to deliver them up to the applicant. If the magistrate had drawn up a written order I could have brought it here and asked this court to quash it; but, as the magistrate has drawn up no order in writing, all I can do is to ask the court to make absolute the rule obtained under 11 & 12 Vict. c. 44, s. 5.

WRIGHT, J.—I am of opinion that this rule must be discharged. In the first instance an application was made for a rule *nisi* for a *certiorari* to quash a supposed order of the learned police magistrate directing in substance that the jewellery in question should be retained for the purposes of the subsequent prosecution in France of a person he was committing for trial under the Extradition Acts. That order was not drawn up, and the form, therefore, of the rule was altered. The question before us is whether we ought to make an order on the learned magistrate requiring him to direct the delivery of this jewellery to the applicant, which was produced by the applicant at the police-court under a *subpœna duces tecum*. It is not immaterial to observe that when this jewellery passed out of the applicant's hands, it passed out of his possession by virtue of the process of the court, and he became divested of it. Consequent upon that, what was the position of things? In this country I take it that it is undoubted law that it is in the power of and it is the duty of constables to retain for use in court whatever articles may be evidence of crime which have come into their possession without wrong on their part. It is undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court, or the constable in charge of them (as is generally the case), to preserve and retain them, so that they may be always available for the purposes of justice until the trial is ended. There is a great deal to be said for the proposition of the *Attorney-General* that when you find the preliminary stages of an investigation applied, not for the purpose of trial in this country, but for the purposes of trial abroad under the Extradition Acts, the magistrate here should have similar powers with reference to the commitment under the Extradition Act as he would have with reference to commitment for trial in this country, and in some cases, at any rate, he would have power to preserve evidence for the use of the foreign tribunal. I cannot help thinking that there may be cases in which the court here would hold a magistrate justified in handing over evidence without which the Extradition Act would be futile in its application to the particular case; but it is not necessary to decide that in this instance, and I prefer not to express any positive opinion

Q.B. Div.] GOZZETT (app.) v. THE MALDON URBAN SANITARY AUTHORITY (resps.). [Q.B. D.]

about it. But, however this may be, the application which is now made to us cannot succeed. Firstly, I very much doubt if this is the kind of matter to which 11 & 12 Vict. c. 44, s. 5, applies. I do not think that the section was intended to authorise persons having private grievances of this kind to obtain in this court an order upon the magistrate to do something outside the ordinary course of his judicial functions. Then I agree with the learned counsel for the applicant that the police magistrate was *functus officio*, and that sect. 5 of 11 & 12 Vict. c. 44, only enables us to order the magistrate to perform his duty; if his duties were over, there is nothing for us to order him to perform. The applicant also has failed to convince us that he is entitled to claim this relief, even if we had power to order it. Of course we cannot try title. I do not know what the French law on that subject may be, or what might be the ultimate view of the matter in the courts of this country. The French law may hold that the mere possession of goods which have been stolen does not convey any interest at all. These goods were not bought by Otto in market overt there; it is not so alleged. It seems to me he has now no *prima facie* title to them, not even a possessory title, according to the doctrine acted upon in *Buckley v. Gross* (7 L. T. Rep. N. S. 743; 3 B. & S. 566; 32 L. J. 129, Q. B.), and that any possessory title which he may once have had has been lawfully divested by reason of the goods passing out of his possession under the direction of the court. There is nothing to justify our granting this application until the applicant makes out title to the goods which he cannot do on an application of this nature. For all these reasons I think that this rule must be discharged, and I come to the conclusion with the less reluctance because it seems to me that the proper remedy of the applicant, if he has a grievance at all, is to bring an action against the persons in whose custody the goods are, and claim an injunction against their parting with them until the trial.

KENNEDY, J. concurred.

Rule discharged.

Solicitor for the applicant, *Joseph Davis*.Solicitor for the magistrate, *Solicitor to the Treasury*.

Monday, Jan. 15.

(Before DAY and LAWRENCE, JJ.)

GOZZETT (app.) v. THE MALDON URBAN
SANITARY AUTHORITY (resps.). (a)

Public health—Width of street—Laying out "new street" as carriage road—Right of way—Bye-laws of local authority—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 157.

Sect. 157 of the Public Health Act 1875 provides that every urban authority may make bye-laws with respect to the level, width, and construction of new streets. Two bye-laws made, arising out of the above section, provided that every person who shall lay out a new street exceeding 100 feet in length, as a carriage road, shall lay out such street of a width of not less than thirty-six feet, and shall lay out on each side of such new street a footway, &c.

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

The appellant became lessee of a piece of on which he commenced to build two houses this piece of land he also obtained a right of way fifteen feet wide over a road more 100 feet in length, which led past the piece of ground on which he had commenced to build. The appellant, after commencing to build, not widen this right of way over the adjacent road to the width of thirty-six feet. The appellant was summoned by the respondents for laying out a new street of a width of less than thirty-six feet. The magistrates, finding that commencing to build two houses, and other facts, constituted a breach of a new street as a carriage road of a width than thirty-six feet in contravention of the respondents' bye-laws, convicted the appellant.

Held, that what the appellant had done did not amount to laying out a new street contrary to the respondents' bye-laws, and the conviction was to be quashed.

THIS was a case stated by the magistrates. The appellant was summoned before the magistrates by the respondents, who were an urban sanitary authority, for having laid out, in the borough of Maldon, a certain new street, designated "London-road," as a carriage road of a width of less than thirty-six feet contrary to the bye-laws of the borough.

During the hearing of the summons the following evidence was given on behalf of the respondents: Mr. Beaumont, the surveyor to the respondents, produced and proved the bye-laws and a plan of the estate in question, and stated that the estate was bounded on the south-west by the London-road, which is an old highway, and on the north-west by Dyke's Chase, which is a public footway twelve feet wide. The Lodge-gate extends from the Lodge gate to the London-road and is 390 feet long and fifteen feet wide, and is used as a roadway to the Lodge.

The surveyor to the respondents further stated that he purchased the Lodge Estate in July 1881 and in Sept. 1892 leased the Lodge, with a portion of the garden, to a tenant for fourteen years with a right of way for horses, carriages, and passengers from the London-road to the Lodge over a piece of ground fifteen feet wide, called the Lodge-road, and in Jan. 1893 he leased to the appellant a piece of ground (which was colored pink on the plan produced) for ninety-nine years at a ground rent of 14*l.* per annum, together with a right of way over the Lodge-road from the London-road to the extremity of the ground so leased, being a distance of 170 feet. The surveyor further stated that he sold in June 1893 his tenant a part of the property called the Lodge (which was shown on the plan produced) together with a right of way over the Lodge for himself and all others authorised by him. The surveyor prepared plans for the erection of the appellant of two houses on the piece of ground which he had leased to the appellant, and he showed the plans before the respondents on the 21st June 1893. The main walls of the houses in question were set back six feet from the London-road, and the bay windows four feet. The appellant a few days before the 21st July 1893 dug out the foundation for these houses, and on the 21st July the plans were again produced to the respondents, but they were not approved.

Q.B. Div.] GOZZETT (app.) v. THE MALDON URBAN SANITARY AUTHORITY (resp.). [Q.B. Div.]

surveyor further stated that on the 2nd May 1893 he offered the Lodge Estate for sale in twelve lots, ten of which were building plots, but none of the plots were sold. A board is now up on the plot of ground facing the London-road advertising the plots for sale as building plots. The board was placed there in Oct. 1892. Anyone passing must see the board. The appellant must have seen it, as his men, he believed, put it up.

The surveyor stated, on cross-examination, that the land (coloured yellow on the plan) was still his own, and was used as a garden; that the Lodge-road belonged to him, subject to the rights of way granted over it. The brick wall between Lodge-road and Dykes Chase was also his property. There was no outlet on the north side. There was a gate at the London-road end of Lodge-road, and also at the end he had sold. He had heard of no intention of building on the other side of Dykes Chase. He had not dedicated the Lodge-road to the public. He was unrestricted as to any use he might put the land (coloured yellow on the plan). The land coloured yellow is advertised on a board for sale, with application to be made to him (the witness). On re-examination he said that the wall was his, and that there was nothing to prevent him opening on to Dykes Chase for foot passengers.

There was no evidence called for the appellant. On his behalf it was contended that the appellant had not laid out the Lodge-road as a new street within the meaning of the Public Health Act 1875, or the bye-laws of the respondents, but that all he had done, or intended to do, was to build two houses on his piece of ground; and that he had no power or control over the land in front or on either side of his piece of ground, and that in building the houses he was simply making use of his own land without any intention of converting the Lodge-road into a new street; that the Lodge-road could never be made of the required width for a new street by the appellant without acquiring the land on the opposite side of Dykes Chase; that the Lodge-road had not been dedicated to the public, but had gates at each end, and was used merely as a private carriage-way to the Lodge residence, and therefore had not been converted into a new street; that the Lodge Estate as a whole (including the site of the Lodge-road) must, notwithstanding the intervening brick wall, be regarded as abutting on Dykes Chase, and that all the appellant had done was to commence erecting two houses facing Dykes Chase, with a private carriage drive from the London-road; that if the new street had been laid out, it was done by the owner of the Lodge Estate and not by the appellant.

The magistrates found that the commencing to build the two houses, and the other facts proved, sufficiently constituted a laying out of a new street as a carriage-road of a width less than thirty-six feet, and a consequent contravention of the bye-laws, and convicted the appellant.

The question for the opinion of the High Court was, whether the appellant, by commencing to erect the two houses on his piece of ground, and on the other facts proved, did lay out the Lodge-road as a new street contrary to the bye-laws.

Sec. 157 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides that:

Every urban authority may make bye-laws with respect to the following matters (that is to say): (1)

With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof.

The following were the two bye-laws under which the appellant was summoned for contravening:

3. Every person who shall lay out a new street as a carriage road shall lay out such street of a width of not less than thirty-six feet, and he shall lay out on each side of such new street a footway of equal width equal to one-sixth part of the entire width of such street, and he shall lay out the remaining two-thirds of such width as a carriage-way.

4. Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage road, and shall, as regards such street, comply with the requirements of every bye-law relating to a new street intended for use as a carriage road.

Channell, Q.C. (*Wightman Wood* with him) for the appellant.—This conviction was wrong, and should be quashed. The appellant merely built two houses on a vacant piece of land. He did nothing to this road over which he had a right of way. Two authorities—*Robinson v. Local Board of Barton Eccles* (50 L. T. Rep. N. S. 57; 53 L. J. 226, Ch.) and *Williams (app.) v. Powning (resp.)* (48 L. T. Rep. N. S. 672)—show that before a road can be considered a “new street” there must be something done to the road. Here there was nothing done to the road by the appellant; he merely had a right of way over it.

R. Cunningham Glen for the respondents.—The Legislature has put certain restrictions on the right of dealing with private land, by means of the Public Health Act 1875 and the bye-laws under it. As to whether the appellant was laying out a new street or not by building these two houses is a question of fact, and the magistrates have found that the appellant was laying out a new street by so doing. Brett, J. says in his judgment in *Robinson v. Local Board of Barton Eccles*, on page 287 (47 L. T. Rep. N. S.), before it went to the House of Lords: “It is often a difficult thing to say when a street begins to be a new street. . . . The Act of Parliament is concerned with what people do . . . upon the land. When would such an owner begin to lay out and form a street? To my mind, he would do so when he built his first house, having the intention to go on to make a street. He would then have begun to lay out and to form a street, and it would from that moment begin to be a street.” [DAY, J.—What evidence was there here of any intention to lay out a new street?] Commencing to build two houses. He cited

Taylor v. Corporation of Oldham, 35 L. T. Rep. N. S. 696; 4 Ch. Div. 395; 46 L. J. 105, Ch.

Hendon Local Board v. Pounce, 61 L. T. Rep. N. S. 465; 42 Ch. Div. 602.

DAY, J.—I am of opinion that this conviction must be quashed. There is no evidence that the appellant was a person who was constructing a new street which exceeded 100 feet in length, within the respondents’ bye-law No. 4. The appellant has simply bought a piece of land and proposes to build two houses upon it: and it is said, because there is a private way which he has a right to use, and which is over 100 feet long, the respondents, the urban sanitary authority, can insist upon him making this road thirty-six feet wide. The appellant is not a person constructing

ADM.]

THE GLENDEVON.

[A.]

or laying out a new street. If there is any evidence of liability against anyone, it would be against Mr. Beaumont, the freeholder. If any person would be liable, he would be. The respondents seem to me to have been premature in saying that the appellant is the person who has constructed a new street. When this road has been made into a two-sided street, it is possible that the urban sanitary authority may be entitled to interfere; but it is unreasonable to say that a person who has only the lease of a bit of the land should be required to make the whole length of this imaginary street thirty-six feet wide. I am of opinion that there was not evidence to justify the conviction.

LAWRANCE, J.—I am of the same opinion. The cases cited have been where streets have been laid out. The bye-law relied on does not apply to this case. The cases to which this bye-law applies is where houses are built on lanes or narrow roads; then it has been held that the lanes and narrow roads are new streets. In the present case the sanitary authority seem to think that this road will some day become a street; but if this is so, it cannot entitle them now to call upon the appellant to widen this road. If this road had not been a carriage road, this question would not have arisen.

Solicitors for the appellant, *Beaumont, Son, and Rigden*, for *Beaumont* and *Bright*, Maldon.

Solicitors for the respondents, *Storey and Cowland*, for *J. Freeman*, Town Clerk of Maldon.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Aug. 1, 1893.

(Before the PRESIDENT (Sir F. H. Jeune) and BAENES, J.)

THE GLENDEVON. (a)

Charter-party — Discharge of cargo — Despatch money—Sundays and fête days.

Where a charter-party provided that a steamer was to be "discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour saved," it was held that Sundays and fête days were not to be taken into account in computing the number of hours saved in discharging, and hence despatch money was payable on the difference between the number of hours actually taken to discharge the ship and the total number of hours allowed by the charter-party.

THIS was an appeal by the defendants, in an action for balance of freight, from a decision of the County Court judge of Newcastle-on-Tyne.

The plaintiffs were the owners of the steamship *Glendevon*, and at the time material to this action she, under a charter-party dated the 17th Nov. 1892, carried a cargo of coals, belonging to the defendants, from Newcastle to Lisbon.

By the terms of the charter-party it was agreed (*inter alia*):

The steamer to be discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days

excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour saved. . . . Despatch 20l. for every day's detention in discharging, in same proportion for any part of such day over and above the days allowed as aforesaid, except in case of any hands striking work, frost, snow, or flood, or other accidents, which may prevent the discharge of such steamer.

The *Glendevon* having arrived at Lisbon commenced discharging at 7 a.m. on the 2nd Dec. which was Friday, and finished at 5 p.m. on the 7th Dec.

According to the time allowed by the charter-party, the charterers had 252 hours to discharge their cargo, which, excluding a fête day and a Sunday and the charter-party, brought the time up to 7 p.m. on the 15th Dec.

The *Glendevon* was in fact discharged in 146 hours, and the plaintiffs credited the defendants with 146 hours despatch, being the difference between 106 and 252 hours. The defendants, however, claimed to include the fête day and Sunday which intervened between the 2nd Dec., the day when the discharge was finished, and the 7th Dec., the date up to which the time allowed for discharging extended, and sought to set aside against the plaintiffs' claim for freight a sum of 20l. in respect of despatch money for those days.

The County Court judge gave judgment for the plaintiffs.

From this decision the defendants appealed.

R. H. Forster, for the defendants, in support of the appeal.—The test to be applied in computing the number of hours despatch money is payable is the number of hours actually saved to the ship. By the charter-party, according to the charter-party, the discharge was finished at 5 p.m. on Dec. 15 to discharge. By reason of their despatch, the discharge was finished at 5 p.m. on Dec. 7. If so, the defendants have earned despatch money for every hour between those dates. In other words, if the shipowner takes Sundays and fête days into account in reckoning the time allowed him to discharge his cargo, charterers should also be entitled to take into account in reckoning the time saved:

Laing v. Hollway, 3 Q. B. Div. 437;

Niemann v. Moss, 29 L. J. N. S. 206, Q. B.

Demurrage and despatch money stand on the same footing,

Aspinall, Q.C. and E. de Hart, for the plaintiffs, *contra*.—If the defendants' contention is right, they would be entitled to include in time saved any bad weather intervening between the day when the discharge was finished and the day when the time allowed for discharge. *Niemann v. Moss* (*ubi sup.*) is not in point. The words "Sundays and fête days excepted" apply to the whole cargo.

Forster in reply.—"Weather permitting" applies to bad weather during the discharge.

THE PRESIDENT.—The question for our decision is, whether despatch is to be counted in respect of Dec. 8, which was a fête day, and Dec. 9, which was a Sunday, making in all forty-four hours, and whether the defendants are entitled to set off such despatch money against the freight. Reliance was placed by the defendants on the case of *Laing v. Hollway* (*ubi sup.*) but it was conceded in argument and could

ADM.]

THE PETREL.

[ADM.]

be denied, that the actual decision is not one that bears on the present case, because there the only question really decided was, that the length of the day was to be taken at its real and actual length of twenty-four hours. There were, however, two expressions in the judgment on both of which reliance was placed, and which might at first sight seem to have a bearing on the question. Bramwell, L.J. said, "The owner would sail away by what has happened 216 hours sooner than he would have done but for the defendants' despatch," and "it was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the despatch money?" I do not think that either of these phrases really lend themselves to the appellants' argument in this case. I am by no means sure, even by the test of the time saved to the steamer, that Sundays or fête days should be taken in, because, though in some cases they might be days available for the steamer's purposes, in other cases they would only be so partly, and possibly not at all. But the argument which the counsel for the respondents has put forward, as regards the other exception in the clause, appears to me to be unanswerable. They point out that days during which the weather does not permit discharge stand on the same footing as regards the charterer's rights as Sundays and fête days; that is to say, the charterer need not discharge on Sundays and fête days and need not discharge on other days if the weather does not permit, but if Sundays and fête days are to be reckoned in as time saved for the purpose of despatch money, then the days during which the weather does not permit discharge ought to stand on the same footing. I confess I am unable to see any answer to that argument, and the results would be so extraordinary as to be unintelligible. It would come to this, that after the ship was discharged the charterer would have the right to say that on a large number of days, it might be even weeks or months, the weather was such as would have prevented discharging, and therefore he was entitled to add them in as days of twenty-four hours, for each hour of which he was entitled to have 8s. 4d. That is an absurdity. Then there is the other contention, that demurrage and despatch stand on the same footing; but that is not so. In the first place, demurrage is governed by a separate clause from that governing despatch money, and the demurrage clause contains no exception of Sundays and fête days. One would not expect it to do so, because it has been pointed out demurrage is fixing damages for breach of contract when time is lost to the steamer. The result, therefore, to which I come is that, on the true construction of this charter-party, the 8s. 4d. per hour is to be paid for the time saved out of the discharging hours, and that discharging hours are to be taken with the exceptions in the clause. The result is, that the judgment appealed from is right, and this appeal must be dismissed.

BAWNE, J.—We have to consider whether the plaintiffs' method of calculating the number of hours saved is correct. According to the charter-party the total time allowed for the discharge of the *Glendevon* is 252 hours, and out of that number of hours only is any saving of time to be reckoned. That is neatly put in the judgment of the learned County Court judge, where he says, "The rate of 200 tons per day means for working days, and every hour saved means every

hour saved out of a fixed or ascertainable number of working days, viz., 252 hours, which exclude Sundays and fête days." Any other construction would lead to difficulty, and I agree in thinking that the judgment should be affirmed.

Solicitors for the plaintiffs, *Botterell, Roche, and Temperley*.

Solicitors for the defendants, *King, Wigg, and Co.*, for *Clayton and Gibson*, Newcastle-on-Tyne.

Monday, July 3, 1893.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PETREL. (a)

Collision—Common employment—Limitation of liability—Gross tonnage—Crew space—Merchant Shipping Act 1867 (30 & 31 Vict. c. 124), s. 9—Merchant Shipping (Tonnage) Act 1889 (52 & 53 Vict. c. 43), s. 1.

Where a collision occurred in Sea Reach of the river Thames between two steamers owned by the same owners, it was held that the masters and crews of such steamers were not in common employment, and hence the master and crew of one ship were allowed to prove for their lost effects against the fund which represented the limit of liability of the owners for the negligence of the other ship.

If the requirements of sect. 9 of the Merchant Shipping Act 1867 are complied with, shipowners in limiting their liability are entitled to deduct crew space from the gross tonnage, notwithstanding the repeal of sect. 21. sub-sect. 4, of the Merchant Shipping Act 1854, by sect. 1 of the Merchant Shipping (Tonnage) Act 1889.

THIS was an action by the General Steam Navigation Company, the owners of the s.s. *Petrel*, to limit their liability in respect of a collision between her and the s.s. *Cormorant*.

The collision occurred in Sea Reach of the river Thames on the 5th Jan. 1893. The *Cormorant*, which was sunk, was also owned by the General Steam Navigation Company.

Owners of cargo laden on the *Cormorant* sued the owners of the *Petrel*, and the Admiralty Court gave judgment on behalf of the plaintiffs therein, and found the *Petrel* alone to blame for the collision. Other claims having been made against the General Steam Navigation Company in respect of the collision, they instituted the present action to limit their liability.

The plaintiffs herein instituted their action against themselves as owners of the *Cormorant*, and against the owners of her cargo and freight, and her master, officers, and crew. The defendants, the owners of cargo, by their defence alleged:

2. The plaintiffs described in the writ and statement of claim as the owners of the steamship *Petrel* are the General Steam Navigation Company, being the same company as are made defendants to the said writ and statement of claim. The plaintiffs were at the time of the said collision the owners of the steamship *Cormorant*, and her freight, and the master, officers, and crew of the steamship *Cormorant* were at the said time the servants of the plaintiffs, and in the same employment as the master and crew of the steamship *Petrel*, by whose negligence the said collision was caused.

3. These defendants will contend that neither the General Steam Navigation Company, as owners of the

ADM.]

THE PETREL.

[A.]

Cormorant and her freight, nor the master, or officers, and crew of the *Cormorant*, have any claim against the fund proposed to be paid into court by the plaintiffs.

4. The gross tonnage of the steamship *Petrel* is 739·08 tons, and the amount which the plaintiffs offer to pay into court is not sufficient to satisfy the plaintiffs' liability.

The plaintiffs offered to pay into court 8*l.* per ton upon the gross tonnage of the *Petrel* less the space reserved for the berthing of the crew, and upon this basis calculated their liability upon 707·28 tons. The defendants disputed their right to deduct crew space.

The following Acts of Parliament are material to the decision:—

The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54:

The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say, (4) where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages . . . in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine-room.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 21:

The tonnage of every ship to be registered, with the exceptions mentioned in the next section, shall, previously to her being registered, be ascertained by the following rule . . . (4) If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows . . . subject to the following provisos: first, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew unless such space exceeds one-twentieth of the remaining tonnage of the ship; and in case of such excess, the excess only shall be added.

The Merchant Shipping Act 1867 (30 & 31 Vict. c. 124), s. 9:

The following rules shall be observed with respect to accommodation on board British ships; that is to say, every place in any ship occupied by seamen or apprentices, and appropriated to their use, shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet and of not less than twelve superficial feet measured on the deck or floor of such place. (3) No such place as aforesaid shall be deemed to be such as to authorise a deduction from registered tonnage under the provisions hereinafter contained, unless there is in use in the ship one or more properly-constructed privy or privies for the use of the crew.

The Merchant Shipping (Tonnage) Act 1889 (52 & 53 Vict. c. 43):

1. (1) In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been first included in the measurement of her tonnage. (2) In sect. 21, par. 4, of the Merchant Shipping Act 1854 the words "First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess, the excess only shall be added" . . . shall be repealed.

Butler Aspinall for the plaintiffs.—We abate the contention raised in the pleadings that the owners of the *Cormorant* we are entitled to against the fund in court. The crew of *Cormorant* are entitled to claim against the fund in court. The doctrine of common employment does not apply to them. The mere fact that they were employed by the same owners as the crew of the negligent ship is not sufficient. They must have been engaged in a common employment. When they contracted to serve on board the *Cormorant* they never contracted to take the risk of the negligence of persons serving on board another ship owned by the same owners.

Hutchinson v. The York, Newcastle, and North Yorkshire Railway Company, 5 Ex. 343;

Charles v. Taylor, 38 L. T. Rep. N. S. 773; 3 Q. B. 492.

The plaintiffs are entitled to deduct crew space. It has been the continuous practice to do so since 1867. The cases of *The Franconia* (39 L. T. Rep. N. S. 57; 3 P. Div. 164; 4 Asp. Mar. Law Cas. 1), and *The Umbilo* (64 L. T. Rep. N. S. 7 Asp. Mar. Law Cas. 26; (1891) P. 118) recognised the propriety of so doing. The tonnage upon which liability is to be calculated means register tonnage plus engine-room space. In order to arrive at register tonnage crew space must be deducted. If so, a shipowner, in calculating his liability on gross tonnage, is entitled to deduct crew space:

Burrell v. Simpson, 4 Ct. Sess. Cas. (4th ser.) 177.

T. E. Scrutton for defendants, owners of *Cormorant*.—The two crews of those two vessels were employed in common employment. It is a question of fact whether these ships travel certain well-recognised routes up and down the Thames. The case is analogous to that of servants of tramways owned by the same company which travel on parallel and opposite lines:

Charles v. Taylor (*ubi sup.*).

The plaintiffs cannot deduct crew space. The provision in sect. 21, sub-sect. 4 of the Merchant Shipping Act 1854, which exempted crew space from being included in gross tonnage, has been repealed by sect. 1 of the Merchant Shipping (Tonnage) Act 1889:

The Franconia (*ubi sup.*);

The Umbilo (*ubi sup.*);

The Palermo (52 L. T. Rep. N. S. 390; 5 Asp. Mar. Law Cas. 369; 10 P. Div. 21).

H. Stokes for other owners of cargo.—Although it has been the practice to allow crew space to be deducted from gross tonnage, the point has not yet been decided. Sect. 9 of the Act of 1867, which the plaintiffs rely on, is confined to registered tonnage, whereas their liability is to be calculated on gross tonnage.

Butler Aspinall in reply.—If the defendant's contention is to prevail, crew space would be deducted in the case of sailing ships and not in the case of steamers.

Cur. adv. vult.

July 3.—The PRESIDENT.—In this case the questions of a wholly different nature arise. On the 5th Jan. 1893 the *Petrel* came into collision with the *Cormorant*, and the *Cormorant* was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that

ADM.]

THE PETREL.

[ADM.]

collision was caused by the negligence of those navigating the *Petrel*, and it is proposed to pay into court the sum for which the owners of the *Petrel* are liable. The first question is, whether the master, officers, and crew of the *Cormorant* can claim against this fund in respect of their effects lost in that vessel. It is said that they cannot by reason of their common employment with the master, officers, and crew of the *Petrel*. No doubt the captain and crew of the *Cormorant* had a common master with the captain and crew of the *Petrel*; but were they in common employment with each other? It is remarkable that, although propositions of law defining common employment and recognising its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English courts (there are several in the Scotch courts) in which, upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, viz., *Priestley v. Fowler* (3 M. & W. 1) in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C.J., of Massachusetts, in *Farwell v. Boston Railroad Corporation* (4 Metcalf, 49), which no doubt materially influenced the House of Lords in the case of *Bartonshill Coal Company v. Reid* (3 Mac. H. L. C. 266), in which, reversing the decision of the Court of Session, their Lordships held that a miner labouring in a mine was in common employment with the engine driver by whom the cage was worked. Two phrases of Shaw, C.J. indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services;" and the other refers to the condition of the safety of each servant depending much on the care and skill with which each other shall perform his appropriate duty. This view was adopted by Blackburn, J. in a judgment affirmed by the Exchequer Chamber in the case of *Morgan v. Vale of Heath Railway Company* (13 L. T. Rep. N. S. 564; L. Rep. 1 Q. B. 149). He says: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost, if not every, case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages." On this principle, it having been previously decided in *Hutchinson v. York and Newcastle Railway Company* (5 Ex. 343) that the engine driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turn-table was in common employment with

shunters working traffic in connection with it. The view of Shaw, C.J. appears to have been followed in *Lovell v. Howell* (1 C. P. Div. 161), in which the principle approved was that the servant accepts the ordinary risks incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant and "of risk of injury being a natural and necessary consequence" of his want of skill and care is consistent with, though perhaps more exact than, the test suggested by Lord Chelmsford in the case of *Bartonshill Coal Company v. McGuire* (3 Mac. H. L. C. 300) from the negative point of view that common employment does not exist when injury happens to the servant "on occasions foreign to his employment" or to servants engaged in "different departments of duty." It was suggested in argument before me, with reference to the case of *Charles v. Taylor* (38 L. T. Rep. N. S. 773; 3 C. P. Div. 492), that the physical contiguity of the employment constitutes a test. But, as Shaw, C.J. points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle range is clearly in common employment with the marker at the other when the two have a common master; and, to give a stronger instance, a servant who unskillfully packs dynamite in a factory and another who in unpacking it at a distant warehouse is injured by its explosion are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with the common employment. I doubt also if "one common object"—the phrase emphasised by Bramwell, B. in *Waller v. South-Eastern Railway Company* (2 H. & C. 102)—supplies an exact criterion. As Blackburn, J. points out, there may be common employment though the immediate object of the labour of the two servants be very different, and if the common object be remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same

ADM.]

THE ROUGEMONT.

[ADM.]

dock, and the safety of each thus became in the ordinary course of things dependent on the skill with which the other was navigated. But, in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the captains of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think therefore that these two captains were not in common employment. The second question relates to the amount of the tonnage by reference to which the measure of liability of the *Petrel* is to be fixed, and to the right to deduct from the gross tonnage for this purpose 31·80 tons representing the berthing accommodation of the crew. This question turns on the effect to be given to the 9th section of the Merchant Shipping Act 1867. It is clear that the measure of liability is, under sect. 54 of the Merchant Shipping Act Amendment Act 1862, fixed as regards steamers by reference to the gross tonnage as determined by the 20th, 21st, and 22nd sections of the Merchant Shipping Act 1854; that, by virtue of sect. 21, sub-sect. 4, of that Act, in calculating gross tonnage no account subject to a condition mentioned is to be taken of closed-in space solely appropriated to the berthing of the crew on the upper deck; and that the words embodying this last provision are repealed by sect. 1, sub-sect. 2, of the Merchant Shipping (Tonnage) Act 1889, subject to the provisoes in that section contained. It is therefore argued that, as the provision by which berthing space on the upper deck was excluded from the sum of gross tonnage is repealed, such berthing space is to be included in the gross tonnage; but the reply is, that the 9th section of the Merchant Shipping Act 1867 gives the right to deduct from the register tonnage places appropriated for seamen, if certain conditions are complied with, which I understand to have been complied with in this case. The only difficulty in the way of this reply is that the section speaks of register tonnage and not of gross tonnage. But I do not think that this difficulty is insuperable. "Register tonnage," in sub-sect. 4 of sect. 9 of the Act of 1867 is clearly the same thing as "registered tonnage" in sub-sect. 3, and I think that those words refer to the total gross tonnage as registered, and not to the register tonnage as mentioned in sect. 23 of the Act of 1854, as distinguished from the gross tonnage calculated under sect. 22 of that Act. If this be not the effect of sect. 9, the result would be, that it would apply to sailing vessels but not to steamers, with the consequence that sailing vessels and steamers, which, as regards the inclusion of berthing accommodation in their tonnage for the purpose of limiting liability, stood on the same footing under the Act of 1854, would be placed in a different position. There is no apparent reason for this, and it cannot be supposed to have been intended. The intention of the Acts of 1867 and 1889 in this respect seems to be clear. By the Act of 1854 berthing space below the upper deck was not exempted; berthing space above the upper deck, subject to a condition, was exempted. The Act of 1867 gave an exemption to all berthing space if certain sanitary conditions were complied

with. As became clear from the case of *The Palermo* (*ubi sup.*) berthing space above the upper deck retained its exemption under the Act of 1854, though the sanitary conditions of the Act of 1867 were disregarded. By repealing the favour shown to berth space above the upper deck by the Act of 1854, the Act of 1889 placed all berthing space in the same position if the requirements of the Act of 1867 were complied with. Except for such a reason it is difficult to see why the words in the Act of 1854 should have been repealed. There is no decision that the 9th section of the Act of 1867 has the effect which I have ascribed to it: but the uniform course of practice has certainly been in harmony with such a view, and there are two cases which appear to assume the correctness of such a construction. In *The Franconia* (*ubi sup.*), decided in 1878, it was discussed whether the berthing space below the upper deck in a foreign vessel could, for the purpose of limiting her liability, be excluded under sect. 9 of the Act of 1867. If the contention in the present case be sound, that question could not have arisen. But no such contention was then put forward, and the court decided that the foreign steamer could not claim the deduction, not because the Act of 1867 never gave it, but because it gave it only when its requirements were observed. Again, in the case of *The Umbilo* (*ubi sup.*), before Sir James Hannen in 1890, it was not disputed that the plaintiffs were entitled, in computing the gross tonnage of their vessel, to deduct the space solely appropriated for the berthing of the crew; in other words, it was admitted that the 9th section of the Act of 1867 had not the effect now sought to be given to it. I think, therefore, that the plaintiffs are entitled to deduct the 31·80 tons.

Solicitor for the plaintiffs, *William Batham*.

Solicitors for the defendants, *Thomas Cooper and Co.*

Tuesday, July 25, 1893.

(Before BARNES, J.)

THE ROUGEMONT. (a)

Collision—Actions in rem and in personam—Cross-cause—Bail—Admiralty Court Act 1861, s. 10.

Where a collision action in personam and one in rem were consolidated and the conduct given to the plaintiff in the action in personam who had brought his action in personam because the other ship had been sunk, the Court held that it had no power under sect. 34 of the Admiralty Court Act 1861 to stay the defendant's proceedings until he had given security to answer the plaintiff's claim.

THIS was a summons adjourned into court by the plaintiffs in a collision action asking for an order staying the defendants continuing their counter-claim until they had given security to answer the plaintiffs' claim.

The collision occurred on the 10th June 1893 between the steamships *John Readhead* and the *Rougemont*, causing the *Rougemont* to sink.

The plaintiffs, who were the owners of the *John Readhead*, then issued a writ in personam in the Admiralty Division against Cory and Sons, the owners of the *Rougemont*, to recover the damage

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

ADM.]

THE ROUGEMONT.

[ADM.]

caused by the collision. The owners of the *Rougemont* subsequently issued a writ *in rem* in the same division against the *John Readhead*, and the defendants therein gave bail to the sum of 13,000*l*.

The owners of the *John Readhead* then asked the owners of the *Rougemont* to give bail to secure their claim. The owners of the *Rougemont* refused to do so.

The two actions were consolidated, and the owners of the *John Readhead* were given the conduct. In these circumstances they issued the present summons, which was dismissed by the registrar, and they now appealed to the judge.

The Admiralty Court Act 1861 (24 & 25 Vict. c. 10), s. 34 :

The High Court of Admiralty may, on the application of the defendant in any cause of damage and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and, if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested and security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause.

Arthur Pritchard, for the owners of the *John Readhead*, in support of the summons. — The defendants ought, in the circumstances of this case, to give security to answer the plaintiffs' claim. The case is well within the intention of the Legislature when it enacted sect. 34 of the Admiralty Court Act 1861. The object was to enable the court to see that both parties were properly secured in respect of their respective claims. The Admiralty Court acted on this principle prior to the Admiralty Court Act 1861 :

The Seringapatam, 3 W. Rob. 41, n. ;

The Johann Friederich, 1 W. Rob. 35 ;

The Heart of Oak, 29 L. J. 78, Ad.

The statute ought to be construed liberally :

The Neubattle, 52 L. T. Rep. N. S. 15 ; 10 P. Div. 33 ;
5 Asp. Mar. Law Cas. 356.

The defendants' action is in substance the principal cause.

Sir Walter Phillimore, for the defendants, *contra*.—The Act of Parliament does not apply to the circumstances of this case, and hence the court has no jurisdiction to make the order. The plaintiffs can, if they like, abandon the conduct of the action and become defendants, when they would be entitled to ask the court to make my clients give security.

Cur. adv. vult.

July 25.—BARNES, J.—The cause of this application is, that Messrs. Cory and Sons, who are sued *in personam*, and whose ship is lost, have nothing which the plaintiffs can arrest; but the defendants, who are the counter-claimants, are able to arrest, and have arrested, or accepted bail for, the ship of the plaintiffs. The object of the application is to enable the plaintiffs to get security from the defendants for the plaintiffs' claim in the same way as the defendants have security by the arrest of the plaintiffs' ship for their counter-claim. The question whether this application can succeed depends simply upon the construction of sect. 34 of the Admiralty Court

Vol. LXX., N. S., 1802.

Act 1861. The case was extremely well argued by counsel on behalf of the plaintiffs, and a number of authorities were cited, but in the course of his argument he was compelled to admit that there was no case which really governed the present, or in fact directly touched upon it, although the Act has been in force for the last thirty-two years; and, so far as I have been informed by counsel, there is no case in which a similar application has been made during the whole of that period. The 34th section of the Admiralty Court Act 1861 is as follows: "The High Court of Admiralty may on the application of the defendant in any cause of damage, and on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross-cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the court may, if it thinks fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." If this case had been under the old practice before the Judicature Act, the plaintiffs' case of the *John Readhead v. Cory and Sons*, the defendants *in personam*, would undoubtedly be the principal cause, and the case instituted afterwards by the defendants against the plaintiffs would undoubtedly be the cross-cause, and I do not think that it would be possible to construe the Act of Parliament in favour of this application if the matter remained under the old practice. But it is contended that, in the present day, where the parties are in the position of claimant and counter-claimant in one action, the counter-claimant's counter-claim may be treated as the principal cause, and the plaintiff's as the cross-cause. It is difficult to see how it is possible to arrive at that result, at any rate in a case in which the plaintiffs commence their action *in personam* and afterwards are sued by arrest of their ship *in rem*, whatever might be the result if a different state of proceedings had taken place. In dealing with this case it will be seen that the words of the section are not applicable because they are, "If in the principal cause the ship of the defendant has been arrested." The principal cause here, I think, is the cause instituted by the plaintiffs *in personam*, in which of course the defendants' ship could not be arrested. The section then goes on, "and in the cross-cause the ship of the plaintiff cannot be arrested"—but in the cross-cause here the plaintiffs' ship is arrested or can be arrested—"the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." I think, therefore, although I regret it, that I must construe the Act so as to hold that it does not meet the present state of things. The object of the Act was to enable a defendant to ask the court to stay the plaintiff's proceedings until the plaintiff has secured the defendant as he has secured the plaintiff. The section does not go so far as to cover the case of the plaintiff commencing the attack *in personam*, the defendant then arresting the plaintiff's ship, and the plaintiff then applying to stay the defendant's cross-action until the defendant has given secu-

H. OF L.]

ROSE AND OTHERS v. BANK OF AUSTRALASIA.

[H. OF

city for the plaintiff's claim. For these reasons I think that, having regard to the way in which these actions are instituted, and without thinking it necessary to decide what might be the case under other circumstances, this application must be dismissed with costs.

Solicitors for the plaintiff, *Pritchard and Sons*.
Solicitors for the defendants, *Thomas Cooper and Co.*

House of Lords.

Feb. 27, March 1, 2, and 20.

(Before the LORD CHANCELLOR (Herschell),
Lords WATSON, HALSBURY, and MORRIS.)

ROSE AND OTHERS v. BANK OF AUSTRALASIA. (a)
ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

*Ship—Salvage—Duty of shipowner—Expenditure
for benefit of all concerned—General average—
Brokerage.*

*Reasonable expenditure incurred by a shipowner in
salvage operations may be distributed over the
interests protected and benefited, and need not
fall upon the ship alone.*

*A ship of the appellants containing a valuable
cargo of a perishable nature was stranded on the
coast of France, while on a voyage to the United
Kingdom, and eventually became a total loss.
The owners incurred expenditure in removing
the cargo from the ship, drying it, and carting it
to a port from which it could be shipped to the
port of destination. For these purposes they
employed persons who were skilled in salvage
operations, and also a French agent on the spot.
Some of the cargo could not be identified, and
was sold by auction, and a brokerage commission
was paid. In an action brought by the owners
against consignees of cargo to recover general
average, particular average, salvage, and other
charges:*

*Held (reversing the judgment of the court below),
that the expenditure above mentioned, though of
an extraordinary character, was reasonably in-
curred for the benefit of all parties, and that
the respondents were liable for their proportion
of it.*

*Schuster v. Fletcher (38 L. T. Rep. N. S. 605; 3
Q. B. Div. 418) discussed, and disapproved.*

*Per Lord Herschell, L.C.: Where cargo has been
removed from a stranded ship, and is by a con-
tinuous operation carried to a place of safety,
expenditure incurred after all hope of saving
the ship has been abandoned may still be
treated as general average expenditure.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), delivered in March 1892, who had reversed a judgment of Lawrance, J., in an action tried before him without a jury in May 1891.

The facts of the case are fully stated in the judgment of the Lord Chancellor.

Lawrance, J. decided in favour of the appellants' claim, but his decision was varied by the Court of Appeal in regard to several items. The appellants then brought the present appeal.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Cohen, Q.C. and Scrutton, for the appellants argued that there were now three points on dispute: (1) the charge for cartage from the place where the cargo was landed to Boulogne; (2) charges for the services of Mr. Anderson, who took charge of the salvage operations; (3) the brokerage commission paid on the sale by auction of that portion of the cargo which could not be identified owing to the obliteration of the marks. The charge for cartage is either a general average charge, as being part of a continuous act from the commencement of the salvage for the benefit of all concerned; or, secondly, it was done on behalf of cargo which was perishable, and would deteriorate if not dealt with; or, thirdly, it was for the benefit of cargo and freight, and in any event ought not to fall upon the ship alone. The point was virtually decided in *Notara v. Henderson* (L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225), which was very nearly this case. The Court of Appeal were in error in saying that all hope of saving the ship was abandoned on the 1st Feb., and there could be no general average after that date. The adventure may continue though the ship is lost. See

Birkley v. Presgrave, 1 East, 220;

Kemp v. Halliday, 13 L. T. Rep. N. S. 256;

L. J. 233, Q. B. (per Blackburn, J.).

As to the charge for the employment of an agent to superintend the salvage, this is an attempt to extend the principle of *Schuster v. Fletcher* (L. T. Rep. N. S. 605; 3 Q. B. Div. 418), which is not good law, or, at best, only applied to the circumstances of the particular case. No doubt the owner cannot charge for his own services, but he may incur reasonable expenses in the employment of agents on the principle laid down in *Speight v. Gaunt* (50 L. T. Rep. N. S. 330; 9 App. Cas. 1113). The commission on the sale is also a reasonable charge. See

Keay v. Fenwick, 1 C. P. Div. 745.

[Lord HALSBURY referred to *Mordy v. J. & C.* (4 B. & C. 394).]

J. Walton, Q.C. and J. A. Hamilton, for the respondents, contended that all charges incurred after cargo got to the top of the cliff must fall upon the shipowner. It was then in a place of safety, and all that was done after that was to forward it to the port of destination in order that the shipowner might earn his freight. General average ceases when the common adventure breaks up and the hope of prosecuting it successfully ends; i.e., when the cargo is removed from the wrecked ship to a place of safety. The shipowner has no right to charge for the services of his own agent or the brokerage which he had to pay. Such charges must fall on freight. No doubt *Schuster v. Fletcher* is difficult to understand on the facts, but it lays down a sound principle.

Cohen, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 20.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—Lords: On the 29th Jan. 1889 a vessel called *Sir Walter Raleigh* took the ground near Cap Grisnez; she was laden with a valuable cargo of wool and other merchandise. The appellants were the owners of that vessel. As soon as they had

of the disaster they communicated with a firm carrying on business in the city of London, Messrs. Anderson, Anderson, and Co., who they knew had had experience in salvage operations and in dealing with disasters of this description. Accordingly they instructed Messrs. Anderson, Anderson, and Co. to take the necessary steps in their interest and in the interest of the others concerned in the adventure. Messrs. Anderson, Anderson, and Co. proceeded at once to do what they could to save both the ship and cargo. They sent Mr. Gavin Anderson, who, though of the same name, was not a member of their firm, to the site of the disaster, and they also made an arrangement with a local firm, Messrs. Adam and Co., bankers, of Boulogne, to do the best they could to save the cargo. In the result, it was arranged that Messrs. Anderson, Anderson, and Co. should receive 750*l.* for their services. One half of this sum by arrangement between them and Mr. Gavin Anderson was to be his, the other half was to be theirs. An arrangement was entered into with the firm of Adam and Co., of Boulogne, that they should receive a percentage upon the cargo saved, and this percentage proved to amount to a sum of 1500*l.* The cargo was all saved, but considerable portions of it, for the cargo consisted of wool—were in a damaged condition. The cargo was taken from the ship, carried up to the top of the cliff, and there placed for a time until it was conveyed by carts to Boulogne. A good deal of it was wetted by sea water, and had to be attended to, to prevent the deterioration and the destruction of the wetted cargo and the cargo which had been in contact with it. The cargo was taken in carts from Andresselles, where it had been stored merely in an open field, to Boulogne, where it was placed upon the quay. Steps were then taken to spread it out and protect it from deterioration and destruction, and ultimately it was forwarded from there to its destination in London. It is obvious that the transactions to which I have referred gave rise to a claim for general average, and a general average bond was entered into by the respondents, who were owners of a portion of the cargo, by which they agreed to pay their "proper and respective proportion of all general or particular average salvage or special or other charges which may be found to be chargeable upon their respective consignments or to which the shippers or owners of consignments may be liable to contribute in respect thereof." The matter was put into the hands of an eminent firm of average adjusters to make out the average statement, and they made out a statement allotting as they thought right to the various interests the expenses that had been paid or incurred. The result of that average statement was to show a sum due from the present respondents, as owners of a portion of the cargo to the appellants the shipowners. A dispute having arisen as to whether certain items had been taken into account which ought not to have been taken into account, an action was brought by the present appellants to recover the sum which appeared to be due to them according to the average statement. The defendants resisted this claim, and the matter came to trial before Lawrance, J. Only two questions were dealt with in the judgment of the learned judge; he treated those as the only questions in dispute before him; the one related to the payment of 750*l.* to Messrs. Anderson, Anderson, and Co., which it was con-

tended ought not—or, at all events, the greater part of it ought not—to be charged; the other related to a sum of 2½ per cent. commission in respect of the sale of wool, which, owing to the destruction of marks and other causes, could not be identified as belonging to particular consignees. These questions Lawrance, J. decided in favour of the present appellants. When his judgment was concluded I observe that Mr. Barnes, who was counsel for the present respondents, said that the learned judge had not dealt with another question, viz., the payment of 1500*l.* to Messrs. Adam, and that it was contended that that was an excessive and unreasonable payment, and also that it had not been properly distributed by the average adjuster. Lawrance, J. said that if called upon he was prepared to decide, as he thought he was bound to do on the evidence before him, that the payment was a reasonable one. The case then went to the Court of Appeal, and the Court of Appeal made an order declaring "that only so much of the 1500*l.* paid to Messrs. Adam as is due in respect of work done up to the end of the 1st Feb. 1889 and superintending the extra work done in saving the goods from deterioration at the top of the cliff up to the same date should be allowed as general average, and only to the extent of a reasonable remuneration to Messrs. Adam; that only so much of the sum of 375*l.* paid to Mr. Gavin Anderson should be brought into general average account as represents the fair and reasonable remuneration of Mr. Gavin Anderson at the end of the 1st Feb. 1889; that no part of the further sum of 375*l.* retained by Messrs. Anderson should be charged as general average in any way against the cargo; that no part of the 2½ per cent. commission charged for the sale of the unidentified portions of the cargo should be brought into general average account or charged against the defendants." Then there was a declaration with regard to the sums paid for tugs and pumps, and as to wages, with which I need not trouble your Lordships, because no question arises with regard to them now—there was no contest at the bar relating to that part of the case. Your Lordships will observe that the foundation of the order made by the Court of Appeal is this, that there could be no general average charges in respect of anything that was done after the 1st Feb., and that therefore, whether the expenses incurred after that date related to the actual dealing with the cargo or were charges for the superintendence of the salvage operations, it was equally improper to make any general average charge in respect of them. In the Court of Appeal the learned judges took the view that by the 1st Feb. the conclusion had been arrived at that it was impossible to save the ship, and that therefore no expenditure after that date was incurred for the general good of the ship and cargo, but only for the benefit of the cargo or for the benefit of the freight. It is stated in one of the judgments that it appeared to be admitted that that was the case. As far as one can discover, that was a misapprehension on the part of the learned judges. The learned counsel who appeared at the bar for the respondents conceded, when the case was argued here, that it was impossible for them to maintain that position; and indeed, when the correspondence and the evidence are looked at, it is obvious that he was right in making that concession. It is quite true that on the 1st Feb., bad weather

H. OF L.]

ROSE AND OTHERS v. BANK OF AUSTRALASIA.

[H. OF L.]

having set in, the tugs were sent away, but the letter which refers to the sending away of the tugs says that if the weather improved the tugs could be recalled; and much later than that, as late as the 14th Feb., there is a letter which distinctly shows that the hope of saving the ship had not even then been abandoned, and it was certainly not till a later date than that that all hope of saving the ship was abandoned. Therefore it is quite clear that the foundation of the judgment in the Court of Appeal fails in point of fact. It is impossible to draw a line at the 1st Feb., and to say that nothing after that date can be general average. Indeed I come to the conclusion that the whole of the cargo was discharged, as far as appears upon the correspondence and evidence, before it can be said that all hope of saving the ship was abandoned. If not all, at all events so nearly all that it is not worth while attempting to make the distinction. Therefore it was really admitted by the learned counsel for the respondents that the order of the Court of Appeal as it stood could not be supported. I may add that I should not myself be altogether prepared to admit that, even if you were to draw the line at the 1st Feb., and if before that date the cargo had been taken out of the ship for the purpose of saving it, and by a continuous operation the cargo was put in a place of safety, although some of that expenditure might have been incurred after the 1st Feb., it might not be perfectly, fitly, and properly treated as general average expenditure. The learned counsel for the respondents contended before your Lordships that the sum which was paid to Messrs. Adam was not properly distributed, and that it ought in the main, if it was payable at all, to be treated as a payment made on account of the freight. No great stress was laid at the bar upon the amount. The learned counsel did not seek to ask your Lordships to disturb the finding of Lawrance, J. that whatever portions of the adventure it ought to be attributed to it was not an unreasonable sum in itself, having regard to all the circumstances. But the learned counsel also argued that the sum of 750*l.*, which was paid to Messrs. Anderson, Anderson, and Co., in so far as it represented work done by Messrs. Anderson, Anderson, and Co., on behalf of the shipowner, which the shipowner might have performed under circumstances to which I will call your Lordships' attention presently, could not be treated as payable at all by any of the other interests to the shipowner, that it was a matter for the shipowner himself, that it merely represented the discharge of a duty incumbent upon the shipowner himself, and ought not to be brought into the general average account at all. He also contended that, so far as it was properly brought into the average account, in regard, for example, to the services rendered by Mr. Gavin Anderson in France, it had not been properly distributed, that it ought to fall substantially on freight, and not to be charged, as it had been, to other interests. The third point which he raised was, that the $2\frac{1}{2}$ per cent. commission, which was charged in connection with the sale of the unidentified wool, was an amount which the shipowner must himself bear, and could not charge to any of the other interests. Those were the points which were argued before this House, and I think it was clear, in the course

of the argument, that the main contest whether the charges by Messrs. Anderson, Anderson, and Co. were such as could be against other interests at all—whether they not merely represent work of the shipowner he ought to have done himself, or, if he employed others to do, must treat as if he had it himself, and therefore could not charge anybody else the expense of doing it. The with regard to the $2\frac{1}{2}$ per cent. There was attempt or desire to re-open the whole of average statement, and therefore I do not propose to deal with the average statement except as it relates to the particular items to which have called attention. Of course, so far as regards so much of the 1500*l.* as was to be charged, the same question would arise as arises with regard to the apportionment of the 750*l.* The cargo, have said, was brought up to the top of the at Andresselles. The case on behalf of respondents was this, that it was then saved it had been rescued from sea peril, and was no longer in any such peril; that all the expenditure after that date, except such expenditure as related to the mere drying of the wool, or putting it into a position to dry, was expenditure by the shipowner on his own account, in order to earn freight, and that consequently it could be charged only against freight, not general average: that could not be charged against the cargo, and could not be charged against the cargo and freight. I think the learned counsel were right in saying that the money paid for superintendence, whether to Messrs. Adam or to Mr. Gavin Anderson, should be dealt with in the same way as the expenditure on work to which the superintendence was applied. Therefore, the question which arises is, whether the contention of the respondents is well founded with regard to the expenditure incurred in the carriage of this wool from Andresselles to Boulogne, a distance, I believe, of twelve miles, where it was taken in carts. Their argument is this: the owner of the ship was at liberty to carry it in order to earn his freight. In being taken from Andresselles to Boulogne it was in transit on a journey, which was ultimately completed in being reshipped at Boulogne and brought over to London, and therefore all the expenditure, whether as cost of carriage, or as cost of superintendence, must be regarded as expenditure by the shipowner on his own account for the purpose of earning his freight. I do not suppose that it could be doubted that, if it were the true view of the facts that the expenditure was, and could only be regarded as, expenditure incurred for that purpose, it was expenditure which the shipowner must himself bear. But then, it is said on behalf of appellants that that is an erroneous view. The cargo, which was a perishable cargo, had been wetted by sea water, and it would have been absolutely impossible, with any regard to the interests of the owners of the cargo, to leave the wool where it had first been put, namely, in a place just above the scene of the disaster at Andresselles; that, if the interests of the cargo alone had been regarded, any prudent person would have taken the wool to Boulogne, where it could have been properly dealt with on the quay or put into a dry and proper warehouse. And therefore, it is said, either in the first place this was general average because it was a continuous act from the time of the commencement of the salvage for the benefit

ship and cargo (when you have begun thus to discharge the cargo, you at the same time on the ship and save the cargo for the common benefit), that that continuous operation has been commenced, until the cargo can be placed in a position of safety it is all general average; or, in the second place it is said, if all is not to be regarded as general average, it may be regarded as having been done on behalf of the cargo, even more than done with the view of earning freight, and for this reason the shipowner, acting on behalf of the cargo owner obviously, under the circumstances of such a case as this, bound to take all reasonable means to place the cargo in a position of safety. If the cargo had not been of a perishable description probably his duty would have terminated at the vessels as soon as the wool had been out of reach of the sea; but with a cargo which might deteriorate from exposure to weather and become entirely destroyed, further steps were not taken to protect the cargo would have been bound, it is said, even if he made up his mind not to carry it on to Boulogne just as he did, and therefore, as he was bound at any particular time to make his decision, but might make it at any reasonable time, he cannot be said to have been doing this on behalf of the freight, inasmuch as, if he had determined when it came to Boulogne not to carry it on, he must equally have incurred the expenditure, and the expenditure must then clearly have fallen upon the cargo, and could not be said to have had reference to freight. The third alternative which was put was that it may be regarded, it is said, as expenditure on account both of cargo and freight which is to be charged to both. It was incurred, on the one hand, for the purpose of placing the cargo in a position of safety; and, on the other hand, for the purpose of enabling the shipowner to earn freight, and therefore it is properly chargeable to both. Those three alternatives were presented to your Lordships by the learned counsel who conducted the case for the appellants at your Lordships' bar. It is obvious that the respondents can succeed in their contention if they can establish that this expenditure must be regarded as having been made on behalf of freight only. If either of the other alternatives is fatal to them, it was general average, if it was to be charged against cargo, or if it was to be charged against both cargo and freight, they must equally fail. I do not entertain any doubt that one or other of the three contentions on the part of the appellants must prevail. It seems to me that, when once the admission of fact which I have stated is arrived at, that the cargo was not safe where it was at the vessels, and that if the safety of the cargo was regarded it ought to have been taken to Boulogne, it was impossible to say that this expenditure was to be treated as an expenditure on account of freight. It is said that when the expenditure was incurred the shipowner had already determined not to elect to carry it on, and that, therefore, as he had made that election, he may be regarded as having acted on account of his freight, even although it ultimately benefited the cargo. I can see no objection to election such as is contended for. It is said that the shipowner had looked out for vessels, and had made certain arrangements with vessels,

with a view to the carriage of this cargo; but, if those persons had refused to carry out their contracts, or if freights had gone up very much, he might have changed his mind and never have shipped this cargo at all. He had done no act which conclusively determined his election. Down to the time when this cargo arrived at Boulogne and all the expense arising thereupon was incurred, it was perfectly open to the shipowner to say, and he would have incurred no liability to anybody if he had said, "I shall not carry it on because it will not answer my purpose to do so." Under those circumstances it seems to me impossible to say that this expenditure can be treated as chargeable against the freight. It is not necessary to say whether it is to be treated as a charge upon general average, or whether it is to be treated as a charge against cargo, or whether it is to be treated as a charge against cargo and freight. One or other of those views, according to my judgment, must be the correct one, and it is not essential to determine which. That really disposes of the case, except so far as regards the question whether the charges by Messrs. Anderson, Anderson, and Co. could properly be made at all. Now, the contention on behalf of the respondents was, that the matter was concluded by a decision in the Queen's Bench Division in the case of *Schuster v. Fletcher* (38 L. T. Rep. N. S. 605; 3 Q. B. Div. 418), and that the shipowner ought to have himself done all those things which Messrs. Anderson, Anderson, and Co. did, or that, if he chose not to do them himself, he could not make any charge in respect of them. I will deal presently somewhat in detail with the case of *Schuster v. Fletcher*, but I will deal first with the matter apart from authority. There is no doubt that when a disaster of this kind happens the shipowner is bound to use his best endeavours in the interest of all concerned; but whether he is to do anything himself, and what he ought to do himself without making a charge for it, must, it seems to me, depend upon the circumstances of the case; there can be no rigid rule of law laid down with regard to it. It would in some cases, as it strikes me, be most unreasonable not to allow the shipowner to employ others to do the work, whilst in other cases it would be most unreasonable that he should, or that if he did he should make any charge in respect of it. Now, what were the circumstances here? The shipowner was at Aberdeen; this disaster happened on the coast of France. In an emergency of this description time is of the utmost importance. It is quite true, as was said, that the shipowner might have come up to London, he might have looked about and made inquiries as to the tugs that would be available, and as to what would be the best steps to be taken. These are not matters within the every-day experience of every shipowner wherever a disaster may happen, and cannot be reasonably assumed to be so; and the disaster and damage occasioned by delay, under such circumstances, may very greatly counterbalance the expenditure which is incurred in employing a person who does know about such things, who is accustomed to deal with them, and will therefore be able promptly to send the requisite aid, or take the best steps so as to cause the disaster to be as small as possible. Now, in this case, the shipowner, who was in Aberdeen, employed a firm in London

H. OF L.]

ROSE AND OTHERS v. BANK OF AUSTRALASIA.

[H. OF L.]

who had had experience in operations of this description, and what was the result? That steps were taken with the greatest promptitude; that tugs were on the spot very early, and an arrangement made with them; that an experienced man was sent over to look after the interests of those concerned; that very speedily an arrangement was made with a French firm accustomed to deal with such matters, whose influence and position in a foreign country no doubt greatly facilitated the proceedings. Under those circumstances, how can it be said that a shipowner who takes that course, and would really if he had attempted to do the thing himself have been acting most prejudicially for the interests of all concerned, ought himself to bear the expenditure, which is an extraordinary expenditure, incurred for the benefit of all concerned in the entire undertaking? I know of no principle of law which would prohibit a shipowner from acting in such a reasonable manner, or would prohibit him, if when he so acts, and the disaster leads to extraordinary expenditure, from seeking to distribute that extraordinary expenditure over the interests which he sought to protect, and did protect and benefit by it. So much with regard to the principle. I quite concede that a shipowner owes a duty to all interested; that he is bound to discharge that duty; that he cannot throw the expense of doing what he ought to do himself upon some other interests because he chooses to employ somebody else. Whilst conceding that, it appears to me clear that there are many cases where the employment of others is a reasonable and right course to take; and where by such employment extraordinary expenditure is incurred for the general benefit, I am at a loss to see why it may not be distributed over those who receive the benefit. Then it is said that the contrary principle has been laid down in *Schuster v. Fletcher*. I am bound to admit that I have a good deal of difficulty in ascertaining what principle, if any, was laid down in *Schuster v. Fletcher*. With all respect to the learned judges who took part in it, I cannot call it a very satisfactory case. If it is supposed to have laid down that under no circumstances may a shipowner employ others to do work for him at a distance from the place where he carries on his business, which if the disaster had happened at the place where he carries on his business he would have been bound to do himself, then all I can say is that, if it is supposed to lay down any such general principle, I respectfully altogether dissent from it. If it does not lay down that general principle, it is difficult to see what principle it can be said to lay down that would be applicable to or govern this case. There the circumstances as regards the occurrences to the ship were very similar to the present: "A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London, and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignee through a broker, who received his brokerage,"—that is the brokerage question with which I will deal in a moment. "In the average statement a remuneration to the shipowner for arranging for salvage operations,

receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds generally conducting the business, was charged partly to general average and partly as particular average on the several interests rateably, the average stater thinking that the amount was reasonable remuneration to the shipowner for his services, and for commission on the sale of the identified cargo, and on disbursements. Held, under the circumstances the amount was properly charged, and could not be recovered there being no contract on the part of the owner of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight." It may be observed that in the 14th paragraph of the case it was alleged that "The defendant incurred considerable trouble in chartering a ship to carry on the cargo from Boulogne to London, and in sending out lighters and necessary advances to Boulogne, and in the identification of so much of the cargo as was identified." The case was somewhat confused by reason of the introduction of the firm of Messrs. G. H. Fletcher and Co., who seem to have taken part in these operations, G. H. Fletcher and Co. being a firm of which the defendant had never been, but was not then, a member, some of his work appears to have been done for them. The charge made in respect of this was a sum of 2500*l*. The case stated that the sum of 2500*l*. does not represent any sum which the defendant has paid, or rendered himself liable to pay, to G. H. Fletcher and Co.; the average stater thought that it "was a reasonable remuneration to the defendant as shipowner in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements." Now, in the judgment of Cockburn, L.C.J. says: "Our judgment must be against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads: one for getting the ship away from the place where she stranded; and the other for the trouble taken in transferring the cargo, identifying it, and arranging for the sale of another part of it, which could not be identified. I think that the services have nothing in common with general average. General average presupposes a sacrifice for the benefit of the whole adventure, which must be borne equally by all. Here the shipowner had an interest in getting the ship saved and bringing the cargo into port in order that he might earn his freight. He cannot be allowed to throw the whole cost of these proceedings upon those who to some extent share in the benefit from them." If he was attempting to do that, it would certainly be a most unreasonable thing. "A great deal of what he has done was in performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the effort when it was hopeless." I think that is an accurate statement of the law. He might elect to do it on after the ship had been lost, but he was bound to do so. "It cannot be said that the case was hopeless, when he was able at the cost of so much trouble to bring the cargo into port." That is what was said upon that point. Mellor, J. says: "I am of the same opinion on both points. McLeod has argued that the consignees stood while the shipowner was taking extraordinary

le, and ought therefore to recompense him for. But the defendant was really doing nothing than his own interests required him to do. In that case it may be that the defendant did more as regards that part of the operation, as a shipowner he was bound to do, and did employ anybody or incur any liability or paying in respect of it; but, as I have said, I see that it anywhere lays down the rule that, if a shipowner employs another reasonably and properly, and incurs extra expenditure by so doing, if he so pays them and incurs that expenditure not for his own benefit, but for the general benefit, and in the hope of averting further loss, he cannot charge that expenditure against the interests concerned. In the present case I have given my reasons for thinking that the learned judge who tried this case was right in his conclusion that this was an expenditure reasonably and properly incurred by the shipowner, the appellants, and if so incurred I have no doubt that I think that it cannot be charged only against the respondents fails. There remains only the question of the 2½ per cent. commission on the sale of the unidentified wool. That point also was decided in *Schuster v. Fletcher*. It was said in paragraph 22: "Where unidentified goods have been sold and the sale is managed, not by the shipowner himself, but by the shipbroker, or some other person, a commission to such person (in addition to the selling broker's brokerage) is allowed and allowed." Therefore the practice has apparently been down to that time to charge the broker's brokerage. With regard to that the Lord Chief Justice says: "As to the charge incurred in respect of the articles which were unidentified, he took no further trouble, but sent them through a broker, who received his commission." The point raised seems to me to be that it also strikes me as a question of fact and of law: In putting the unidentified goods into the hands of a commission merchant for sale, was the shipowner be acting in a reasonable and proper manner, or ought he himself to have dealt with the selling broker, and therefore be allowed to charge no more than the selling broker's half per cent. brokerage? The learned judge who tried the case has found that this was reasonable, it has been allowed by the average of the law, and unless in point of law it can be said that such a charge which, under no circumstances, can be made, it would be impossible for your Lordships, in the argument of this case, and at the same time, to enter upon such an inquiry and to determine whether the charge of 2½ per cent. under such circumstances was a reasonable charge. A shipowner, of course, is not bound to himself; in selling he may do what is reasonable and fair and just under the circumstances. It is no business to incur expense unreasonably, or to put money unnecessarily into other people's hands, prejudicially to the cargo owner. Of that there cannot be the slightest doubt. But if it be an ordinary and reasonable course on the part of a shipowner who has goods to sell to put them into the hands of a firm, such as Anderson, Anderson, & Co., and to pay them this commission, then I see nothing in point of law to prevent the commission being a proper charge as against the cargo owner of the cargo of wool which had to be sold

for their benefit, and being therefore a proper deduction from the proceeds to be divided among the parties interested. I desire to say upon both those last points that I should be very sorry to encourage any attempt on the part of a shipowner, on the happening of a disaster such as has occurred here, to refrain from personally using all reasonable exertions, and taking all reasonable steps, and to unnecessarily and unreasonably incur expenditure for work which he might equally well have done himself, and then to cast that expenditure upon others who are interested in the adventure. All that we have to do here, however, is to determine the question of law, and it appears to me that, if *Schuster v. Fletcher* has been supposed to lay down any such rigid rule as was insisted upon by the learned counsel for the respondents, then that decision cannot be regarded as good law. I doubt very much whether it was ever intended to lay down any such rigid rule at all. I think it must be looked upon in relation to the facts; and certainly, if it laid down any new principle, a less precise and satisfactory announcement of a principle it is impossible to conceive. Whilst fully adhering to the view that the shipowner must discharge his own duties thoroughly and efficiently, I think that, where he acts reasonably in incurring extraordinary expenditure for the benefit of the adventure generally, there is nothing in point of law that prevents his charging that expenditure upon those who are interested. I therefore move your Lordships, that the judgment appealed from be reversed, and the judgment of Lawrance, J. restored, with the usual result as to costs.

Lords WATSON, HALSBURY, and MORRIS concurred.

Judgment appealed from reversed: Judgment of Lawrance, J., restored: Respondents to pay the costs in this House and below.

Solicitors for the appellants, Parker, Garrett, and Parker.

Solicitors for the respondents, Waltons, Johnson, Bubb, and Whatton.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 15, 16, 17, Feb. 3 and 20.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Debtor and creditor—Partnership debt—Retirement of one partner—Taking over debt by new firm—Liability of retiring partner—Principal and surety—Giving time to principal debtor—Release of surety.

The plaintiff was in partnership with his three brothers, the defendants being the bankers of the firm. In May 1878 a mortgage was executed by the firm to secure the account current to the bank which contained a joint and several covenant by the members of the firm for payment of the debt to the bank.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF

In 1884 the plaintiff retired from the firm, and the business was thenceforward carried on by his three brothers, who thus constituted a new firm, and the plaintiff by the deed of dissolution assigned all his interest in the old firm to the new, they covenanting to discharge all the debts and liabilities of the old firm and to indemnify the plaintiff against them. There was a stipulation that he should not be entitled to require payment of any of the debts so long as he should be so indemnified. Among the liabilities taken over was a large overdraft due from the old firm to the bank. The banking account was continued with the bank. The account with the old firm was closed except for the purpose of calculating interest on the debt, and was kept distinct and separate from the account with the new firm. But, in ascertaining the balance due to the bank, the bank set the credit balance of the new firm against the overdraft of the old firm.

On the 16th Feb. 1889 the bank passed a resolution allowing the new firm to continue the overdraft until the 14th March 1889. In Aug. 1890 an agreement was entered into between the three members of the new firm (the plaintiff not being a party) and a surety on the one hand, and the bank on the other, for guaranteeing payment to the bank of any balance due on the account beyond a certain sum. In Aug. 1892 the new firm stopped payment, a large overdraft being still due to the bank. The bank then claimed a lien for the amount on certain shares in the bank held by the plaintiff; and thereupon he brought an action, claiming a declaration that he was entitled to the shares free from any lien by the bank, and an injunction to restrain them from dealing with the shares.

Held (Kay, L.J. dissentiente), that the stipulations in the deed of dissolution precluded the plaintiff from objecting to the giving of time by the bank to the continuing partners; and that therefore the bank were entitled to the lien claimed.

Oakeley v. Pasheller (4 Cl. & F. 207; 10 Bli. N. S. 548) discussed.

Decision of Kekewich, J. reversed.

APPEAL by the defendants from a decision of Kekewich, J. (69 L. T. Rep. N. S. 828).

Finlay, Q.C., Warmington, Q.C., and Vernon R. Smith for the appellants.—The questions here are (1) whether, by the dealings between the appellants and the new firm, the respondent was released from all liability for the balance due to appellants; and (2) whether, if he was liable, it was only as surety, and, if so, whether by the extension of time for payment given by the appellants to the new firm, he was discharged from liability, according to the well-settled doctrine that an extension of time given by the creditor to the principal debtor discharges the surety. Kekewich, J. decided the first question in our favour, but was of opinion that, although there had been no novation of contract, and that the respondent, after retiring from the firm, was still liable for the balance due, yet he was in the position of a surety only; and that by the extension of time for payment given by the appellants to the new firm he was released from his liability as surety:

Oakeley v. Pasheller, 4 Cl. & F. 207; 10 Bli. N. S. 548.

But the terms of the dissolution were such as to authorise the new partners to obtain time, if necessary to pay the old debt; and therefore, if the respondent was in the position of a surety, he was not discharged by what was done. The deed of dissolution of the partnership authorised the giving of time; it contained a covenant by the continuing partners to indemnify the respondent against all debts and liabilities of the old firm, and a stipulation that he should not be entitled to require payment of any of the debts so long as he should be so indemnified. We do not doubt that the appellants had notice that the respondent was to become, as between himself and the continuing partners, liable as a surety only. The respondent's position, however, as regarded the appellants, was always that of a principal debtor, and not that of a surety, and he was therefore discharged by the agreement made at that time. The stipulation not to require payment of the debt according to the common form to be found in Davidson's Precedents in Conveyancing (3rd ed. vol. 2, part 1, p. 520), where, in a note, the learned authors state the reasons why such a stipulation should be inserted, on the authority of

Savard v. Anstey, 2 Bing. 519; 10 J. B. Mo.

Knowledge only on the part of the creditor, and no arrangement come to between his own debtors, was not enough to compel the creditor to recognise the arrangement, and to prevent him from dealing with them regardless of it:

Oakeley v. Pasheller (ubi sup.);

Oakford v. European and American Steam Ship

Company Limited, 1 H. & M. 182, 190;

Overend, Gurney, and Co. v. Oriental Fire

Corporation, 25 L. T. Rep. N. S. 813; L.

Ch. App. 142; on app., 31 L. T. Rep. N.

L. Rep. 7 E. & I. App. 348;

Maingay v. Lewis, Ir. Rep. 3 C. L. 495

C. L. 229.

That, however, was not the view taken by the Court of Queen's Bench in

Swire v. Redman, 35 L. T. Rep. N. S. 470;

Div. 536.

In that case it was held that two principal debtors could not change their position *inter se* to the detriment of a principal and surety, so as to affect their position without his assent; and that Oakeley v. Pasheller (ubi sup.) had not decided that they could. At any rate, the rule laid down in the other case was inapplicable to the present case, having regard to the terms of the deed of dissolution. The result referred also to

Dane v. The Mortgage Insurance Corp.

Limited, 70 L. T. Rep. N. S. 83; (1894)

54;

Re Sherry; London and County Banking Co.

v. Terry, 50 L. T. Rep. N. S. 227; 25 C.

692;

David v. Ellice, 5 B. & C. 196.

Renshaw, Q.C. and F. Thompson for the respondent.—There has been a substitution of debtors, and, consequently, a novation of contract, and the appellants have agreed to look to the new firm alone for payment, and to discharge the respondent. But, even if this is not so, the respondent's position, as between himself and his copartners, was not affected by the deed of dissolution in the position or character of a surety only for the debt of the new firm. The appellants had full knowledge of this, and discharged the respondent by agree-

OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

re time to the new firm in Feb. 1889, and in Aug. 1890, without consulting the respondent and without reserving their rights to him :

Oakeley v. Pasheller (*ubi sup.*).

submit that Kekewich, J. was perfectly right in deciding that the present case was concluded by *Oakeley v. Pasheller*. The covenant to indemnify followed by the proviso as to not requiring payment, is a common form introduced to meet the requirements of judicial decisions. Where a covenant is made by a proviso, the proviso must be read as qualifying the covenant, and the covenant not as being extended in its operation. The covenant is to pay with all convenient speed, *i.e.*, in a reasonable time. The proviso is that the respondent shall not be entitled to require payment of any of the debts so long as he is indemnified. The surety might himself pay off the principal debt and then sue the debtor under the Law Amendment Act 1856, s. 5). The result of the decision in *Oakeley v. Pasheller* (*ubi sup.*) was considered in

Bailey v. Edwards, 4 B. & S. 761, 773 ;

Wilson v. Lloyd, 28 L. T. Rep. N. S. 331 ; L. Rep. 16 Eq. 60.

The respondent is free from liability ; the debt is not due to the appellants from the firm as at present constituted. Having regard to the transactions in 1885, the appellants took the liability of the firm, and exonerated the respondent from any liability :

Ex parte Jansen ; *Re Corf*, 3 Madd. 229 ;

Pergussion v. Fyffe, 8 Cl. & F. 121 ;

Thompson v. Percival, 5 B. & Ad. 925.

The need not be an express agreement ; there is one implied without communication to the respondent to be indemnified :

Wilborough v. Holmes, 35 L. T. Rep. N. S. 759 ; 5 Ch. Div. 255.

also referred to

Barries v. Stainback 6 De G. M. & G. 679 ;

Wooley v. Harradine, 7 E. & B. 431 ;

Greenough v. McClelland, 2 Ell. & Ell. 424.

May, Q.C. replied.

Cur. adv. vult.

20.—The following written judgments were delivered :—

WINDLEY, L.J.—This is an appeal by the respondents against a decision of Kekewich, J. giving the plaintiff entitled to fifty-five shares of the defendant company free from any lien or charge in favour of the company. The company is an old banking company, registered as a limited company under the Companies Act 1862. The plaintiff is a duly registered shareholder in that company, in respect of fifty-five shares, and he claims those shares when he became indebted to the company as hereinafter mentioned. By the company's articles of association the company is bound to a lien on the shares of those members who are indebted to it. It is beyond controversy that the company had at one time a lien on the plaintiff's shares in respect of a debt of about £100, some of which has since been paid off. It is equally beyond controversy that the company still has a lien for the balance still due, and that the company has since lost that lien. The learned judge has held that the company has lost its lien. Hence this appeal. The material

facts of the case are as follows:—In 1870 the plaintiff and three other persons became partners as worsted spinners and manufacturers, and carried on business in partnership under the name of William Rouse and Co. The firm opened an account with the defendant bank, and by a deed, dated May 9, 1878, the plaintiff and his copartners covenanted jointly and severally with the bank to pay what might be, or become, due to the bank from the firm on its banking account, and the plaintiff and his copartners mortgaged their partnership property to the bank to secure the like sum. After this the firm became considerably indebted to the bank, and, at the end of 1884, the balance due from the firm to the bank amounted to 55,000*l.* or thereabouts. Under the covenants contained in the deed of May 1878 the plaintiff was plainly liable, severally as well as jointly, to the bank for the payment of this sum. On the 31st Dec. 1884 the partnership expired by effluxion of time, and the plaintiff retired from the firm. Its business was, however, continued by the other partners under the old name, and no new partner came in. On the 17th April 1885 a deed of dissolution was executed by the plaintiff and his late copartners. The provisions of this deed are extremely important. The deed recites the articles of partnership and the expiration of the partnership by effluxion of time on the 31st Dec. 1884, and that it had been agreed that the plaintiff should withdraw from the business as from that date, and that the other partners should carry it on, and that notice of the dissolution should be advertised, and that an account had been taken and the plaintiff's share in the capital and effects of the partnership had been ascertained to amount to 2669*l.* 8*s.* 4*d.*, and that the plaintiff had agreed to assign his share and interest in the partnership assets to the continuing partners, and that they had agreed to indemnify him from the partnership debts and liabilities, and that they had agreed to execute mutual releases, and that the plaintiff had agreed to leave the said sum of 2669*l.* 8*s.* 4*d.* in the business. The deed then contains a release and assignment of his share and interest in the assets to his copartners, and a covenant by him to confirm whatever they may do in the way of dealing with or realising the assets, and a covenant by the continuing partners with the plaintiff to pay with all convenient speed, and to indemnify him against, the partnership debts and liabilities, but it is expressly provided that the plaintiff shall not be entitled to require payment of any of those debts so long as he shall be so indemnified. The deed then contains a mutual release of all partnership claims and demands, and a covenant by the continuing partners with the plaintiff to pay him the said sum of 2669*l.* 8*s.* 4*d.*, with interest at 5 per cent., with a proviso that the plaintiff shall not require payment for five years from the date of the deed, if the continuing partners, or any of them, so long live and continue to carry on the business of the firm and to pay the interest regularly. On the 21st April 1885 a notice of the dissolution, dated 9th Feb. 1885, was inserted in the *London Gazette*. This notice was signed by the plaintiff and by his late copartners. The notice stated the dissolution on the 31st Dec. 1884, and that all debts due to and from the late firm would be received and paid by the continuing partners, who would continue to carry on the business on

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF A.]

their own account, under the old name of William Rouse and Co. The defendant company was informed of these arrangements. It was admitted before us that the company knew of the notice in the *Gazette*, but it was urged that the company knew no more than they learnt from the *Gazette*. There is no distinct evidence to show what the defendant company did or did not know. But, having regard to what took place on the trial before Kekewich, J., it must be taken that it was conceded before him that the bank knew the substance and general effect of the terms of the dissolution; and, under these circumstances, this court ought to deal with the case as if it were proved that the defendant company knew that the continuing partners were to take over the assets and liabilities of the old firm, and were to pay and indemnify the plaintiff against those liabilities, including the debt to the bank. The effect of this knowledge will be considered hereafter. The new firm continued to bank with the defendant company, and a new account was opened with the new firm. The old debt of 55,000*l.* was, however, not brought forward into this new account, but was always kept separate and distinct. The bank charged the new firm compound interest on the old debt and commission; but on the other hand, allowed the new firm interest on its new account, which was always in credit. The balance, however, of interest and commission thus arrived at was added to the old debt, which in Feb. 1889 amounted to 67,000*l.* The amount then standing to the credit of the new account was 17,000*l.*, so that, if this were set against the 67,000*l.*, 50,000*l.* would be due to the bank; 50,000*l.* was the normal limit of the overdraft allowed by the bank. In Feb. 1889 the new firm wanted a further advance of 3000*l.*—i.e., to increase the overdraft to 53,000*l.*—and Mr. J. F. Rouse, one of the partners, applied for an overdraft of 53,000*l.* accordingly until the 14th March. On the 16th Feb. 1889 the bank agreed to this, upon certain conditions which were complied with. In July 1890 the new firm again applied to the bank for assistance, and in Aug. 1890 the bank agreed to make the firm further advances to the extent of 18,000*l.* on receiving certain guarantees from two other gentlemen. The securities taken by the bank on this occasion were dated the 11th Aug. 1890, and were, in substance, agreements by the new firm and the sureties to pay one day after demand all moneys due from the new firm to the bank, with a proviso that the liability of the sureties should be limited to 2500*l.* each, and should cease as soon as the liability to the bank should be reduced to 45,000*l.* These securities did not otherwise refer to or affect the old debt, for which alone the plaintiff was responsible. On the 16th Sept. 1892 the new firm stopped payment, and executed a deed for the benefit of their creditors. Under this deed the bank claimed to prove as joint creditors for the amount due to them. The proof was at first disputed, on the ground that the bank's right to prove was not against the joint estate of the new firm, but only against the separate estates of the partners. The proof was ultimately admitted, and the bank received a dividend of 10*s.* in the pound on their debt. A considerable sum, however, still remains due to the bank, and, without going into figures, it is admitted that there is still due to them in respect of the old debt more than

the value of the plaintiff's shares. The question, therefore, is whether the plaintiff is still liable to the bank for the unpaid balance of the old debt. The plaintiff contends that he is not, and that he has been discharged. First, he says that there has been a novation—i.e., a substitution of debtors—and that the bank has agreed to look to the new firm alone for payment and to discharge him. Secondly, he says that, even if this be not so, he became, in April 1885, a creditor in position or character of a surety only for the debts of the new firm, and that the bank knew of this and discharged him by agreeing to give the new firm in Feb. 1889, and again in Feb. 1890, without consulting the plaintiff and without reserving their rights against him. Thirdly, Kekewich, J. decided against the plaintiff on the first point, but in his favour on the second. The learned judge held that the case of *Oake v. Pasheller* (4 Cl. & F. 207; but better reported in 10 Bli. N. S. 548) was conclusive on the last point. Both points having been again raised before us, it is necessary to allude to them. First, as to novation. The question whether a creditor releases one or more persons has released one of them and has converted the others into his sole debtors by way of novation is a question of intention, and not of fact. The intention to look to them for payment, especially when requested to do so by their co-debtors, is quite consistent with an intention to look to them as a mere matter of convenience without releasing them. To succeed on this ground, what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred. The last case on this point is *Re Head* (69 L. T. 100; 10 Bli. N. S. 753; (1893) 3 Ch. 426), but it is unnecessary to cite authorities upon it. The bank had no interest in the plaintiff's shares, and those shares were not valuable. It does not, therefore, seem at all probable that the bank should intentionally give up this security, which would be the result of discharging the plaintiff, unless care was taken to prevent such a result. Dealing with the plaintiff as a firm, and treating them as debtors, and proceeding against their estate, is quite consistent with releasing the plaintiff. All the partners in the new firm were liable to the bank for the old debt, and in proving against their estate the bank was only doing its best to reduce the plaintiff's liability. Such proof does not, as a matter of course, discharge the plaintiff (see *Sleech's case*; *Devlin v. Noble*, 1 Mer. 539, and *Harris v. Furze*, 10 Beav. 31, where a new partner had come in). It is no doubt there are cases in which a creditor of a firm, one member of which has retired, has, by dealing with the continuing partners and by providing for their bankruptcy against them, shown an intention to look to them alone, and has furnished evidence of an agreement to do so. *Hart v. Anderton* (2 M. & W. 484) and *Bilborough v. Harris* (35 L. T. Rep. N. S. 759; 5 Ch. Div. 255) are cases of this sort. But in both of these cases the partners had come in, and in the last of them the proof was for money lent by the creditors to the new firm. Considering that in the present case the old debt was always kept separate and distinct, and that no new partner became liable for it, that the new security was ever obtained for it, and that there is really nothing like proof of any intention to release the plaintiff, as distinguished from an intention to obtain payment, if possible, from

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

co-debtors, I am of opinion that the plaintiff fails to establish that he has been discharged by any agreement, express or implied, by the bank to look to the new firm, and to the new firm only, for the payment of the old debt. I pass now to consider the more difficult question whether the bank discharged the plaintiff by what took place in Feb. 1889. It must be taken that the bank knew of the nature of the arrangement come to between the plaintiff and his copartners when he retired. Further, there can be no doubt, from the terms of the resolution of the 16th Feb. 1889, and the letter of the 18th Feb. 1889, that the bank agreed to give the new firm time to pay the old debt until the 14th March, and that there was a sufficient consideration for this agreement to render it binding on the bank. Lastly, it is clear that the plaintiff was not consulted in this matter, and that the bank did not reserve its rights against him. But it is urged by the bank that the terms of dissolution were such as to authorise the new partners to obtain time, if necessary, to pay the old debt, and that, therefore, even if the plaintiff was in the position of a surety, he was not discharged by what was done. It was further contended that the plaintiff's position always was that of a principal debtor primarily liable, and not that of a surety, and that he was not, therefore, discharged by the agreement to give time. One of the main objects, if not the primary object, of the deed of dissolution was to enable the continuing partners to carry on the business of the old firm, and so to pay off the plaintiff; and, the better to enable them to do so, the plaintiff expressly agreed not only to give them five years at least to pay him his capital, but also not to require them to discharge the liabilities of the old firm so long as he was not himself called upon to pay them. The proviso following the covenants to pay, and indemnify the plaintiff against, the partnership debts clearly, in my opinion, amounts to an agreement by the plaintiff to the effect I have stated. Any other construction of the proviso would, I think, defeat the object which the parties had when they inserted the proviso in this deed. The object and provisions of this deed lead me to infer that the plaintiff impliedly authorised his copartners to make any arrangements with the creditors of the old firm which might be necessary to gain time for payment of its debts, provided, of course, that the pecuniary liability of the plaintiff was not increased. The principal debt of the old firm was the debt due to the bank, and it was obvious to the plaintiff, as well as to his copartners, that, if the bank pressed for payment and could not be induced to give time, one of the main objects of the plaintiff himself would be defeated. When, therefore, the continuing partners did induce the bank to agree to give them time for payment, they were only doing that which the plaintiff had impliedly authorised, and when the bank agreed to give them time the bank did nothing which was in any way inconsistent with the plaintiff's rights under the deed, which, it is contended, put him in the position of a surety. The bank's conduct did not, therefore, discharge him. This view of the case was not presented to Kekewich, J., and is not alluded to in his judgment. In my opinion, however, the above view of the dissolution deed is correct, and, if correct, it is conclusive against the plaintiff. Indeed, I am of opinion that the mere agreement by the plaintiff not to require payment

of the partnership debts and liabilities by his copartners would of itself prevent his discharge by a creditor who agreed to give them time. I cannot myself see how, in the face of such an agreement, giving time could discharge him. The express agreement necessarily involves an agreement not to call upon the principal creditor to require payment of his debt, but the ground on which a surety is discharged by an agreement to give time is that he is deprived of this right without his consent: (see per Lord Hatherley in *Oriental Financial Corporation v. Overend, Gurney, and Co.*, 25 L. T. Rep. N. S. 813; L. Rep. 7 Ch. App. 142, 150, 151.) If he has himself agreed not to exercise this right this reasoning is inapplicable. It is urged that the surety might himself pay off the principal debt and then sue the debtor, and reliance was placed on the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), s. 5. But, if the surety were to do this before he was himself required to pay, he would, in my opinion, be acting contrary to the agreement expressed in the proviso I am considering. It may be said that, if the principal creditor agreed to give the debtor time, he could still sue the surety, who would then have a right to require the creditor to sue the principal debtor. But it would be a gross breach of faith on the part of the creditor, and, in truth, a breach of his agreement with the debtor, if the creditor were to sue the surety and put him in motion against the debtor until the expiration of the indulgence agreed to be given him; and there is ample authority for saying that this cannot be done. Lord Hatherley in *Oriental Financial Corporation v. Overend, Gurney, and Co* (*ubi sup.*) expressly said: "If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because, if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. Statements of the law to the same effect will be found in the judgments in *Davies v. Stainback* (6 De G. M. & G., at pp. 689, 696). No case has yet decided that a surety has been discharged by an agreement by the principal creditor to give time to the debtor, where the surety had himself agreed not to require the debtor to relieve him until he was himself sued, and, for the reasons I have given, the law does not go that length. But, be this as it may, the dissolution deed in this case contains other clauses, which, with the proviso, remove whatever doubt there might be if the proviso stood alone, or were in a deed framed to carry out other objects. It was strenuously argued before us that this case was concluded in favour of the plaintiff by *Oakeley v. Pasheller* (*ubi sup.*). But the foregoing observations, if well founded, take this case out of the rule established, or supposed to be established, in that case, and render it wholly inapplicable to the present. In *Oakeley v. Pasheller* (*ubi sup.*) Sherard and Reid were partners. Sherard died. Reid took in a new partner, Kynaston; and it was then agreed between Sherard's executors and Reid and Kynaston that Reid and Kynaston should continue the business, take over the assets, and indemnify Sherard's estate from the partnership debts and liabilities. These included a liability for 10,000*l.* to Oakeley, who held joint and several bonds for that amount, given by Sherard and Reid, and which were not

[CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF AP.]

then due. Oakeley was father-in-law to both Reid and Kynaston, and Oakeley's son was one of their clerks. It is clear that Oakeley knew all about the arrangement between them and Sherard's executors. For years Reid and Kynaston paid Oakeley interest on his debt of 10,000*l.*, and he clearly looked to them for payment of the principal. The new firm contracted a new debt to him, and the old and new debts were blended together in its accounts with him. Moreover, on several occasions he gave them time to pay the old debt, and, on one occasion in particular in 1817 he agreed to give them three years' time. The old debt was also referred to in the correspondence between him and the new firm as a loan to it. On one occasion (in 1823) when Oakeley required further security, he, at the request of Reid and Kynaston, deliberately abstained from communicating with Sherard's executors for fear they should enforce their indemnity against the new firm. Reid afterwards died, and his estate was insufficient to pay his debts. Shortly afterwards Oakeley assigned Sherard's bonds to trustees, and Oakeley having himself died, these bonds were sought to be enforced against Sherard's estate. This led to a suit by his executors to restrain proceedings on the bonds, and the Master of the Rolls in the first instance, and Lord Brougham on appeal, and, finally, Lord Lyndhurst and Lord Cottenham in the House of Lords, decided that Sherard's estate had been discharged by the agreement to give time in 1817, and an injunction was granted accordingly. Oakeley's knowledge and conduct clearly warranted the inference, not only that he knew of the arrangement come to between Sherard's executors and the new firm, but that, knowing such arrangement, he himself acceded to it, and consented to treat Reid and Kynaston as his principal debtors, and Sherard's executors as sureties only. Of course, if this were the view taken of the facts, the decision would present no difficulty, for it would be quite obvious that, by agreeing to give three years' time to Reid and Kynaston, Sherard's executors would be discharged. This view of the decision is, I confess, the view I should myself adopt; but it is undeniable that *Oakeley v. Pasheller* (*ubi sup.*) has been regarded as going a step further, and as deciding that knowledge only on the part of the creditor of the arrangement come to between his own debtors is enough to compel the creditor to recognise that arrangement, and to prevent him from dealing with them regardless of it. This was clearly the view taken of *Oakeley v. Pasheller* (*ubi sup.*) by Wood, V.C. in *Oakford v. European Steam Shipping Company* (1 H. & M. 182, 190); by Lord Cairns in *Oriental Financial Corporation v. Overend, Gurney, and Co.* (31 L. T. Rep. N. S. 322; L. Rep. 7 E. & I. App. 348, at p. 360); and by a majority of the judges in the Irish Court of Exchequer Chamber in *Maingay v. Lewis* (Ir. Rep. 5 C. L. 229). In *Oakford v. European Steam Shipping Company* (1 H. & M. 182, 190) Wood, V.C. declined to extend *Oakeley v. Pasheller* (*ubi sup.*), but, nevertheless, said that it determined "that where a creditor had two joint principal debtors and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that the creditor, having notice of the agreement, was

bound to regard it." It cannot, I think, be denied that the view there taken of *Oakeley v. Pasheller* (*ubi sup.*), whether rightly or not, has led to decisions which now, at all events, have resulted in establishing the proposition above stated. In *Swire v. Redman* (35 L. T. Rep. N. S. 470; 1 Q. B. Div. 536) it is true that the Court of Queen's Bench did not adopt the view of *Oakeley v. Pasheller* (*ubi sup.*) as that taken by other judges in the cases to which I have referred, and the court deliberately refused to hold the creditor of several persons primarily liable to the creditor as principals was not at liberty to deal with them as such simply by being informed that since the obligation to him had been contracted they had agreed amongst themselves that one of them should be indemnified by the others. But, notwithstanding the decision of the House of Lords in *Oriental Financial Corporation v. Overend, Gurney, and Co.* (*ubi sup.*), the decision in *Swire v. Redman* (*ubi sup.*) cannot, I think, be supported upon grounds on which it was mainly rested. The implied authority, however, given by the reasoning of the partners to the continuing partners to carry on the business in the way in which he and they had been in the habit of carrying it on was sufficient to support the decision in that case, as, indeed, the court itself pointed out at the end of its judgment. Notwithstanding the reasoning of the court in *Swire v. Redman* (*ubi sup.*), which I should adopt and follow if I were free to do so, I am driven to the conclusion that notwithstanding all events, the law has come to be what it is. Wood, V.C. and Lord Cairns said it had been decided to be in *Oakeley v. Pasheller* (*ubi sup.*). I have already stated Wood, V.C.'s view of the case. Lord Cairns said (in L. Rep. 7 E. & I. App. 348) that after that case "it is impossible to contend if, after a right of action accrued against a creditor against two or more persons, the creditor is informed that one of them is a surety for the other, and after that he gives time to the principal debtor, the rule as to the discharge of the surety applies." Notwithstanding *Swire v. Redman* (*ubi sup.*), I find it impossible to draw any satisfactory distinction between the case of a debtor primarily liable and afterwards becoming indemnified by a surety, with the knowledge of the creditor, and the case of a person who is a surety and who makes himself primarily liable to the creditor, who does not know that his debtor is a surety, but is afterwards informed of that fact. The House of Lords having decided that the rule as to the discharge of a surety applies to the case of a debtor, I am unable to hold that it does not apply to the first, and, in truth, the Lords decided that it applied to the second case, because, in the first view, it had already been decided to apply to the first. I have been induced to make these observations on *Oakeley v. Pasheller* (*ubi sup.*) because the present case was argued as if it turned upon what was there really decided, and because the view taken by Kekewich, J., and the correctness of his view of that case was impeached before us. But, for the reasons given in an earlier part of my judgment, the rule supposed to have been there laid down, and which, however it originated, I take to be now law, is inapplicable to the present case. The terms of the dissolution deed exclude the application of the rule to the question. In my judgment, the bank has discharged the plaintiff, and is still entitled to

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

lien which it claims on his shares. The appeal, therefore, must be allowed. Judgment must be given for the defendants, both on the claim and on the counter-claim, and it must be declared that they are entitled to the lien which they claim on the fifty-five shares of the plaintiff. If an account is wanted of what is due to the bank in respect of its lien, liberty to apply in chambers for such an account must be reserved, but the plaintiff, being in the wrong, must pay the costs here and below.

KAY, L.J.—William Rouse was partner with three other persons in a firm of worsted spinners at Bradford, carrying on business as William Rouse and Co. On the 31st Dec. 1884 the partnership came to an end by effluxion of time, and on the 17th April 1885 a deed of dissolution was executed, by which William Rouse agreed to leave his capital of 2669*l.* in the business to be thenceforward carried on by his three copartners, and assigned to them all his shares in the assets, and they covenanted with him to pay all the debts of the firm, and to indemnify William Rouse against them, and to repay to him his capital on the 1st July then next, with interest at 5 per cent., with a proviso that if the interest were regularly paid he would not call it in for five years. At the date of this deed the members of the late firm were jointly and severally indebted under a deed of covenant, dated the 9th Jan. 1878, to the Bradford Banking Company, in a sum of upwards of 55,000*l.*, since reduced to 34,269*l.* 15*s.* 8*d.* William Rouse held fifty-five shares in the bank. They had a lien on these shares for his debt to them. He claims his dividend on the shares. The bank assert their lien. To this William Rouse replies that he was by the deed of dissolution put as between himself and his copartners in the position of a surety, and that the bank had full knowledge of this, and afterwards gave time to the new firm, and so discharged him. Also he contends that there was a novation of the debt. It was said in opening this appeal that there was no evidence of the bank's knowledge of the deed of dissolution. In the judgment of the learned judge that fact is treated as being known to them, and counsel for William Rouse state that this was admitted in the argument in the court below. In this state of things we have communicated with the learned judge in the court below, who confirms this statement. We must therefore deal with the case on the footing that the bank had full knowledge of the deed of dissolution, and of the relative position of the parties to it before the transaction, which is relied on as a contract to give time to the new firm. On the 16th Feb. 1889 the bank agreed with the new firm to allow them an overdraft of 53,046*l.*, which included the whole debt until the 14th March, the firm undertaking to wind-up the manufacturing department of their business, which would release about 15,000*l.* capital, and to seek a reduction of certain mortgages upon the mill property to other persons. This was confirmed by a resolution of that date at a meeting at which one of the firm was present. Other subsequent transactions were also relied on, but it seems to me not necessary to refer to them, because I think this was a binding agreement for consideration not to enforce payment of the 54,036*l.* before the 14th March. The effect upon William Rouse was, that he could not before that time exercise his right of requiring the creditor to enforce payment by the principal debtor, nor, if

in the meantime he had paid to the bank the amount, could he have sued the principal debtors in the name of the bank until after the 14th March. There was therefore that alteration in his position which *prima facie* would discharge him. But this would not interfere with his right of suing upon the covenant by his former partners to indemnify him, which was contained in the deed of dissolution. Does this make any difference? I think that question is answered by *Oakeley v. Pasheller* (1836) 10 Bli. N. S. 548). This is the authority upon which the learned judge in the court below has founded his decision, and it is necessary to examine it carefully. Two persons, George Reid and Philip Castel Sherard, were partners in a firm of George Reid and Co. They became indebted for 10,000*l.* to Sir Charles Oakeley, who held their joint and several bonds for the amount. Sherard died. Reid carried on the business for himself and Sherard's executors until the end of the partnership term. The determination of the partnership by effluxion of time was gazetted, and Reid then took a partner named Kynaston, who was a son-in-law of Sir Charles Oakeley. On the 8th June 1815 a deed was executed between Reid, the executors of Sherard, and Kynaston, by which in effect Reid and Kynaston purchased all the executors' interest in the business for a large sum, of which a small part was to be paid and the rest secured, and they covenanted to give a bond in 150,000*l.* to indemnify the executors against the debts of the concern, which included the 10,000*l.* due to Sir Charles Oakeley. In 1817 an arrangement was made under which Sir Charles Oakeley was to take an interest in the new firm, and he at the same time engaged not to call upon them for their debt to him of 10,000*l.* for three years. The Master of the Rolls, Sir J. Leach (1832), held that this discharged the estate of Sherard, saying (at p. 577) this: "In 1817 Sir Charles Oakeley enters into an agreement with the two persons who had become as between themselves and the estate of Sherard the principal debtors; he enters into an arrangement with them to give three years' time for the payment of the demand, and I am of the opinion, to be collected from what I have already stated, that Sir Charles Oakeley could not either proceed within these three years against the principal debtor or against the surety in respect of that demand, and if he could not proceed against either of them in respect of the demand, then the surety is released, and the surety is released for this reason, because, whatever the surety pays, he has a right to call on the principal debtor to repay the sum which he has so advanced; but if there be a delay for three years he may be extremely prejudiced by that delay, because in the interim the solvent principal debtor may become an insolvent principal debtor, and then by the act of the creditor the surety would have lost his remedy against the principal debtor. I am therefore of opinion," continued the Master of the Rolls, "that the giving the time for three years in 1817 did discharge the estate of Philip Castel Sherard. I consider that it did discharge him, being of opinion that Sir Charles Oakeley well knew in 1817 that by the arrangement between the two partners Reid and Kynaston they had become the principal debtors, and Sherard's estate surety only." This decree was affirmed by Lord

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

Brougham, L.C.; but his judgment we have not been able to obtain. It was then appealed to the House of Lords, and was there again affirmed by Lord Cottenham, L.C. and Lord Lyndhurst. During the argument Lord Lyndhurst asked (at p. 586): "How will an arrangement between debtors affect a creditor unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent?" The argument answers this first by saying that notice of the new arrangement is enough, and that, having that notice, he is bound so to conduct himself as not to affect the surety. This argument seems to have been accepted, for, in giving judgment, Lord Lyndhurst stated (at p. 589) that an arrangement was made between Sir Charles Oakeley and Kynaston, without any communication with the executors of Sherard, to extend the time of payment for a period of three years, and the question was what was the effect of that extension, whether it discharged the representatives of Sherard; and his Lordship continued: "Now, in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties, and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new situation and exposes him to risk and contingencies which he would not otherwise be liable to. That being the fact in the present instance, and as the facts bring home the knowledge of all the circumstances of the transaction to Sir Charles Oakeley, it is my opinion, in this case, that the representatives of Sherard were discharged from their liability." The circumstance that the executors had a covenant of indemnity upon which they might have sued Reid and Kynaston directly without using Sir Charles Oakeley's name was not treated as altering the application of this law. The case seems also to decide that, where persons who are jointly and severally liable to a creditor, all being originally in the position of principal debtors, by a subsequent arrangement provide as between themselves that some of them shall take the burden of the debt and indemnify the others against it, this arrangement puts the debtors who are to be so indemnified in the position of sureties as between themselves and their co-debtors. It further decides apparently that, if this alteration of the position of his debtors *inter se* becomes known to the creditor, and he thereafter gives time to the debtors who have assumed the position of principal debtors, this will discharge those who have become sureties. On this last point, however, a serious difference of opinion has been intimated by distinguished judges. It seems to be founded upon the question asked by Lord Lyndhurst during the argument in the House of Lords, which I have already quoted: "Can the parties alter their situation with respect to the creditor without his assent?" Must it not be shown that he adopts the arrangement between them? Unquestionably no assent by the creditor is wanted to render valid an arrangement among the debtors that some of them shall pay the debt and indemnify the others against it. It would be absurd to say that joint debtors cannot make such an arrangement among themselves without the assent of their creditor.

But what is meant is, that the creditor may disregard the arrangement unless he not only knows it but also agrees to be bound by it. That is, unless he so agrees, he may alter the position of a debtor who, as he knows, is a surety, by giving time to the other debtors without discharging him. But when he agrees to give time he may reserve his rights against the surety, and then the surety will not be discharged: (per Lord Eldon in *Ex parte Glendinning*, Buck's Bank. Cas. 517; *Owen v. Homan* 4 H. of L. 997, 1037.) The only additional burden thrown on the creditor is the necessity of not dealing separately with the principal debtor so as to injure the surety without expressly declaring that he does not release him. Such a reservation when giving time to the debtor would mean that the creditor engages not to sue within the time so given, unless compelled to do so by the surety. It was always the law that, if the creditor knew that the debtors to him were as between themselves in the position of principal debtor and surety, whether he knew this at the time when the debt was contracted or discovered it afterwards, that knowledge obliged him not to deal with the principal debtor alone, so as to prejudice the surety. Lord Cottenham, in *Hollier v. Eyre* (1840) (9 Cl. & F. 1) expressly says (at p. 45): "Although all the grantors were principals as between them and the grantees, yet, as between themselves, some of them might be sureties for others; and if it was established that such was the case as between" them, "and that the grantees knew that such was the case, they might by their dealing with" the principal debtor "have raised an equity in favour of" the surety. And he proceeds to say that, to affect the creditor with this equity, he must have that notice at the date of the transaction by which the position of the surety is altered. Can it be the law that, if by a subsequent agreement one of the principal debtors becomes a surety, and this is made known to the creditor, he may disregard it? The difference between that case and the creditor discovering after the debt was contracted that one of the debtors was at the time of contracting the debt as between himself and his co-debtors only a surety seems to me inappreciable. It is only the knowledge by the creditor of the surety's position which affects him in that case, and why it should not equally affect him in the other I confess I cannot comprehend. In *Ex parte Graham* (1854) (5 De G. M. & G. 356) the indorsee for value of a bill of exchange had notice after the indorsement to him that it had been accepted for the accommodation of the drawer, and after this notice he joined the other creditors of the drawer in a composition arrangement, and released the drawer. Subsequently, he sought to prove against the acceptors, who had become bankrupt. Knight Bruce, L.J. asked if the question was not unaffected by decision. Counsel seem to have thought it was. *Oakeley v. Pasheller* (*ubi sup.*) was not cited. The proof was allowed. In *Oakford v. European and American Steam Shipping Company* (1863) (1 H. & M. 182), Wood, V.C., at p. 190 said of *Oakeley v. Pasheller* (*ubi sup.*): "That case determined that where a creditor had two joint principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went

upon the footing that the creditor having notice of the agreement was bound to regard it." In *Oriental Financial Corporation v. Overend, Gurney, and Co.* (1871) (25 L. T. Rep. N. S. 813; L. Rep. 7 Ch. App. 142) bills of exchange were discounted by the defendants. They were afterwards informed that the acceptors were merely accommodation acceptors, and with that knowledge they bound themselves to give time to McHenry, the principal debtor. Lord Hatherley, L.C. referred to *Ex parte Graham* (*ubi sup.*) and to the inquiry made in that case, whether there was any authority on the subject, and pointed out that *Oakeley v. Pasheller* (*ubi sup.*) was a "precise and direct authority upon the point," and his Lordship proceeds to say that there is no hardship in the case, because when giving time the creditors might reserve their rights against the surety. The case was appealed to the House of Lords, and is reported in L. Rep. 7 E. & I. App. 348; and at p. 360 Lord Cairns, L.C. says: "It was said that the knowledge that the Financial Corporation was surety was not obtained by Overend, Gurney, and Co. until after the bills became due; and inasmuch as the contract arising out of and connected with the bills was made before Overend, Gurney, and Co. had any knowledge of that suretyship, their rights and their powers of proceeding under the contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords," the Lord Chancellor continued, "it appears to me that, after the case which was referred to at the bar decided by your Lordships' House, that of *Oakeley v. Pasheller* (*ubi sup.*), it is impossible to contend, if after a right of action accrues to a creditor against two or more persons he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." It is clear that Lord Hatherley and Lord Cairns understood *Oakeley v. Pasheller* (*ubi sup.*) to have decided that the mere knowledge of the creditor that one of his debtors has become surety as between him and the other obliges the creditor not to deal with the principal debtor alone, so as to prejudice the surety. Both those learned judges treat this as the law, whether the debtors were originally in that position and the creditor was afterwards informed of it, or whether by a subsequent arrangement between themselves they were put into that position and the creditor was informed of the change. We have obtained the cases and appendix of *Oakeley v. Pasheller* (*ubi sup.*) before the House of Lords, and I find it stated in the appellants' case that Sir Charles Oakeley was unaware of the arrangement for indemnity of Sherard's executors, and that when he gave time in 1817 he reserved his rights against the estate of Sherard. The respondents' case states that the arrangement in 1817 was not known to the executors of Sherard. The appendix contains no evidence of any reservation of rights against Sherard's executors or of any agreement between them and Sir Charles Oakeley to treat them as sureties only. In *Maingay v. Lewis* (Ir. Rep. 5 C. L. 229) the question came before the Court of Exchequer in Ireland, and the case of *Oakeley v. Pasheller* (*ubi sup.*) was carefully considered. Pigot, C.B., Lawson, J., Morris, J., and Monahan, C.J. held that giving time to a principal

debtor discharged a surety who had become such by an arrangement between himself and the other debtors after the debt was contracted, if the creditor was aware of this change of their relative position before he gave time to the principal debtor. All these judges treated *Oakeley v. Pasheller* (*ubi sup.*) as having decided the point. Lawson, J. states the argument against the doctrine (at p. 231) and follows the House of Lords' decision reluctantly. Deasy, B. and Keogh, J. differ because in the case before them they consider time was not given. Fitzgerald, B. is the only judge who doubts the effect of the case in the House of Lords, *Oakeley v. Pasheller* (*ubi sup.*). He considers that the ground of the decision was the giving time to Kynaston, the new partner, to whom the deceased partner's estate was always, he says, in the position of surety. In this state of the authorities the question came before the Court of Queen's Bench upon an equitable plea in the case of *Swire v. Redman* (1876) (35 L. T. Rep. N. S. 470; 1 Q. B. Div. 536, 541), which in its facts was identical with what I understand to have been the facts in *Oakeley v. Pasheller* (*ubi sup.*). There were two principal debtors, Redman and Holt, who were partners. The partnership expired, and by arrangement between them Holt assumed the position of principal debtor and Redman that of surety. The creditors were informed of this, and after receiving that information gave time to Holt. On an application for a new trial, Bramwell, B. having ruled that Redman was not discharged, Lord Cockburn, C.J. read the judgment of Lord Blackburn. The judgment was to this effect: If a creditor has two debtors, one of whom is not surety for the other, or if he is and the creditor is ignorant of the fact, he may give time to either without discharging the other. But if from the beginning one is principal and the other surety the case is different. "And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period." Though this doctrine, continued the learned judge, seems "consistent neither with justice nor common sense"—and see similar observations by the same learned judge in *Petty v. Cooke* (25 L. T. Rep. N. S. 90; L. Rep. 6 Q. B. 790)—"it has been long so firmly established that it can only be altered by the Legislature. And as it depends upon the supposed necessity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such right, was not acquired till after the surety had become liable to the creditor: (*Pooley v. Harradine*, 7 E. & B. 431; *Greenough v. McClelland*, 2 E. & E. 424; and *Oriental Financial Corporation v. Overend, Gurney, and Co.*, 25 L. T. Rep. N. S. 813; L. Rep. 7 Ch. App. 142.) This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone," (but see, in the case of a surety, 19 & 20 Vict. c. 97, s. 5), "and the right which Redman would have had to

CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time. The contention is, that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then by giving notice to prevent the plaintiffs from doing that which they lawfully might before—to create a right in themselves which, if observed, must derogate from the plaintiffs' right, and then to say that it is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants' derogating from the plaintiffs' right without their consent." The judgment then deals with *Oakeley v. Pasheller* (*ubi sup.*), which the learned judges refuse to understand in the manner in which it was understood by Lord Hatherley and Lord Cairns. But they construe it to mean that the new arrangement by which Sherard's executors became sureties was an arrangement to which the creditor Sir Charles Oakeley was a party, made between him and the two partners in the new firm, of whom one Kynaston was his son-in-law. That is, that Sir Charles Oakeley not merely knew of this arrangement, but that he engaged to be bound by it. There is nothing in the facts of the case as stated nor in the language of the judgments which I have read to justify this construction of the decision in *Oakeley v. Pasheller* (*ubi sup.*). Lord Hatherley and Lord Cairns did not so understand it. The question involved in the case was an equitable one, and the opinion of the two Lord Chancellors as to the effect of that decision must have more weight than that of the two learned judges who decided *Swire v. Redman* (*ubi sup.*). The report of the *Oriental Financial Corporation v. Overend, Gurney, and Co.* (*ubi sup.*) in the House of Lords does not seem to have been before their Lordships, and Lord Cairns' construction of that decision is not referred to by them. Moreover, the value of the decision in *Swire v. Redman* (*ubi sup.*) seems to me, if I may say so with all respect, greatly affected by the fact that it is based upon the view that the doctrine of the discharge of a surety by giving time to the principal debtor is "consistent neither with justice nor common sense." It was long ago adopted by courts of common law. In the language of Tindal, C.J. in *Coombe v. Woolf* (1832) (8 Bing. 156, 161): "Except where a surety has entered into a bond for payment in default of the principal debtor, courts of law as well as courts of equity have always held the surety to be discharged where without his assent time has been given to the principal debtor. Where the surety has entered into such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a court of equity, because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal." Moreover, the doctrine has again and again been recognised and affirmed in the House of Lords: (see, amongst other cases, *Hearn v. Cole*, 1 Dow 459; *Bank of Ireland v. Beresford*, 6 Dow 233, 238; *Torrance v. Bank of British North America*, 29 L. T. Rep. N. S. 109; L. Rep. 5 P. C. 246; *MacTaggart v. Watson*, 3 Cl. & F. 525; *Creighton v. Rankin*, 7 Cl. & F. 325; *Owen v. Homan*, 4 H. of L. 997.) A criticism of *Oakeley v. Pasheller* (*ubi sup.*) which shows so

strong a desire not to follow that decision if it be possible to escape from it must be received with some hesitation. For myself I am bound to say that the decision in *Oakeley v. Pasheller* (*ubi sup.*), fairly read, seems to admit of but one meaning, that which was put upon it by Hatherley, L.C. and Cairns, L.C.—namely, that the information to the creditor of a subsequent arrangement by which his co-debtors became as between themselves in the position of principal and surety, puts him under the obligation not to deal with the principal debtor so as to prejudice the surety, just as would be the case if the debtors were originally in that position *inter se* and the creditor discovered it afterwards. Then it was argued that there was a novation of the debt, by which the continuing partners were accepted as the sole debtors, and the plaintiff, William Rouse, was released. Such a release must be by a contract with William Rouse, express or implied. There was no express contract to release him; the argument is that such a contract must be implied from the circumstances of the case. The principal facts relied on to raise this implication are, that, although the bank kept a separate account of the old debt, they charged in that account compound interest, and that, as they must be taken to know that they could not make this charge against William Rouse after they had, by his withdrawal from the business, ceased to act as bankers for him, that fact shows that they treated the continuing partners as alone liable. Moreover, the bank dealt with them only in respect of the debt, and after their bankruptcy the bank proved against their joint estate and received a dividend of 10s. in the pound, which, it is argued, they could not have done if they had not released William Rouse. But this is not a case in which any new partner, not originally liable for the debt, has been treated as liable; all these dealings were with the original joint debtors, or some of them. It is clear that the mere treating the continuing firm as liable, and proving against their estate, is not necessarily inconsistent with preserving their right against the retired partner: (*Harris v. Farwell* 15 Beav. 31.) That joint estate was really the estate which the retired partner made over all his interest in, when he retired; and, upon the whole, though with some hesitation, I do not think there is sufficient evidence of an intention to release William Rouse to enable us to decide in his favour on this ground. But, if the true result be that the bank did not intend to release William Rouse, I cannot help feeling great reluctance to lean to the conclusion that he has been released in effect by the inadvertence of giving time to his co-debtors without reserving the rights of the bank against him. Lindley, L.J. has called attention to the form of the deed of dissolution, and we have heard a further argument upon the question whether, by that deed, William Rouse did not empower his copartners to make an arrangement for further time without his concurrence, or without discharging him by so doing. The creditor was not a party to this deed, and it cannot be read as giving to him any right against the surety. The deed contains a covenant by William Rouse's former partners to pay the debts of the old firm as soon as they conveniently can, and to indemnify and keep indemnified William Rouse against them, and this covenant is qualified

[CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF APP.]

by a proviso worded thus: "Provided always and it is hereby agreed and declared that the said William Rouse, his executors and administrators, shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said J. F. Rouse, F. Rouse, and H. Rouse, so long as the said William Rouse, his heirs, executors, and administrators, shall be indemnified according to the covenant last hereinbefore contained." The rights of a surety which are taken away by an agreement not to sue the principal debtor for a certain time are principally these—namely, first, his right to call upon the creditor to compel the principal debtor to pay, for which purpose he might institute a suit in equity; or, secondly, his right to pay the creditor and then to sue the principal debtor in his name: (see *Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 5*.) The proviso in question does seem to give up the first of these rights so long as William Rouse is indemnified "according to the covenant." But if the principal debtors do not pay the debt as soon as they conveniently can, they do not fulfil their covenant, and if they arrange with the creditor not to pay for a certain time, when they could conveniently pay within that time, it seems to me that the proviso would not prevent the surety from using all the remedies in his power. To the second right of the surety which I have mentioned, that of voluntarily discharging the debt and then calling on the principal debtor to repay the amount, the proviso does not in terms apply at all. It is a common form found in *Davidson's Precedents* (2nd edit., vol. 2., part 1, p. 475; *Ib.*, 3rd edit., vol. 2, part 1, p. 520). It is there explained by a note thus: "A proviso to this effect should always be inserted, unless it be intended that the covenantor should immediately pay the debts. For where a person sold an estate which was charged with annuities, but which he was not personally liable to pay, and took a covenant from the purchaser to pay the annuities and indemnify the vendor against them, it was held that the vendor could sustain an action for nonpayment of the annuities without showing that he had been damaged by the nonpayment." The object, then, of this proviso is to prevent this use being made of the covenant to pay the debt and indemnify the surety. It is not intended to deprive the surety of any other of his rights as between him and the creditor or as between him and the principal debtor. I cannot find anything else in the deed which has that effect. When dealing with debts due to the firm there is an express agreement that, with respect to these, William Rouse "will allow and confirm whatsoever" his partners, or their executors, administrators, or assigns, shall lawfully do or cause to be done. But there is no like provision as to debts due from the firm. The deed follows in all respects the form given in *Davidson's Precedents* (*ubi sup.*), and if it be held that this deed authorises the grantees to arrange with the creditors for time, it must follow that in every case of a deed of dissolution in the ordinary form this must be the result. The doctrine that arrangements between the creditor and principal debtor which prejudice the surety have the effect of releasing him is founded on the jealous care which courts of equity and courts of law have always taken of a surety's interest. The principle is thoroughly settled. I am not inclined to

depart from it or to question its reasonableness if authority permitted. Authority seems to me decisive against this; and, on the whole, I think that the decision in this case should be affirmed.

SMITH, L.J.—It is not disputed in this case that, unless the plaintiff can establish that the defendants have released him from a debt of some 34,000*l.*, which at one time he undoubtedly owed to the defendants, they are entitled to the lien they set up in the present action. The way in which the plaintiff seeks to establish that he is no longer a debtor to the defendants is by setting up that they have accepted the liability of a firm which succeeded the plaintiff in business in accord and satisfaction of the plaintiff's debt to them; or, in the alternative, that upon the authority of *Oakeley v. Pasheller* (4 Cl. & F. 207; 10 Bli. N. S. 548), in the House of Lords, he is discharged by reason of the defendants having given time to the new firm by binding contract, for which firm, to the knowledge of the defendants, the plaintiff had become surety. I have nothing to say upon the first point, viz., the accord and satisfaction, or, as it is called, a release by novation, excepting that I agree that the judgment of Kekewich, J. should be upheld as to this for the reasons given by him and the Lords Justices who have preceded me. I desire, however, to say something upon the second point, which undoubtedly, as matters stand, is one of great difficulty. Now, it has long since been established that, if a creditor contracts with a principal debtor and a surety, and afterwards by a binding contract with the principal debtor he gives time to him without the consent and knowledge of the surety, and without reserving his rights against the surety, the surety is discharged. Different reasons for this will be found in the books, given by different judges. But I apprehend that the main reason is, that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name to sue the principal debtor, and if the creditor has bound himself to give time to the principal debtor the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent. It was decided in the year 1857, by the Court of Queen's Bench, in *Pooley v. Harradine* (7 E. & B. 431), that although upon the face of a document (a promissory note) two persons had contracted with a creditor as principal debtors, yet if one of them when he so contracted was in truth only a surety for the other, and the creditor at the time he took the document knew this to be so, the creditor could not afterwards give time to the one who was in reality the principal without releasing the other who was in reality the surety. It was held that, inasmuch as the relationship of principal and surety in fact existed to the knowledge of the creditor between the persons contracting with him, though they contracted as principals, an equity arose, which compelled the creditor thereafter to treat the one as the surety, which in truth he then was, and not to give time to the principal debtor without the assent of the surety. It is true that the creditor could sue the surety upon his contract as principal debtor, and that this was not altered; but it is

[CT. OF APP.]

ROUSE v. THE BRADFORD BANKING COMPANY LIMITED.

[CT. OF AP.]

impossible to say, as it was argued before us, that the creditor's position was not altered by the introduction of the equity. Before its introduction the creditor could have dealt with either of his debtors as he liked; after its introduction he could not, for if he gave time to the one who was in fact the principal debtor, he discharged the other who was in fact the surety, unless he reserved his rights against him. The court in this case forbore from deciding whether this equity would have arisen if the creditor did not know of the position of surety at the time when he contracted. It is too late to discuss the ground for, or the validity of, the equity, for in the case of *Overend, Gurney, and Co. v. Oriental Financial Corporation* (31 L. T. Rep. N. S. 322; L. Rep. 7 E. & I. App. 348), where the relationship of principal and surety existed when the creditor contracted with his debtors as principal debtors, the House of Lords held it to exist, and decided that it applied even if notice of the relationship of principal and surety was not conveyed to the creditor until after the contract was made. In this case it was held that a surety was discharged when the creditor believed he was contracting, and did in fact contract, with them as principal debtors, if, after the contract was made, the creditor became aware, as the truth was, that he had only contracted with persons who stood in the relationship of principal and surety *inter se*, and that he could not afterwards give time to the one who was the principal debtor without discharging the surety. It appears to me that the equity which was applied in *Pooley v. Harradine* (*ubi sup.*) was applied in this case with the addition that notice of the true state of facts would suffice if given after the contract was made between the creditor and his debtors, which last point the Court of Queen's Bench had abstained from deciding. It will be seen that in these two cases (*Pooley v. Harradine* (*ubi sup.*) and *Overend, Gurney, and Co. v. Oriental Financial Corporation* (*ubi sup.*)) the court gave effect so far as possible to what in truth was the real position *inter se* of the persons when they contracted with the creditor, and applied thereto the rule as to the discharge of the surety by giving time to the principal debtor. As I have said before, it is too late to quarrel with this equity. But it was said on behalf of the plaintiff that, as long ago as the year 1832, in the case of *Oakeley v. Pasheller* (*ubi sup.*), the court had gone further, and had held that, where a creditor contracts with two who are *de facto* principal debtors *inter se*, they, without the knowledge or assent of the creditor, can afterwards create *inter se* the position of principal debtor and surety, and that the creditor, although no party to such arrangement, upon having notice of it, is compelled to recognise this new-made position of principal and surety, and that, if the creditor after such notice gives time to the principal debtor without the consent or knowledge of the thus created surety, this surety is discharged. I cannot myself see in such a case where any equity comes in. If the court by the application of an equity is to give effect, as it did in the two cases above mentioned, to what in truth was the real relationship of the persons *inter se* when they contracted with the creditor, why, if an equity exists, should it not do the like in the present case? Agreeing as I do, from the cases above mentioned, that it

has been held that an equity exists to compel the creditor to give effect to what was the real relationship of the parties *inter se* at the time contracted with the creditor when that relationship became known to him, why, I ask, should an equity arise for the purpose of giving effect to what was not the real relationship of the parties *inter se* when the contract was made with the creditor? The real position of the persons *inter se* when they contracted with the creditor in the present case was that of principals *inter se*, and the equity is to be applied so as to give effect to the true relationship of these persons, it should, it appears to me, give effect to what the relationship in reality was, which was that of two principal debtors *inter se*, and not that of principal debtor and surety. I can understand its application where the creditor is unfortunate enough to have contracted with two who when he contracted were *inter se* principal and surety, but I cannot understand its application when the creditor has contracted with two who, when he contracted with them, were *inter se* in fact two principal debtors. This difficulty I have in this case, and which I do not seem able to overcome. No reasons at the bar have been given why there should be an equity as is contended for. All that is said is that there is such an equity, because the House of Lords, in *Oakeley v. Pasheller* (*ubi sup.*), decided that it existed, and that two most eminent judges have since said that it was so decided. It has been so decided by the House of Lords, of course there is an end of the matter; but when it has appears to me to be one great question in this case. Before turning to *Oakeley v. Pasheller* (*ubi sup.*) I should point out that in the year 1832 this exact point came up for actual decision in the Queen's Bench Division in the case of *St. v. Redman* (35 L. T. Rep. N. S. 470; 1 C. Div. 536), when it was held that two principal debtors could not change their position *inter se* to that of principal and surety so as to affect their creditor without his assent, and that *Oakeley v. Pasheller* (*ubi sup.*) had not decided that they could. Bramwell, B. had held *Nisi Prius* that the point taken was untenable. The Queen's Bench Division, in a considered judgment which was prepared by the then Blackburn J., upheld Bramwell, B.'s ruling. I cannot myself read this judgment without feeling its force and good sense. This judgment must be erroneous if the House of Lords in *Oakeley v. Pasheller* (*ubi sup.*) has decided what the plaintiff says it has, and which view Kekewich, J. has ratified. I agree that in *Oakeley v. Pasheller* (*ubi sup.*) it was decided that where two partners were originally principal debtors to a creditor, and the partnership was dissolved and one partner went out, and the other having taken in a new partner continued the business, and both gave indemnity to the partner who went out, that in such case the one who went out became secondarily liable, or, in other words, a surety for both the continuing and the new partner. It decides one point taken by Mr. Finlay for the defendants against him, for he argued that the plaintiff in that case never became a surety at all. It also, in my judgment, decided that in the circumstances of that case the old partner Sherrin (it was in reality the executors of the old partner) but this is immaterial) had become surety to Charles Oakeley, who had advanced money to

old firm, and that Sir Charles, by giving time as regards the old debt to the principal debtors in the new firm, discharged him. But what were the circumstances of that case? In my judgment it is impossible to read the prolix statement of facts set out in 4 Cl. & Fin. and in 10 Bli. N. S. without seeing that there existed ample evidence from which to hold that Sir Charles Oakeley not only had notice of, but actually agreed to, the whole arrangement which was come to by his two sons-in-law, Reid and Kynaston, viz., the substitution of Kynaston for Sherard as principal debtor with Reid, to Sir Charles for the old debt, and the constituting the old partner Sherard a surety for Reid and Kynaston to Sir Charles Oakeley. The taking in of the new partner Kynaston was good consideration for such agreement. It seems to me immaterial whether it is called an "agreement," or, as are used in the case, an "acceptance," or an "adoption," or an "assent," by Sir Charles Kynaston, if there was good consideration for his agreeing to what had been arranged by the principal debtors between themselves. Towards the end of the argument of the case in the House of Lords (p. 232 of 4 Cl. & Fin.) Lord Lyndhurst is reported to have put the point. He says: "Can you cite any authority to the effect that two original principal debtors could by arrangement among themselves convert one into a surety only for the other principal debtor?" In 10 Bli. N. S. (at p. 586) Lord Lyndhurst's question is reported thus: "How will an arrangement between debtors affect a creditor unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent? Can you cite any authority to show that joint debtors by their own act can alter their situation after the contract has been concluded?" Mr. Pemberton, who was arguing for Sherard's executors, could not do so. What he said in answer to Lord Lyndhurst, as appears from 4 Cl. & Fin., was this: "The letters and accounts and all the circumstances of this case make it quite clear that Sir C. Oakeley 'accepted' Reid and Kynaston as principal debtors, looking to Sherard's executors as surety." It appears to me from the question that Lord Lyndhurst did not at the time consider the mere notice of the arrangement come to by the partners *inter se* would bind Sir Charles. The words he apparently used were "adopt" and "assent." Mr. Pemberton, so far as the report goes, appears to have satisfied Lord Lyndhurst by the answer he gave, that Sir Charles Oakeley either "adopted," or "accepted," or "assented" to the new position, for shortly after these remarks Lord Lyndhurst, finding that a new partner had been introduced, delivered a short judgment, holding that Sherard's executors had been discharged under the circumstances which existed in that case. That there was good consideration for this to Sir Charles Oakeley, as I have before said, is clear, viz., the liability of the new partner Kynaston. With all deference to those who have thought, and still think, that this judgment decides the point it is said to do, I cannot bring myself to so hold. What in my judgment it does decide is, that, where two have contracted with a creditor as principal debtors who were then principal debtors *inter se* and afterwards, by agreement for consideration between themselves and their creditor, one of the principal debtors is to be a surety and the other principal debtor, then the creditor must

treat them as in that position, though he has a contract with them as principals and cannot afterwards give time to the principal debtor without discharging the surety. It will be noticed that in the case of *Overend, Gurney, and Co. v. The Financial Corporation (ubi sup.)* the House of Lords was dealing with a case in which the parties contracting with the creditor were originally principal debtor and surety *inter se*. They had not to consider, and, as it appears to me, they did not consider, the point as to what would be the case if the two had been originally principal debtors *inter se*. And, as before stated, the equity which was then applied was, that the court would give effect to the true position of the principal debtors *inter se* when the contract was made, even though the creditors did not have notice of this position till after it was made. It is true that Lord Cairns in delivering judgment in this case did use words which would lead to the conclusion that he thought that the equity now contended for existed, for he said (at p. 360 of L. Rep. 7 E. & I. App.): "It is impossible to contend, if after a right of action accrues to a creditor against two or more persons he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." These remarks, it must be remembered, were made by Lord Cairns when he was dealing with a case in which the persons contracting with the creditor were always from the first in the position of principal and surety *inter se*, and not of two original principal debtors. It is also true that in 1863 Lord Hatherley, when Page Wood, V.C., in *Oakford v. European and American Steam Shipping Company* (1 H. & M. 182, at p. 190), when he was dealing with a case in which the debtors were originally principal debtors *inter se*, said of *Oakeley v. Pasheller (ubi sup.)* as follows: "In order to sustain the plaintiff's contention it would be necessary to give a very large extension to the doctrine of *Oakeley v. Pasheller (ubi sup.)*. That case determined that, where a creditor had two joint principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of the right. That was a strong decision, and it went upon the footing that the creditor having notice of the agreement was bound to regard it." This language, I own, leads to the inference that the Vice-Chancellor understood that the equity now contended for by the plaintiff existed in the case of original principal debtors *inter se*. But the learned judge gave no reasons for its application, excepting that it had been so decided in *Oakeley v. Pasheller (ubi sup.)*. The Irish case of *Maingay v. Lewis* (Ir. Rep. 3 C. L. 495, and on appeal in Ir. Rep. 5 C. L. 229) exemplifies what different views can be taken of what was decided by the House of Lords in *Oakeley v. Pasheller (ubi sup.)*. In the present case there is no evidence, nor is it suggested, that the bank agreed to treat, or "adopted," or "accepted," or "assented" to the plaintiff becoming a surety; all that is alleged is, that it had notice that the plaintiff had left the firm, and that the old partners had given him the indemnity which they did. It appears to me that there is no authority

CT. OF APP.]

WENDON (app.) v. THE LONDON COUNTY COUNCIL (resps.).

[CT. OF AP

actually binding upon me which would compel me to hold that the equity now contended for by the plaintiff existed in a case like the present, and, if I were forced to decide the point, I should have held, as was held in *Swire v. Redman* (*ubi sup.*), that there was no such equity. It is not, however, necessary for me to decide this question, for I am of opinion, for the reasons given at length by Lindley, L.J., that, by the contract between the plaintiff and his old partners contained in the deed of dissolution, this case is not governed by *Oakeley v. Pasheller* (*ubi sup.*), nor by the equity which the plaintiff contends for, even if it exists, and that consequently he is not discharged from the debt of 34,000*l.* due from him to the defendants by reason of their having given time as they did to the new firm by a binding contract. For these reasons, in my opinion, this appeal should be allowed and judgment entered for the defendants, with costs here and below.

Appeal allowed.

Solicitors for the appellants, *Patersons, Snow, Blozam, and Kinder*, agents for *Gardiner and Jeffery, Bradford*.

Solicitors for the respondent, *Field, Roscoe, and Co.*, agents for *Taylor, Jeffery, and Jessop, Bradford*.

March 1 and 2.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

WENDON (app.) v. THE LONDON COUNTY COUNCIL (resps.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis Management Acts—General line of buildings—Erection of building beyond general line—Work begun before general line existed—*Metropolis Local Management Act 1862* (25 & 26 Vict. c. 102), s. 75.

The Metropolis Local Management Act 1862, by sect. 75, provides that "no building, structure, or erection shall, without the consent of the [London County Council] be erected beyond the general line of buildings in any street in which the same is situate; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent" beyond the general line of buildings, a magistrate may order it to be demolished.

The owner of land, adjoining a street where there was no general line of buildings, built thereon the footings of the external walls of two sides of a shop, and upon the footings on the side adjoining the street he built a wall twelve feet high. A general line of buildings, ten feet further back than the wall from the street, then came into existence. The owner then built the shop upon the footings and wall in the way in which he had always intended to build it. A magistrate ordered him to demolish so much of the shop as he had built since the general line of buildings came into existence.

Held (affirming the decision of the Queen's Bench Division), that the owner had erected a building or structure beyond the general line of buildings, because the footings and wall built before there was a general line of buildings were not a building or structure within the meaning of the Act;

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

and that the order of the magistrate was rightly made.

SPECIAL CASE.

This was an appeal by Wendon from the judgment of the Divisional Court (Wills and Wright, JJ.), affirming the order of a magistrate, upon a special case.

1. (a) Previously to the month of March 1890 the owner of a piece of land, bounded on the west by a road called Munster-road, and on the east by a road called Filmer-road, laid upon the said piece of land a road for building a new street forty feet in width called Fernhurst-road, and communicating in a straight line directly between the said Munster-road and the said Filmer-road. (b) In or about the month of March 1890 the owner of the said piece of land deposited with the vestry of the parish of Fulham plans for the erection of twelve shops upon the said piece of land fronting the said Munster-road and immediately to the north of the said Fernhurst-road. At the time of such deposit there were no buildings erected on the said piece of land in or fronting the said Munster-road, or in or fronting the said Fernhurst-road on either side thereof. The site of the southernmost of the said shops shown upon the plan as being on the north of the said Fernhurst-road, and immediately at the junction of the said road with the said Munster-road, and such site is the same as the site of the building complained of in the summons, and is hereinafter referred to as the said site. (c) In or about the month of March 1890 the owner of the said piece of land commenced to build upon the said site in accordance with the said plan, and constructed immediately between the said site and the said Munster-road and immediately between the said site and the said Fernhurst-road, the footings for the flank and flank external walls respectively of the southernmost shop, and erected upon such footings and immediately adjoining and abutting upon the said Fernhurst-road the flank wall of the shop to a distance of thirty feet from the said Munster-road, and to a height of twelve feet from the level of the said Fernhurst-road. (d) The said owner discontinued any building operations at the said corner of the said Munster-road and Fernhurst-road, and portions of the work had done there as above mentioned being covered with rubbish. Subsequently to the construction of the said footings and the erection of the said flank wall, namely, in or about the month of 1892, the said owner erected upon the north of the said Fernhurst-road a number of dwelling houses, the fronts of which were erected at a distance of thirty feet from the centre of the roadway of the said road, which said fronts were about ten feet back from the front of the wall above mentioned. (e) In the month of March 1892 the owner of the said piece of land granted a building lease of the said site to the appellant, who purchased from the said owner the footings and the said flank wall, and in or about the month of January 1893 commenced building operations, utilising for that purpose the portions of the work which about two and a half years before had been erected by the said owner as before described. In the course of the building operations a chimney breast which had been built in the old wall was cut away. At the

CT. OF APP.]

WENDON (app.) v. THE LONDON COUNTY COUNCIL (resps.).

[CT. OF APP.]

of the said summons the said shop had been carried to the height of two storeys, or about twenty-three or twenty-four feet from the level of the ground, and projected about ten feet in advance of the general line of buildings herein-after mentioned. The work so executed by the defendant has been added to the old work; that is to say it has been erected upon the footings hereinbefore mentioned, and upon and by the side of the flank wall hereinbefore mentioned. No portion of the work is erected or built in advance of the said flank wall, or further in advance of the general line of buildings hereinafter mentioned than the said flank wall is in advance of such line. And at the date of the said summons the said footings and the said flank wall formed part of the building complained of in the said summons. (f) The consent in writing of the London County Council had not been obtained to the completion by the defendant of the said building, and on the 21st March 1893 the superintending architect of the said council decided the general line of buildings on the north side of the said Fernhurst-road to be the main fronts of the dwelling-houses erected thereon as hereinbefore stated.

2. In support of the said summons reliance was placed upon the decision of the Queen's Bench Division in *Nathan (app.) v. Metropolitan Board of Works (resps.)*, a copy of the case stated therein for the opinion of the court, and a copy of the shorthand notes of the judgment delivered by the court, was supplied to me, and it was contended upon such decision that any work executed by the appellant on the said site which was in advance of the general line of buildings in Fernhurst-road was prohibited by sect. 75 of 25 & 26 Vict. c. 102, such general line of buildings having come into existence before the execution of such work.

3. On behalf of the appellant it was contended that sect. 75 of 25 & 26 Vict. c. 102, in no way prohibited the appellant from continuing and completing the erection of a building commenced before the existence of any general line of buildings at all in Fernhurst-road, and that the decision of the Queen's Bench Division in the case relied upon by the respondents was therefore not in point, it being a decision merely that the Metropolitan Board of Works was not prevented from enforcing the prohibition contained in sect. 75 of 25 & 26 Vict. c. 102, in that particular case, by reason of the limitation contained in sect. 11 of 11 & 12 Vict. c. 43, and reliance was placed upon the judgments of the Court of Appeal in *Auckland v. The Westminster District Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597).

It was further contended that, assuming the prohibition contained in sect. 75 of 25 & 26 Vict. c. 102, did apply to the appellant's said building, the complaint upon which the summons herein was issued had not been made within six calendar months of the time when the matter of such complaint arose, and that the decision of the court in *Nathan v. The Metropolitan Board of Works* had, so far as it related to such point, been overruled by the decision of the Court of Appeal in the *London County Council v. Cross* (61 L. J. 160, M. C.).

4. I was of opinion that the appellant had by the works erected by him erected a building in advance of the general line of buildings in the Fernhurst-road, contrary to sect. 75 of 25 & 26

Vict. c. 102, and I ordered the appellant to demolish within one calendar month so much of the said building as was erected by him beyond the general line of buildings in Fernhurst-road as defined by the said superintending architect as aforesaid.

5. The question for the opinion of the court is, whether my determination was right in point of law; if not, my said order is to be quashed, otherwise it is to stand.

The Divisional Court (Wills and Wright, JJ.) held that the order of the magistrate was rightly made.

Wendon appealed.

Channell, Q.C. and R. Cunningham Glen for the appellant.—Sect. 75 of the Metropolis Local Management Act 1862 does not apply to ground which, at the time when the building line is established, has a building upon it. Sect. 75 applies only to ground which is, at that time, vacant. In *Auckland v. Westminster Local Board* (26 L. T. Rep. N. S. 961; 7 Ch. App. 597). Mellish, L.J. construes the Act thus: "To make the two sections (74 and 75) consistent with each other I think that we must construe the words 'no building, structure, or erection' in the 75th section to mean no building, structure, or erection built or erected for the first time;" and James, L.J. construes the Act in the same way. In this case the land was built upon, and was not vacant land at the time when the building line became established. There had been no abandonment of the intention to complete the building which had been commenced, and it is so found in the special case. Before the building line became established the owner of this land had exercised his right of building upon the land in any way he pleased, and the subsequent establishment of a building line could not make the completion of that which had been lawfully commenced unlawful. The case of *Nathan v. Metropolitan Board of Works* (1894) 1 Q. B. 230, note) is distinguishable from the present case, because in that case there was a general line of buildings before the building in question was commenced; here there was no general line of buildings at the time when this building was commenced.

Horace Ivory for the respondents.—No injustice will arise from the construction of sect. 75 adopted in this case. In *Spackman v. Plumstead Board of Works* (53 L. T. Rep. N. S. 157; 10 App. Cas. 229) Lord Selborne, L.C. says: "Why should it be unjust? If for public interests it is desirable to prevent one man from doing what may be injurious, perhaps by unduly contracting the public space, to the health or the light of the neighbours, or, at all events, injurious to his immediate neighbours . . . why should it be unjust that the Legislature should have enacted a reasonable and definite way of deciding that question without litigation? Is it not right? What is the general line of buildings is fixed by the architect; that is, he says what is the general line of buildings existing at a particular time." In this case the general line of buildings existed before the work was done in respect of which the appellant was summoned. The continuance of the work which had been done before the building line became established was an erection within the meaning of sect. 75. In *Clarke v. St. Pancras Vestry* (34 J. P. 181) it was held that the continuing of an existing wall so as to make

CT. OF APP.]

WENDON (app.) v. THE LONDON COUNTY COUNCIL (resps.).

[CT. OF APP.]

it into a building was the erection of a building or structure within sect. 75; and in *Ellis v. The Plumstead Board of Works* (57 J. P. 359), that a mere boundary wall was not a building or structure within the section, but that a wall might be a building or structure in some cases. So much of this building, therefore, as was erected after the building line became established can be ordered to be demolished under sect. 75. To all intents and purposes this shop was built after the building line became established, because that which was merely a wall, and not a building or structure, had been continued until it had become a building or structure. In *London County Council v. Cross* (66 L. T. Rep. N. S. 731) it was only held that the cause of complaint arose as soon as a building is erected above the level of the ground beyond the general building line, whether the architect had certified or not. [DAVEY, L.J.—In *Barlow v. Kensington Vestry* (52 L. T. Rep. N. S. 155; 27 Ch. Div. 362) the opinion of James and Mellish, L.J.J., expressed in *Auckland v. Westminster Local Board* (*ubi sup.*), was adopted by the Court of Appeal. That case was overruled in the House of Lords (55 L. T. Rep. N. S. 221; 11 App. Cas. 257), but only upon another point.]

Channell, Q.C. in reply.—This case must be determined as if building operations had been continuous and without a break, and while they were proceeding a building line came into existence. In such case the builder could not be ordered to demolish the part of the building done after the building line came into existence. The Act applies only in cases where the building or structure has been commenced after there is a building line, and does not make unlawful the completion of that which was lawfully commenced.

Lord ESHER, M.R.—The question in this case is, whether what was erected by the appellant after the building line of the street was defined was a building, structure, or erection within the meaning of sect. 75 of the Metropolis Local Management Act 1862 (25 & 26 Vict. c. 102), and was properly dealt with by the magistrate under that section. The answer to that question depends upon the true construction of sect. 75. This case is not within sect. 74 of the Act at all. The state of things was this: Before the building line was defined part of a wall had been built by the predecessor of the appellant. That was the same as if it had been built by the appellant himself. That part of a wall was intended to be the beginning of a house or shop. For two years and a half that wall ceased to be further constructed; but, inasmuch as there was no abandonment, the case is precisely the same as if what was done after the expiration of that time had been done continuously with what had been done before. Was, then, what was done afterwards the erection of a building, structure, or erection within the meaning of sect. 75? Now, I think that we must take it that the construction of this section was properly laid down by James and Mellish, L.J.J. in *Auckland v. Westminster Local Board of Works* (*ubi sup.*), and the question is, whether what was done after the building line was defined was a building, structure, or erection, within the meaning of sect. 75, upon ground which was to be considered as vacant ground within the meaning of

the statute. I think that the answer to that question must depend largely upon the facts and upon the proper legal inference to be drawn from the facts. Now, the existing facts here are those which have been found in the case stated by the magistrate. This wall, which was twelve feet high, was built before the building line was defined, and was intended to be part of a building within the meaning of the section. The question of fact in this case is, whether that wall was sufficiently advanced to be a building, structure, or erection within the meaning of sect. 75. In my opinion the provisions of sect. 75 do not prevent a building or structure which exists at the time when the building line is defined from being completed and finished or altered after the building line has become defined. Sect. 75 says that a building or structure is not "to be erected," and the intention of that section is, as was said by James and Mellish, L.J.J., that there must not be placed a building or structure, upon land which is vacant within the meaning of the statute, which contravenes the provisions of sect. 75. If, then, what was upon the land when the building line became defined was not a building or structure, it cannot be said that what was done after the building line became defined was the continuing or completing or altering of a building or structure which was existing at the time when the building line became defined, because there was not then existing on the land any building or structure within the meaning of the Act. If, then, we come to the conclusion that what existed before the building line became defined was not a building or structure within the meaning of the Act, it follows that what was done afterwards was the erection of a building or structure after the building line became defined, and was not the altering, completing, or finishing of a building or structure which was then existing. Now, what in any particular case may be a building or structure is a question of fact to be determined in each particular case by the court before which that question arises. In this case the wall was twelve feet high in some parts, but not along its whole length. The question of fact here is whether that was a building or structure. I think that the intention of the person who built it has not much to do with the question. The question is, what it was in fact. In my opinion, this wall was not so far advanced as to be properly called a building or structure within the meaning of the statute. If a house has been raised up to the second or third floor, then I think it would be a building or structure within the meaning of the Act; but in this case I come to the conclusion that, as a matter of fact, there was not a building or structure at all before the building line became defined, within the meaning of sect. 75, and that the land was therefore vacant land within the meaning of the Act. For these reasons I think that the order made was right, and that this appeal must be dismissed.

LOPES, L.J.—I will shortly state the facts of this case, because I think that they are very material to the question. [His Lordship then shortly stated the facts as they appear in the special case.] This question then arises: Was the act of the appellant in raising the building, after the building line had been established, a violation of the provisions of sect. 75 of the Metropolis Local Management Act 1862? Now,

the words of that section are: "No building, structure, or erection shall, without the consent in writing of the [London County Council] be erected beyond the general line of buildings in any street . . . in which the same is situate . . . such general line of buildings to be decided by the superintending architect to the [London County Council] for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent," beyond such general line of buildings, it may be ordered to be demolished. The material question is, what was that wall which had been erected to the height of twelve feet before the building line became established. It must be assumed that the wall had been erected to form part of a house or shop, and the question is whether it was, before the building line became established, a building, structure, or erection within the meaning of sect. 75. I have come to the conclusion that it was not. I think that what was said by Cockburn, C.J. in *Clarke v. The Vestry of St. Pancras* (*ubi sup.*) is very material. The facts of that case were as follows: There was a house with a yard between the front of the house and the street, the yard being inclosed by a brick wall; the occupier of the house raised the brick wall five feet, and then covered in the yard with a roof. It was held that the roofed inclosure was a building within the meaning of sect. 75, and that the magistrate might order the roof to be removed. Cockburn, C.J. said: "I think the mere raising of a wall is not within the prohibition of this enactment, but as to the whole of the things done, I think this was a building within the meaning of the section." He thought in that case that the raising of a wall was not a building, but that covering the wall with a roof made it a building. There is, of course, this distinction between that case and this one, that there was not in that case any finding of fact that the wall had been raised for the purpose of substantially forming part of a house. Still I think that the principle is the same. It appears to me that, in every case where work has been done before the building is defined, whether such work is a building or structure within the meaning of the Act must be a question of fact to be determined in each case. In the case of a building which has, for instance, been raised as far as the third floor before the building line is defined, it might well be a building or structure within the meaning of sect. 75; but it is not necessary to express any opinion as to that in this case. It appears to me that the ground in question here was vacant land, within the meaning of the Act, when the building line was established, according to the judgments in *Auckland v. The Westminster Local Board of Works* (*ubi sup.*). After the building line became defined the appellant made the wall into a house, which is clearly within the provisions of sect. 75, and he made it beyond the building line. I think that that which can really and fairly be called the building was erected after the building line became defined. Speaking for myself I think that any danger of hardship being inflicted is modified by the power of giving consent in writing which is conferred upon the London County Council, and we must assume that the county council, in considering whether such consent should be given, would act properly, and not capriciously or arbi-

trarily. I think that the order was properly made in this case, and that the appeal must be dismissed.

DAVEY, L.J.—I am entirely of the same opinion. The real question seems to me to be whether the building or erection directed by the magistrate to be demolished was a new building within the meaning of sect. 75. I am of opinion that, upon the facts of the case, it must be regarded as a new building, structure, or erection, notwithstanding that before the building line was defined there were footings and a part of a wall upon the land, and that the footings and wall were erected with the object and intention of erecting a shop upon the site. If it was a new building or structure within the meaning of the Act, then there are only the rights of a new building in respect of it. I adopt the opinion of James and Mellish, L.J.J., expressed in *Auckland v. The Westminster Local Board of Health* (*ubi sup.*), and, in doing so, we are following the interpretation of Cotton, L.J., as expressed in *Barlow v. The Kensington Vestry* (*ubi sup.*). It is true that the decision of the Court of Appeal in that case was overruled by the House of Lords, but only upon the ground that no building line had been properly established there, and nothing was said to differ from the interpretation which Cotton, L.J., following the opinion of James and Mellish, L.J.J., put upon the provisions of sect. 75. It may no doubt be inconvenient to have to decide upon the facts in each case, and cases very near the line, and cases of apparent hardship may arise; but the answer to that is, that the London County Council may give their consent in particular cases, and thus have a dispensing power. We must assume that it was for that reason that the Legislature gave this discretionary power to allow buildings beyond the building line. I will add nothing to what has been said upon the question whether, when a building exists before the building line is defined, though not completed, the mere completion or finishing of that building will bring the case within the provisions of sect. 75 of the Act. I think that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Newman, Paynter, and Co.*

Solicitor for the respondent, *W. A. Blaxland.*

March 6 and 7.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.J.J.)

WORCESTER CITY AND COUNTY BANKING COMPANY v. FIRBANK, PAULING, AND CO. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Writ—Writ issued without leave against firm in firm's name—Foreign firm carrying on business within jurisdiction—Partners out of jurisdiction—Service of writ—Substituted service—Order XLVIIIa., rr. 1 and 3.

Order XLVIIIa., r. 1, provides that "any two or more persons . . . being liable as copartners, and carrying on business within the jurisdiction may be sued in the name of the firm of which they were copartners at the time of the accruing of

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

[APP.] WORCESTER CITY AND COUNTY BANKING CO. v. FIRBANK, PAULING, AND CO. [APP.]

to issue a writ against a firm in the name of the individual where you cannot issue the writ against each individual member of the firm. The circumstances of this case are as follows: The firm has been made bankrupt in Natal, and is therefore a Natal firm; that is, a colonial firm. In my opinion the law under these rules is precisely the same with respect to a colonial firm as with respect to a foreign firm. The question as to firms under these rules is not a question whether they are under the allegiance of the Queen, but is a question of submission to the jurisdiction of the courts of this country; and if a firm is subject to the jurisdiction of the courts of this country, it is a foreign firm. This writ, therefore, was issued against a foreign firm within the meaning of the rules. Now, these rules, which existed before the additions made to Order XLVIII., were construed to mean that a writ could not be issued against a foreign firm, the partners in which were out of the jurisdiction, without leave. That appears to involve some hardship, and consequently, in Order XLVIII., new words were added to rules 1, 3, and 8. It has been said by Fry, L.J., in *Fry v. Moore* (*ubi sup.*), that these rules form a code, and that we must look at the rules for the purpose of construing any one of them; and I think that that is so. Looking, therefore, at rule 1 of Order XLVIII., and construing it by having regard to the terms of rules 3 and 8, it seems to me to be now immaterial whether the writ is issued against an English firm, a foreign firm, or a colonial firm; the only question is, where the writ is issued without leave, whether the firm carries on business within the jurisdiction of the courts of this country. If the firm does carry on business within the jurisdiction of our courts, although it also carries on business out of the jurisdiction, whether it is an English or a foreign firm, a writ, under Order XLVIII., rule 1, can be issued against the firm in the name of the firm without leave. This writ, therefore, was properly issued, because it is admitted for the purposes of this appeal that the firm carries on business in England. The first contention of the appellant therefore fails. Then was this writ properly served? or was the service irregular, so that it ought to be set aside? In such a case as this the writ may be served upon any partner in England, and, if the plaintiff can so serve it, then the writ is served upon the firm. The writ can also be served upon the firm in another way. If the firm has a place of business within the jurisdiction, and a manager of their business at that place, there is another mode of serving the writ on the firm; that is, by serving it upon the manager at the place of business. This writ, therefore, might have been served in either of those ways, and that would have been service on the firm. Was this writ served in either of those ways? It was not. It was not served upon a partner in England; it was not served upon a manager at a place of business. An order for substituted service was obtained. Application was made for an order for substituted service on Pauling, one of the partners resident out of the jurisdiction. If substituted service had not been asked for, the writ could not have been served on Pauling at all as service upon the firm, because he was out of the jurisdiction. The plaintiffs, therefore, asked for substitution for a service which could not have been made at all;

that is, for substituted service in a case in which personal service must be impossible. Substituted service cannot be made as good service for a service which cannot be made. The substituted service, therefore, which was asked for in this case, could not be made. This substituted service, then, will not do at all, either as service upon the firm or as service upon the partner. This substituted service, which was authorised, was wrongly authorised, and the order must be set aside. The service of the writ was irregular, and must be set aside. If service is properly effected in this case, execution can issue only under rule 8 of Order XLVIII., and judgment is not obtained against the property of the firm in Natal, or against the partners in Natal personally as to their private property in England or in Natal. This appeal, then, must be allowed as to the application to set aside the service of the writ.

LOPES, L.J.—I am of the same opinion. The evidence establishes the fact that this firm was a Natal firm, and, therefore, a foreign firm out of the jurisdiction. Before the making of Order XLVIII. there would have been no jurisdiction to issue a writ against this firm without leave. The writ in this case was issued against the firm in the name of the firm, and no leave to issue the writ was obtained. Before the making of Order XLVIII. this writ would have been irregular. There is abundance of authority for that proposition: (*Heinemann v. Hale* (*ubi sup.*)). That being the state of the law, much inconvenience arose in the case of firms out of the jurisdiction which carried on business, and it might be a very large business, in this country, and had property in this country, but could not be sued or have execution levied upon their property in this country. To remedy that inconvenience, Order XLVIII. was made. I think that the true meaning of rules 1, 3, and 8 of Order XLVIII. is this: rule 1 authorises the issue of the writ, rule 3 provides how that writ may be served, and rule 8 says what property may be taken in execution. The general scope of the rules is to authorise the issue of the writ in a case like this without leave, and to provide a mode of service of the writ upon firms within the jurisdiction, whether the partners are within the jurisdiction or not, but to permit execution only against the property of the firm which is within the jurisdiction. That seems to me to be the true interpretation of these rules. That removes the inconvenience which previously existed. In my opinion, therefore, the writ in this case was regularly issued. Then there is the question as to the service of this writ. Rule 3 of Order XLVIII. provides for the service of this writ; it can either be served on any partner within the jurisdiction, or it can be served upon a manager at a place of business within the jurisdiction. Neither of those modes has been followed in this case, but an order has been obtained for substituted service upon a brother of Pauling. That order is clearly bad. It is clear law that there cannot be substituted service of a writ which could not, at the time of its issue, be served personally. This writ could not, at the time of issue, have been served personally upon Pauling because no leave to issue it had been obtained. Therefore it is clear that the order for substituted service was irregular, and must be set aside. This writ, consequently, was

CT. OF APP.]

LOCAL BOARD FOR THE DISTRICT OF MINEHEAD v. LUTTRELL.

[CHAN. DIV.]

regularly issued, but the substituted service was irregular, and must be set aside. The appeal, as to the service of the writ must be allowed.

DAVEY, L.J.—I agree, and will give my reasons, because I think that we are differing from the judgment of Wright, J. in *Grant v. Anderson* (*ubi sup.*). I think that prior to the making of Order XLVIII. this writ would have been irregular. The reasons for that view are succinctly stated in *Heinemann v. Hale* (*ubi sup.*) by Fry, L.J., viz., that suing a firm is a short way of suing all the partners of a firm, and that if the partners are resident abroad the firm cannot be sued unless leave is obtained to issue a writ for service abroad, and to serve that writ abroad. The old rules did not depend upon the question whether a firm was a foreign firm, but applied to the case of a partner resident out of the jurisdiction. I think that that is clear from the case of *Indigo Company v. Ogilvie* (*ubi sup.*). In my opinion Order XLVIII. has laid down a new code, which has entirely altered the law as to suing firms in the name of the firm. The test now is, whether a firm is carrying on business within the jurisdiction, not whether a firm is a foreign or colonial firm. If a firm carries on business within the jurisdiction, then, by Order XLVIII., r. 1, it can be sued in the firm name without leave. Then rule 3 provides for service of the writ, and that when a firm is properly sued under rule 1 it can be served in either one of two modes, whether any partner is out of the jurisdiction or not. That effects what the former rules did not, for in effect it extends the rules for service of a writ out of the jurisdiction, and supplies the defect which formerly existed. Those two rules must be read together with rule 8, which provides that no injustice shall be done by limiting the execution in such a case to the property of the firm which is within the jurisdiction, and provides that judgment shall not be executed against property abroad except in cases where leave to serve the writ abroad has been obtained. Those rules seem to me in that way to make a clear and reasonable code of rules for suing, and recovering against, firms which are carrying on business within the jurisdiction of our courts. I think, therefore, that the issue of this writ against a firm carrying on business in this country was regular. It appears, however, that one of the parties was resident out of the jurisdiction when the writ was issued. He could not have been served with this writ except under the provisions of Order XI. by obtaining leave to issue and serve the writ out of the jurisdiction, and therefore could not be reached by a judgment against the firm. An order for substituted service was obtained. That order was bad. According to the rules in respect of substituted service, an order for substituted service cannot be obtained in respect of a person upon whom personal service could not be made at the time of the issue of the writ. Here the writ could not be served upon Pauling without leave, and therefore this writ could not be served upon him by substitution: *Fry v. Moore* (*ubi sup.*); *Wilding v. Bean* (*ubi sup.*). I therefore agree that the writ in this form was regularly issued against the firm, and would entitle the plaintiff to obtain judgment against the firm if it were properly served. The substituted service on Pauling, however, was irregular, and must be set aside. The plaintiff can still serve Pauling with

this writ if he comes within the jurisdiction while the action is pending.

Appeal allowed as to service of the writ.

Solicitors for the appellant, *Slaughter May*.

Solicitors for the respondent, *Field, Hoare and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Feb. 23.

(Before ROMER, J.)

THE LOCAL BOARD FOR THE DISTRICT OF MINEHEAD v. LUTTRELL. (a)

Local government—Sewers made by landowner for his own profit—Voluntary sewer rate—Public Health Act 1875 (38 & 39 Vict. c. 55), sub-sect. (1), s. 14.

A landowner, intending to compensate himself for his outlay, constructed sewers at his own expense for the purpose of draining a town, of which he was the principal owner. He, in fact, demanded and received for many years a voluntary sewer rate from those who made use of his sewers, whether his own tenants or not.

Held, that the sewers were made by the landowner "for his own profit," within the meaning of sect. 13, sub-sect. (1) of the Public Health Act 1875, and did not therefore vest in the local board for the district.

THE plaintiffs were the urban sanitary authority for the district of Minehead, in the county of Somerset, and were so constituted in 1891. Prior to that date the town of Minehead was under the control of the Williton Rural Sanitary Authority, and had no proper system of drainage. The defendant, George Fownes Luttrell, of Dunster Castle, was lord of the manor of Minehead, and owner of a large portion of the town, and of the land in the parish. In 1878 the defendant constructed, at his own expense, and with the sanction of the local authority (where necessary), a system of sewerage for effectually draining the town of Minehead, and subsequently extended it to new streets as they were made. The great number of the houses in the town were connected therewith. As to four-fifths of their length the sewers were constructed through, across, or under roads or streets which were public highways. The defendant also constructed flushing tanks on his own land for periodically flushing the sewers, and expended in the aggregate a sum of about 5000*l.* In respect of this outlay he annually received from the grantees, lessees, and tenants, occupying houses drained thereby, a voluntary sewerage rate varying in amount from year to year. When the sewers were constructed some of the houses in Minehead were in possession of the defendant, some in fee simple; some were in the occupation of tenants under building leases for long terms; some were in the occupation of tenants from year to year at rack rents; and some were held by divers grantees in fee simple, subject to perpetual rentcharges.

A part of the town, called "The Park," belonged to Sir Thomas Dyke Acland, and there was

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

the sewers so situated upon said land. Then, *Bonella v. Twickenham Local Board of Health* was again a case where certain owners of land laid it out for building and made a street, and as part of their building operations they made a sewer to drain the houses in the street. It was held, and no doubt rightly held, that that was not a case where the owners could be said to have put in these sewers simply for the purpose of profit within the section. So again, the case of *Ferrand v. The Hallas Land Building Company* was a case where a landowner put in sewers for the sole purpose of draining the houses erected by him on his own land. None of those cases at all touch, as it appears to me, the case before me, or the facts upon which I have to decide this case. The case here is not a case where the landowner has merely put in sewers for the purpose of draining his own houses, and merely looking to be compensated for his expenses in the advantage that would accrue to his houses by their having a proper system of drainage. That is not the case here. This is a case where the defendant has laid out money for the purpose of making sewers, intending to be compensated and paid directly for his expenditure upon the sewers by receiving payment from every person, whether his tenants or not, who avail themselves of the benefit of his sewers, and where he intended to receive, and did receive, payment direct to himself for the benefit of his sewers by the persons using them. The facts are, that the defendant erected these sewers under these circumstances: In 1878 Minehead was not well drained. Now, the defendant, Mr. Luttrell, was owner of a great part of Minehead, but he was not the owner of the whole of it, or of the whole of the part of Minehead that he provided sewers to drain. As to several parts of Minehead he, or his prede-

Q.B. Div.]

Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY LIMITED.

[Q.B. Div.]

cessors in title, had granted long leases; and, as to other portions of Minehead, he, or his predecessors in title, had parted with the fee simple of them; and his only interest in them was receiving a rentcharge. Several portions of Minehead might be in some sense said to belong to him, but not in the sense of receiving a rack rent; and other portions of Minehead in no sense could be said to belong to him. In this state of facts what the defendant did was this: He speculated in the erection of sewers, not only for those portions of Minehead which belonged to him, but for some parts which did not. He speculated, as it were, in making these sewers with the intention that he should be remunerated, simply having regard to the amount he expended upon them. It appears to me that this was undoubtedly a case where the defendant erected the sewers for profit within the meaning of sect. 13, sub-sect. 1. The action fails, and must be dismissed with costs.

Solicitor for the plaintiffs, *Edgar Bogue*, for *R. Hole*, Minehead.

Solicitors for the defendants, *Rowcliffe and Co.*, for *Ponsford, Joyce*, and *Davis*, Bardon, near Taunton.

QUEEN'S BENCH DIVISION.

Wednesday, Feb. 28.

(Before MATHEW and CAVE, JJ.)

Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY LIMITED. (a)

Industrial and provident society — Winding-up — County Court — Jurisdiction — Industrial and Provident Societies Acts 1876 and 1893 (39 & 40 Vict. c. 45, s. 17; 56 & 57 Vict. c. 39, ss. 58, 59) — Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), ss. 1, 10 — County Court Rules 1892 Order XLI., r. 9.

The Industrial and Provident Societies Act 1876 (39 & 40 Vict. c. 45) enacts, by sect. 17, that a society may be dissolved by an order to wind-up the society made as directed in regard to companies by the Companies Act 1862, and that the court having jurisdiction in the winding-up shall be the County Court.

By the Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63) it is provided, by sect. 1, that the County Courts shall have jurisdiction to wind-up companies, and by sect. 10 that where in the course of the winding-up of a company under the Companies Acts it appears that any officer of the company has misapplied any moneys of the company, the court may examine into the conduct of such officer and compel him to repay any moneys so misapplied.

By Order XLI., r. 9, of the County Court Rules 1892, the provisions of the Companies Acts 1862 to 1890, so far as they relate to winding-up, are applied to the winding-up of societies registered under the Industrial and Provident Societies Act 1876.

The Industrial and Provident Societies Act 1893 (56 & 57 Vict. c. 39) repeals the Industrial and Provident Societies Act 1876, and provides by sect. 58 that a society may be dissolved by an order to wind-up the society made as is directed in regard to companies by the Companies Acts 1862 to 1890, and by sect. 59 that any proceedings

in the winding-up of a registered society, at the passing of this Act are pending in the County Court, may, on the application of the registrar, be transferred to the High Court. Held, that the County Court judge had jurisdiction to order the examination of an officer of an industrial and provident society, the winding-up of which society was pending in the County Court at the time when the Industrial and Provident Societies Act 1893 came into force.

THIS was an appeal from the decision of Mr. Justice Ham. J. at chambers refusing to grant a writ of prohibition to be addressed to the judge of the County Court of Glamorganshire.

In Aug. 1893 a petition was presented to the County Court for winding-up the Ferndal Industrial Co-operative Society Limited under the provisions of the Industrial and Provident Societies Act 1876, and a winding-up order was made.

In October 1893 an application was made to the judge of the County Court on behalf of the liquidators of the society, for an order directing E. J. Thomas, lately manager of the society, and E. Davies, secretary and an officer of the society, had each and both misapplied moneys retained in their own hands, and become trustees and accountable for certain moneys of the society, and that they, and each of them, had been guilty of misfeasance and breach of trust in relation to the society, whereby the society had suffered loss, and that the court might examine into the conduct as such manager and secretary, and make an order directing them to repay any moneys proved to have been misapplied.

The hearing of this application was adjourned until the month of Jan. 1894, when the judge made the order applied for, and on the 3rd inst. began the examination of the said E. J. Thomas and E. Davies.

On behalf of the said E. J. Thomas and E. Davies, it was objected that the judge had no jurisdiction to make the above order, and that an application was made at chambers for a writ of prohibition. That application having been refused the present appeal was brought.

The Industrial and Provident Societies Act 1876 (39 & 40 Vict. c. 45) enacts:

Sect. 17. With respect to the dissolution of registered societies, the following provisions shall have effect: (1) A society may be dissolved by an order to wind-up the society, or a resolution for the winding-up thereof made as is directed in regard to companies by the Companies Acts 1862, the provisions whereof shall apply to any such order or resolution, except that the court having jurisdiction in the winding-up shall be the County Court.

The Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63) provides:

Sect. 1. (1.) The courts having jurisdiction to wind-up companies in England and Wales shall be the County Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, the County Courts, the Stannaries Court. (2.) Where the amount of the debt of a company paid up, or credited as paid up, does not exceed ten thousand pounds, a petition to wind-up the company, or to continue the winding-up of the company, may be presented to the court, shall be presented to the High Court, or in the case of a company situated in Wales, to the High Court or to the palatine court having jurisdiction. (3.) Where the amount of the capital

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. DIV.]

Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY LIMITED.

[Q.B. DIV.]

company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction under this Act, a petition to wind-up the company or to continue the winding-up of the company under the supervision of the court, shall be presented to that County Court.

Sect. 10. (1.) Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys, or restore any property, so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

The County Court Rules 1892 provide, by Order XLI., r. 9:

The provisions of the Companies Acts 1862 to 1890 and the rules made thereunder, so far as they relate to winding-up, shall apply to the winding-up of societies registered under the Building Societies Acts 1874, and the Industrial and Provident Societies Act 1876; and the winding-up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said Acts.

The Industrial and Provident Societies Act 1893 (56 & 57 Vict. c. 39) repeals the Industrial and Provident Societies Act 1876, and enacts:

Sect. 2. This Act shall come into operation on the first day of January next after the passing thereof.

Sect. 58. A registered society may be dissolved: (a) By an order to wind-up the society, or a resolution for the winding-up thereof, made as is directed in regard to companies by the Companies Acts 1862 to 1890, the provisions whereof shall apply to any such order or resolution, except that the term "registrar" shall for the purpose of such winding-up have the meaning given to it by this Act.

Sect. 59. Any proceedings in the winding-up of a registered society, which at the passing of this Act are pending in any County Court, may, on application made by or on behalf of the registrar, with the consent of the Treasury, be transferred to the High Court, and thereupon the Companies (Winding-up) Act 1890 shall, so far as applicable, apply thereto accordingly.

David for the appellants.—The County Court judge had no jurisdiction to make the order for the examination of the appellants under the provisions of the Companies (Winding-up) Act 1890 (53 & 54 Vict.), s. 10. This society was registered under the Industrial and Provident Societies Act 1876, and therefore cannot be wound-up under the Companies (Winding-up) Act 1890:

Re London and Suburban Bank, 66 L. T. Rep. N. S. 716; (1892) 1 Ch. 604.

That decision has since been followed in

Re Real Estates Company, 68 L. T. Rep. N. S. 24; (1893) 1 Ch. 604.

The petition for winding-up the society was presented before the Industrial and Provident

Societies Act 1876 was repealed, and therefore the County Court had jurisdiction to entertain the petition. But that Act is now gone, and the County Court has only the jurisdiction conferred upon it by the Act of 1893. Under that latter Act the proceedings should be transferred to the High Court, and there by sect. 59 the Companies (Winding-up) Act 1890 would apply. It is further submitted, that it appears from the books of the society that the capital of the society exceeded £10,000, and therefore by sect. 1 sub-sect. 2 of the Companies (Winding-up) Act 1890 the petition should have been presented to the High Court. It is also contended that the appellants were not managers or officers, but only clerks in the employment of the society.

Benson for the liquidator.—Whatever the amount of the capital of the society was, it is submitted that the County Court had jurisdiction. In Aug. 1893, when the petition for winding-up the society was presented, the Act of 1876 was in force, and, by sect. 17 of that Act, the Companies Act 1862 (25 & 26 Vict. c. 89) was applicable to the proceedings, and the examination of the appellants can take place under sect. 165 of that Act. By the County Court Rules 1892, Order XLI., r. 9, the provisions of the Companies Acts 1862 to 1890 and the rules made thereunder, so far as they relate to winding-up, apply to the winding-up of societies registered under the Act of 1876. *Re London and Suburban Bank* 66 L. T. Rep. N. S. 716; (1892) 1 Ch. 604 only decides that a petition for winding-up a society cannot be presented to the High Court. The County Court under the Acts and County Court Rules, clearly has the same jurisdiction in winding-up these societies as it has in the case of building societies:

Re Portsea Island Building Society, 69 L. T. Rep. N. S. 138; (1893) 3 Ch. 205.

The Act of 1893 does not take away the jurisdiction of the County Courts, but merely provides for the transfer of the winding-up proceedings to the High Court in special cases.

MATHEW, J.—We are of opinion that this appeal must be dismissed. It is quite clear that the proceedings that have been instituted were properly instituted under the Act of 1876, because the recent statute, according to the decision of North, J. in *Re London and Suburban Bank* (66 L. T. Rep. N. S. 716; (1892) 1 Ch. 604), does not apply. The proceedings having been instituted under the Act of 1876, the effect of that Act, according to the decisions on the subject, was to substitute the County Court for the Superior Court. And every statute subsequently passed relating to the winding-up applies to winding-up in County Courts as well as in the Superior Court. The County Court rule passed in 1892 recognised that, for it applied in terms the Winding-up Acts to societies of this kind, as well as to other societies that had not been previously provided for. And the decision of Williams, J. in *Re Portsea Island Building Society* (69 L. T. Rep. N. S. 138; (1893) 3 Ch. 205) recognises that, and adopts the same principle. It is perfectly clear that the provisions of sect 10 of the Act of 1890 as to winding-up apply to winding-up in County Courts, and the question about capital therefore does not arise. That disposes of the points mainly argued in this case, and that disposes of every difficulty raised, except that raised by sect. 59 of the Act of 1893.

Q.B. Div.]

ROSCOE v. BODEN.

[Q.B. Div.]

It is said that that section provides for every winding-up pending in County Courts; in other words, that it takes away the jurisdiction of County Courts in such cases; and that it takes away the power given by sect. 58. I cannot agree with that construction. The power of winding-up is given by sect. 58, which is of general application; and sect. 59 is permissive only, and applies to the winding-up of all societies without reference to capital. But sect. 59 provides that, if application is made by the registrar, and if the consent of the Treasury be obtained—if those two things are done, the winding-up may be transferred to the High Court. It is clear, therefore, that the appeal must be dismissed.

CAVE, J.—I am of the same opinion. At first I had some little difficulty in following the course of legislation, but, when at last I succeeded in understanding the case as represented, it does not seem to me that there are any real difficulties in the way. It is quite clear that by the Act of 1876 industrial and provident societies may be wound-up under sect. 17, which provides that such a "society may be dissolved by an order to wind-up the society, or a resolution for the winding-up thereof, made as is directed in regard to companies by the Companies Act 1862, the provisions whereof shall apply to any such order or resolution, except that the court having jurisdiction in the winding-up shall be the County Court." Now, that being so, it is clear that after the passing of that statute these societies could be wound-up in the County Court, and in the County Court only. The provisions of the Companies Acts then existing were applied to the practice in the County Court, but the tribunal was to be the County Court. Then came the Act of 1890, and Mr. David alleges that that made a difference. I think the answer to that is given by Williams, J. in *Re Portsea Island Building Society* (69 L. T. Rep. N. S. 138; (1893) 3 Ch. 205), and in the comments which he makes on the case of *Andrews v. Swansea Cambrian Building Society* (44 L. T. Rep. N. S. 106), decided by Denman, J. and Lindley, J., whose name, of course, is a name of weight on all questions relating to companies. There it was decided that sect. 32 of the Building Societies Act 1874 (37 & 38 Vict. c. 42)—an Act which is practically the same for the purposes of this question as the Industrial and Provident Societies Act 1876—substitutes the County Court for the Court of Chancery, and it did in effect, though not expressly, put building societies under the Acts of 1862 and 1867 by virtue of a clause in the Act relating to industrial companies, although the Companies Acts of 1862 and 1867 were not expressly incorporated in the Building Societies Act. If that is true with reference to the Building Societies Act, it is equally true with regard to the Industrial Societies Act; that is to say, the Act of 1876 still applied to the extent that it gave jurisdiction to the County Court exclusively. And so North, J. held in the case that has been referred to. But then the jurisdiction being retained in the County Court, it was to be exercised in accordance with the practice under the Companies Act. That being so, sect. 10 of the Act of 1890 comes in, and the County Court judge was bound, or at liberty, according to circumstances, to apply the practice there laid down in winding-up an industrial society. Where

the application was compulsory he was bound to apply the practice; where the application was discretionary he had the discretion the Court of Chancery would have had in applying it. Although the practice of the court was altered by the Act of 1890, yet the tribunal was not altered, and it remained the County Court and the County Court only. Then came the Act of 1893, and that Act makes certain provisions which it is not necessary to go into for the purposes of this case. Sect. 59, which is the only one we need discuss, provides: "Any proceedings in the winding-up of a registered society which at the passing of the Act are pending in the County Court may, on application made by or on behalf of the registrar, with the consent of the Treasury, be transferred to the High Court." Now this undoubtedly is a winding-up of a registered society which at the passing of the Act of 1893 was pending in the County Court, and, no doubt, under sect. 59 it might be transferred. But it can only be transferred on application made by or on behalf of the registrar with the consent of the Treasury. So far as the section itself operating as an actual transfer, it requires those conditions precedent which the transfer cannot be made. And if such conditions have been fulfilled, and no objection of transfer has been made, and consequently the case remains properly in the County Court. The case remaining properly in the County Court, the County Court judge has jurisdiction to make an order with regard to anything he does in the course of winding-up, the usual application to set him aside must be made in the ordinary way. It is a question that goes to his jurisdiction. He has jurisdiction, and he alone, to wind-up the society so long as no order is made under sect. 59. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W. H. Martini & Co., for G. David and Evans*, Cardiff.

Solicitors for the liquidator, *Bell, Brodric & Gray*, for *Simons and Sons*, Pontypridd.

Feb. 23 and 26.

(Before MATHEW and CAVE, JJ.)

ROSCOE v. BODEN. (a)

Trespass—Damage feasant—Impounding—Application of remedy—Right to recover damages.

A pony belonging to the defendant having gone into the plaintiff's field and kicked a horse belonging to him, the plaintiff seized the pony and refused to give it back to the defendant unless he paid the injury inflicted on the plaintiff's horse. The defendant having refused to pay the damages demanded, the plaintiff detained the pony and sued him for the injury caused by the defendant's pony galloping over his field, for the damage caused to his horse, for veterinary expenses incurred, and for the keep of the pony. Held, that the plaintiff, having elected to seize and impound the defendant's pony, could not recover damages for the injury caused either to his horse or to his horse.

THIS was an appeal from the decision of the judge of the County Court of Cheshire holding for the defendant at Chester.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

. Div.]

ROSCOE v. BODEN.

[Q.B. Div.]

action was brought by the plaintiff against defendant, for "damage done to the plaintiff's by the defendant's pony trespassing and being over the same, 1s.; damage to the plaintiff by the defendant's pony while damage at, 25l.; veterinary expenses, 3l. 3s.; keep of defendant's pony from the 26th Aug. to the 1st Nov. at 2s. a day, 8l."

appeared, from the evidence given at the trial of the action, that the plaintiff and the defendant were the occupiers of adjoining lands, and that on the 26th Aug. a pony of the defendant got into a field in the occupation of the plaintiff, and while in the field kicked a filly belonging to the plaintiff. A filly in the employment of the plaintiff injured the pony in the act, and the plaintiff offered to give the pony back to the defendant, but the defendant refused to pay the amount so offered by the plaintiff, who kept possession of the pony until this action first came before the County Court, when it was agreed that the pony should be returned to the defendant, and the County Court judge should decide how much ought to be paid for its keep while it was in possession of the plaintiff.

The learned County Court judge held that the plaintiff was entitled to recover damages for the injury inflicted upon his filly by the defendant's pony, and the amount of the veterinary expenses, but that he was not entitled to recover any damages for the alleged injury to the grass in his field. And he assessed the amount to be paid for the keep of the pony at 5l. 18s. On this decision the defendant appealed.

Macmorran for the appellant.—It is submitted that the plaintiff was not entitled to recover any damages for the injury to his filly. He seized the defendant's pony damage feasant, and refused to return it back to the defendant. He elected to keep upon the pony for the damage he had done, and he could not bring his action as well as keep as he retained possession of the pony. In the case of cattle taken damage feasant, impounded, and detained as a distress, the law clearly establish that no action of trespass is maintainable, so long as the distress is detained or not accounted for," per Cleasby. B.: *Chaine v. Philpott*, 33 L. T. Rep. N. S. 98; L. Rep. 10 Ex. 242.

Kingwood Hope for the respondent.—The defendant seized the pony to prevent further damage being caused to his filly. If the appellant required to pay an excessive amount for the keep of his pony, such sum might have been recovered by him:

Green v. Duckett, 48 L. T. Rep. N. S. 677; 11 Q. B. Div. 275.

An animal can only be seized damage feasant for trespass done by it to the freehold:

Former v. Biggs, 2 Car. & Kir. 31.

E. J. referred to Rolle Abr. p. 664, where the case of a greyhound chasing conies in a warren was cited. [The pony in this case might have been sold under the provisions of 17 & 18 Vict. c. 31, but the respondent could only have recovered the cost of its keep.]

Macmorran in reply.—If an animal is taken damage feasant, as long as it is detained it is a trespass to an action for trespass:

Asper v. Edwards, 12 Mod. 658.

MATHEW, J.—I am of opinion that this appeal must be allowed, and that, as matters stood at the time when the learned judge pronounced his decision, the action could not be maintained. We have been desirous of finding recent authority upon the subject, and we have had the assistance of a very close investigation by the learned counsel for the plaintiff, and also of a search by the learned counsel for the defendant, but they have failed to carry us further down than the point at which we were disposed to start on the day when this case was heard last—the time at which Rolle produced his famous work. That work, as it stands, appears to afford abundant authority for the proposition for which Mr. Macmorran has contended. It is laid down in Rolle's Abr. (1668) p. 664, tit. "Distress (A) Damage feasant": "Unleverer poet estre prise d'ammage feasant current apres les conyes en un garren. Issint home poet prendre un ferret que un auter ad port en son garren et ad prist conies ove ceo." Now, in this case the pony of the defendant had escaped, from the defect of the defendant's fence, on to the plaintiff's land and had there kicked a filly of the plaintiff and injured it, and was taken possession of there and then damage feasant. Subsequently, the animal still remaining in the possession of the plaintiff, this action was brought for the damage done to the filly. The learned judge gave judgment for the plaintiff for the amount of damage which was proved to have been done to the plaintiff's animal. The objection was taken by the defendant that the plaintiff, having elected to arrest the animal damage feasant, was disentitled, *rebus sic stantibus*, to bring an action for trespass, and for that proposition the case referred to on the last occasion was cited, that a person upon whose land an animal trespasses damage feasant has his choice of sending the animal back and bringing an action for damages, or of taking the law into his own hands and distraining; but while he holds the animal distrained as a pledge, he is disentitled to bring an action. On these grounds I think the appeal must be allowed, and judgment entered for the defendant.

CAVE, J.—I am of the same opinion. I certainly am not surprised that the learned judge came to a conclusion in favour of the plaintiff, because undoubtedly it has given us a considerable amount of trouble to trace this law to its source, and to see exactly how much it does cover. But when we get back to Comyn's Digest, and from there go back to Rolle, it seems to be distinctly laid down that you may distrain damage feasant anything animate or inanimate which is on the land of the distraining party and is doing damage there. Not only may you distrain a greyhound running after conies in a warren, but also a ferret which a man has taken into a warren and has taken conies with. So, too, you may take a net; that, however, being subject to the general rule that you may not take either an animate or inanimate thing out of the actual manual possession of the man who is using it. You may not distrain a horse upon which a person is riding and trampling down your corn, and you may not take out of his hands a net which he has actually brought there for the purpose of taking your rabbits. But, when once you get from that difficulty—if the man is not there in actual possession of the chattel—there is no reason at all why it may not be taken, provided it is on the land of the dis-

Q.B. Div.]

SOMERSET (app.) v. WADE (resp.).

[Q.B. D.]

trainer and is doing damage of any kind there. That being so, it follows that the plaintiff, having elected to take the remedy in his own hands by distraining, cannot, at all events so long as the distress remains subject to making good the damage, bring an action to recover the damage otherwise. That being so, therefore, there is an end of this action, and judgment must be entered for the defendant.

Appeal allowed.

Solicitor for the appellant, *Cartwright*, Chester.
Solicitors for the respondent, *Austin and Austin*,
for *F. B. Mason*, Chester.

Friday, Feb. 16.

(Before *MATHEW* and *COLLINS*, JJ.)

SOMERSET (app.) v. WADE (resp.). (a)

Licensing—"Permitting drunkenness" to take place on licensed premises—Ignorance of licensee—*Licensing Act 1872* (35 & 36 Vict. c. 94), s. 13.

Sect. 13 of the Licensing Act 1872 provides that, if any person permits any drunkenness on his premises or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty.

The respondent, a licensed person, was charged under the above section with permitting drunkenness upon his licensed premises. The evidence before the justices satisfied them that the respondent did not know that the person found drunk on his premises was drunk.

Held, that the justices were justified in dismissing the information.

Somerset (app.) v. Hart (resp.) (12 Q. B. Div. 360) approved and followed.

Bond (app.) v. Evans (resp.) (59 L. T. Rep. N. S. 411; 57 L. J. 105, M.C.; 21 Q. B. Div. 249) explained.

THIS was a case stated by the justices of Chelmsford in the county of Essex.

The material facts as stated were as follows:—

The appellant, a police inspector, had laid an information against the respondent, the landlord of certain licensed premises in Chelmsford, for "permitting drunkenness" on the premises, contrary to the provisions of sect. 13 of the *Licensing Act 1872*.

The evidence showed that a police constable found a woman, R. L., drinking beer on the respondent's premises, with which she had been served by him or his barman. The constable had previously ordered the same R. L. out of some other licensed premises on the ground that she was drunk, and after some conversation with her he ordered her off the respondent's premises. In the constable's opinion she was then drunk. The respondent gave evidence that there was nothing in R. L.'s appearance to show that she was drunk, and that he was quite unaware at the time that she was in that condition.

The constable's evidence did not contradict the respondent's evidence as to the appearance of the woman.

The justices believed the constable's statement that the woman was in fact drunk, but they also believed the respondent's evidence that he was absolutely ignorant of the fact when he served R. L. with drink, and they dismissed the informa-

tion on that ground, but stated a case for the request of the appellant.

Sect. 13 of the *Licensing Act 1872* (35 & 36 Vict. c. 94) enacts as follows:

If any licensed person permits drunkenness violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable, &c.

Sect. 14 enacts as follows:

If any licensed person knowingly permits his premises to be the habitual resort of or place of meeting of prostitutes . . . he shall, if allowing them to remain longer than is necessary for reasonable refreshment, be liable, &c.

Sect. 16 enacts as follows:

If any licensed person knowingly harbours, or knowingly suffers to remain on his premises any constable bound by duty, he shall be liable, &c.

Sect. 17 enacts as follows:

If any licensed person suffers any gambling unlawful game to be carried on, on his premises, he shall be liable, &c.

C. E. Jones on behalf of the appellant stated that the word "knowingly" is properly omitted before the word "permits" from sect. 13 of the *Licensing Act 1872* (35 & 36 Vict. c. 94), whereas in sect. 16 and sect. 17 of the same Act it has been inserted. In sect. 17 of the Act, "suffers any gambling to be carried on upon the premises, is an offence without proof of any knowledge by the licensee or his agent. The decision in the case of *Somerset (app.) v. Hart (resp.)* (12 Q. B. Div. 360) which might govern the present case, is approved of in the case of *Bond (app.) v. Evans (resp.)* (59 L. T. Rep. N. S. 411; 57 L. J. 105, M.C.; 21 Q. B. Div. 249). "Knowledge" is not an essential to this offence under sect. 13, and is also cited

Cundy (app.) v. Lecocq (resp.), 51 L. T. Rep. N. S. 265; 53 L. J. 125, M. C.; 13 Q. B. Div. 249.

Reg. v. Bishop, 42 L. T. Rep. N. S. 240; 5 Q. B. Div. 259; 49 L. J. 45, M. C.

No one appeared on behalf of the respondent.

MATHEW, J.—In the case of *Somerset (app.) v. Hart (resp.)* (*ubi sup.*) the court held that the absence of knowledge, connivance, or connexions on the part of the landlord of a licensed house or his agent, upon an information laid against such landlord for "suffering gaming" to be carried on on his licensed premises, was a good ground of defence, which magistrates might dismiss such an information. "Suffering" is not to my mind distinguishable from "permitting." He does not permit drunkenness if he does not know of its existence, or connives at it, or wilfully shuts his eyes to it. The magistrates here find no evidence before them that the respondent "permits drunkenness." I see no ground for saying that there was no evidence to support a finding. As to the wording of sect. 13, it enacts that, if a publican "knowingly permits his premises to be the resort of prostitutes, he shall be guilty of an offence, the distinction there inserted for an obvious reason. He must be shown to know the application of that term to the persons there resorting; otherwise there would be no offence in serving the women with beer, and permitting their presence on the premises. I think this appeal must be dismissed on the ground that there was evidence justifying the magistrates in dismissing the information, and I make

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

I should probably have come to a similar conclusion on the evidence as stated to us.

LINDLEY, J.—I am of the same opinion. The facts of the earlier part of the section would, without the decision of *Somerset v. Hart* (sup.), imply that, without knowledge, or connivance, or privity between the landlord and tenant, who might have known of the offence committed, there could be no "permitting." It were otherwise the appellant's counsel must show that, even if in the temporary absence of the landlord a quarrel took place in a back-house, the fact of such a quarrel having occurred would be sufficient to secure a conviction for "permitting quarrelsome or riotous conduct to take place on the premises." That must be so. In *Somerset v. Hart* (ubi sup.) Coleridge says that "suffering" without "knowing" is impossible. It is said that this was questioned in *Bond v. Evans*. It is obvious that, in this latter case, *Somerset v. Hart* was not questioned on the point whether "suffering" would be possible without knowledge on the part of the landlord, but it was pointed out that, in *Somerset v. Hart*, there was something peculiar in the circumstances in that the servant there was not in charge of the premises, and there had been no delegation of authority by the landlord. So understood *Bond v. Evans* is not in conflict with the decision in *Somerset v. Hart* at all. The court in *Bond v. Evans* simply say that, given no delegation of authority to the person who commits or assists in the commission of the offences, they agree that there can be no "suffering" such an offence to be committed without "knowing" of its commission, and therefore it is equally an authority in *Somerset v. Hart* that a person cannot "suffer" or "suffer" the commission of any offence licensing offences in sect. 13 without "knowing" of their commission. In *Cundy v. Mizeley* (ubi sup.), which turned on the last part of sect. 13, the offence of "selling" or "supplying" liquors to a drunken person was held to be complete because of the express words in the section defining the offence. But "permitting" in the other sections must imply "knowingly permitting." In the two other sections dealing with "permitting the premises to be the resort of prostitutes," or of "harbouring police constables on duty," the appellant would have to show that, without the word "knowingly," as inserted, the offence might be committed without knowing the character of the woman, or the fact of the man being a constable. That would clearly involve great hardship, and therefore "knowingly" is inserted, as applicable to the character of the persons designated, and not extending the sense of "permitting" or "suffering."

Appeal dismissed. Judgment for the respondent.

Solicitor for the appellant, William Tanner.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 19 and 20, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

TYRELL v. PAINTON. (a)

APPEAL FROM THE PROBATE DIVISION.

Probate—Will—Circumstances exciting suspicion of the court—Onus on beneficiary propounding the will—Proof of fraud or undue influence.

The rule laid down in *Barry v. Butlin* (2 Moo. P. C. 480, 482), *Fulton v. Andrew* (32 L. T. Rep. N. S. 209; L. Rep. 7 E. & I. App. 448, 460), and *Brown v. Fisher* (63 L. T. Rep. N. S. 465), that those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction, does not merely apply to cases where a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases in which circumstances exist that excite the suspicion of the court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion or doubt, and to prove affirmatively that the testator knew and approved of the contents of the document. It is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely upon, to displace the case made for proving the will.

By an indenture, dated the 23rd May 1874, being a settlement made on the marriage then intended, and shortly afterwards solemnised, between George Bye and Rebecca Hatton, a freehold cottage and premises and a life interest in certain personalty were assured to the Rev. George Purdue and John Painton upon trust to hold the same (*inter alia*) in case there should not be any child of the marriage who, under the trusts thereinbefore declared, should attain a vested interest in the trust premises, upon trust for such person or persons as Rebecca Hatton, whether covert or sole, by deed or will, should appoint.

George Bye died in 1880.

There were no children of the marriage.

In 1880 and 1884 Mrs. Bye caused her solicitor to prepare wills, whereby she disposed of her property in favour of Painton and his children.

In 1888, Purdue having died, Painton became sole trustee of the marriage settlement.

Until that time Mrs. Bye had had complete confidence in Painton, but she then became dissatisfied with him, and ceased to regard him with favour. She complained of his conduct as trustee, and she took steps to have someone appointed trustee with him, and proposed her cousin, Edward Brooks Tyrrell.

On the 17th Oct. 1892 Mrs. Bye, being then in a bad state of health, instructed her solicitor as to making a new will in Tyrrell's favour. Before anything further was done towards making this proposed will, a doctor was consulted as to her mental capacity, and he declared himself satisfied that she was fit to make a will.

Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

TYRRELL v. PAINTON.

[CT. OF A.]

Mrs. Bye became worse, and she being very anxious to make the new will, and the matter appearing to weigh on her mind, steps were taken by her friends to enable her to carry out her wishes; and on the 7th Nov. 1892 a new will, in favour of Tyrrell, was prepared at her house by her solicitor upon her instructions, and was executed by Mrs. Bye in the presence of her solicitor, the vicar of the parish, and the doctor. This will gave the cottage and the residue of her personal property to Tyrrell, whom she appointed executor, subject to a life interest in one part of the cottage (it being then divided into and occupied as two tenements), in favour of one Mitchell; it gave her household goods to Mitchell absolutely. It was manifest to all three witnesses that Mrs. Bye clearly understood the provisions of the will, and that she was, as she expressed herself, completely satisfied with what she had done.

Two days later, namely, on the 9th Nov. 1892, Mrs. Bye executed another will, which was attested by Thomas Painton, a son of John Painton, and Peter Rowland.

This will was in the handwriting of Thomas Painton, and had been prepared by him upon verbal instructions from Mrs. Bye, and written in pencil by him on the 8th Nov. 1892, and subsequently in ink on the following day. It was in favour of John Painton, giving him the cottage and the household furniture absolutely, subject to a life interest in part of the cottage in favour of Mitchell, and it appointed Joseph Painton, another son of John Painton, sole executor. The evidence of all the circumstances attending this will was such as to justify suspicion and to leave it doubtful whether the testatrix understood what the effect of it would be if it were admitted to probate.

Mrs. Bye died on the 22rd Nov. 1892.

On the 1st Feb. 1893 Tyrrell commenced this action against Joseph Painton and John Painton, claiming to be the sole executor of the will dated the 7th Nov. 1892, and to have that will established.

The defendants alleged in their defence that the true last will of the deceased was the one which was dated the 9th Nov. 1892, and they counter-claimed that the court should pronounce against the will bearing date the 7th Nov. 1892, and decree probate of that bearing date the 9th Nov. 1892.

The plaintiff in reply alleged that the will of the 9th Nov. 1892 was obtained by the undue influence and by the fraud of the defendants and Thomas Painton; that the deceased never gave instructions for it; and that the contents thereof were never brought to her knowledge.

At the trial of the action on the 25th Nov. 1893 Sir Francis Jeune, having heard the evidence, considered that there was no fraud established by the plaintiff, and pronounced in favour of the will of the 9th Nov. 1892.

From that decision the plaintiff now appealed.

Wheeler, Q.C. and W. H. Roberts for the appellant.—The court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, although the will may have been prepared by a solicitor, and although fraud is not pleaded by the person opposing the will, and where there was

no testamentary capacity on the part of the testator or the witnesses:

Brown v. Fisher, 63 L. T. Rep. N. S. 465.

Those who take a benefit under a will and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction. There is a fixed and unyielding rule of law that, when it has been proved that a testator, competent in mind, had a will read over to him, and has then executed it, all further inquiry is shut out:

Fulton v. Andreu, 32 L. T. Rep. N. S. 209; 7 E. & I. App. 448, 460.

The *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. If a party writes or prepares a will in which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and judicious in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased:

Barry v. Butlin, 2 Moo. P. C. 480, 482.

If circumstances exist which excite the suspicion of the court, they must be removed by the party propounding the will before those opposing it can prove fraud or undue influence.

Bargrave Deane, for the respondents, contra.

LINDLEY, L.J.—It is extremely difficult to review a case in which the judge whose decision is appealed from has seen the witnesses himself, and is much better able, therefore, than we are to judge of the evidence. Still, I do not believe on the grounds which I will presently state that the decision he has come to is wrong. Lordship then discussed the facts of the case, and observed that, as to the will of the 7th Nov. 1892, he could not see any reason for throwing suspicion upon it, but that he could not see any reason as to the will of the 9th Nov. 1892. [Lordship proceeded:] But Jeune, J., in arriving at the conclusion he did, did not address himself to a rule which is perfectly well established and applicable to cases of this sort, namely, that wherever circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will to which the suspicion arises to remove the suspicion or doubt, and to prove affirmatively that the testator knew and approved of the contents of the document. It is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or, if they ever else they rely upon to displace the case for proving the will. I will refer to a passage in *Barry v. Butlin* (2 Moo. P. C. 480). There, at 482 Parke, B., says that the rules of law applicable to such cases of this nature are to be divided into two, which he proceeds to state as follows:—"The first is, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which

CT. OF APP.]

BUNTING v. HICKS.

[CT. OF APP.]

generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." Similar expressions of opinion are to be found in *Fulton v. Andrew* (32 L. T. Rep. N. S. 209; L. Rep. 7 E. & I. App. 448), where Lord Hatherley says that "there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will, and they have thrown upon them the onus of showing the righteousness of the transaction;" and also in *Brown v. Fisher* (63 L. T. Rep. N. S. 465). The rule laid down in those cases is not confined to the single case in which a will is prepared by or on the instructions of the person taking a benefit under it, but extends to all cases where, as I have said, there are circumstances which arouse the suspicion of the court. In my opinion, therefore, the judge misdirected himself; he directed himself to the question of fraud, forgetting the well-established rule to which I have referred. I think the appeal must be allowed.

SMITH, L.J.—I am of the same opinion. If I thought that the judge had directed himself rightly, I should certainly not be disposed to interfere with his decision. There is, to my mind, in this case such "a strong presumption," to use the language of Lord Hannen in *Brown v. Fisher* (63 L. T. Rep. N. S. 465), "against the correctness" of the defendants' statements "from all the circumstances of the case," as to the will of the 9th Nov. 1892, that I cannot accept them. The law applicable to these cases, as laid down in *Barry v. Butlin* (2 Moo. P. C. 480), has been acted upon over and over again. Before we need come to consider the question of fraud alleged by the plaintiff, there is that other onus which is thrown upon the defendants by the suspiciousness of the case to be disposed of. That onus has not, in my opinion, been satisfied, and I think, therefore, the appeal should be allowed.

DAVEY, L.J.—I entirely agree, and should not wish to say anything were it not that we are differing from the learned judge in the court below. The principle of law laid down in the cases which my brothers have referred to does not apply, as Lindley, L.J. has said, merely where the person who has been concerned in the preparing of the will takes a legacy or some benefit under it—as happened in those cases; but it applies to all cases which give rise to a suspicion in the mind of the court. The suspicion which the circumstances of the present case give rise to has not been removed by the defendants, on whom the onus is, and I agree that the appeal should be allowed.

SMITH, L.J.—I entirely agree with the principles of law which have been deduced by Lindley and Davey, L.J.J. from *Barry v. Butlin* (2 Moo. P. C. 480), *Fulton v. Andrew* (32 L. T. Rep. N. S. 209; L. Rep. 7 E. & I. App. 448), and *Brown v. Fisher* (63 L. T. Rep. N. S. 465).

Appeal allowed.

Solicitors for the appellant, *Wood, Bigg, and Nash*, agents for *A. G. Haines*, Faringdon.

Solicitors for the respondents, *Tarry and Sherlock*.

Feb. 27, March 2, 3, 5, and 13.

(Before LINDLEY, KAY, and SMITH, L.J.J.)

BUNTING v. HICKS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Watercourse—Artificial channel—Riparian owner—Implied grant—Diminishing flow of water—Injunction.

The owner of land in which water flows through an artificial channel has no right to appropriate all such water.

Nor is he entitled to diminish the flow of water down the stream by abstracting water from the springs which feed that stream.

Dudden v. Guardians of Clutton Union (1 H. & N. 627) followed.

Broadbent v. Ramsbotham (11 Ex. 602) distinguished.

Decision of Kekewich, J. reversed.

APPEAL by the plaintiff from a decision of Kekewich, J.

The facts of the case and the arguments of counsel sufficiently appear from the judgments of the Lords Justices.

Chester for the appellant.

Renshaw, Q.C., Douglas Walker, Q.C., and Jason Smith for the respondent.

Cur. adv. vult.

March 13.—The following written judgments were delivered:—

LINDLEY, L.J.—In 1877 the lands owned by the plaintiff and the defendant belonged to the same person, who sold them in two lots. The plaintiff's predecessor bought one lot, consisting of pasture and arable land, situate at a lower level than the other lot, which was afterwards bought by the defendant's predecessor. There was and had been for many years a stream of water, originating in a spinney on the defendant's land, and flowing down in a defined channel to and through the plaintiff's land into a brook. This stream was and had been for many years used for watering cattle turned into three, at least, of the pastures bought by the plaintiff, and was, so far as I can see, necessary for the beneficial enjoyment of those pastures. The conveyance to the plaintiff's predecessor expressly included all easements and watercourses "appertaining to" the land conveyed; but the words "or usually enjoyed therewith or reputed as part thereof or appurtenant thereto" were not inserted. The watercourse in question was not an easement in any proper sense, whilst the lands in which the stream originated, and through which it flowed, belonged to one and the same owner. But it is, in my opinion, clear that after the conveyance to the plaintiff's predecessor the vendor could not have cut off the stream and have deprived the purchaser of the benefit of its flow: (see *Watts v. Kelson*, 24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166; and *Wneeldon v. Burrows*, 41 L. T. Rep. N. S. 327; 12 Ch. Div. 31, in which *Pyer v. Carter*, 1 H. & N. 916, was explained and put on the right footing.) [His Lordship then read and commented on the judgment of the court in *Watts v. Kelson* (*ubi sup.*) and continued:] But it is said that the stream was only a drain from the spinney, and that the vendor and those claiming under him could alter the mode of draining the spinney, and were not

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

BUNTING v. HICKS.

[CT. OF APP.]

bound to leave the water coming from it to flow in its old accustomed channel. But this argument assumes that there is no implied grant of any right to the water coming from the so-called drain, and the doctrine invoked by the defendant is wholly inapplicable to such a stream as this. The early history of this stream and of its origin is lost in obscurity. The evidence shows that the spinney to which I have referred is and has been as long as anyone can remember full of springs, which can be seen bubbling up. These springs first fill some ponds, and then, being on the side of a slope, run down; and they run down not in a multitude of streamlets, but in one defined channel; and they have so run as long as anyone can remember. There is some evidence to show that fifty years ago the stream thus formed entered a stone culvert, and flowed out of it on to the hill side. But in 1847 a railway was made, crossing this stream, and the old culvert was then destroyed, and the stream was carried for some distance along the bottom of the railway bank, and then under the railway into the channel of another watercourse, flowing by the pastures which are now the plaintiff's, and so into the brook already referred to. There is also evidence to show that where these springs come up, and for some distance round and below them, there was formerly a bed of gravel, which had been dug out. It is contended that the removal of this gravel has made the springs artificial springs, and that they ought to be regarded as so many wells sunk by the defendant's predecessor in title, and from which the defendant can therefore take water in any quantities and for any purposes he likes. I am quite unable to take this view of the case. It may be that the places where the springs now come to the surface are not the same as those where the water escaped when the gravel bed was still undisturbed; but, assuming this to be so, the springs must then have existed and overflowed somewhere, and there is no reason to suppose that there is any material difference between the present and former state of things on the defendant's side of the railway, so far as the springs and the stream caused by their overflow are concerned. At all events there is nothing like proof of any such difference. Kekewich, J. took the same view of the evidence on this point as I do myself; but I differ from him with respect to what has been done before the stream issues from the defendant's land. In my opinion the defendant has diminished the flow of water down the stream, by abstracting water from the springs which feed that stream. There is no boggy or spongy ground between the springs and the stream which the defendant is entitled to drain as he likes. The defendant's own plan shows that there is a defined stream from the highest spring. Under these circumstances, in my judgment, this case is governed by *Dudden v. Guardians of Clutton Union* (1 H. & N. 627), and not by *Broadbent v. Ramsbotham* (11 Ex. 602). The conclusion thus arrived at entitles the plaintiff to an injunction, either on the ground of an implied grant, to which I first alluded, or on the ground that he has the rights of an ordinary riparian owner to the flow of an ancient stream. The appeal must therefore be allowed with costs, both here and below, and an injunction must be granted as in *Watts v. Kelson* (24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166, 176).

KAY, L.J.—In the land of the defendant there is a spring of water. It arises in two small ponds situate in a spinney, which contains some large trees. There are two of these ponds in the spinney connected by a defined channel. Part of the spinney is boggy ground, from which some water also runs into these two ponds. But the main source consists of springs in the two ponds, where, as the witnesses say, the water may be seen boiling up. From the westernmost of these two ponds the water runs by a defined channel into the other pond, and thence into a third pond just outside the spinney, and from this third pond it runs in a defined channel which it has worn into the ground in an easterly direction as the land slopes down to the Great Northern Railway, which, running north and south, crosses the direction of the stream. The railway was made in 1847, and the stream was then diverted on the western side of the line by an artificial ditch, which carried it parallel to the railway into a culvert formed underneath the railway to take this water, and also the water of a ditch, called on the defendant's plan "open grip." Beyond this culvert it runs down the grip on the plaintiff's land, and feeds a pond in a pasture belonging to the plaintiff. This state of things has existed from 1847, when the railway was made, and is very clearly delineated on the defendant's plan put in evidence in this action. The spring in the spinney has existed for a long time, certainly more than sixty years, and there is no evidence as to the date of its origin. Long ago it is said there was a stone culvert from the spinney in the course of the present stream across where the railway now is, coming to the surface in a field east of the line which now is part of the plaintiff's property. From the outlet of the culvert in that field one witness says that the water had no defined channel, but spread over the surface of the field. This stone culvert no longer exists, and the water now runs down to the railway in a channel which it has worn for itself, and it is found by the learned judge in the court below that from the third pond, which is outside the spinney, down to the railway, it is a natural stream. But the learned judge, if I rightly understand his judgment, seems to hold that, although the defendant could not cut off or divert the water from this stream, he may take it from the third pond, which he considers no part of the stream. I find it difficult to agree with the view which the learned judge has taken of the facts. With deference to his opinion, I think that the stream begins in the westernmost of the ponds in the spinney where the spring first rises, and treating it as a natural stream and spring the defendant can no more take all the water from the spring, or from any part of its course after it appears above ground, than he could take it from the channel east of the third pond outside the spinney. This, if authority is wanted, was clearly decided in *Dudden v. Guardians of Clutton Union* (1 H. & N. 627), where sinking a tank at the source of a stream and carrying the water thence by pipes was treated as a wrongful act just as though the water had been diverted from the stream lower down. But the case has not been argued before us upon this ground at all. The stress of the argument has been, that the spring and stream are not natural but artificial, and that, therefore, the defendant has a right to appropriate all the water. If the fact were so, I should demur

that conclusion on two grounds. First, it is the law that the owner of land in which waters flow through an artificial channel can appropriate such water. The contrary was decided in *Wood v. Waud* (3 Ex. 748, 777), where the law is established thus: "The proposition that a watercourse, whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed as to confer a right to the use of the water if proved to have been originally artificial, is indefensible; but, on the other hand, the general proposition that, under all circumstances, a right to watercourses arising from enjoyment is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses as against the party creating them surely must depend upon the character of the watercourse, whether it be of a temporary or permanent nature, and upon the circumstances under which it is created." Are this spring and watercourse of a temporary or permanent character; or were they created under circumstances which give the defendant a right to divert them? There is no direct evidence when or how they originated, or whether they were created by man's agency at all. The theory presented is this: It is that, in a large hollow in the clay extending somewhere west of the spinney beyond the eastern side of the railway, there lies a deposit of gravel. The land slopes gradually from west to east. This gravel, lying on a bed of clay, would naturally become filled with water, and an overflow that water would issue somewhere on the slope and form a spring. But it is said a large area of this gravel bed has been worked, extending from the west side of the spinney and the line of the railway in an irregular oval. On the west side of the spinney the land rises slightly about five feet, and the westernmost pond of the spinney is at the base of that rise, being, it is suggested, the furthest point at which the gravel has been taken in that direction. This is another guess-work; but, assuming it to be true, the effect of so excavating the gravel may have been to cause the water to issue from the gravel point more west than it would otherwise have done, and so to alter the position of the spring and then the stream by the addition of that name. But this does not make the character of the stream temporary in any sense, nor is there anything in these circumstances which can give the defendant the right to divert or destroy the stream or the spring. The excavation of gravel suggested, if it did take place, was more than sixty years ago. Large trees have since grown in the spinney. The flow of water has been constant, except when in dry seasons it may have failed for some time, during all that period. In my opinion, if these alleged facts are true, they afford no ground whatever for treating this spring and stream as other than a natural spring and stream for the purpose of determining the rights of riparian owners to the flow from them. It is argued that this is like the overflow of a well in *Broadbent v. Rambotham* (11 Ex. 602), in which the owner of the well was, it was held, at liberty to divert from the well. But the reason of that decision, right or wrong, was that this overflow never did run in a channel natural or artificial down to the brook on which the plaintiff was riparian proprietor, and if any of the water ever found its way to the brook it was after it had

squandered itself over a swamp, and therefore the defendant was at liberty to intercept and divert it just as he might appropriate "water falling from heaven on the side of a hill" before it arrived at a defined natural watercourse. It is not necessary to decide what would have been the right of the plaintiff if the alleged stone culvert was still in existence and were carrying the water on to his land. But, if the water was of use to him either for watering his cattle or irrigating the field in which this culvert came to the surface, I cannot see how the defendant could have any right to divert the water. The plaintiff would then claim it as the owner of the field in which the culvert came to the surface, not as riparian proprietor on the stream as it now exists. So far I have considered the case without reference to the manner in which the predecessors in title of the plaintiff and defendant acquired their respective properties. Before 1879 these properties belonged to the same person. In that year they were sold by auction in separate lots on the same day, and the plaintiff's predecessor bought the land east of the railway, the defendant's predecessor buying the land west of the railway in which the spring or stream commences. The plan in the particulars of sale does not show the spring or stream, neither is it marked upon the plan on the conveyance to the plaintiff's predecessor. It is not mentioned in that conveyance, which contains only the general word "watercourse" which could apply to it. But, although the law is now understood to be that upon a grant easements cannot be reserved over the land granted by implication without express words (*Wheeldon v. Burrows*, 41 L. T. Rep. N. S. 327; 12 Ch. Div. 31), it is otherwise as to implied grants of such easements as are continuous and apparent. The grantor cannot derogate from his grant, and a continuous and apparent easement passes by implication without express words. The law is the same where the servient and dominant tenements are sold at the same time and the *quasi* easement only becomes an easement in fact by the severance of ownership: (*Swansborough v. Coventry*, 9 Bing. 305; *Allen v. Taylor*, 16 Ch. Div. 355.) On this ground, even if the defendant could otherwise have destroyed the spring or stream, I should be of opinion that the law would not permit him to do so. When the unity of ownership was severed, this watercourse and spring then existing in the condition I have described, it would be both apparent and continuous, and the defendant could no more interfere with it than the grantor could have done if he had retained the defendant's land. I think the injunction should be granted in the terms suggested by Lindley, L.J., taken from *Watts v. Kelson* (*ubi sup.*).

SMITH, L.J.—This action is brought by the plaintiff, who is an owner of property through which a stream of water flows, against a defendant who is the owner of property situated higher up upon the same stream, for abstracting considerable quantities of water therefrom for brickmaking purposes, whereby the flow of water through the plaintiff's land is greatly diminished in quantity. It was proved that the defendant had constructed on the lower side of a spinney which was situated upon his land, a large pond, into which was collected the water which rose in that spinney, and which theretofore had flowed thereout and found its way to the land of the plaintiff. From

CT. OF APP.]

BUNTING v. HICKS.

[CT. OF

the water thus collected in this pond the defendant carted away the water at the rate of some thirty cartloads a day. The question in this case is, whether the plaintiff is entitled to this flow of water through his land in such circumstances as to be able to successfully complain of the defendant's appropriating it to his own use as he is doing. Kekewich, J. found for the defendant, and the plaintiff appeals upon the ground that, though the learned judge found the facts rightly, he applied the wrong law; whereas the defendant, on the contrary, alleges that he applied the right law but found the facts wrongly. It is not necessary to discuss the numerous authorities which the learned judge touched upon in his judgment, for the two rules of law, one of which must be applied to this case, will be found clearly enunciated in *Broadbent v. Ramsbotham* (11. Ex. 602) and in *Dudden v. The Guardians of the Clutton Union* (1 H. & N. 627), and no doubt can be cast upon the accuracy of the law which is therein respectively laid down. In *Broadbent v. Ramsbotham* (*ubi sup.*) it was held that where water, whether from a spring head or any other source, is squandering itself over the surface of land before it has arrived at a natural defined course, the owner of the land over which it is so squandering itself may do what he likes with it, irrespective of what effect his action may have upon the volume of water in a stream down below which has then become a defined natural watercourse. In *Dudden v. The Guardians of Clutton Union* (*ubi sup.*) it was held that, if a natural defined stream commences running from a spring head, the stream begins at the spring head which is its source, and that the owner of the land upon which the spring head and the stream are situated must deal with them as one and can only take such water from either as is incident to his right as being a riparian owner thereon. This being the law, it becomes necessary to ascertain what is the true result of the evidence given in this case, for, until this be done, it is impossible to say which of these two rules is to be applied. I have taken the opportunity since this case was argued to read through the notes. [His Lordship reviewed the evidence and continued:] In the face of this testimony it was argued on behalf of the defendant that the spinney did not contain a natural spring, and it was said that at some period prior to living memory (for the defendant called no living witness to prove the fact) gravel had been dug out in and around the spinney, and that by this digging the water which was in the gravel was tapped, and that the present case was to be likened to water found at the bottom of a well when sunk, and consequently the plaintiff was not entitled to this water even if it overflowed the surface of the well. I do not decide whether the defendant would be correct in his law if he were right in his facts as to this, though I very much doubt it, for it seems to me that in such circumstances the hand of man would have brought about an artificial flow of water for a permanent and not a temporary purpose, and if so, that would suffice for the plaintiff: (see *Wood v. Waud*, 3 Ex. 748.) But be this as it may, in my opinion, the proved facts in no way support the suggestion made on behalf of the defendant. There is not a tittle of evidence that the water was not boiling up from the gravel before it was excavated in the same way as it most undoubtedly has been for years and is boiling up now, though

possibly not at the exact point where it now up. Kekewich, J., as it seems to me, found the water which came to the surface spinney was a natural spring, for he said it would not be right to attribute to it an artificial origin." If, however, the defendant is correct in saying that Kekewich, J. did not find the water in the spinney to be a natural spring, I have been of opinion that he was wrong; before stated, I think he did hold that it was a natural spring. I now come to the next question, viz., did this water, rising as it did in the spinney, commence running in a natural defined course from the spring head, and so continue down the surface and through the plaintiff's lands? There is a mass of evidence given on the part of the plaintiff to show that it did. [His Lordship reviewed the evidence, and continued:] If this be, as I have proved to be, ever-running water, I do not see how it could be otherwise than springing up and coming out of the spring in the spinney. It is true that upon the conveyance to the railway the stream is not delineated, but the defendant's mentioned culvert is, and the defendant is right in pointing out this fact. But, although this is so, I cannot doubt upon the evidence in this case that Kekewich, J. arrived at a right conclusion when he held as follows: "It will be seen from the above summary of the facts that, in my opinion, the water flows naturally and in a defined channel from the drinking place just below the spinney to that just short of the railway, and the defendant was interfering with the water flowing down the grip to the prejudice of the plaintiff, he would, in my judgment, have a right of action against him." In this I entirely agree. But Kekewich, J. also held that, because the defendant's diversion of the water took place in the spinney and in the land immediately below it, including the pond or drinking place, before the water had reached the grip, or even the passage connecting that with the pond, the defendant was entitled to do so, and the plaintiff's case consequently failed. I am here with all respect I cannot agree with the learned judge. It is proved that the spinney was the spring head with ever-flowing water. One witness said that the spinney "combusted" with springs. It is proved that the water ran direct from these springs to the drinking place, and thence ran direct through the grip (whether a stone drain or not is immaterial) in a defined course down to the railway. In such circumstances, how can the diversion of the water in the spinney and land immediately below it be justified by the defendant? There is no question here of the water over lands between the spring head and where the water becomes a defined natural course. The diversion of the water, as Kekewich, J. has truly found, is in the spinney or immediately below it, i.e., in the land which constitutes the source of the stream. Kekewich, J. applied the case of *Broadbent v. Ramsbotham* (*ubi sup.*), and this is where the plaintiff says he has erred, and this is where he cannot agree with the learned judge, for, in my judgment, the case of *Dudden v. The Guardians of Clutton Union* (*ubi sup.*) is the case which is to be applied to the present. I have so far dealt with the spring head and the stream therefrom to the railway. A point was taken by the d

nt that there was evidence that the stream from the spring head in the old stone drain, after got below where the railway now is, used before the railway was made to debouch therefrom, and then squandered itself over fields which are now the plaintiff's. There is some such evidence, but, whether reliable or not, I think it is immaterial, even if it be reliable, the plaintiff's predecessors are entitled to all water which would have come out of that stone drain before the railway was made, and this the defendant, by his act, had the stone drain still remained, has prevented from doing. In my judgment there is no evidence that the stone drain had been made for general purposes of draining. For the reasons above, the defendant is not entitled to dam back the water in the pond, and to cart it away as he has done and is doing, and therefore the plaintiff is entitled to an injunction. I also think that the plaintiff's case could be supported upon the ground of an implied grant of an apparent and continuous easement, as the Lords Justices who have preceded me have stated. But, in my judgment, it is not necessary to resort to that in the present case, for, as above pointed out, the law applicable to riparian owners decides this case in favour of the plaintiff. In my opinion an appeal should be allowed, and judgment entered for the plaintiff, and the injunction as stated by Lindley, L.J. granted.

Appeal allowed.

Solicitors for the appellant, *Bonner, Thompson, Burnie, and Co.*, agents for *Calthrop and Bonner*, London.

Solicitors for the respondent, *Roscoe and Hincks*, agents for *Deacon and Son*, Peterborough.

Wednesday, Feb. 21.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

HANFSTAENGL v. THE EMPIRE PALACE LIMITED AND OTHERS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Copyright—Infringement—Paintings—Reproduction—Living figures—Painted backgrounds—Fine Arts Copyright Act 1862 (25 & 26 Vict. c. 68), ss. 1, 6, 11.

The owner of the copyright in certain paintings moved to restrain the defendants from reproducing the pictures in a series of "living pictures" at a theatre. The defendants produced their "living pictures" by grouping living persons posed and attired in a suitable manner, with painted backgrounds and the necessary properties. The defendants admitted that the idea of the representation was taken from the plaintiff's pictures.

Held, that the exhibition, so far as regarded living persons, was not a reproduction of the plaintiff's pictures within sect. 1 of the Copyright Act 1862, and was not an infringement of his copyright, as a reproduction within the meaning of that section must be something in the nature and character of a picture; but the question with reference to the painted backgrounds was ordered to stand over until the trial, the respondents being put upon terms.

Decision of Stirling, J. affirmed.

(c) Reported by J. SANDERSON and W. C. BISS, Esqrs., Barristers-at-Law.

THIS was a motion by the plaintiff for an interim injunction to restrain the first defendants, their servants, agents, artists, and workmen, from exhibiting or representing, as part of their series of living pictures at the Empire Palace Theatre of Varieties, any copies or imitations of the plaintiff's copyright works "The Three Graces" and four other pictures, or any of them. These five pictures were all painted by foreign artists, and the plaintiff, a fine art publisher carrying on business in Munich, with branch houses of business and agencies in Germany and elsewhere, was the owner of the copyright in them in Germany and under the International Copyright Acts in the United Kingdom.

The defendants, the Empire Palace, were exhibiting at their theatre a series of "living pictures," representing the five pictures mentioned above among others, by grouping living persons, posed and attired in a suitable manner, with painted backgrounds, and the necessary properties. The plaintiff alleged that the unauthorised reproduction of his pictures as part of a variety entertainment would tend to vulgarise them, make them less valuable as works of art, and decrease the value of his copyright, and he further said that he had seen the representation, and that the pictures were reproduced exactly, so as with the backgrounds to be an exact copy and present a kind of living canvas to the spectator. The defendants did not admit that their exhibition represented exact copies of the plaintiff's pictures. They said that there were many differences between their living pictures and the photographs of the plaintiff's pictures, in attire and in the attitude of the living persons, but they allowed that the idea of their exhibition was derived from the pictures of the plaintiff.

Hastings, Q.C. and *A. H. Jessel* for the motion.—This is a reproduction within the meaning of sect. 1 of the Copyright Act 1862:

Turner v. Robinson, 10 Ir. Ch. Rep. 121, 125, 126, 144, 510.

Copyright here has not been registered, but this is no obstacle to us:

The Hanfstaengl Art Publishing Company v. Holloway, 68 L. T. Rep. N. S. 676; (1893) 2 Q. B. 1, 5;

Berne Convention, art. 4;

Copinger on Copyright, 3rd. edit. App. cxii.

We are the best judges whether we shall be injured by these reproductions, and we submit we are entitled to an injunction apart from the copyright case.

Buckley, Q.C. and *Roger Wallace* for the Empire Palace Company.—The Act of 1862 does not prevent persons attiring themselves in a dress to be found in a certain picture, and standing in a certain attitude. The arrangement of living persons is not a picture, nor the reproduction of a picture or of the design of a picture. [STIRLING, J.—Suppose that a sculptor reproduced it in marble.] We agree that, where there is a reproduction in an inanimate form, this is within the Act. [STIRLING, J.—What is the difference?] Suppose a lady studied Gainsborough's pictures with a view to adopting the dress there depicted more skilfully, this would not be a reproduction of the picture. To reproduce a painting, is to produce a replica of the original painting. The inclusion of the design in sect. 1 is not an extension of

CT. OF APP.] HANFSTAENGL v. THE EMPIRE PALACE LIMITED AND OTHERS. [CT. OF AP

reproduction; but you must not take the design any more than you may take the painting. You are not to multiply copies of the painting or the design thereof:

Dicks v. Brooks, 43 L. T. Rep. N. S. 71, 73, 74; 15 Ch. Div. 22, 35.

[STIRLING, J.—Do you suppose James, L.J. in *Dicks v. Brooks* means to lay it down that, if the picture is reproduced in porcelain, that would not be an infringement of copyright?]

Martin v. Wright, 6 Sim. 297.

We submit that it is impossible to say that persons standing on a stage are a reproduction. They are only in a sense a picture, as when you speak of a living picture; it is not a picture but a mere grouping of persons, and is outside the Act altogether. Charles, J. was of opinion that under sect. 4 of the Act of 1862 registration was necessary. You may photograph a sculpture with impunity: (Copinger on Copyright 3rd. edit. p. 434.) [STIRLING, J.—What if they were represented in waxwork?] That would not infringe the Act of Parliament. If tableaux vivants had been intended to be included, protection would have been given to them. In form, colour, light and shade there is no exact similarity with the pictures, though the same idea occurs to the mind.

Hastings in reply.—Every night this picture is produced. They multiply and reproduce it every time. Much of it is actual painting. [STIRLING, J.—Would marble statues or waxworks be a reproduction?] Yes. [STIRLING, J.—What do you say of *Dicks v. Brooks*?] That was decided under a different statute. Reproduction may be in any way or by any means. [STIRLING, J.—Then your view is that a sculptor cannot reproduce a picture in marble.] No, he cannot.

His Lordship then asked the respondents, what defence they had as to the backgrounds.

Buckley.—The motion as lodged is not addressed to that, but we will undertake to keep an account of the particular backgrounds we use every night, the persons who visit our entertainment, and the amount received by us.

Grosvenor Woods, Q.C., *H. A. Forman*, and *G. F. Hart* for other respondents, against whom the motion was ordered to stand over.

STIRLING, J., in giving judgment (after stating the nature of the motion, and that it was not disputed that the plaintiff's pictures or photographs of them were the groundwork of the defendants' representations), said that the question whether there had been any infringement depended on the construction to be placed on sect. 1 of the Copyright Act 1862, which provides that the author of every original painting, drawing, and photograph which should be or should have been sold or disposed of before the commencement of the Act, and his assigns, should have the sole and exclusive right of copying, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof as therein mentioned; and sect. 6 of the same Act provides penalties for the infringement of the right. The question was, whether the words of the section, wide though they were, could support the construction contended for, which would apparently prevent a sculptor from reproducing a painting in the form of sculpture. The case of *Dicks v. Brooks* (43 L. T. Rep. N. S. 71; 15 Ch. Div. 22),

his Lordship thought, afforded some guidance at this point, though it was not a decision on the Act, but on 7 Geo. 3, c. 38, and 17 Geo. 3, c. 38. There the question was, whether a pattern that worked out in wool was a "copy" of an engraving and James, L.J. (43 L. T. Rep. N. S. 73, 74; 15 Ch. Div. 35), after expressing his opinion that it was not a copy, piratical imitation, or a copy of a colourable variation, said: "Now I am of opinion that, whatever may be the similarities between the one and the other, the attempt not to reproduce the print, but to produce something which has a distant resemblance to the print, not by any means in the nature of engraver's work, but by which you may call a mosaic of coloured parallelograms, is not in any sense of the word a piratical imitation of the print. Nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was the print. It is a work of a very different character, intended for a different purpose, and, in my opinion, no more calculated to injure the public than the *quâ* print, or the reputation of the engraver, than the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving in waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain." Seemed from these remarks, that James, L.J. would have said that it was not a reproduction within the Act of 1862 to reproduce in waxwork and the judgment of Bramwell, L.J. in the same case shows that he thought the words "otherwise copy" were inserted to catch possible means of copying the engraver's work and taking the benefit of it, by producing a substitute of an engraving character. In the light of this decision it seemed that the reproduction must be of a painting character, and that reproduction in marble, or by grouping living people, was not a reproduction within the Act of 1862. On the question of the backgrounds used in the defendants' exhibition, his Lordship thought he had not sufficient materials before him to decide it, whatever the applicant's right might be. The plaintiff might have a right to an injunction and suffer damage. He therefore ordered the motion to stand to the trial or further order, upon the defendants giving an undertaking to take photographs of the backgrounds used, and to keep an account of the number of times each background was exhibited, and of all moneys received for admission when any of the backgrounds should be exhibited.

From this decision the plaintiff appealed.

Hastings, Q.C., *Sir Richard Webster*, Q.C., *T. Scrutton*, and *A. H. Jessel* for the appellant.—This is a reproduction of these pictures within the scope of the Fine Arts Copyright Act 1862. That section says the author shall have the sole right of copying and reproducing a picture "by any means." The Act does not say the reproduction must be permanent or by another picture. The object of this performance is to reproduce the pictures. Though the living figures in the pictures cannot be forfeited, as provided by sect. 6, yet the background and accessories can. Besides, because the remedy cannot be enforced, the appellant is deprived of the other remedies. Sect. 6 provides for the infliction of a penalty on anyone who

copies "the design" of any painting. An imitation of a picture in sculpture would be a piracy. In the judgment in *Ex parte Beal* (L. Rep. 3 Q. B. 387, 393, 394), Blackburn, J. held that a photograph of a painting was a copy of it. A picture is a reproduction of an actual scene at a particular moment without action. In *Lucas v. Cooke* (42 L. T. Rep. N. S. 180, 183; 13 Ch. Div. 872, 879), Fry, J. said that if a photographic artist, having seen a picture, placed a living person in his studio in the position of the person in the picture, and then took a photograph of her with the requisite background, it would be reproducing the painting. The cases of *Gambart v. Ball* (8 L. T. Rep. N. S. 426; 14 C. B. N. S. 306) and *Graves v. Ashford* (16 L. T. Rep. N. S. 98; L. Rep. 2 C. P. 410); *Maple and Co. v. Junior Army and Navy Stores* (47 L. T. Rep. N. S. 589; 21 Ch. Div. 369); and *West v. Francis* (5 B. & Ald. 737), support the plaintiff's contention. The case of *Dicks v. Brooks* (*ubi sup.*), upon which Stirling, J. relied, was different to this case. There the court refused to grant an injunction to restrain the copy of a painting because the application was made by the owner of the copyright of the engraving of the picture, and not by the owner of the picture. [LINDLEY, L. J. referred to *Bradbury v. Hotten*, 27 L. T. Rep. N. S. 450; L. Rep. 8 Ex. 1.]

Buckley, Q.C. and *Roger Wallace*, for the respondents, were not called on.

LINDLEY, L. J.—There is no doubt that this is an important question, and it is a new one, but I think we are asked to put a construction upon this Copyright Act, which was never dreamt of when it was passed, and which it does not really bear. We are asked to say that a person who is an author of a painting or a drawing, or a photograph, is entitled to restrain other people from representing it by living pictures. Whether it is called dramatising or not, and whether there is action in it or not, I do not think is material. The plaintiff bases his claim upon the Fine Arts Copyright Act 1862. He is a foreigner, but that is immaterial, for under the International Copyright Act 1886 (49 & 50 Vict. c. 33) he is to be treated for this purpose as if he were a British subject and the author of the original paintings. The Act of 1862 is one of a series. There is the Literary Copyright Act, the Engraving Copyright Act, the Designs Copyright Act, the Dramatic Copyright Act, a Sculpture Copyright Act, and also the Fine Arts Copyright Act 1862, which we have now to consider. This Act was passed in order to place painters and people of that kind in a position more or less similar to engravers who were protected by previous Acts of Parliament. As early as George II. there was an Act of Parliament (8 Geo. 2, c. 13.) protecting engravers and giving them a copyright in their engravings. That Act was followed by 7 Geo. 3, c. 38, which again was confined to engravers. Painters naturally complained that there was no Copyright Act for their protection, and this Act of Parliament was passed to assist them and to give them a commercial copyright in their paintings. It was not confined to paintings, but extended to drawings and photographs. But Parliament was not endeavouring to protect them by putting a totally different class of people under restraint; it was not dealing with, or intending to limit the scope of, sculptors' or actors' business, or anything

of the sort. It was to protect painters and persons who produced drawings and photographs from having their productions infringed, and infringed by reproduction, by means of anything similar to that which they produced, and of which they were the authors. That is the key to this Act of Parliament, and to the line of Acts of which it is one. Now the language of sect. 1 of 25 & 26 Vict. c. 68 is this (I will read it shortly): "The author of every original painting, drawing, and photograph shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means, and of any size, for the term of the natural life of such author." Now what does that mean? We are asked to say that the words "copying and reproducing by any means" mean reproducing in the sense of imitating or representing by means not equivalent to drawing, or painting, or photography, or any such means at all, but by totally different means, viz., by the exhibition of living pictures. Is that what the Act was intended to prevent? It appears to me plainly it is not. When we consider the language used where that idea was present to the mind of the Legislature, we find a totally different class of words used. The word "represent" is the word used in the Dramatic Copyright Act. There is not a word about "represent" here. The section does not provide that the author of a picture may prevent anybody from representing his picture by any means whatever; the object is to protect the author of the picture from anybody who may produce another picture and compete with him in the market. That is the object of the section, and the language appears to me to be incapable of being fairly stretched so as to include such representations as are complained of in this case. Now light is thrown on the true construction of sect. 1 by sects. 6 and 10, the first of which provides for the forfeiture of the copies of any painting, drawing, or photograph, and the object of the second is to prevent the importation of such copies. Those sections are really inapplicable to this Act if it is construed as the plaintiff asks us to construe it. But I do not rely so much upon those sections as upon the clear and unquestionable meaning and intention of Parliament in passing this series of Acts. If we are to go beyond the language and look further, I think a good deal of light is thrown upon this question by the case of *Dicks v. Brooks* (*ubi sup.*), because, although it is very true that the word "design" is not used in the Acts referring to copyright in engravings, still the object of the Act of Parliament in protecting engravings is exactly the same as the object which the Legislature had in view in protecting paintings, drawings, and photographs in this Act. It was not intended to give the author a right to restrain Madame Tussaud, or anybody else, from exhibiting them in waxworks. Such works do not infringe the right of the author of the painting, they do not interfere with something that is produced in the market. I think this is an experiment which fails, and the appellant must pay the costs in the usual way.

KAY, L. J.—I am entirely of the same opinion. The question being one on the Copyright Acts, I will add a few words. The plaintiff in this case has all the rights of the author of the paintings

CT. OF APP.] HANFSTAENGL v. THE EMPIRE PALACE LIMITED AND OTHERS. [CT. OF AP

which he says have been reproduced, and therefore he has the right to protect the paintings and the designs thereof. As Lindley, L.J. has said, he is within this statute which we have to consider, for although he is a foreigner and the paintings are foreign paintings, yet by reason of the International Copyright Act 1886 he is to be treated as though he were a British subject and the author of a painting produced in this country by a British subject. Now what I understand has actually been done is this: Upon the stage of the Empire Theatre a large gilt frame has been set up, and within that frame a certain amount of canvas has been painted as a background. With that at present we have nothing to do, because the undertaking given as to that, I think, covers that part of the case, and the argument has not been founded upon the fact that certain portions of this so-called picture consist of a painted canvas which is used as a background—I put that aside. The rest of the so-called picture consists of human figures grouped precisely, and dressed, I presume, precisely like the figures in the pictures of which the plaintiff is the owner, and the design of the pictures, that is, the grouping of the figures and their arrangement in the tableaux and the accessories around them, are all taken, I presume, directly from the pictures which it is intended to represent. The question is, whether that kind of thing (putting the background out of sight for the moment) is a representation of a picture of which the plaintiff is the author or artist, and whether it is a reproduction of the painting or of the design within the meaning of the Fine Arts Copyright Act 1862. If it is, of course the right to an injunction is quite clear. The words of sect. 1 (which I will read shortly) are these: "The author of every original painting shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting and the design thereof." I think, looking at sect. 6, it probably would be right to read that as though it were "or the design thereof by any means and of any size for the term of his natural life," and so on. Now, is what has been done here a reproduction of such painting? A reproduction of a painting must be, one would think, by another painting, or something which is equivalent to another painting, and I do not think it has been argued on that ground that this is a reproduction of the paintings. The argument has rather been put on the latter part of the clause, that this is a reproduction of a design of a painting within the meaning of this Act. What does "reproduction" really mean? Reproduction is producing again. Is this producing again a design of this painting within the meaning of this Act? I cannot think it is. It seems to me that, in order to reproduce the painting you must have something such as would be properly described as a picture itself, and I avail myself of the suggestion made by Smith, L.J. during the argument. He asked whether, if the author of these pictures had himself had these *tableaux vivants* represented upon the stage of some theatre, would he have had a copyright in the *tableaux vivants*? Would the *tableaux vivants* have been pictures within the sense of this Act of Parliament, and does not a picture mean something in which if the original author of the painting had himself produced it he might have had a copyright? I think that is

the meaning of this Act of Parliament, and should come to that conclusion simply upon language of this 1st section. But then, when you look further into the Act, I think that conclusion is quite confirmed by the language of subsequent sections. Sect. 6 seems to cover very same kind of offence, and to impose pecuniary penalty for the repetition of any such act. The words are a little different there. It provides that, if anyone shall, without the consent of the proprietor, "repeat, copy, colour, imitate, or otherwise multiply for sale, hire, exhibition, or distribution," any painting or design thereof, he shall forfeit a sum not exceeding 10*l.*, "and all such repetitions, copies, imitations made without such consent as aforesaid, and all negatives of photographs made for purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright." Therefore, the Act contemplates, I think, such a reproduction as results in a picture which can be forfeited under sect. 6. If you apply that to this particular case, you see at once there is no particular reproduction of a picture that could be forfeited. The living persons in these *tableaux*, no doubt taken from the design of the original picture, could not be forfeited. The thing complained of here does not seem to me to come within the meaning of this statute at all. If it did it would follow that anybody in his own private drawing room, who arranged a *tableau vivant* of his friends or guests in the manner and for the purpose of imitating a group of figures in a well-known picture would be infringing the Copyright Acts, because the element of doing it for reward or remuneration does not enter into this Act at all. Any kind of copying, whether for profit or not, comes equally within the mischief which this Act of Parliament was enacted to prevent. For my part, I come to the conclusion that what has been done (leaving the background out of the question) is not an infringement of anything within this Act, and that it is not a reproduction of the paintings in question, and therefore this appeal entirely fails and must be dismissed with costs.

SMITH, L.J.—The question in this case depends entirely upon the construction of this Act relating to copyright in works of the fine arts, and is a very small point, though I admit it is of importance. Now, in the preamble to that Act it is recited: "Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works;" and then it is enacted that the author of every painting, drawing, or photograph shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, by any means, and of any size. The question is, what is the meaning of that section? If that right of the author of any painting, drawing, or photograph is infringed, three remedies are provided by the Act—he may apply for an injunction; he may sue for penalties under sect. 6; and he may sue for damages under sect. 11; and when I have to construe an Act of Parliament it always seems to me important that you should look at the whole Act; and inasmuch as if the author, as I have said, of any drawing, painting, or photograph, if his right is infringed, may seek any one of the three remedies, I look to see what the Legislature has said shall happen if he seeks a remedy either

CT. OF APP.]

FURNESS, WITHY, AND CO. v. WHITE AND CO.

[CT. OF APP.]

way of penalty or by way of damages. It is clear as anything can be upon an Act of Parliament that neither sect. 6 (which deals with penalties) nor sect. 11 (which deals with damages) includes a case which we are asked to bring within sect. 1, for the very simple reason that if he sued for penalties under sect. 6 it is provided that the piratical imitations are to be forfeited, which of course only applies to things in the nature and character of paintings, pictures, or photographs, or things of that sort, and not to living beings, because they cannot be forfeited; and if he sues for damages under sect. 11, it is equally patent that the present case does not come within that section, because in addition to damages he is entitled to enforce the delivery to him of all unlawful repetitions, copies, imitations, and negatives of photographs. It is perfectly clear that the Legislature had in its mind that the piratical acts would be something which would be given up and forfeited when they were complained of, and when penalties were obtained or damages were recovered. Now, I look at sect. 1 in the light of sects. 6 and 11. What does sect. 1 say? It says that, "The author of every painting . . . shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph." How do you copy a painting? How do you engrave a painting? How do you reproduce a painting? How do you multiply a painting? Why, of course, by something in the nature or character of a painting, picture, drawing, or engraving. But then it is said that is leaving out the words "by any means and of any size," and those words import *tableaux vivants* or the grouping of living figures, because the picture has been copied, reproduced, and multiplied "by any means and of any size." That is not the meaning of the Act at all. It is straining it out of all proportion. I am clearly of opinion that when this Act was passed nobody ever dreamt of trying to include a case like this in it. When you look at the statute it was not drafted for that purpose, and putting a fair and honest meaning on this Act, I am clearly of opinion that the present application fails, and the appeal must be dismissed with costs.

Scrutton asked of an extension for the terms of the undertaking. He urged that the present form of undertaking would allow the defendants to destroy the backgrounds if they kept photographs of them, and that they ought not to be allowed to do so, as the plaintiff, if he recovered damages, would be entitled to have the backgrounds given up.

Their Lordships considered that the undertaking was sufficient.

Solicitor for the plaintiff, *H. Bentwitch*.

Solicitors for the defendant company, *Ashurst, Morris, Crisp, and Co.*

Solicitor for the other defendants, *Basil Thomas*.

Dec. 1, 2, and 19, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

FURNESS, WITHY, AND CO. v. WHITE AND CO. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Consignee for sale—Receipt of goods under bill of lading—Liability for freight—Deposit—Merchant Shipping Acts Amendment Act 1862 (25 & 26 Vict. c. 63), ss. 66-72.

A mere consignee for sale of a cargo shipped abroad and delivered to him in England out of a warehouse under a bill of lading, is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act 1862, as the deposit is not equivalent to payment, but is only security for payment.

Decision of Day, J. affirmed (Davey, L.J. dissenting).

THE plaintiffs were shipowners carrying on business in London, and the defendants were fruit and produce brokers and commission agents, also carrying on business in London. When foreign fruit was consigned to the defendants they acted for the shippers as agents to sell only, and remitted the proceeds of the sale of the goods, less commission and expenses, to the shippers abroad.

A consignment of apples in barrels was shipped in the plaintiffs' ship *Inchulva*, at Halifax, Nova Scotia, for conveyance to London, consigned to the defendants for sale.

The bill of lading stated the number of barrels

Marked and numbered as in the margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition at the aforesaid port of London . . . unto W. N. White and Co. or to their assigns, freight and charges payable by consignees as per margin.

Appended to the bill of lading was a condition that

The property shall be discharged from the ship into transit sheds or otherwise, as soon as she is ready to unload, by the agents of the owners of the vessel, and is to be entered by the consignees at the Custom House within twenty-four hours after the ship is reported.

And also the following clause:

The shipowners shall be entitled to land these goods on the quay of the dock where the steamer discharges immediately on her arrival; and upon the goods being so landed the shipowners' responsibility shall cease. This is to form part of this bill of lading, and any words at variance with it are hereby cancelled.

The ship arrived at the Victoria Docks, London, on Saturday, the 10th Dec. 1892, but the defendants, not being aware of the consignment to them, were not at the discharging berth ready to take delivery of the cargo on its arrival. The captain therefore, under the provisions of sect. 67 of the Merchant Shipping Acts Amendment Act 1862, and of the clause in the bill of lading, landed the cargo into a warehouse of the London and India Docks Joint Committee, the discharge being completed on Tuesday, the 13th Dec. 1892. On the landing of the apples the plaintiffs gave notice to the Docks Committee that they were to remain subject to a lien for freight.

On the 12th Dec. the defendants heard for the

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

CT. OF APP.]

FURNESS, WITHEY, AND CO. v. WHITE AND CO.

[CT. OF AP

first time of the ship's arrival, and of the consignment to them, and on that day they sent to the Docks Committee the following letter :

Dear Sirs,—We herewith hand you cheque for freight under the Merchant Shipping Amendment Act 1862, ss. 68, 69, 70, 71, and 72, and request you to hold same pending the receipt of your landing account and our further instructions.—Yours truly, W. N. WHITE AND Co. Limited ; WM. NICH. WHITE, managing director.

A cheque for 152*l.* 17*s.* 1*d.* was inclosed, which was the amount due for freight as calculated by the defendants from the entries in the margin of the bill of lading ; but there was a miscalculation, the proper amount being 148*l.* 16*s.* 3*d.*

The cheque and letter were received by the Docks Committee on the 13th Dec., and the same day the following letter was sent by them to the plaintiffs :

London and India Docks Joint Committee, Royal Victoria Dock, 13th Dec. 1892.—Gentlemen.—I am instructed to inform you that Messrs. W. N. White and Co. Limited have deposited 152*l.* 17*s.* 1*d.* with this committee for freight, &c., on apples, *ex Inchulva*, Captain ———, from Halifax, and have given notice to retain 152*l.* 17*s.* 1*d.*—I am, Gentlemen, your obedient servant, WOODWARD.

On the 13th Dec. the delivery of the apples to the defendants from the warehouse was commenced, and was completed on the following day.

In consequence of the defendants' notice to the Docks Committee, the plaintiffs were unable to obtain the 148*l.* 16*s.* 3*d.* due to them for freight, and on the 13th Dec. they wrote to the defendants saying they declined to wait for the money until the expiration of the thirty days provided by sect. 72 of the Act, and that they would issue a writ for the amount unless it was paid on that day. The defendants contended that they were within their rights, and on the afternoon of the 13th Dec. the writ in this action was issued claiming 148*l.* 16*s.* 3*d.* for freight, but it was not served on the defendants until the next day.

On the 14th Dec., before the writ had been served, the defendants wrote to the plaintiffs saying that, as the Docks Committee had received the goods, the defendants were entitled to have delivery of them under the Act of 1862 ; they denied that the freight would be locked up for thirty days, as upon the goods being delivered to the defendants in proper order the dock company would pay over the amount less any damage for which the ship was liable. They also said they had acted in accordance with the provisions of the Act, and that they should act in the same manner in future, in order to avoid delay in settling claims.

On the same day, and before the service of the writ, the defendants wrote to the Docks Committee directing them to pay the plaintiffs the sum of 148*l.* 16*s.* 3*d.*, the corrected amount of the freight, less the sum of 15*s.* for "three barrels broken and plundered at 5*s.* each." On the 15th the agents of the Docks Committee tendered the plaintiffs the sum of 148*l.* 1*s.* 3*d.*, but the plaintiffs refused to accept it as the action had been commenced, and they did not admit their liability for the 15*s.*, and afterwards the 148*l.* 16*s.* 3*d.* was paid into court in the action.

The defendants contended that the plaintiffs could not maintain the action against them, as

they were not parties to the bill of lading, that the shipper of the goods was not their agent, that they were only agents for the sale of apples, and were not indorsees of the bill of lading within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111) ; that there was no express implied promise on their part to pay the freight, and that at the time the action was commenced the plaintiffs had not delivered the goods to the defendants, and had not withdrawn their notice that they claimed a lien on the goods for freight.

After the statement of defence had been delivered, the plaintiffs amended their statement of claim by claiming, in the alternative, a lien on the money deposited with the Docks Committee.

The action was tried by Day, J., who held that as the defendants had taken delivery of the goods there was an implied contract on their part to pay the freight, and gave judgment for the plaintiffs for 148*l.* 16*s.* 3*d.*

From this decision the defendants appealed.

Channell, Q.C. and Cranston for the appellants.—Apart from the Merchant Shipping Amendment Act 1862 the appellants are liable. The acceptance of the goods by them not amount to an implied promise to pay charges for freight :

Sanders v. Vanzeller, 4 Q. B. 260 ;

Kemp v. Clark, 12 Q. B. 647.

Besides which, the defendants having deposited the amount of the freight in accordance with the Merchant Shipping Acts Amendment Act 1862 cannot be sued for it. The words at the end of sect. 70, "without prejudice to any other remedy which the shipowner may have for the recovery of the freight," only apply to cases where the shipowner has a remedy by action on the bill of lading itself, and they do not apply to a consignee's sale, whose liability depends on a contract to be inferred from the circumstances of each particular case, and no promise to pay can be inferred when he deposits the amount claimed. Making the deposit the defendants were entitled under the statute to receive the apples. There is no consideration for any promise to pay freight on delivery, and they are under no personal liability to pay it.

Pickford, Q.C. and H. F. Boyd for the respondents.—A contract by the defendants to pay freight must be inferred from the circumstances of this case. By sect. 72 a right of action is given to the shipowner against every person coming within the definition of "owner of goods ;" and by sect. 66 that expression includes "every person who is for the time being entitled either as owner or agent for the owner, to possession of the goods." The defendants are therefore liable as owners under this section.

Channell, Q.C. in reply.

Cur. adv. vul.

Dec. 19.—LINDLEY, L.J.—The question raised by this appeal is new and important. It is whether a mere consignee for sale of a cargo shipped abroad and delivered to him here out of a warehouse under a bill of lading is liable to be sued on the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act 1862 (25 & 26 Vict. c. 63). To decide t

question it is necessary to consider, first, his liability apart from that statute; and, secondly, his liability since it passed. Apart from the statute, the liability of a consignee or indorsee of a bill of lading to pay the bill of lading freight on delivery of the goods to him was and is clear and undoubted. Such liability arises from a real though tacit contract—a contract not expressed in the bill of lading, to which he is no party, but to be inferred from the conduct and obvious intentions of the shipowner and himself. It would be unbusinesslike and highly improbable that a shipowner would give up his lien for freight and deliver the goods to the consignee or indorsee unless he undertook to pay the freight, and it would be equally unbusinesslike and improbable that the consignee or indorsee would expect to obtain possession of the goods except upon the terms of paying the freight for which the shipowner had a lien upon them. A promise to pay is inferred as a matter of course from delivery unless there are other circumstances to rebut the inference. But the promise so inferred is, as already stated, a promise in fact, and not one of those so-called implied promises in law which are imputed irrespective of intention. This was settled in *Sanders v. Vanzeller* (*ubi sup.*) and *Kemp v. Clark* (*ubi sup.*). The consideration for the promise to pay the freight is the delivery of the goods to the consignee or indorsee of the bill of lading. The consideration is not the mere abandonment of the lien, but the delivery of the goods. The lien may be waived or even released under seal, and yet if the consignee or indorsee does not get delivery of the goods he will not be liable to pay the freight unless a distinct promise to pay it in consideration of a release of the lien as distinguished from a delivery of the goods can be proved. Such a promise is no doubt theoretically possible, but I do not suppose it has ever been heard of in business. It is, however, important to bear in mind that it is the delivery of goods which is the consideration for the consignee's promise to pay the freight, and, apart from the statute, a consignee named in a bill of lading or an indorsee of a bill of lading had to pay the bill of lading freight on delivery of the goods to him, unless he could show circumstances relieving him from this obligation, as in *Smidt v. Tiden* (30 L. T. Rep. N. S. 891; L. Rep. 9 Q. B. 446). If the consignee or indorsee is also the owner of the goods, he is liable to pay the freight as if he had entered into the contract contained in the bill of lading. But this liability has been imposed by statute 18 & 19 Vict. c. 111, and does not depend on a contract to be inferred from the mere delivery of the goods to him. Such being the liability of a consignee or indorsee of a bill of lading apart from the Merchant Shipping Acts Amendment Act 1862, I pass to consider the effect of that part of the Act which bears upon this question, viz., sect. 66 and those following. The object of the Legislature in passing this part of the Act will be found explained in *Meyerstein v. Barber* (16 L. T. Rep. N. S. 569; L. Rep. 2 C. P. 38) and *Mors-le-Blanch v. Wilson* (28 L. T. Rep. N. S. 415; L. Rep. 8 C. P. 227), where the inconveniences of landing goods in warehouses and so creating another lien are illustrated. In reading the statute it must be borne in mind that it is the duty of the consignee or indorsee of a bill of lading to be ready to receive the goods as soon as the

ship arrives and the master is ready to deliver them. It is only where there has been failure on the part of the consignee or indorsee to take delivery direct from the ship on arrival that the necessity for warehousing the goods arises. Now by the Act in question provision is made (1) for enabling the owner of any ship arriving from foreign parts to land the goods on a wharf or in a warehouse (sect. 67); (2) for preserving his lien for freight and other charges on the goods so landed (sect. 68); (3) for the discharge of this lien, either by the production of a receipt or release from the shipowner (sect. 69), or by a deposit by the owner of the goods of the amount claimed for freight and other charges (sect. 70); (4) for the payment by the warehouseman to the shipowner of the whole deposit in fifteen days if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight, &c. (sect. 71); (5) for the payment by the warehouseman to the shipowner of so much of the deposit as is admitted by the owner of the goods and for returning the balance to the owner of the goods unless the shipowner shall within thirty days take proceedings to recover the amount in dispute from the owner of the goods (sect. 72). Throughout these sections the expression "owner of the goods" includes agents entitled to the possession of the goods—e.g., consignees for sale (sect. 66). Now, in providing this machinery I can discover no indication of any intention on the part of the Legislature to alter the consignee's liability to pay the freight on delivery to him. Nay, more, the Legislature has expressly negated any such intention. See the words at the end of sect. 70. It is contended, however, that these words can only apply to cases where the shipowner has a remedy by action on the bill of lading itself, and that they do not apply to a mere consignee for sale, whose liability depends on a contract to be inferred in each particular case from the circumstances of that case, and that no promise by him to pay freight can be inferred when he deposits the amount claimed. It is, moreover, urged that, as on making the deposit he is entitled by the statute to receive the goods, there is no consideration for any promise to pay the freight on delivery. This argument is ingenious, but to my mind not convincing. The introduction of the machinery of a deposit was for the benefit both of the shipowner and the consignee. It enables the shipowner to discharge his ship without risking the loss of his lien, and it enables the consignee to obtain the goods without waiting to settle disputes. But the deposit is not equivalent to payment; it is only a security for payment; and it is clear to my mind that the deposit was never intended to deprive the shipowner of any right of action which, apart from the deposit, he would have had against a consignee obtaining the goods. This is, I think, made plain by the language of sect. 72, which clearly contemplates and expressly authorises legal proceedings by the shipowner against the goods-owner for the recovery of money from him. The legal proceedings here referred to are such as were usual in such cases—viz., an action for the freight—and the statute has always been so construed. I do not say that a suit in equity by the shipowner against the consignee making the deposit and the warehouseman to obtain payment out of the deposit might not be had recourse to; on the con-

[CT. OF APP.]

FURNESS, WITHEY, AND CO. v. WHITE AND CO.

[CT. OF APP.]

trary, I have no doubt it might, and in some cases—e.g., if the consignee were insolvent, or in such cases as *Smidt v. Tiden*—such mode of proceeding would be best. But no legislative enactment is required to give the shipowner such a remedy as this. Some provision, however, was necessary to give the shipowner a remedy against the consignee personally, as the deposit discharged the lien. Such a provision is found in sect. 72, even if sect. 70 is insufficient for the purpose, as perhaps it is, or would be if its construction were not aided by sect. 72. I come, therefore, to the conclusion that the statute 25 & 26 Vict. c. 63 preserves the liability which, but for the deposit made under its provisions, would have been incurred before it passed by an agent for sale to pay the bill of lading freight upon delivery of the goods to him. The application of this view of the Act to the facts of the present case is easy. A cargo of apples belonging to someone in Canada was shipped in the plaintiffs' ship for carriage from Halifax to London. The apples were consigned to the defendants for sale, and by the bill of lading were made deliverable to them or their assigns, "freight and charges payable by consignees as per margin." The ship arrived in the Victoria Docks on Saturday, the 10th Dec. 1892. On the 12th the defendants heard of her arrival, and they paid the sum of 152*l.* 17*s.* 1*d.*, being the amount calculated by the defendants from the margin of the bill of lading, to the dock company, and at the same time the defendants gave the company notice not to part with the money until further instructions. All this was done before the apples were landed. They were landed on the 13th, and the defendants, having deposited enough, became entitled to take them away, but owing to a letter of the defendants of the 12th, the plaintiffs could not get the freight. On the 15th the writ in this action was issued by the plaintiffs against the defendants for 148*l.* 16*s.* 3*d.*, the amount of freight claimed for the apples landed. The difference between this sum and the 152*l.* 17*s.* 1*d.* was some miscalculation, and is immaterial. After the writ was issued the defendants released the sum deposited, but it has not, as I understand, been accepted by the plaintiffs in consequence of these proceedings. The money has since been paid into court in this action. If I am right in the construction of the statute, the defendants are personally liable for the freight. This was the view taken by Day, J. Whether the true view is that the old liability remains notwithstanding the deposit, or that the statute has substituted a fresh liability for the old one wherever it would have existed but for the deposit, admits of some doubt, which, however, is of no importance in this case. Whichever view is theoretically the more correct, the defendants are wrong. Their contention has been throughout that, having made a sufficient deposit, they were entitled to have the apples, and were under no personal liability to pay the freight. If this contention were correct, the defendants would get the apples and the plaintiffs would not get the freight, which might be detained from them for some time. The contention of the defendants is not in accordance with the usual course of business, and this action has been brought in order to have the question of their liability decided. The decision ought, in my opinion, to be against the

defendants, and their appeal ought therefore to be dismissed with costs.

SMITH, L.J.—The main question in this case is whether a shipowner who has carried goods in his ship from a foreign port to this country, and has landed them into warehouse, pursuant to sect. 67 of the Merchant Shipping Acts Amendment Act 1862, can maintain an action at law for freight against a consignee of the goods named in a bill of lading who is agent for sale in this country of a foreign shipper, and to whom no property in the goods has passed, when such consignee has taken delivery of the goods *ex* warehouse, and made the deposit prescribed by the Act. The amount in dispute is small, being 15*s.* 8*d.*, but the question is one of considerable practical importance, for the point raised by the defendants is, whether a shipowner in the circumstances of the case is obliged to have recourse to the goods owner for his freight, and, if necessary, sue him upon the other side of the Atlantic; or whether he can sue in an action at law the receiver of cargo here, and thus settle all matters in dispute regarding the freight with him. The facts are as follows: The plaintiffs carried a consignment of apples in their steamship from Halifax, Nova Scotia, to London under a bill of lading which made them deliverable to the defendants or their assigns, he or they paying freight for the same in cash upon delivery; and it was also therein provided that the shipowners should be entitled to land the goods on the quays of the dock where the steamer should discharge immediately on her arrival. No property in the apples passed to the defendants, and consequently they were not bound by the contract contained in the bill of lading between the shipowners and the foreign shipper. The ship arrived in London on the 10th Dec. 1892. The defendants had made no entry, and were not at the discharging berth ready to take delivery of the apples *ex* ship; and thereupon the captain under the provisions of the Act and of the bill of lading, as he lawfully might do, proceeded to land them into a warehouse of the London and India Docks Joint Committee, which, as Day, J. found, was completed upon the 13th Dec., before the writ in this action was issued. Upon the 12th Dec., and before the discharge into warehouse was completed, the defendants sent the following notice to the warehouse owners. [His Lordship then read the letter of the 12th Dec. and continued:] The 152*l.* 17*s.* 1*d.* arose from the miscalculation by the defendants of what the freight would come to, it should have been 148*l.* 16*s.* 3*d.* The dock company (who were the warehouse owners), upon receipt of the notice from the defendants, wrote to the plaintiffs as follows: [His Lordship then read the letter from the dock company of the 13th Dec. 1892, and continued:] The plaintiffs thereupon in the afternoon of the 13th Dec. issued the writ in this action claiming the freight due, 148*l.* 16*s.* 3*d.*, which was served upon the defendants upon the 14th Dec. 1892. The defendants having deposited the 152*l.* 17*s.* 1*d.* with the dock company, and given the notice of the 12th Dec. 1892 as above mentioned, took delivery of the apples *ex* warehouse. They now assert that in these circumstances they are not liable to be sued at law by the plaintiffs for freight. They also assert that there were three broken and plundered barrels of apples; or, in other words, that there was a short delivery of three barrels, and consequently 15*s.* 3*d.* should be

deducted from the freight of 148*l.* 16*s.* 3*d.* They say that, having deposited the amount of freight claimed with the warehouse owners pursuant to the provisions of sects. 70 and 71 of the Act, no further liability attaches to them. Now, it cannot be doubted, if the defendants were consignees of the goods mentioned in the bill of lading, to whom the property therein had passed, that in the circumstances which exist in this case they could be sued here at law by the plaintiffs for freight, and that this question of 15*s.* would be decided in that action, and the deposit with the warehouse owners by the defendants of the freight claimed would be no answer at all. They would be liable by reason of the Bill of Lading Act (18 & 19 Vict. c. 111), which transferred the contract contained in the bill of lading to them, and there is no dispute as to this. In my judgment it is also clear that, if the defendants had made entry and had taken delivery of the goods *ex* ship, they could have been successfully sued at law for freight by the plaintiffs, not upon the contract contained in the bill of lading, but by reason of having accepted the goods under the bill of lading, for this would be good evidence of a new contract to pay freight according to its terms, and any jury or judge would so hold. To repeat an expression of the late Willes, J., there are a bushel of authorities to support this proposition. The consideration for this new contract would be the shipowner parting with the goods to the consignee, and thereby abandoning his lien. It was, however, argued for the defendants that they were not liable to be sued, for they were neither consignees named in the bill of lading, to whom the property in the goods had passed, nor had they taken delivery of the goods *ex* ship, and that the circumstances under which they did take delivery of the goods afforded no evidence of a new contract to pay freight; and moreover, if they did, there was no consideration for such a contract, the shipowners' lien having been lost by reason of the deposit of the freight claimed by the defendants under the Act of 1862. I would point out that, if no legal proceedings can be maintained against the defendants, the strange result will follow by reason of the provisions of the Act, viz., that a consignee, by neglecting to make entry and to be ready at the ship's side to receive the goods he is about to receive, can compel a shipowner to resort to the warehousing clauses of the Act, and then, having made the deposit and thus obtained possession of the goods, can force the shipowner to sue the goods owner for freight wherever he may happen to be; whereas, if the consignee took the goods as he should, *ex* ship, he would be liable to be sued for freight; or in other words, if a consignee does what he ought to do he can be sued personally for freight, if he does what he ought not he cannot be. That it is the duty of a consignee to be ready to take delivery is clear: (see *Wright v. New Zealand Shipping Company*, 40 L. T. Rep. N. S. 413; 4 Ex. Div. 165; and *Postlethwaite v. Freeland*, 42 L. T. Rep. N. S. 845; 5 App. Cas. 599.) In *Meyerstein v. Barber* (*ubi sup.*) Willes, J. traced the history of the warehousing clauses of the Act of 1862, and it will be seen that they were passed for the benefit of shipowners, and not of consignees. It appears to me not necessary to decide the point which was so much argued at the bar for the defendants, whether by taking

delivery of the goods *ex* warehouse under the circumstances existing in this case they have afforded good evidence of a new contract for good consideration to pay the bill of lading freight, for in my judgment, when shipowners land goods into warehouse pursuant to the Act of 1862, and a consignee makes deposit, and thus gets rid of the shipowners' lien, and obtains possession of the goods, and gives the prescribed notice, sect. 72 of the Act designates such consignee as the person against whom legal proceedings to recover the amount of freight not admitted to be due, or otherwise for the settlement of any disputes which may have arisen concerning the same, are to be taken, and that these legal proceedings include at any rate an action at law. Sect. 67 of the statute of 1862 provides that, if the owner of goods imported in any ship from foreign ports to the United Kingdom (and the term "owner of goods" by sect. 66 includes a person for the time being entitled to the possession of the goods as agent for the owner, and exactly describes the defendants' position) fails to make entry of the goods, or having made entry thereof fails to land and take delivery of them with all convenient speed, the shipowners may make entry, and land the same at the time and subject to the conditions of the section. This, it is admitted, is what the shipowners in the case have rightfully done. By sect. 68 the shipowner, by giving the prescribed notice to the warehouse owner, may preserve his lien for freight which by sect. 69 is to continue until the freight is paid. Sect. 70, however, provides that an owner, which, as stated before, includes an agent for the owner entitled to the possession of the goods, may deposit with the warehouse owner the amount of freight claimed, and thereupon the shipowner's lien is discharged without prejudice to any other remedy which the shipowners may have for the recovery of the freight. If the Act had stopped here, the point as to whether the shipowners had or had not any remedy against the defendants upon a new contract would have necessarily arisen; but it does not stop here. Sect. 71 enacts that, if such deposit be made, and the person making the same does not within fifteen days give to the warehouse owner notice in writing to retain it (stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any such sum to be payable), the warehouse owner may at the expiration of fifteen days pay the deposit over to the shipowner. Sect. 72 provides for the case where the deposit has been made and the notice is given by the person who made the deposit. The warehouse owner is then to immediately apprise the shipowner of such notice, and pay to him out of the sum deposited the sum, if any, admitted to be payable to him, and retain the remainder; or, if no sum is admitted to be payable, then the warehouse owner is to retain the whole sum deposited for thirty days from the date of the notice, and at the expiration of such days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods (which includes, as before pointed out, the agent for the goods owner who has made the deposit) to recover the sum not admitted to be due, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight, the warehouse owner is to pay back to the goods owner or the agent, as the case

[CT. OF APP.]

FURNESS, WITHEY, AND CO. v. WHITE AND CO.

[CT. OF APP.]

may be, the sum about which the controversy has arisen. It will be noticed that the words of sect. 72 are: "Unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover" what is alleged to be due—that looks to me like an action at law—or otherwise for the settlement of any dispute which may have arisen between them concerning the freight or other charges as aforesaid—that is, the charges which are referred to in sect. 68, and are such for which the shipowner had a lien. In my judgment the effect of this legislation is, that a consignee who makes deposit, gives the prescribed notice, and takes delivery of the goods *ex* warehouse, is placed in precisely the same position as regards being sued in an action at law as a consignee who takes delivery of the goods *ex* ship, or of a consignee to whom the property in the goods has passed, and who takes delivery of them *ex* warehouse, and I can find no indication in the statute of making any distinction as regards liability for freight between different sorts of consignees who become receivers of cargo. On the contrary, in my judgment the provision in sect. 72, which enacts that legal proceedings may be taken against the person who makes the deposit, was expressly inserted in order that there should be no distinction. In my opinion the deposit by the consignee is to be made for the purpose of enabling him to obtain the goods with quick despatch, and is not, as is suggested by the defendants, for the purpose of freeing him from all liability relating to freight to be paid for their carriage. I cannot myself doubt that the legal proceedings mentioned in sect. 72 include at any rate actions at law. Whether they also include a suit in the old Court of Chancery (for in 1862, if proceedings in equity were taken, they must have been in that court) against the consignee in the nature of a bill filed by a mortgagee to establish his security and take the accounts, to which the warehouse owner would have had to be a party, I need not, as it seems to me, determine, though I think it would have been open to a shipowner to have taken that course if he had been so advised. The Act of 1862 was passed at a time when the procedure of the courts of common law and the Court of Chancery was wholly distinct, and I would point out that, although actions at common law for freight against receivers of cargo *ex* warehouse have been of constant occurrence, I do not myself know of a bill filed in the Court of Chancery for that purpose, which must have been the case if these proceedings were resorted to prior to 1873. Upon judgment being given in a common law action in cases where deposit of freight has been made, the practice has been, when the matter in dispute has been determined, to order the deposit money to be paid out to whomsoever it has been found by the result of the action to belong. In my judgment, for the reasons above, the plaintiffs have a right of action at law against the defendants personally, the point they now take is not sustainable, and Day, J. was right in the conclusion at which he has arrived. Mr. Channell, in his able argument for the defendants, then took the point that the writ in the action was issued too soon, and that it should not have been issued till after the defendants had given the second notice, which they did to the warehouse owner on the 14th Dec.—not a very worthy point considering what it was the parties

desired to have settled, and have had settled in a Superior Court upon a 15s. dispute, and I have satisfaction in thinking that it is not well founded. Mr. Channell argued that the notice of the 12th Dec. 1892 by the defendants to the warehouse owner was not a notice as required by sect. 71 of the Act, and that no action could be maintained until the goods owner had stated how much he admitted and how much he disputed of the freight claimed, and that this was not such a notice. In my judgment business men might well read this notice of the 12th Dec., as in fact the warehouse owner did read it, viz., a notice to retain the whole of the deposit, and that the defendants admitted nothing to be then due to the plaintiffs for freight, and the plaintiffs were therefore within their rights in issuing the writ as they did upon receipt of the communication from the warehouse owner. I should notice that up to the present moment the defendants have not admitted that their claim to the 15s. rebate of freight was erroneous, and it is only by means of an action that the plaintiffs can recover it. As was stated by Lord Chelmsford in *Ireland v. Livingston* (27 L. T. Rep. N. S. 79, 80; L. Rep. 5 E. & I. App. 395, 416), if, when construing a mercantile document which is susceptible of two meanings, the one party has *bonâ fide* adopted one of those meanings and acted upon it, it is not competent for the other afterwards to say that he intended the document to be read in the other sense of which it was equally capable. The other should have stated in the document what he did mean in clear and unambiguous terms. In my opinion the point about the writ having been issued two days too soon does not avail the defendants. The real point the parties intended to raise and have determined, which Mr. Channell told us had for some time been mooted, was, whether a receiver of cargo in the position of the defendants could be sued at all by the shipowners for freight. I am of opinion that they can, and that this appeal must be dismissed with costs.

DAVEY, L.J.—In this case I have the misfortune to differ, not only from the learned judge in the court below, but also from my learned brethren on this bench. Needless to say that, in differing from the judges of far greater experience than I have in cases of this kind, I am almost certainly wrong. But, as I have formed an opinion on the construction and effect of the Act, I feel bound to express it. The writ in this action was issued on the 13th Dec. 1892, for the recovery from the defendants of 148l. 16s. 3d. for freight due from the defendants to the plaintiffs on apples, the particulars of which are given. The question we have to decide is, whether the plaintiffs had a right of action against the defendants for the freight. The defendants are the consignees named in the bill of lading of the goods, but they were not the owners of the goods, and had no property in them. It is admitted that they were not parties to the contract contained in the bill of lading, and could not be sued upon that contract or under the provisions of the Bills of Lading Act. It was decided in *Sanders v. Vanseller* (*ubi sup.*), and is established law, that acceptance of goods under a bill of lading does not by implication of law constitute an agreement to pay freight according to the bill of lading, but such an acceptance may be evidence (stronger or weaker, according to other circumstances) of a new contract to make the payments

stipulated in the bill of lading. It is, however, conceded by the defendants that, when a consignee takes delivery from the master, a jury ought to find such a contract. The contract in such a case would be that, in consideration of the shipowner's delivering the goods and thereby waiving his lien, the consignee agrees to pay (see per Parke, B. in *Young v. Moeller*, 5 E. & B. 755, 760). The plaintiffs contend that such a contract ought to be implied in the present case, and of that opinion was the learned judge in the court below, and they say alternatively that a new right of action is given by sect. 72 of the Merchant Shipping Acts Amendment Act 1862. What happened in the present case was this: The defendants did not make entry of the goods, and were not ready to take delivery over the ship's side. On the 12th Dec. the master gave notice to the dock company to take the goods and hold them for the freight under sect. 68 of the Act. On the same day the defendants handed to the dock company a cheque for 152l. 17s. 1d., being the full amount of freight claimable under the bill of lading, as calculated by them, accompanied by a letter, which has been already read. This was intended to be a deposit under sect. 70. It has been contended that this letter was not intended to operate as a notice to retain the whole amount under sect. 71, but was merely an intimation that further instructions would be given in due course. The dock company certainly understood it as a notice to retain the whole, as shown by their letter to the shipowners. The notice is at best ambiguous, and in accordance with the sound principle laid down by the House of Lords in *Ireland v. Livingston* (*ubi sup.*), the defendants, who were the authors of it, cannot complain of its being so understood. I shall assume, for the purpose of my judgment, that it was a retainer of the whole freight, but subject to be afterwards modified or qualified by another notice. The learned judge found that the goods were delivered by noon of the 13th Dec. to the dock company, and were afterwards delivered by the dock company to the defendants. Sect. 70 of the Act is as follows: [His Lordship read sect. 70, and continued:] The effect of the deposit made by the defendants, which was in excess of the sum actually claimed, was therefore to discharge the shipowners' lien on the goods, and the plaintiffs ceased from the time when the deposit was made and the goods delivered to the dock company to have any further interest in or control over the goods. They had no power to interfere with the delivery of the goods to the defendants by the dock company. In other words, I am of opinion that from the time of completion of the combined transactions of the deposit by the defendants and the delivery by the plaintiffs to the dock company, the plaintiffs exchanged their lien or right of retainer of the goods for an active lien or right to obtain payment out of the sum deposited, but they retained any other remedy which they had at that time for recovery of the freight. Had they at that time a right of action for the freight against the defendants, or was there any evidence of a contract by the defendants to pay the freight? I think not. I do not see any materials out of which such a contract could be implied. There was no consideration for such an implied contract. The lien was discharged by the statute, and if it be said the plaintiffs gave up their lien

by delivery to the dock company to the order of the defendants, that may conceivably have been in consideration of the defendants having discharged the lien by making the deposit, but certainly was not in consideration of the defendants entering into a new contract to make themselves personally liable to pay over again. It may be further observed that the delivery to the order of the defendants when the lien was discharged (as it was by the statute) was in pursuance and performance of the original contract between the shipper and the shipowner. The shipowners retain all their existing remedies, but they do not so far acquire any new right of action under a new contract. But it is said that by sect. 66 the expression "owner of goods" includes every person who is for the time being entitled as owner or agent for the owner to the possession of the goods, subject in the case of a lien (if any) to such lien. This is true; but it does not, of course, make the person entitled as agent liable to whatever rights of action the real owner would be liable to. It was then contended that sect. 72 gives the same right of action against every person coming within the definition of owner, as the shipowner has against the owner, because (as I understand the argument) such a construction is necessary in order to work the machinery of the section. The section is an important one. The material words for the present purpose are, "at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any dispute which may have arisen between them concerning such freight." It is said that this contemplates that legal proceedings may be instituted by the shipowners against the persons included in the expression "the owner of the goods," in which I agree; but it is further said that no effectual proceedings can be had unless you imply a right of action for the freight against (among others) the consignee, and that it would be absurd in a case like the present to relegate the shipowner to his action against the foreign or (it may be) unknown principal. If I thought this the necessary result of not holding that the shipowner has a right of action for the freight against the consignee, I might yield to the argument, notwithstanding the difficulty which I felt in saying that a new right of action can be given by such words as I find in sect. 72. But I do not think it is, and, curiously enough, an illustration of what seems to me to be the true answer to the argument is to be found in an amendment made by the present plaintiffs in their statement of claim. I am of opinion that the effect of the group of clauses under consideration, and particularly sect. 72, is to give the shipowner a right to be paid his freight out of the sum deposited, which, subject to such payment, belongs to the person who made the deposit. Call it what you will, it is a security to him for his freight; and I think he has the same right as any other security holder to take legal proceedings against the person entitled to the subject-matter of the security subject to the charge, to have his right declared and the amount due to him ascertained and raised and paid out of the property charged. It will be observed that the words of the section are "legal proceedings" not only "to recover the balance or sum," but

CT. OF APP.]

HADDOW v. MORTON; TROUT, Claimant.

[CT. OF APP.]

"or otherwise for the settlement of any disputes which may have arisen between them concerning such freight." These words seem to me to exactly describe such legal proceedings in the nature of a mortgagee's suit as I have mentioned above, and I have no doubt such an action could be maintained. Inasmuch, therefore, as it is not, in my opinion, necessary in order to work the machinery of sect. 72 to imply a right of action for freight against the consignee where it does not exist apart from the section, I do not think that such a right of action ought to be implied or is given by sect. 72. The plaintiffs' claim was, and is, for 148*l.* 16*s.* 3*d.* The defendants, after action brought, direct the dock company to tender a sum less than that by 15*s.* only, which was refused. On the 3rd June 1893 the plaintiffs amended their claim by claiming a lien. No question is raised as to the propriety or regularity of this amendment, and, in my opinion, there being this dispute about 15*s.*, it was the proper course for the plaintiffs to take in order to settle the dispute which had arisen between them concerning the freight. The result is, in my opinion, that the action as originally framed was misconceived, and down to the amendment the plaintiffs were wrong; but I think the plaintiffs on their amended statement of claim are entitled to a judgment for payment to them of the amount of their claim, which is now admitted, out of the fund which has been brought into court, but not to a personal judgment against the defendants. As the appeal will, of course, be dismissed with costs, it is unnecessary for me to say how I think the costs of the action should be borne.

Solicitors for the appellants, *Devereux and Heiron*.

Solicitors for the respondents, *Crump and Son*.

Tuesday, Feb. 13.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

HADDOW v. MORTON; TROUT, Claimant. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

County Court—Interpleader—Goods taken in execution—Deposit by claimant of value of goods—Judgment on issue for execution creditor—Deposit paid out to execution creditor—Re-seizure of goods by creditor for the same judgment debt—Estoppel—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 156.

Upon an interpleader issue between an execution creditor and a claimant to goods seized in execution, the claimant deposited the value of the goods in court, under sect. 156 of the County Courts Act 1888. The execution creditor succeeded at the trial of the issue, and the money deposited by the claimant was ordered to be paid over to him. The execution creditor then seized the same goods again in respect of the unpaid balance of the same judgment debt. The claimant claimed the goods again, and again deposited the value of the goods in court. Upon the trial of the second interpleader issue:

Held, that, by taking out of court in the first interpleader issue the money deposited by the claimant, the execution creditor was estopped in the second

interpleader issue from denying that as against himself the goods were the goods of the claimant. Judgment of the Queen's Bench Division (69 L. T. Rep. N. S. 859; (1894) 1 Q. B. 95) affirmed.

THIS was an appeal from a judgment of the Queen's Bench Division (Charles and Wright, JJ.) allowing an appeal from a decision of the judge of the Wandsworth County Court.

Haddow obtained judgment in the County Court against Morton for 28*l.* and costs. He then seized in execution certain goods which were claimed by Ellen Trout. She, acting under sect. 156 of the County Courts Act 1888, deposited with the bailiff 25*l.*, being the amount of the value of the goods claimed, to abide the decision of the judge upon the claim.

At the trial of the interpleader issue, the County Court judge held that the claimant had failed to establish her claim, and he ordered the 25*l.* deposited by her to be paid over to the execution creditor, the plaintiff in the issue.

Haddow then seized the same goods again, in respect of the unpaid balance of the same judgment debt. Trout claimed the goods, and deposited another 25*l.* in court as before.

On the trial of the second interpleader issue, the County Court judge gave judgment for the execution creditor.

Upon the claimant's appeal, the Queen's Bench Division (Charles and Wright, JJ.), holding that the execution creditor was estopped, by taking the money out of court, from denying that the goods were the goods of the claimant, reversed the decision of the County Court judge and gave judgment for the claimant.

The execution creditor appealed.

Cluer for the execution creditor.—The question is, whether a claimant, who has no title to goods, for so the County Court judge held at the trial of the first interpleader issue, can, by paying into court the value of the goods, prevent a judgment creditor from levying execution on them. The claimant obtained no title to the goods as against the world by paying money into court, and it is submitted that this plaintiff is in no worse position than any other execution creditor of Morton. If there is an estoppel in this case, there will be an estoppel against the plaintiff, by which he will be prevented from seizing these goods under any other judgment that he may get. The case is really the same as if the claimant had lent money to the debtor, and the plaintiff is in the same position with regard to her as he is in with regard to the debtor. There can be no estoppel here, because the goods are in fact the property of the debtor.

Lawson Walton, Q.C. (*Horace Browne* with him), for the claimant, was not called upon.

Lord ESHER, M.R.—The question in this case is, whether the plaintiff, in this interpleader issue, is entitled, as against the claimant, to take out of court the money which she has paid in. The facts of the case are, that the plaintiff, having previously seized the very same goods in respect of the very same judgment debt as now, the claimant claimed them, and upon the trial of an interpleader issue the plaintiff succeeded. He then took out of court the money which the claimant had paid in, which was equal to the full value of the goods he had seized. The plaintiff then seized the same goods again in respect of the

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.] ALLINSON v. GENERAL COUNCIL OF MEDICAL EDUCATION, &C. [CT. OF APP.]

same judgment debt, and the claimant, having again paid the value of the goods into court, the plaintiff now says that he is entitled to take out of court the second amount which has been paid in. That is to say, he wants to take twice the value of the goods he has seized. I think that, as against the same claimant, he has no right to do that in respect of one and the same judgment. The appeal must be dismissed.

LOPES, L.J.—I agree, and adopt the words used by Wright, J. in the court below, when he said: "I agree that by the payment into court she did not acquire any property in the goods; but I think that the judgment creditor, by taking out of court the money paid in by the claimant, elected to accept the money in lieu of the goods, and was thereby estopped from afterwards denying that as against himself the goods were the goods of the claimant."

DAVEY, L.J.—I agree. *Appeal dismissed.*

Solicitor for the execution creditor, *H. B. Jones.*

Solicitor for the claimant, *F. A. K. Doyle.*

Friday, Feb. 23.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

ALLINSON v. THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Judicial inquiry—Disqualification of member of tribunal—Judge and accuser—Evidence of bias—Medical register—Medical practitioner—Infamous conduct in a professional respect—Medical Act 1858 (21 & 22 Vict. c. 90), s. 29.

Where the decision of a person who has acted in a judicial capacity is impugned on account of bias, other than in the nature of a pecuniary interest in his decision, the only question for the court to consider is, whether his relation to the matter before him was such as to form a reasonable and substantial ground for suspecting him of bias.

By sect. 29 of the Medical Act 1858, if any registered medical practitioner shall after due inquiry be judged by the General Council of Medical Education and Registration to have been guilty of "infamous conduct in any professional respect," the council may cause his name to be erased from the register which they are by the Act directed to keep.

Held (affirming the decision of Collins, J.), that, if a medical man in the pursuit of his profession has done something with respect to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, that is evidence of "infamous conduct in a professional respect."

THIS was an appeal from the judgment of Collins, J. at the trial of the action without a jury.

The plaintiff was a medical practitioner, and the defendant council having ordered his name to be erased from the register which is kept by them under the Medical Act 1858, he brought this action claiming an injunction against the council to restrain them from keeping his name erased,

and a mandatory injunction ordering them to put his name back in the register.

By the Medical Act 1858 (21 & 22 Vict. c. 90) it is provided as follows:

Sect. 29. If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they think fit, direct the registrar to erase the name of such medical practitioner from the register.

In May 1892 the general council gave the plaintiff notice to appear before them and answer a complaint made against him that he had been guilty of "infamous conduct in a professional respect."

Two grounds of complaint were brought forward, one was the advertisements which he had been publishing for some time in a newspaper in which he made serious accusations against all medical men, except himself, and against many of the methods of medical science as generally followed by the medical profession, and in which also he held himself out as the one person to whom people in ill-health should come for relief. These advertisements were published with the view of increasing his medical practice and obtaining fees. The other ground of complaint referred to a book on vaccination which the plaintiff had published. This book met with great disapproval among the medical profession, and the plaintiff had promised to withdraw it from circulation. In fact, however, his interest in the book passed from him to the Anti-Vaccination Society, and the plaintiff continued afterwards to advise his patients to go to the Anti-Vaccination Society and indirectly promoted the sale of the book.

The complaints against the plaintiff were laid before the defendant council by the committee of the Medical Defence Union, a society of medical men, one object of which was the protection of the honour of the medical profession.

A Dr. Phillipson had been for some time a subscribing member of this society, and was also a vice-president, and as such was an *ex-officio* member of its committee.

On the 3rd May 1892 he was elected a member of the defendant council, and he thereupon sent in to the Defence Union a resignation of his membership. By the rules of the Defence Union a resignation of membership was not complete until the lapse of two months from the day when it was sent in.

On the 28th May he attended a meeting of the defendant council, at which the complaints against the plaintiff, which were brought by the committee of the Defence Union, came on for hearing. After due inquiry the council judged the plaintiff to have been guilty of "infamous conduct in a professional respect," and directed the registrar to erase the plaintiff's name from the register.

Dr. Phillipson had not attended any meeting of the committee of the Defence Union at which complaints against the plaintiff were discussed, and until the 28th May, when the defendant council heard the case against the plaintiff, he had no personal knowledge whatever of the complaints made against the plaintiff.

The action for an injunction against keeping the plaintiff's name erased from the register, and

(a) Reported by E. MAXLEY SMITH, Esq., Barrister-at-Law.

asking that the defendant council should be ordered to insert his name again on the register, was tried by Collins, J., without a jury, and the learned judge gave judgment for the defendants. The plaintiff appealed.

Coleridge, Q.C. and Schultess Young for the plaintiff.—There are two reasons upon which we submit that this judgment is wrong. First, Dr. Phillipson, being a member of the committee of the Defence Union and a member of the body who tried the plaintiff's case, was in the position of both judge and accuser. His position renders the decision of the council wholly void. Public policy requires not only that persons acting judicially shall in fact be free from any bias or prejudice, but also that they shall be free from any suspicion of bias. This is the view expressed by Fry, L.J., in his dissenting judgment in *Leeson v. The General Council of Medical Education and Registration* (61 L. T. Rep. N. S. 849; 43 Ch. Div. 366), and it is submitted that his view was the correct one:

Reg. v. Gaisford, 66 L. T. Rep. N. S. 24; (1892) 1 Q. B. 381;

Reg. v. Meyer, 34 L. T. Rep. N. S. 247; 1 Q. B. Div. 173;

Reg. v. Henley, 61 L. J. 135, M. C.

[LOPES, L.J. referred to *Reg. v. Handsley*, 8 Q. B. Div. 383.] Striking a man's name off the medical register is a judicial act:

Partridge v. The General Council of Medical Education and Registration, 62 L. T. Rep. N. S. 787; 25 Q. B. Div. 90.

Though Dr. Phillipson did not personally take any part in the committee of the Defence Union in the plaintiff's case, yet it is a necessary legal inference that the committee were acting as his agents in what they did in the matter. The second objection to the decision of the defendant council is, that there was no evidence of any "infamous conduct in a professional respect" on the part of the plaintiff. "Infamous conduct" means conduct that is infamous *per se*. The plaintiff ought to have been shown guilty in the first place of conduct infamous *per se*, and then it should have been shown that such conduct was in a professional matter, before he could be brought within the words of sect. 29.

B. T. Reid, Q.C. and Muir Mackenzie for the defendants.—The bias alleged against Dr. Phillipson is not of a pecuniary nature. If it were, the proof of the smallest pecuniary interest would be enough to disqualify him from acting judicially in this matter; but, as the bias is not of that nature, the question for the court is one of substance and fact, whether his interest in the case before him was so substantial that, in the opinion of the court, he may reasonably be suspected of bias. That is the effect of the decision of the majority of the court in *Leeson's case* (*ubi sup.*), and that decision is binding on this court. There must be more than a possibility of bias; there must be a real possibility, or a possibility with a probability:

Reg. v. Farrant, 57 L. T. Rep. N. S. 880; 20 Q. B. Div. 58;

Reg. v. Rand, L. Rep. 1 Q. B. 230.

The court should not inquire into the character of the person alleged to be biassed. The only question for the court to consider is, whether his position is such that an ordinary person in the

same position would be likely to be biassed. Upon the second objection which has been taken here, it is submitted that the expression used in sect. 29 means professional infamy. It means something which the medical profession would consider infamy. A mere breach of a professional rule would not necessarily be infamous; but an endeavour by a medical man to discredit the whole medical profession, except himself, with the object of attracting business, and so making money, is infamous professionally. If there was any evidence of such conduct before the defendant council, then its decision cannot be overruled by this court:

Allbutt v. The General Council of Medical Education and Registration, 61 L. T. Rep. N. S. 585; 28 Q. B. Div. 400.

Coleridge, Q.C. replied.—Possibly the peculiarities of the plaintiff's tenets may not commend themselves to the medical profession; but the question is whether he propagated them honestly or not.

Lord ESHEE, M.R.—In this case the grounds of the plaintiff's claims are two. The first is, that Dr. Phillipson, one of the members of the defendant council who adjudicated upon the plaintiff's case, was disqualified from so acting, so that the decision of the council was rendered not only illegal but void. The second ground is, that there was no evidence upon which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in a professional respect." It is admitted that, if the plaintiff can now make good either of these two objections, the decision of the council is illegal and void, and in either case, I presume, the plaintiff would be entitled to the relief which he asks for. The first question, then, is this, Was Dr. Phillipson in such a position as to make his participation in the decision of the council illegal as being against public policy? If he was in such a position, then the decision of the council was rendered wholly void. Now, it is said that he was incapacitated from taking part in the decision because he was, or might be, biassed. That he had any pecuniary interest in the matter is not suggested, but it is suggested that he might have had a bias. We are bound to act according to the decision of this court in *Leeson v. The General Council of Medical Education and Registration* (*ubi sup.*). It may be that some of us (of whom I am not one) would have preferred that that case should have been decided according to the view which was taken by Fry, L.J.; but, as we are now bound by that decision, all we have to do with regard to it is to discover rightly what it did decide and whether it embraces the present case. It seems to me that, in that case, the majority of the court decided that where a person who has taken part in a judicial proceeding, or, in other words, has sat in judgment on a case, has any monetary interest in the result, however small, the court will not inquire further as to whether he was really biassed or in any way likely to be biassed. The court will say at once that it is against public policy. But *Leeson's case* (*ubi sup.*) also decides that a person who is to sit as a judge may have other positions or relations to the matter which may incapacitate him from acting as a judge, as to which it may be a crucial question whether he was in substance and in fact incapacitated by bias from sitting as a

judge. The question then is one of substance and of fact in each particular case. What is the fact to be decided? If his relation to the matter which is the subject of the judicial proceeding is such that he can by no possibility be biassed, then it seems clear that there is no objection to his acting as judge. The question is not whether in fact he was or was not biassed. The court cannot inquire into that. But there is something between those two propositions. In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in the same sort of capacity, public policy requires that, in order that there may be no doubt as to the purity of the administration, any person who takes part in it shall not be in such a position that he might be suspected of being biassed. In *Reg. v. Allon* (4 B. & S. 915) Mellor, J. said: "It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives." If those words be taken literally I think that they are rather too large, because I know of no case in which a man cannot be suspected. There are some persons whose minds are so perverse that they suspect other people without any ground whatever. Now the question of incapacity is to be one of substance and of fact, and therefore, as it seems to me, the man's position must be such that, in substance and in fact he cannot be suspected. The question is, not whether he may not be suspected by some perversely-minded person, but whether he bears such a relation to the matter that he cannot reasonably be suspected of being biassed. I think that, for the sake of the character of the administration of justice, we ought to go as far as that, but we ought not to go any further. That I take to be the rule for the application of the test laid down in *Leeson's case* (*ubi sup.*). Turning now to the present case, could Dr. Phillipson be reasonably or substantially suspected of bias? The question depends in each case upon the relation of the judge who is impugned to the matters which he has had to adjudicate upon. Now the relation of Dr. Phillipson to that matter in this case was as follows: He had been a subscriber to and member of a society called the Medical Defence Union, a society formed for the defence of the honour of the medical profession, to protect that honour against the improper conduct of any individual member of the profession. He had been a vice-president of the society, and was in consequence an *ex-officio* member of the committee to which was intrusted an authority to complain of improper conduct by any medical man before the defendant council. He was only an *ex-officio* member of the committee, and in fact never acted as a member of it. Moreover, before the plaintiff's case came on for hearing by the defendant council he had resigned altogether his membership of the Defence Union, so that, if his resignation was complete, he was, when the plaintiff's case was heard, not only not a subscriber to the Defence Union, but was not a vice-president nor a member of the committee. He had nothing to do with the matter at all. It was suggested by the learned counsel for the plaintiff that, although Dr. Phillipson had resigned his membership of the Defence Union, yet his resignation was not an accomplished fact until the end of the two months following. But it seems to me that, though that

may be technically so, yet the substance of the thing is that he had resigned his membership. He might perhaps have repented at the end of two months, but he did not. His resignation dated from the time he sent it in, because otherwise the two months did not begin to run. Therefore he resigned when he sent in his resignation, and he resigned so as not to act, and with the determination not to act as a member of the union, and he never did act again. Under these circumstances, it seems to me impossible that any reasonable person should think him biassed, or that substantially and really he could be liable to be even suspected of bias. There is nothing upon which to found the suspicion. The first objection, therefore, taken to his decision falls to the ground. As to the second ground, it is admitted that, if there was no evidence upon which the council might fairly and reasonably say that the plaintiff had been guilty of infamous conduct in a professional respect, they went beyond the jurisdiction given them by the Act of Parliament in entertaining or adjudicating upon the case. If there was no such evidence they ought to have refused to interfere. Then comes the question, Was there any evidence here of misconduct by this plaintiff that justified the defendant council in finding him guilty of "infamous conduct in a professional respect?" I am prepared to adopt this statement, at all events, of one ground of guilt which has been drawn up by my brother Lopes. It is this: If it be shown that a medical man, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the general medical council to say that he has been guilty of "infamous conduct in a professional respect." The question is not merely whether what a medical man has done would be an infamous thing for anybody else to do, but whether it is infamous for a medical man to do it. An act done by a medical man may be infamous though it would not be infamous if done by anybody else, but to bring such an act within sect. 29 of this Act of Parliament it must also be shown to have been infamous "in a professional respect." There may be some acts which, although not infamous if done by any other person, yet if done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered as "infamous conduct in a professional respect." Such acts would, I think, come within sect. 29. I adopt that statement of my brother Lopes as a good definition of at least one state of circumstances in which the General Medical Council would be justified in finding a medical man guilty of "infamous conduct in a professional respect." Now, was there any evidence in the present case of any such conduct by the plaintiff? It seems to me that this question must be solved thus: Taking the evidence before the defendant council as a whole, did it bring the plaintiff within the definition I have read? Was the evidence, taken as a whole, reasonably capable of being treated by the council as bringing the plaintiff within that definition of "infamous conduct in a professional respect"? I cannot doubt that it was. It seems to me that it may be fairly said that the plaintiff endeavoured to defame his brother practitioners,

CT. OF APP.] ALLINSON v. GENERAL COUNCIL OF MEDICAL EDUCATION, &c. [CT. OF APP.]

and to induce suffering people, by means of his defamation, to avoid going to them for advice, and to come to himself, in order that he might obtain the remuneration or fees which otherwise he would not obtain. If, on the whole, his conduct could reasonably be construed as amounting to that, it seems to me to come within the definition, and the defendant council were justified in saying that the plaintiff had been guilty of "infamous conduct in a professional respect." I think it could be, and therefore the plaintiff's second ground of appeal fails, and in my opinion the judgment of Collins, J. was right, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. That an accuser must not be a judge is in accordance with public policy and natural justice, and is a principle too well established to require any comment. A person who has a pecuniary interest in the result of an accusation cannot adjudicate on it. The inference at once arises that he is interested. But where there is no pecuniary interest nor any suggestion of pecuniary interest, it is, to use the words of Bowen, L.J. in *Leeson's case* (*ubi sup.*), "a question of substance and of fact whether one of the judges has in truth also been an accuser." Again adopting the words of Bowen, L.J.: "Has the judge whose impartiality is impugned taken any part whatever in the prosecution either by himself or by his agents." And in the same case, which was very similar to the present one, the General Medical Council and the Medical Defence Union both being concerned in it, Cotton, L.J. said: "Then as regards the question whether they are to be considered as complainants here, we ought to look to substance and not, because this complaint is brought by the council in the name of the union, to say that a person, a member of the union, who has nothing to do, or can have nothing to do, with bringing forward this complaint, is to be treated as a prosecutor, or as one of the persons who are bringing forward this complaint." Those words are very applicable to the present case, and the conclusion which I draw from that case is, that in such a case as the present the proper question to be asked is this: whether there is any reasonable, any real and substantial ground for suspecting bias. Now, let me apply that to this case. Was there any reasonable ground in substance and in fact for suspecting any bias in Dr. Phillipson? He was a subscriber to the Medical Defence Union. He had been a vice-president, and as such he was an *ex-officio* member of the committee, which was the body which on behalf of the union instituted complaints such as that against the plaintiff. Dr. Phillipson never acted upon that committee, and at the time when this inquiry took place he had resigned his membership of the union. It was contended that his resignation did not take effect, or was not complete, for a period of two months after he had sent it in, but I think that in effect he had resigned his membership. It must also be recollected that the evidence shows that he had never heard of the plaintiff's case before the inquiry. In these circumstances I think that Collins, J. was quite right in coming to the conclusion that there was no reasonable ground in substance or in fact for suspecting any bias in Dr. Phillipson. If that is so, the first objection relied on by the plaintiff fails. Then I come to the other question as to

the meaning of the expression "infamous conduct in a professional respect," contained in sect. 29 of the Medical Act 1858. I think that, if there was any evidence on which the council could reasonably have come to the conclusion which they did come to, their decision is final. If, on the other hand, there was no evidence upon which they could reasonably arrive at that conclusion, then their decision can be considered by this court, and reversed if it is thought necessary. It is important first to consider what is meant by "infamous conduct in a professional respect." My Lord has adopted a definition which with his assistance and that of my brother Davey I had prepared. I do not for a moment imagine that that is an exhaustive definition, but I think it is one which is strictly and properly applicable to the present case. Assuming it to be a sufficiently good definition for the purpose of the present case, was there any evidence before the General Medical Council which justified them in coming to the conclusion that the plaintiff had been guilty of infamous conduct in his profession within that definition? It appears to me that there was abundant evidence upon which they might find as they did. [His Lordship repeated the facts mentioned by the Master of the Rolls.] But there is another matter to which the Master of the Rolls has not alluded, viz., the plaintiff's conduct with regard to his pamphlet on vaccination. His conduct in that matter appears to me to come distinctly within the definition I have given. In 1887 or 1888 he published a pamphlet against vaccination which met with great disapproval, and he promised to withdraw it, and, so far as he was concerned, it appears that he did withdraw it from circulation. But it had passed from his hands into those of the Anti-Vaccination Society, and well knowing that, he advised his patients to consult that society, being perfectly aware that the advice they would get from the society would be to adopt a method of effacing the effects of vaccination. In fact, he was indirectly advising those who consulted him to violate the law which the Legislature has thought desirable for enforcing vaccination. On both these grounds I think there was ample evidence to justify the council in coming to the conclusion that the plaintiff was guilty of "infamous conduct in a professional respect."

DAVEY, L.J.—Nothing can be more important than to maintain intact the principle that a man shall not be judge in his own cause, and to preserve every tribunal which has to adjudicate upon the rights or status or property of any of Her Majesty's subjects from any suspicion of partiality. Speaking for myself, if I were at liberty to discuss the judgments which were delivered by the Lords Justices in *Leeson's case* (*ubi sup.*), I confess that my mind would go rather with the judgment of Fry, L.J. He appears to me to state a general principle, easy of application to the circumstances of any particular case, whereas I find a difficulty in extracting from the judgments of Cotton and Bowen, L.J.J. the exact principle to be applied. Their judgments also seem to me to leave too much to the inferences to be drawn from the circumstances of each particular case. The true rule to be applied seems to me to be one which ought to be above and beyond the circumstances of any particular case, whether the facts suggest bias or not. The true

CT. OF APP.]

HANSEN v. HARROLD BROTHERS.

[CT. OF APP.]

rule, I think, was that laid down by Mellor, J. in *Reg. v. Allen* (*ubi sup.*), to which my Lord has already referred. But we are bound by the judgments of the majority of the court in *Leeson's* case, and I adopt them in the sense in which they have just been explained by the Master of the Rolls and Lopes, L.J. Applying to the best of my power the principle which is to be evolved from those judgments, I am of opinion that there is no ground for holding that Dr. Phillipson was disqualified from taking part in the decision of the present case. I must add that, even if I were to adopt the judgment of Fry, L.J., or the words of Mellor, J. in their most extreme application, I should come to the same conclusion that Dr. Phillipson was not disqualified. What are the facts of the present case. Dr. Phillipson was a vice-president of the Medical Defence Union, and as such he was, according to the constitution of the society, a member of their committee, but he did not attend any of the meetings of the committee, and it appears that he was not even aware of the plaintiff's prosecution before the defendants until he had taken his seat as a member of the defendant council. That shows that he was not a party or privy to what has been called the plaintiff's prosecution. Still he might be held to be disqualified if members of the committee of the union were as such disqualified. But there is a fact to which I attach much more importance than was apparently attached by Collins, J., viz., Dr. Phillipson's resignation. The inquiry by the defendant council was held on the 28th May. On the previous 3rd May, Dr. Phillipson had ceased, so far as lay in his power, to be a member of the union, and that being so, the mere fact that under the rules of the society two months must elapse before a resignation is complete, does not seem to me to be of any consequence. It would, I think, be a straining at a gnat to hold that under these circumstances a rule which the society chose to adopt disqualified Dr. Phillipson from taking any part in the decision of the plaintiff's case. On the second point I agree that there was sufficient evidence upon which the defendant council might reasonably and properly infer that the plaintiff was endeavouring to discredit and defame the medical profession generally, and to shake the confidence of the public in other medical men, with a view to his own profit and pecuniary advantage. The question is not whether the plaintiff is right or wrong in his views on the subject of medicine and hygiene. He may be right, notwithstanding his differences from the majority of his professional brethren. He may be in the position of *Athanasius contra mundum*. But there are different modes of stating one's opinions and views, and a man may be actuated by different motives in enforcing his views and opinions on the world. In the present case the language in which the plaintiff has thought fit to express his views, and the circumstances, and the surroundings with which his advertisements were issued, coupled with the notices to which our attention has been drawn, recommending his own works and his own advice, seem to me, when taken together, to be evidence from which the medical council might reasonably hold that his conduct was "infamous in a professional respect." I adopt the definition which has been drawn up by Lopes, L.J., and approved by the Master of the Rolls as being at

any rate a test and a standard by which those words may be defined. There is also the plaintiff's conduct with regard to the leaflet on vaccination, after he had undertaken not to publish it. I repeat, in order that there may be no mistake about it, that I do not think the observation to be well founded that upon the evidence before the council they must be taken to have condemned the plaintiff on the ground of his peculiar opinions on the subject of medicine and hygiene. We have not got to say whether the council were right or wrong in the inference which they drew. All that we have to decide on this point is whether there was evidence on which they might, as reasonable men, have come to the conclusion which they did come to, and in my opinion there was.

Appeal dismissed.

Solicitors for the plaintiff, *Francis Miller and Co.*

Solicitors for the defendants, *Warren, Murton, and Miller.*

Thursday, March 1.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

HANSEN v. HARROLD BROTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Chartered freight a lump sum—Sub-charter—Bill of lading freight less than chartered freight—Cesser clause, construction of—Liability of charterers.

Where, under the provisions of a charter-party, a ship was re-chartered, and the original charter-party contained a clause that the captain should sign bills of lading for the cargo at any rate of freight required without prejudice to the charter-party, and also a clause for the cesser of the charterer's liability, coupled with a stipulation, "the owner having a lien on the cargo for all freight and demurrage under this charter-party."

Held, that, there being no express agreement to the contrary, the cesser of liability did not apply so far as the lien given to the owner was not equivalent to the liability of the charterers.

THIS was an appeal from a judgment of Day, J., at the trial of the action, without a jury.

The plaintiff was a shipowner, and he brought the present action against the charterers of his ship to recover the sum of 195*l.* 13*s.*, balance of the chartered freight.

By the charter-party the ship was chartered for a voyage from New Zealand to London, the freight being agreed to be "a lump sum of 4000*l.* sterling." The charter-party provided that the charterers were to have:—

The privilege of re-chartering the vessel at any rate of freight without prejudice to this agreement, and the captain to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port, at the current or any rate of freight required without prejudice to this charter-party, for which purpose he is to attend daily at the charterers' or their agent's office during business hours, if so required, and should the freight list, according to the bills of lading, show a less sum in the aggregate than the chartered freight, the difference to be paid in cash prior to the ship's clearance at the custom house.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.]

HANSEN v. HARROLD BROTHERS.

[CT. OF APP.]

The charter-party also contained the following clause:—

The liabilities of charterers to cease on the vessel being loaded, the master and owner having a lien on the cargo for all freight and demurrage under this charter-party.

The charterers, the defendants, re-chartered the vessel.

The sub-charterers loaded her with a cargo of oats, and presented to the captain a bill of lading by which freight was payable on the delivery of the cargo at the rate of 37s. 6d. per ton delivered, and the bill was signed by the captain.

As the freight list, according to the bill of lading, showed an aggregate of 3487l. 7s. 3d., the charterers paid to the plaintiff the sum of 532l. 12s. 9d. in cash prior to the ship's clearance at the custom house, as agreed by the charter-party, to make up the chartered freight of 4000l.

On the voyage the oats shrank, and upon their delivery in London the freight, which under the bill of lading was payable according to weight, only amounted to 3271l. 14s. 3d., leaving a deficiency from the chartered freight of 195l. 13s., for which sum the owner now sued the charterers.

At the trial of the action without a jury, Day, J. gave judgment for the plaintiff.

The defendants appealed.

Bigham, Q.C. and Carver (Schjott with them) for the defendants.—By the cesser clause the charterer's liability ceased on the vessel being loaded, and after that moment the owner's remedy for obtaining freight was only his lien on the cargo:

French v. Gerber, 36 L. T. Rep. N. S. 350; 2 C. P. Div. 247.

The cesser clause contains two independent clauses, one that the charterer's liability is to cease, the other being a statement that the owner has a lien. There is no condition as to the accrual of the lien being a condition precedent to the cesser of liability:

Kiah v. Cory, 32 L. T. Rep. N. S. 670; Law Rep. 10 Q. B. 553;

Restitution Steamship Company v. Pirie, 64 L. T. Rep. N. S. 491, n.

The cesser clause provides for the cesser of all future liabilities, and of past liabilities so far as the lien is given. Here according to the judgment of Day, J., the charterers are in the position of absolute guarantors of the freight. The very object of the cesser clause is to prevent the charterers from being in that position. The meaning of the clause is to be decided by the clause itself, not by the lien which may be given by the bill of lading, or anything else that may happen after the making of the charter-party. The case of *Clink v. Radford & Co.* (64 L. T. Rep. N. S. 491; (1891) 1 Q. B. 625) is distinguishable, because the point of the decision was upon the meaning of demurrage, which was held not to include damages at the port of loading. Any loss which the plaintiff has suffered is due to the negligence of his captain in signing the bill of lading without insisting, as he should have done, on the addition to it of the words "all other conditions as per charter-party."

Arrospe v. Barr, 8 Court of Sess. Cas. 4th series, 602.

The captain had no authority to sign a

bill of lading which contained any stipulation contrary to the terms of the charter-party:

Rodocanachi v. Milburn, 56 L. T. Rep. N. S. 594; 18 Q. B. Div. 67.

There is nothing unfair in making the consignees liable for the sum which the plaintiff now claims, any more than making them liable for demurrage at the port of loading.

H. F. Boyd (Joseph Walton, Q.C. and Balloch with him) for the plaintiff.—The captain could not have insisted on the addition of any words to the bill of lading. He was bound to sign the bill as it was presented to him. Even if the words "all other conditions as per charter-party" had been added to the bill, they would not affect the meaning of the charter-party. The meaning of the words "without prejudice to this charter-party" has been clearly settled:

Shand v. Sanderson 28 L. J. 278, Ex.;
Gledstanes v. Allen, 12 C. B. 202.

As to the construction of the cesser clause, the two parts of it are dependent on each other, and their meaning is that the liability of the charterers is to cease, so far as the owner has an equivalent in the lien which he gets on the cargo, and no further. *Clink v. Radford (ubi sup.)* is the last case on the subject, and in earlier cases the law has been rather unsettled. Whatever may have been held in earlier cases, the court should now follow the latest decision of this court. The facts of *French v. Gerber (ubi sup.)* were of a very special kind, and the judgment turned entirely on the facts.

Carver replied.—*Clink v. Radford* did not summarize the cases on cesser clauses, but only cases as to demurrage at the port of loading. The whole object of the cesser clause is to free the charterers from liability for breaches occurring after the ship has left the port of loading.

LORD ESHER, M.R.—In this case the plaintiff, a shipowner, is suing the charterers of his ship for breach of contract. The plaintiff claims to be entitled to be paid by the defendants the unpaid balance of a lump sum of 4000l. agreed upon as freight for a certain voyage. Now, in the charter-party is a stipulation that the charterers are to have the privilege of re-chartering the ship at any rate of freight, "without prejudice to this agreement," and the captain is "to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port, at the current or any rate of freight required, without prejudice to this charter-party." Then there is also this cesser clause, "the liabilities of charterers to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charter-party." We have now to construe these parts of the contract, having regard to other parts of the contract dealing with the same subject-matter. The first question arises as to the lump sum of 4000l. for freight. That sum would become due at the end of the voyage. But then there is a stipulation that part of that lump sum is to be paid at the port of loading, and the effect of that would be that so much as was not paid at the port of loading would have to be paid at the port of discharge. Now, looking at the cesser clause, we find that it begins, "the liabilities of charterers to cease on the vessel being loaded." If that stood alone, there is no

doubt that the charterers would not be liable after the vessel had started. Those words contain a stipulation entirely in favour of the charterers, and it is obvious that the owner would not agree to such a stipulation standing alone. He therefore couples with it this clause: "The master and owners having a lien on the cargo for all freight and demurrage under this charter-party." What is the effect of construing those two parts of the clause together? They must be construed according to the rule laid down in *Clink v. Radford* (*ubi sup.*). There may be previous cases to that, containing observations or dicta, or even decisions which are not consistent with the decision in that case, but that case is the last one in this court upon this subject, and we cannot overrule it. Moreover, I think the decision in that case is a proper one, and is founded upon good mercantile reasons. Certain rules were laid down in that case. I used these words: "In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion; in other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." That is, because there would be no mercantile reason for his doing so. Bowen, L.J., in the same case says: "There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability, without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability, with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." That is what I said in other words. Then Fry, L.J., says: "The rule that we are *prima facie* to apply to the construction of a cesser clause followed by" (I should say "coupled with") "a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this: that the two are to be read, if possible, as co-extensive. If that were not so we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; and there would then come a lien clause which did not re-create that liability in anybody else." That is the cause of construction with a good mercantile reason for it, and that reason seems to me to be unanswerable. Therefore the proposition is true that when the clause providing for the cesser of liability is accompanied by a stipulation that the

owner should have a lien, then the cesser of liability is not to apply so far as the lien created under the charter-party is not equivalent to the liability which ceases. It is not necessary that the lien should be expressed to be of an equivalent amount to what the owner gives up by the cesser clause. If, under the charter-party, the charterers can insist upon the owner relying upon his lien, then there is a cesser of the charterer's liability only so far as the lien, which the charterers have insisted on, is equivalent to it. What is the lien which the charterers in this case were able to insist on being taken by the owner? The charter party provides that the captain is "to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port at the current or any rate of freight required, without prejudice to this charter-party." It was contended that that enabled the captain to refuse to sign bills of lading unless in terms they gave him all the rights given in the charter-party, and to insist on having added to the bills the words "all other conditions as per charter-party," so that he might refuse to sign if those words were not added. There have been several decisions on the meaning of the words "without prejudice to this charter-party." The expression means that nothing in bills of lading signed by the captain shall affect the contract of the charter-party, and that is the recognised meaning which was settled in the cases of *Shand v. Sanderson* (*ubi sup.*) and *Gledstanes v. Allen* (*ubi sup.*). The captain in this case was bound to sign bills of lading presented to him, and the words "without prejudice to this charter-party" do not affect that duty to sign, but when he has signed the bills, they are not to have any effect on the charter-party. But for that stipulation the captain would not be bound to sign any bill of lading except such as his owner wished, but by this charter-party he is bound to sign other bills. Now this charter-party gave liberty to the charterers to sub-charter the ship, so that the sub-charterers became entitled to decide upon the form of the bills of lading, and, whatever conditions they wished to put in, the captain was bound to sign the bills as presented, though there was no contract between the owner and the sub-charterers. Power was therefore given to the sub-charterers to present bills of lading, under which the freight to be paid according to weight to the owner would not be equivalent to the chartered freight, the owner's right to which was given up by the cesser clause. By the decision of this court in *Clink v. Radford* (*ubi sup.*) we are obliged to say that upon the true construction of this charter-party the cesser clause only relieves the charterers from liability to pay so much of the chartered freight as is equivalent to the lien given to the shipowner. Here the bill of lading freight was not only less than the chartered freight, but was less than the amount of the chartered freight which remained unpaid after the ship had left the port of loading. The cesser clause does not relieve the charterers from the difference between those two sums, and they still remain liable to pay it to the owner. Under those circumstances the result of our decision is the same as that of the decision of Day, J., and this appeal must be dismissed.

LOPES, L.J.—I agree, and have nothing to add.

CT. OF APP.]

KEMP v. WANKLYN.

[CT. OF APP.]

DAVEY, L.J.—This case has been argued with great ability, but the argument has not carried conviction to my mind. I cannot say whether all the cases on the construction of charter-parties are reconcilable, but I think that we can decide the present one without infringing on the decisions in earlier authorities. The general rule for the construction of a cesser clause when it is joined to a clause providing for a lien has been laid down in *Clink v. Radford* (*ubi sup.*). The view there taken by Bowen, L.J. seems to me to be sound for logical as well as commercial reasons. The general principle laid down in that case is that when these two clauses, viz., that the liability of the charterer is to cease upon the vessel being loaded, and that the master and owner are to have a lien, are coupled and linked together, then, according to true construction and grammar, they are to be read together as forming relative obligations. The second clause does not actually create a lien, the lien is to be on goods to be subsequently shipped by an hypothetical shipper. At the time of this charter-party the charterers had no power to give a lien on actual goods. The words of the clause point to a lien to be created hereafter, and are, I think, a contract to give a lien. I myself should have thought it reasonable that the existence of the lien should be held to be a condition precedent to the cesser of liability, so that the liability of the charterers should only be discharged so far forth as it was satisfied by the lien. But I do not wish to put my decision on that ground, because in this case it is unnecessary to do so. I prefer to say that the two stipulations are connected together so as to form relative obligations. Whose fault is it if the owner has not got the lien for which he stipulated? The charterers say that it is the captain's fault, and cite the Scotch case of *Arrospe v. Barr* (*ubi sup.*). Notwithstanding some dicta in that case, I do not think it is an authority for the charterer's proposition that the master might have insisted on refusing to sign the bill of lading unless words were added to it which would incorporate the provisions of the charter-party. I do not think that that case is an authority for more than this, that the captain ought not to sign bills of lading which contain stipulations at variance with the charter-party. In the present case I think it was the fault of the charterers that the lien which they contracted to give to or procure for the shipowner was not given or procured. The charterers when they sub-chartered the ship might have made a stipulation with the sub-charterers for such a lien as was contemplated by the charter-party. In my opinion, the master was not guilty of any negligence in signing the bill of lading in the form in which it was presented to him, and, further than that, I think that the charterers were in default in not making arrangements with the sub-charterers so as to obtain the lien which they ought to have obtained for the owner. This seems a much more reasonable view to take than that which was suggested on behalf of the charterers. The result therefore is that, as the owner obtained no lien to cover so much of the chartered freight as remained unpaid at the port of shipment, because the bill of lading freight was smaller than the chartered freight, the defendants are not relieved by the cesser clause. Whether the case is put on the ground of condition precedent or on breach of contract, for which the damages would be the

difference between the bill of lading freight and the chartered freight, the result is the same. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *W. A. Crump and Son.*

Solicitors for the defendants, *Stokes, Saunders, and Stokes.*

Feb. 27 and March 8.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

KEMP v. WANKLYN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Parliament—Registration—Borough vote—Service of notice of objection—Ordinary course of post—6 & 7 Vict. c. 18. s. 100.

By sect. 100 of 6 & 7 Vict. c. 18, an objector to a person claiming a Parliamentary vote may serve his notice of objection by post, and in that case a duplicate notice shall be stamped by the postmaster of the office where the notice is posted, and "the production by the party who posted such notice of such stamped duplicate, shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would, in the ordinary course of post, have been delivered to such place."

Held, that "the ordinary course of post" refers to the general rules of the post-office as to the delivery of letters to the inhabitants of a postal district taken as a body; and an objector, when posting his notices of objection, need only take into consideration such general rules, without inquiring into the mode in which, by special arrangement, some particular inhabitants in the district may have their letters delivered.

Childs v. Cox (58 L. T. Rep. N. S. 338; 20 Q. B. Div. 290) *overruled.*

THIS was an appeal from a judgment of the Queen's Bench Division (Lord Coleridge, C.J., Lawrance and Collins, JJ.) upon a case stated by the revising barrister for the borough of Colchester.

The appellant objected to the names of Moses Stockton Atkyns and forty-six other persons being retained in Division II. of the list, as Parliamentary voters in respect of dwelling-house qualifications in the barracks within the borough. He posted in Colchester notices of objection, addressed to the soldiers at their places of abode within the barracks, as described in the overseer's list. It was contended before the revising barrister that there was no proof of the service of the notices of objection on or before the 20th Aug. The appellant produced stamped duplicates, and relied on them as evidence of delivery "in the ordinary course of post," in accordance with sect. 100 of 6 and 7 Vict. c. 18.

By 6 & 7 Vict. c. 18, an objector may either serve notices of objection personally under sect. 17, or else he may proceed under sect. 100 and send them by post. In such a case, sect. 100 provides for the stamping of a duplicate notice by the postmaster of the office where the notice is posted, and enacts that

The production by the party who posted such notice

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered to such place.

It was proved that it is the universal practice, in accordance with the military and postal regulations in towns where soldiers are quartered, that letters addressed to soldiers in barracks are not delivered at the barracks by the post-office authorities, but are delivered at the post-office in private bags to orderlies appointed from each regiment for that purpose, and are taken to the barracks by them and delivered to the persons to whom they are addressed.

The notices of objection in this case, which were registered in accordance with the statute, were delivered to the orderly in the usual way; but the orderly did not sign the receipts for the notices, but took them away in blank, and they were afterwards returned to the post-office signed by the persons to whom the notices were addressed.

The voters had left Colchester at some time between the 15th July and the 19th Aug., and were, in fact, at the latter date at the camp at Aldershot. It was proved that the notices of objection were brought to the barracks by the post orderly at about 1.45 p.m. on Saturday the 19th Aug., and that the corporal in charge of the orderly room, believing from their appearance that they were of the nature of circulars, and having instructions to keep back circulars, on account of the expense of forwarding them, in the exercise of this discretion, put them aside till he could consult an officer.

On Sunday, the 20th Aug., he saw an officer, who directed him to forward the notices, and they were, in fact, forwarded to the voters on Monday, the 21st Aug.

If the voters had been still in the barracks at Colchester, at the places of abode stated in the list, the notices would have been distributed by the post orderly on the afternoon of the 19th Aug., and if they had been redirected and posted on the afternoon of the 19th Aug. they would have been delivered at Aldershot on the 20th Aug. If the corporal in charge had thought that they were of the nature of letters and not circulars, he would have so redirected and posted them.

The revising barrister held that the case could not be distinguished from *Childs v. Cox* (58 L. T. Rep. N. S. 338; 20 Q. B. Div. 290), and that there was no "ordinary course of post" to the barracks, and that the stamped duplicates were not available to prove the service of the notices of objection, and that the names must therefore be retained on the list.

Upon a case being stated by him the Queen's Bench Division (Lord Coleridge, C.J., Lawrence and Collins, J.J.) were of opinion that *Childs v. Cox* (*ubi sup.*) governed the present case, but that that decision could not be supported, and they therefore affirmed the decision of the revising barrister, and at the same time gave leave to appeal.

The appellant, the objector, appealed.

Cyril Dodd, Q.C. and Lewis Thomas for the appellant Kemp.—The question is, What is the meaning of "the ordinary course of post?"

It is submitted that the only question for the objector to consider is, when would the letter have reached the person objected to if that person had been in the position of an ordinary inhabitant in Colchester? It is immaterial whether or not there is any ordinary course of post to these barracks; the question is, whether the letter was delivered to the post-office in such time that by the ordinary course of post it would be delivered by the 20th Aug. to a person residing within the postal district in which the barracks are situated:

Lewis v. Evans, 31 L. T. Rep. N. S. 487; L. Rep. 10 C. P. 297;

Doogan v. Colquhoun, 20 L. Rep. Ir. 361;

Hudson v. Louth, 6 L. Rep. Ir. 69.

In this view of the case the private arrangement as to the mode of the delivery of letters at the barracks is immaterial. The decision in *Childs v. Cox* (58 L. T. Rep. N. S. 338; 20 Q. B. Div. 290) is wrong, and the case should be overruled.

Morten for the respondent.—An objector is not obliged to make use of the post in serving his notices. The Act contemplates personal service, and if the objector prefers to use an alternative method of service and use the post-office, he should see that there is an "ordinary course of post" to the place where he intends the notices to be sent. If there is no ordinary course of post to that place then the objector cannot act under sect. 100.

Cur. adv. vult.

March 8.—Lord ESHER, M.R.—The point raised in this case is whether there was any proof of the service, on or before the 20th Aug. 1893, of notices of objection to the Parliamentary votes of Moses Atkins and forty-six other soldiers. The revising barrister, in obedience to the decision in *Childs v. Cox* (*ubi sup.*), held that there was no proof of the service of the notices of objection because there was no delivery "in the ordinary course of post" at the barracks at which the soldiers claimed qualifications as voters within the borough of Colchester, and he therefore retained the names of the soldiers on the list of voters. The Divisional Court affirmed the decision of the revising barrister, but being of opinion that *Childs v. Cox* could not be supported, gave leave to appeal to this court. The circumstances in this case and in *Childs v. Cox* are precisely similar, and we must therefore consider whether we agree with the decision in that case. The question depends on the true construction of certain words in 6 & 7 Vict. c. 18. Under that Act an objector may serve notices of objection personally under sect. 17, or else he may proceed under sect. 100, which provides for the stamping of a duplicate notice by the postmaster of the office where the notice is posted, and enacts that "the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered to such place." The notice of objection may clearly be posted in the same district in which the person objected to resides or at a post office any distance away, and the provisions of the Act may be relied on by the objector, although the letter posted may in fact not be delivered. We have to consider what is the meaning of the words "in the ordinary

CT. OF APP.]

ARDEN v. BOYCE.

[CT. OF APP.]

course of post." The enactment is one for the public benefit, and is in favour of objectors, and after considerable thought I have come to the conclusion that the proper construction of the words "in the ordinary course of post" depends entirely on the acts of the post office. The post-office is the authority which determines the course of post, that is to say, how letters are to be conveyed and how they are to be delivered. It determines the districts within which letters are to be delivered to the residents, considered as a body of persons, within those districts, and it determines the times at which, as a general rule, letters will be delivered within a district to the inhabitants of it, considered as a body of persons. Therefore the objector, if he acts under sect. 100, need only consider the general regulations of the post-office, and if he posts his notice of objection in one place to be delivered at another, he has merely to look at the post-office regulations to see when an ordinary letter posted at the place where he posts his notice of objection would be delivered in ordinary course to an ordinary inhabitant within the ambit of the district in which the person objected to has his qualification. That is all that the objector must do, and he need not inquire whether within that district there are some people who may have their letters delivered in a different way by some special arrangement with the post-office or the post-office officials. In either of those two cases, though there would be a good delivery of letters, it would not be a delivery "in the ordinary course of post;" it would be an extraordinary delivery. It would be immaterial to consider whether the letter would be in fact delivered by the post-office or how else, or whether there was misconduct on the part of anybody, because those questions have nothing to do with "delivery in the ordinary course of post." If that be so, then *Childs v. Coz* was wrongly decided. In the present case there was a delivery in the ordinary course of post in Colchester in the district within the ambit of which the barracks stood, although as regards the barracks the ordinary course of delivery by post was replaced by an extraordinary course of delivery. But with that the objector had nothing to do. According to the ordinary course of post in the district, the notices here were posted in time, and the stamped duplicates were therefore under the Act evidence of their due delivery. We therefore disagree with the decision of the Divisional Court in the form in which it was given, and this appeal must be allowed.

LOPES, L.J. delivered the following written judgment.—This is a case of some importance, because we are now overruling the decision in *Childs v. Coz* (*ubi sup.*). The revising barrister held, on the authority of that case, that there was no delivery "in the ordinary course of post" at the barracks, within the meaning of sect. 100 of 6 & 7 Vict. c. 18, and that the stamped duplicates were not available to prove the service of the notices of objection. It is necessary to consider what the words "in the ordinary course of post" mean. [His Lordship then read sect. 100.] The object of the Legislature was to make the stamped duplicate retained by the objector evidence of the notice having been given. The objector had to comply with the requirements of sect. 100, and the notices must have been posted so that "in the ordinary course of post" they would be delivered on or

before the 20th Aug. In this case the objector had done all that was required by sect. 100, and the only question was, whether the notices were posted, so that "in the ordinary course of post," they would be delivered on or before the 20th Aug. There was an ordinary course of post in Colchester, and it is clear that, if the ordinary course of post had been permitted to take its ordinary course, the notices would have been delivered on the 20th Aug. at the barracks. The reason why they were not delivered was because, owing to some military regulations, the post was not allowed to take its ordinary course. In my judgment this cannot prejudice the action of the objector. He had done all required of him by the statute; it was no fault of his that the notices were not delivered in the ordinary course of post. A person with a private box or a private bag might give directions to the postmaster to retain his letters till called for, or to forward them once a week. Could it be said that an objector was to be prejudiced if his notice was not delivered in time? He could know nothing of this private arrangement. It would be sufficient for him that if nothing had been done to delay or intercept the notices they would in the ordinary course of post have been delivered in time. *Childs v. Coz* (*ubi sup.*) was, in my judgment, wrongly decided, and ought to be reversed. The court there says, "The case shows that on the 20th Aug. no 'ordinary course of post' existed." But that is not so. There was an "ordinary course of post" by which the notices would have been delivered in time if nothing had been done to intercept it. I do not think sect. 17 can be relied on.

DAVEY, L.J.—I entirely agree with the judgments that have been delivered, and have nothing to add.

Appeal allowed.

Solicitors for the appellant, *Speechly, Mumford, Landon, and Rogers*, for *Prior*, Colchester.
Solicitor for the respondent, *The Town Clerk of Colchester*.

Thursday, March 8.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

ARDEN v. BOYCE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—*Specially indorsed writ*—*Landlord and tenant*—*Recovery of land*—*Notice to quit on forfeiture*—*Order III., r. 6 (f)*.

The writ in an action by a landlord against his tenant for the recovery of land cannot be specially indorsed when the notice to quit relied upon by the plaintiff is founded upon a forfeiture.

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Collins, JJ.) refusing to allow the plaintiff to sign final judgment upon a summons under Order XIV.

The action was brought by a landlord against his tenant for the recovery of possession of the demised premises.

By indenture of lease, dated in May 1892, the plaintiff demised the premises in question to the defendant for the term of seven years at the yearly rent, payable half-quarterly, as therein agreed, subject to a proviso that,

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

If the premises demised or any part thereof be at any time shut up or unoccupied, or any part of the rent be unpaid for twenty-one days next after the same shall become due, although no legal or other demand shall be made for payment thereof . . . then and in any or either of such events and without any demand whatsoever, the lessor may forthwith determine the term hereby created by notice to quit in writing signed by himself or his agent and left at the said premises.

Rent became unpaid and in arrear for twenty-one days, and the plaintiff thereupon gave a notice to quit in accordance with the above-mentioned proviso.

By Order III., r. 6 (f), a writ may be specially indorsed "in actions for the recovery of land with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit."

By the indorsement on his writ of summons the plaintiff claimed possession of the premises held upon the above mentioned tenancy "which said tenancy was duly determined by notice to quit in writing given in accordance with the terms of the said lease and expiring on the 4th Dec. 1893," and he also claimed 17l. arrears of rent due in respect of the said premises.

The plaintiff took out a summons under Order XIV., and the master made no order.

An appeal to the judge at chambers was dismissed.

Upon appeal to the Divisional Court (Mathew and Collins, J.J.) the Court made an order allowing the plaintiff to sign judgment for the arrears of rent, but refused to allow him to sign judgment for possession of the premises.

Against this refusal the plaintiff now appealed.

Douglas Walker, Q.C. and *J. Herbert Williams* for the appellant, the plaintiff.—This case is within the terms of Order III., r. 6 (f), the term having been duly determined by notice to quit. The determination by notice to quit included in rule 6 (f) is not limited to determination of a yearly tenancy or any other tenancy usually determined by notice to quit. This rule is an extension of the provisions of the statutes 1 Geo. 4, c. 87, s. 1, and 15 & 16 Vict. c. 76, s. 213. Under those Acts it was decided that a claim by a landlord to re-enter for a forfeiture was not within the Acts, because in such a case the term had neither "expired" nor been "determined by notice to quit":

Doe d. Cundy v. Sharpley, 15 M. & W. 558;

Doe d. Carter v. Roe, 10 M. & W. 670;

Doe d. Cardigan v. Roe, 1 D. & E. 540.

Since rule 6 (f) came into operation it has been similarly decided that a claim to re-enter for a forfeiture is not within the rule because in such a case the term has not "expired" or been "determined by notice to quit":

Burns v. Walford, W. N. 1884, p. 31;

Mansergh v. Rimell, W. N. 1884, p. 34.

In this case the plaintiff says the term has been determined by notice to quit. By the contract of tenancy the parties have agreed that upon the happening of a certain event the lessor may determine the tenancy by giving a notice to quit; that event has happened and the lessor has given the notice to quit agreed upon between the parties. There is no reason why the notice to quit specified in rule 6 (f) should be limited to any particular kind of notice to

quit, and be held not to apply to any notice to quit which may be agreed upon by the landlord and tenant:

Daubus v. Lavington, 51 L. T. Rep. N. S. 206; 18 Q. B. Div. 347;

Hall v. Comfort, 55 L. T. Rep. N. S. 550; 18 Q. B. Div. 11.

Ernest Pollock for the respondent, the defendant.

—This claim by the landlord is really a claim to re-enter for a forfeiture, and is, therefore, not within the rule according to the authorities which have been cited. This is not really a notice to quit at all. The notice to quit, to which Order III., r. 6 (f) applies is only the notice to quit which is necessary to determine a yearly tenancy. The words "duly determined" have the same meaning as the words "determined by a legal notice to quit" in the County Courts Act 1856 (19 & 20 Vict. c. 108), s. 50, which have been held to apply only to yearly tenancies:

Friend v. Shaw, 58 L. T. Rep. N. S. 89; 20 Q. B. Div. 374.

Douglas Walker, Q.C. replied. *Curr. adv. vult.*

March 8.—Lord ESHER, M.R.—In this action the plaintiff has sought to obtain judgment for recovery of possession of certain premises demised by him by means of Order XIV., alleging that his writ has been specially indorsed within Order III. rule 6 (f). Now the first statute of importance is 1 Geo. 4, c. 87, s. 1, which was followed by the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76) s. 213, and that again was followed by the Rules of the Supreme Court Order III. rule 6 (f). Though the words in these three enactments are not exactly the same, they are all to the same legal effect, and Order III. rule 6 (f) was intended to follow the provisions (sect. 213) of the Common Law Procedure Act 1852, and that section was intended to follow sect. 1 of 1 Geo. 4, c. 87. Therefore any decision on 1 Geo. 4, c. 87, s. 1 which we agree with ought to be applied to sect. 213 of the Act of 1852, and also to Order III. rule 6 (f). Now ought we to follow the decision of *Doe d. Cundy v. Sharpley* (*ubi sup.*), which decided that sect. 1 of 1 Geo. 4, c. 87, did not apply to a claim by a landlord for possession in respect of a forfeiture, so as to enable him to obtain judgment by summary proceedings? It is unnecessary to say now whether we should have agreed with that and subsequent decisions on the same point at the time when they were given. Those decisions have always been acted on by judges at chambers in the long course of practice ever since they were decided, and a long, constant, and uniform practice, founded upon decisions so many years ago, ought not to be overruled. I therefore think that this case does not come within Order III. rule 6 (f), and that the judgment of the Divisional Court is right. The appeal must be dismissed.

LOPES, L.J.—This is a summary proceeding for judgment under Order XIV., and I think that any proceeding under that order ought to be regarded with great strictness. Now it is not unimportant to observe that up to 1 Geo. 4, c. 87, there was no summary procedure for recovery of possession of land. We must also bear in mind that the words of Order III. rule 6 (f) are practically, though not precisely, the same as the words of 1 Geo. 4, c. 87, s. 1, and the Common Law Procedure Act 1852, s. 213, because that fact renders important

CHAN. DIV.]

Re HOLFORD; HOLFORD v. HOLFORD.

[CHAN. DIV.]

the decisions on the words of those two Acts. Having regard to those decisions and the practice founded on them, I have come to the conclusion that the procedure of Order XIV. is only applicable to a case where the tenancy is determined by effluxion of time or by an ordinary notice to quit. By that, I mean a practically undefended case, where the tenancy is determined and the tenant holds over. The strongest case under the old Acts I have mentioned is *Doe d. Cundy v. Sharpley* (*ubi sup.*), where it was held that sect. 1 of 1 Geo. 4, c. 87, did not apply to the case of the determination of a tenancy by forfeiture, as in the present case. I think that the summary procedure of Order XIV. does not apply to that class of cases, and this appeal should be dismissed.

DAVEY, L.J.—If this point now came before us for the first time, I might find it difficult to say why the plaintiff should not have judgment, because the tenant has no real defence. But I do not feel inclined to disturb the settled course of practice which seems to have existed since 1 Geo. 4, c. 87, was passed, and under the Common Law Procedure Act 1852, and has been continued and adopted in chambers up to the present time. I am aware that it has been argued on behalf of the plaintiff that this case is not one where the tenancy has been determined by forfeiture, but, according to the form adopted in the lease, by notice to quit, and that consequently the case comes within the very words of Order III. rule 6 (f). I think it is too late to argue that point now. It would be frittering away the law if we made such a distinction as that which we are asked to make, and we must say that this lease has been determined by forfeiture. I agree with the judgments that have been delivered, and this appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *S. W. Johnson and Son.*

Solicitor for the defendant, *J. C. Clay.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 17, 20, and March 15.

(Before CHITTY, J.)

Re HOLFORD; HOLFORD v. HOLFORD. (a)

Infants—Maintenance—Gift to class attaining twenty-one—Conveyancing and Law of Property Act 1881, s. 43.

A testator, who died in July 1888, by his will gave his residuary estate consisting of the proceeds of sale of real estate and of personal estate to trustees upon trust for the child or children of T. H. living at the testator's death, and who should attain twenty-one years, in equal shares if more than one, and if but one, the whole to be in trust for that one child. The will contained no maintenance clause. At the testator's death there were six children living of T. H., all infants. On the eldest of the children attaining twenty-one she claimed her sixth share of the original residuary estate, and of the fund accumulated during her minority, and also the whole

of the income of the residuary estate arising after the time she came of age until the next child should come of age, and after that one-half of the same income until another child should come of age, and so on until the youngest child should come of age, and she claimed the income of the accumulated fund in the same manner.

Held (dissenting from Re Adams (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329), that the eldest child was entitled to receive her sixth share of the original residuary estate, and of the accumulated fund and income down to the time of her taking a vested interest, but not to the income of the remaining five-sixths of the original residuary estate and accumulated fund.

H. S. HOLFORD, by his will dated in 1888, gave his residuary estate, comprising personal estate and proceeds of sale of real estate, to trustees upon trust for the child or children of Thomas Holford living at the testator's death, and who should attain the age of twenty-one years, in equal shares if more than one, and if but one, the whole to be in trust for that one child. The will contained no maintenance clause. The testator died in July 1888, and at his death there were six children living of Thomas Holford, all infants. The eldest child, who had married and settled all her interest under the will, having attained twenty-one years of age, she and the trustees of the settlement claimed to be entitled, first, to one-sixth share of the original trust funds, and of the accumulations of income during her minority, which amounted to about 40,000*l.*; and secondly, to the whole of the income of the remaining five-sixths of the original trust funds, and of the accumulated income until another child should come of age. An originating summons was taken out by the infant children by their next friend, to have the question determined whether the income of the remaining five-sixths of the original trust estate and of the accumulated income to which they were contingently entitled, was under sect. 43 of the Conveyancing Act 1881 applicable for their maintenance, and, so far as not so applied, went in augmentation of their shares on attaining their majority.

Farwell, Q.C. and Davenport for the plaintiffs.

—The infant children are entitled to the remaining five-sixths of the original trust fund and of the accumulated income contingently on their attaining twenty-one, and the income thereof may under sect. 43 of the Conveyancing Act 1881 be applied for their maintenance. So far as *Re Adams* (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329) is a decision to the contrary, it is incorrect. Where there has been a gift to children as a class contingently on their attaining twenty-one, it has long been the practice of the court on the eldest child attaining twenty-one to pay out the shares of such child, and to carry over the share of the children contingently entitled to separate accounts. They also referred to

Genery v. Fitzgerald, Jac. 468;

Bective v. Hodgson, 10 H. L. C. 656;

Brandon v. Aston, 2 Y. & C. C. 24;

Rochford v. Hackman, 9 Hare, 475;

Kidman v. Kidman, 40 L. J. 359, Ch.;

Re Jeffery, 64 L. T. Rep. N. S. 622; (1891) 1 Ch. 671;

Re Burton, 67 L. T. Rep. N. S. 221; (1892) 2 Ch. 38.

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

Byrne, Q.C. and George Lawrence for the eldest daughter.—Where there is a contingent gift to a class and one member of that class attains a vested interest, he is entitled to the whole fund until another contingency happens of another of the class attaining a vested interest, and by virtue of that ownership of the fund he is entitled to the whole of the income. The cases of *Re Adams (ubi sup.)*, *Shepherd v. Ingram* (Amb. 448), *Scott v. Earl of Scarborough* (1 Beav. 154), and *Mills v. Norris* (5 Ves. 335) are in our favour, and so is *Furneaux v. Rucker* (W. N. 1879, p. 135).

J. Williams Cunliffe for the trustees of the will.

H. F. Wilson for the trustees of the eldest daughter's marriage settlement.

Farwell, Q.C. in reply.—The attainment of a vested interest by one of the class does not affect the rights of the other members of the class. The decision in *Furneaux v. Rucker* did not affect the rights of the other members; all that was decided in that case was, that on one attaining a vested interest the income no longer fell into residue.

CHITTY, J.—The questions raised in this case are of considerable importance, often recurring, particularly in chambers, in reference to the maintenance of infants. The will is simple. The residuary estate, consisting of a mixed fund made up of the proceeds of sale of real estate and of personal estate is given to trustees upon trust for the child or children of the defendant Thomas Holford living at the testator's death, and who shall attain twenty-one years, in equal shares if more than one, and if but one the whole to be in trust for that one child. The gift then is to a class contingently, and the class is not capable of increase after the testator's death. There is no maintenance clause in the will, which was made in 1888. At the testator's death there were living six children of the defendant Thomas Holford, all infants. One daughter has recently attained her majority, and has settled her interest under the will. The income of the residuary estate is very large, amounting to some 10,000*l.* per annum. The accumulations of income during the period which elapsed before the eldest daughter came of age, and not expended in maintenance, amount to about 40,000*l.* On behalf of the eldest daughter and her trustees the following claims are made: First, to her sixth share of the original residuary estate and of the fund accumulated during her minority; secondly, to the whole of the income of the residuary estate arising from the time she came of age until the next child comes of age, and from that time to one-half of the same income until another child comes of age, and so on until the youngest child comes of age; and, thirdly, to the income of the accumulated fund in like manner. The result of these claims, if valid, is that, during the period beginning with the coming of age of the eldest child, the whole of the income would belong to the children for the time being of age, and no part of it would be available for the benefit of the children for the time being under age, or would go to them with their shares of capital on their coming of age. But the remaining five-sixths of the present accumulated fund, composed although they are of surplus past income, are not claimed by the eldest daughter. The reasons why they are not claimed

appear to be as follows: It is admitted, in conformity with *Re Adams (ubi sup.)*, and consistently with the principle of the decision of the Appeal Court in *Re Dickson* (52 L. T. Rep. N. S. 707; 29 Ch. Div. 331), that during the minority of the eldest daughter sect. 43 of the Conveyancing Act 1881 applied. Consequently it is further admitted that, by virtue of sub-sect. 2 of the same section, the accumulations of income not applied in maintenance and made up to the time of the eldest daughter coming of age are held for the benefit of the persons who may ultimately become entitled to the property (that is, the five-sixths of corpus of the residuary estate) from which the accumulations had arisen. The effect of these claims and disclaimer on behalf of the eldest daughter is certainly curious and (as it strikes me) anomalous. A line is drawn, and (as it seems to me) arbitrarily drawn, on the coming of age of the eldest child. Neither by express terms, nor, as I think, by implication, is such a line drawn by the 43rd section of the Act. On the contrary, the five-sixths of the original residuary estate and of the accumulated fund are still held by the trustees for the infants contingently on their attaining the age of twenty-one years, in the language of sub-sect. 1 of sect. 43, and I am not able to see why the section does not apply to these remaining parts of the estate and fund. The argument for the eldest daughter, however, is, that the effect which I have ventured to describe as curious and anomalous is necessarily produced by a rule of construction founded on particular authorities. So far as the testator's intention is concerned it appears to me to be plain that all the children who attain twenty-one are to take equally. To take what? An equal share of the capital, certainly. Income is not mentioned. But, as they are to take an equal share of the capital, and as the income, being as it is the income of a trust residue, follows the capital, the intention is that each child should take the income of the aliquot share of capital to which he or she ultimately becomes entitled. No preference, no priority of any sort is conferred upon the child who first attains the age of twenty-one years. To hold that the eldest child on coming of age thenceforth takes the whole of the income in the manner claimed appears to me to be a departure from the manifest intention of equality, and to confer on that child a preference in violation of the terms of the will. The leading authorities on the question of income following the capital are *Genery v. Fitzgerald (ubi sup.)* and *Bective v. Hodgson (ubi sup.)*. In the latter case Lord Westbury stated the principle in reference to residuary personality. There is no difference on this point between residuary personality and such a residuary trust fund as the present. He lays it down that if by a will the whole of the personal estate or the residue of the personal estate be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory; and must, during the period which the law allows for accumulation, be accumulated and added to the principal. The principle enunciated, which Lord Westbury terms a cardinal principle, is that the increase of the fund follows the destination of the fund itself as an accessory. It appears to me to apply equally where the residuary personal estate is given contingently to one person, or to two or more by name, or to a class. Where the gift is

CHAN. DIV.]

Re HOLFORD; HOLFORD v. HOLFORD.

[CHAN. DIV.]

to two or more by name contingently on attaining twenty-one, each is entitled to his share of principal and the increase which has been produced by it, and I can see no difference material to the present question between such a gift to persons by name and a like gift to a class. I have a strong impression that the course of the court has been that where a fund is standing to the account of a class contingent on attaining twenty-one, the regular and common order has been, on the eldest child attaining that age, to pay out his share of capital and income, and to carry over the residue in shares to the separate contingent accounts of the infants with a direction to accumulate the interest on each share carried over. I remember Sir John Romilly, on such a petition being presented by the child of age, holding that the costs of the petition ought to come, not out of the share, but out of the general fund, where such a carrying over was directed, as in that case the order taken was for the common benefit of all interested, the effect being that each of the infants on coming of age could apply for his share without serving the others. I have consulted several of the most experienced registrars as to the course of the court in such matters, and they all say that the common order is such as I have stated. I requested one of them to make some search for precedents. The difficulty, as I anticipated, has been to discover a clue; the question is one which has passed apparently without note in the registrars' books, and also without argument; the latter circumstance indicates the general opinion entertained at the bar. The research of one of the registrars (Mr. Lavie), which has necessarily not been of an exhaustive character, has however produced three cases which seem to be in point. I have also spoken to Stirling, J. on the point, and have his authority for stating that since the recent decision in *Re Adams (ubi sup.)* he has had the question before him in chambers on more occasions than one; that he has offered to adjourn the case into court for argument if desired; that counsel, however, have preferred to take his decision in chambers, and that he has declined to follow that authority so far as it indicates an opinion against the infants; and that he has refused to order payment of the whole of the income to the child of age, and that his opinion, though expressed in chambers, has been acquiesced in. I also have adopted a similar course in chambers with a similar result. The precedents furnished to me by the registrar include the following three cases. *Re Samuel Higgins*, before Lord Romilly, in 1866, where the fund consisted of a legacy of 2000*l.* severed from the rest of the estate, and bequeathed to trustees (so far as material) upon trust for the brothers and sisters of Sarah Higgins Goode, in equal shares, to be vested in them respectively as and when they should attain the age of twenty-one years. Eliza Goode, mother of Sarah Higgins Goode, was living at the presentation of the petition, and was forty-nine years of age, and consequently not presumed to have passed the age of childbearing. The petition was by a child who had recently attained twenty-one, and the respondents were the other seven children, all under age. The residuary legatees were also served. A person was appointed to represent the four children of Eliza Goode, who having survived the testator had died under

twenty-one. The order, made the 23rd June 1866, after directing taxation of the costs of all parties, divided the balance of the fund into eight shares, and ordered payment of one share, and the past accumulations of income in respect of that share to the petitioner, and the carrying over of the other seven shares to the separate contingent accounts of the infants. There was no maintenance clause in the will applicable to these infants set out in the petition. The order is prefaced by a statement of the opinion of the court that the fund (which in fact consisted of the legacy and past accumulations of interest) was divisible into eight parts. The court therefore held that the children of Eliza Goode took contingent interests, and treated the income as following the ultimate destination of the capital of each of the shares, and applied this principle to the case of a contingent gift to a class which was capable of increase down to the time when a member of the class had become entitled to a share of the capital. The second case is *Re James Higgin*, before Lord Romilly, also in 1866. The effect of the will was a gift of a share of residue in trust for a class contingent on attaining twenty-one. The shares of those who had come of age were paid to them, and the shares of the infants were carried over to separate contingent accounts. In the case of *Re Toder*, which was before me in 1884, the gift was of a sum, part of the residue, upon trust to invest and to accumulate, and to hold the fund and accumulations in trust for such of six persons named as should attain twenty-one, in equal shares. A similar order was made directing payment to the person who had come of age, and the carrying over of the infants' shares. In ordinary circumstances my judgment would have stopped here, if not sooner; but, out of deference to the opinion apparently entertained in *Re Adams*, I proceed to mention shortly the reported cases cited at the bar for and against the eldest daughter's contention. Many of them have, in my opinion, but little bearing on the present controversy. The cases cited against the eldest daughter's contention are *Brandon v. Aston (ubi sup.)*, *Rochford v. Hackman (ubi sup.)*, and *Kidman v. Kidman (ubi sup.)*, and they appear to me, so far as they go, to be in favour of the argument for the infants. In *Brandon v. Aston* the gift was to a class contingent on attaining twenty-one, or as to daughters marrying, but capable of increase by reason of the father being alive at the time when his interest determined. Knight Bruce, V.C. held that the children who at that time were of age were entitled only to the income of their vested shares, and directed that the income of the share of an infant then living should be carried over to a separate account of the contingent share of the infant. It is said that the point was not argued in reference to the income, but the eminent counsel engaged, and by whom the authorities such as *Shepherd v. Ingram (ubi sup.)* and the like were cited, were not likely to have overlooked the point. In *Rochford v. Hackman* the testator's son, Richard, had a life interest determinable, and it was held that his interest had determined. After his decease the share of residue in which he took the life interest was given to his children as and when they should attain twenty-one. He had, when his interest ceased, two children living, one of age, and the other an infant. Sir George Turner held that the interests of the children were not

CHAN. DIV.]

MAYFAIR PROPERTY COMPANY v. JOHNSTON.

[CHAN. DIV.]

accelerated, and that the fund was not distributable until after the death of the testator's son, when the class was to be ascertained; but that, on the question of the title of the children to the intermediate income, the child then of age was entitled to a share, but only a share, of the income, and that the income of the other share to which the infant child was contingently entitled ought to be accumulated. This is a decision that the child who had a vested interest in a share liable to be diminished by after-born children was not entitled to the whole of the subsequent income, and that the income to which the infant child was contingently entitled ought to be accumulated to follow the result. There was a maintenance clause in the will whereby the trustees were directed to apply the whole of the shares of the children, or so much thereof as they should think fit, for their maintenance, but this clause is not referred to in the judgment. In the case before me the maintenance section is imported by the Act into the will. In *Kidman v. Kidman*, Malins, V.C. held that the interests of the children were contingent on their attaining twenty-one, and that, inasmuch as the fund was severed from the rest of the estate, the income followed the capital, and accordingly that "all the income from the death of the tenant for life till the children attained the age of twenty-one years must be accumulated and go with the capital, each child on attaining twenty-one taking his or her share of the fund as it then exists." The cases cited for the daughter are all, with the exception of *Re Adams*, already mentioned, and *Furneaux v. Rucker* (*ubi sup.*), cases in which the class was liable to future increase, and underlying them there seems to be an analogy to the rule of convenience, as it has been called, adopted in *Whitbread v. St. John* (10 Ves. 152), in regard to the distribution of capital, a rule on which I commented in *Re Wenmoth* (57 L. T. Rep. N. S. 709; 37 Ch. Div. 266), and which I there declined to apply to a gift of income. *Shepherd v. Ingram* was a case of a gift of residue to the children of a living person in such a form as to vest at births, but defeasible in the event of the parent dying without leaving issue. It was held by Lord Northington that the first child born took the whole of the interest until the birth of the second child, and that after the birth of the second child the first and second children took the interest in equal shares, and so on. This case appears to me to be distinguishable from the present on the ground that the interests of the members of the class were there vested as they severally came into existence. In *Mills v. Norris* (*ubi sup.*) the will was special. Again, it was a case of a class liable to increase. It was held by Lord Loughborough that, upon the enlargement of the class by the birth of another child, such child was not entitled to participate in the income which had arisen previously to his birth. In *Scott v. Scarborough* (*ubi sup.*) the will was very peculiar, and to a certain extent inconsistent. It was held that the ordinary rule of convenience as to the distribution of a fund among a class capable of increase was on construction excluded by express terms, and that the grandchildren of age at the time indicated by certain terms in the will as the time for distribution took vested interests liable to be partially divested and diminished; but, again, on the construction of the will that the grand-

children then of age were entitled in respect of their vested interests to the income of the fund notwithstanding this liability, and further, that no part of the income ought to be retained for the benefit of a grandchild who was then an infant, or of grandchildren (if any) who might be subsequently born and ultimately take vested interests. In *Furneaux v. Rucker* the gift was a specific bequest of leasehold property on a contingency, and the rule is that such a gift does not carry the intermediate income. Consequently, the income fell into the residue until one of the class came of age, and Sir G. Jessel, M.R. held that the child of age took the income from that date. But in this case the income did not follow the principal during the suspense of vesting, but fell into the residue. For the reasons above stated I find myself constrained to decline to follow the case of *Re Adams*, so far as an opinion is there expressed that children on attaining vested interests would be thenceforth entitled to the whole of the income as against those who, being still infants, had merely a contingent interest in the capital. The decision in *Re Jeffery* still appears to me, as it did when I decided *Re Burton* (*ubi sup.*), not to be inconsistent with the opinion I have formed as to such a gift as that now before me. I hold, then, that the eldest daughter is entitled to receive her sixth share of the original capital and of the accumulated fund and income down to the time of her taking a vested interest, but not to the income of the remaining five-sixths of the original capital and accumulated fund during the suspense of vesting. This income is applicable during the suspense to the maintenance of the infants. My opinion would have been the same if the class had been liable to increase after the testator's death, subject to this exception—that the class would have closed on the eldest child attaining a vested interest.

Solicitors: Cunliffe and Davenport; Sutton, Ommanney, and Rendall.

Jan. 30 and 31.

(Before NORTH, J.)

MAYFAIR PROPERTY COMPANY v. JOHNSTON. (a)

Partition—Party wall—Tenants in common—Trespass injurious to reversion—Injunction—Damages.

An action was brought by the owners and tenants of a mansion at Hyde Park Gate, against the owners and tenants of the adjoining mansion, for partition of the wall which separated the gardens in the rear of the two mansions, and of which the plaintiffs and defendants were tenants in common in equal shares. The plaintiff owners were rebuilding and enlarging their mansion, and, in so doing, had pulled down a portion of the old wall and built in its place a thicker wall to form the flank wall of their new building in such a manner that the foundations and footings of the thicker wall extended into the defendants' premises, beyond the site of the old wall, and thus had trespassed on the defendants' property. The plaintiffs claimed partition on the ground that it was expedient and desirable. The defendant owners opposed the claim for partition, and counter-claimed for an injunction to restrain the

(a) Reported by J. TRUTNAM, Esq., Barrister-at-Law.

CHAN. DIV.]

MAYFAIR PROPERTY COMPANY v. JOHNSTON.

[CHAN. DIV.]

plaintiffs from permitting the new foundations and footings to continue upon the defendants' land, and for damages for the wrongful acts of the plaintiffs, but did not make their own tenants parties to their counter-claim.

Held, that the plaintiffs were entitled as of right to partition, that the foundations and footings placed on the defendants' ground belonged to them, and could be removed by them, so that no injunction should be granted; but that the trespass being of a permanent nature affecting the reversion, the defendant owners were entitled to sue for and obtain damages in respect of it, although their lessees did not join in the claim.

THIS was an action for partition of a wall dividing the gardens of two adjoining houses.

The plaintiffs were the Freehold and Leasehold Investment Company Limited, being the owners in fee simple of the hereditaments known as No. 37, Hyde Park Gate, in the county of Middlesex, and also the Mayfair Property Company, as the lessees of No. 37, Hyde Park Gate, under a building agreement dated the 24th Nov. 1892.

The defendants were Francis John Johnston and Reginald Eden Johnston, who were mortgagees of the hereditaments known as No. 36, Hyde Park Gate, which adjoins No. 37, Hyde Park Gate, on the east side; William St. Aubyn and Reginald Eden Johnston, to whom No. 36, Hyde Park Gate had, by indenture of the 19th Nov. 1881 been conveyed in fee simple, subject to the mortgage, in favour of Francis John Johnston and Reginald Eden Johnston; and also Isabelle Lewis (widow) and Francis Theodore Lewis, who, as executors of Sir Charles Edward Lewis, deceased, were entitled to No. 36, Hyde Park Gate, for the residue of a term of fourteen years, granted by a lease dated the 15th Oct. 1886.

The hereditaments, No. 36 and 37, Hyde Park Gate, and the wall, which was the subject of the action, dividing them from north and south, formerly belonged to John Austin, who, by an indenture dated the 28th June 1858, conveyed No. 37, Hyde Park Gate, to the plaintiffs' predecessor in title, and by another indenture of the same date conveyed No. 36, Hyde Park Gate, to the defendants' predecessor in title; neither of which indentures mentions the wall.

The owners of the hereditaments, Nos. 36 and 37, Hyde Park Gate, were interested in and entitled as tenants in common in equal undivided moieties to the wall, which was six feet six inches in height, and nine inches in thickness.

In March 1893 the Mayfair Company commenced to rebuild No. 37, Hyde Park Gate, and for this purpose pulled down and removed about thirty-three feet of the wall and the buttresses and foundations.

On the 21st April 1893 the defendants in the present action (other than the executors of Sir C. Lewis) obtained an injunction from North, J. against the Mayfair Company restraining them from interfering with the wall in derogation of the rights of the co-owners thereof, but it was ordered that the Mayfair Company should not be thereby prevented from restoring the portions of the wall and buttresses removed by them. After this the Mayfair Company made or completed concrete foundations and footings extending beyond the bottom of the original wall into the defendants'

garden, thereby trespassing thereon, and erected, instead of the old wall, the flank wall of their new house, 37, Hyde Park Gate. At the height of 6ft. 6in. from the garden level they set back the flank wall 4½in. westwards and at the height of 36ft. from the garden level they set back the flank wall another 4½in. westwards. A motion by the defendants in the present action to sequester the property of the Mayfair Company, and to commit the company's architect for acting in alleged breach of the injunction, stood over until the determination of the questions raised in the present action, which was commenced on the 12th May 1893.

The plaintiffs in their statement of claim alleged that the wall was a party wall, and that it was expedient and desirable that a partition of the wall should be made by the direction of the court, and claimed that a fair partition of it should be made, and that all proper conveyances might be executed to carry out such partition.

The defendants (other than the executors of Sir C. Lewis who did not deliver a defence) by their statement of defence and counter-claim, to which the executors of Sir C. Lewis were not made defendants, denied that the wall was a party wall, alleged that each owner had an interest in keeping the wall dividing the houses and premises intact and undivided, and denied that the wall was a subject-matter which was divisible, or which it was expedient should be partitioned. They also alleged that the flank wall erected by the Mayfair Company was not a restitution of the old wall and ought to be removed and not partitioned; and submitted that, if it were partitioned, they (the defendants) would be entitled to remove so much of it as might be allotted to them, and also the concrete foundations and footings placed upon their garden. And, by way of counter-claim, they alleged that the building erected by the Mayfair Company on the site of the wall would require lateral support from the adjacent soil of the defendants, to which the Mayfair Company were not entitled. The defendants therefore claimed (1) an injunction to restrain the plaintiffs from permitting the concrete foundations and footings to continue on the defendants' land; (2) a declaration that the plaintiffs were not entitled to lateral support for their new building from the adjacent soil of the defendants; and (3) damages for the wrongful acts of the Mayfair Company.

The plaintiffs in their reply stated that a portion of the flank wall of their new building was above 4½in. of the garden wall on the side adjoining their premises, but denied that any portion of the flank wall was built upon the moiety of the garden wall which adjoined the defendants' premises; and, in answer to the counter-claim, they stated that they did not claim any additional lateral support from the adjacent soil of the defendants in respect of any additional weight of the new buildings on the plaintiffs' premises, and denied that the defendants had suffered damage.

Swinfen Eady, Q.C. and Peterson for the plaintiffs.—The plaintiffs are justified in building as they did, and if they obtain partition their whole building will be on their land. They are entitled to partition as a matter of right, since, apart from the Partition Act, the Acts of 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, empower a tenant in common to compel a partition. The Act 3 & 4 Will. 4, c. 27,

CHAN. DIV.]

MAYFAIR PROPERTY COMPANY v. JOHNSTON.

[CHAN. DIV.]

n. 36, abolished the old writ of partition, but did not affect the right to obtain partition. They referred to

Parker v. Fairfax, 17 Ves. 548;
Griffies v. Griffies, 11 W. R. 943.

[NORTH J. referred to *Turner v. Morgan*, 8 Ves 143.] The remarks of Fry, J. in *Watson v. Gray* (42 L. T. Rep. N. S. 294, 295; 14 Ch. Div. 192, 195) show that a wall may be the subject of a partition, as also do the observations of Bayley, J. in *Cubitt v. Porter* (8 B. & C. 257, 264). With regard to the counter-claim, the counter-claiming defendants are reversioners and the lessees of No. 36, Hyde Park Gate, who are the only persons (if any) suffering any damage through the building operations of the Mayfair Company, are not parties to the counter-claim, and make no claim for damages. Therefore the counter-claim is not maintainable. It is in effect a claim for a trespass, in respect of which the reversioners are not entitled to the injunction they claim. They referred to

Cooper v. Crabtree, 47 L. T. Rep. N. S. 5; 20 Ch. Div. 589.

Even if the counter-claiming defendants were in occupation of No. 36, Hyde Park Gate, it would be a case in which the court had a discretion with respect to granting an injunction. They referred to

Goodson v. Richardson, 30 L. T. Rep. N. S. 142; L. Rep. 9 Ch. App. 221.

As to the counter-claim for damages for pulling down the wall, the Mayfair Company acted in good faith and pulled down the wall with a view to rebuilding it, which they had a right to do. They referred to

Cubitt v. Porter, 8 B. & C. 257.

[NORTH, J. referred to *Wiltshire v. Sidford*, 1 M. & Ry. 404; 8 B. & C. 259, n.; *Stedman v. Smith*, 8 E. & B. 1.] No complaint as to obstruction of light is made by the defendants. If the Mayfair Company should have trespassed a few inches on the defendants' ground damages would be a sufficient remedy for such trespass, and it is in the discretion of the court to decline to grant a mandatory injunction. [NORTH, J. referred to *Krehl v. Burrell*, 40 L. T. Rep. N. S. 637; 11 Ch. Div. 146.]

Cozens-Hardy, Q.C. and *Curtis Price* for the defendants (other than the executors of Sir C. Lewis).—The Mayfair Company have clearly trespassed upon the defendants' land. They pulled down the garden wall, and, after placing concrete foundations and footings so as to infringe on the defendants' ground, they rebuilt the wall so as to form the flank wall of their new building. They then claim partition; but, if partition is granted, the defendants will be entitled to remove their half of the wall and the foundations and footings on their land, and then the wall and footings left on the plaintiffs' land will be insufficient to comply with the requirements of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122). [NORTH, J.—Even if I do not grant a partition the defendants are entitled to remove the foundations and footings which have been placed on their land, and then the wall would not fulfil the requirements of that Act.] If half the thickness of the wall were taken away the defect would be much more serious, as the thickness of the wall would be insufficient. It is in the discretion of the court to refuse parti-

tion. The defendants are entitled to counter-claim for the trespass although they are reversioners, as it is a trespass of a permanent nature which is injurious to the reversion. The defendants have in fact been ousted from the wall by the action of the Mayfair Company: (*Stedman v. Smith* (*ubi sup.*)). It is clearly within the scope of those cases where reversioners have obtained redress for trespasses of a permanent nature. They referred to

Tucker v. Newman, 11 A. & E. 40;
Goodson v. Richardson, 30 L. T. Rep. N. S. 142;
L. Rep. 9 Ch. App. 226;
Attorney-General v. Tomline, 36 L. T. Rep. N. S. 684; 5 Ch. Div. 750.

A. H. Hudson for the executors of Sir C. Lewis.
Swinfen Eady, Q.C. in reply.

NORTH, J.—I think that the plaintiffs are entitled to a partition. The defendants oppose it, but I do not see what legal ground they have upon which that opposition can be based. The old statutes of Henry VIII. still provide for the making of partition between tenants in common, and recognise the right of the parties to it; and although no doubt the means given by those statutes, of a common law right of partition, was abolished in the reign of William IV. by the Act 3 & 4 Will. 4, c. 27, s. 36, yet the proceedings by courts of equity in decreeing partition show one of two things—either that the writ of partition was merely one mode of carrying out what the statutes directed should be done; or that the courts of equity have an independent power to decree partition. It does not matter on which of those two grounds they proceeded, because the courts of equity held, as a matter of course, that a tenant in common was entitled to have partition of the property held by him as tenant in common with other persons. I think the cases on the point are quite clear. They are old ones, but they are none the worse for that, especially when one bears in mind that in the later cases the old ones are practically acquiesced in. The first case that I have seen is *Parker v. Gerard* (Amb. 236), which is very shortly reported. The report is this: "On a bill for partition, Sir Thomas Clerke, M.R. said that such a bill is matter of right, and there is no instance of not succeeding in it, but where [there] is not proof of title in plaintiff; and in the case of *Cartwright v. Lord Bath* [*Cartwright v. Pultney*, 2 Atk. 380] the court gave leave and time for the plaintiff to make out his title. In the case of Mr. Baines [*Warner v. Baines*, Amb. 589], upon a bill for a partition of the cold bath, &c., the strongest arguments of inconvenience imaginable were used, but did not prevail. In *Nevis v. Levene* the plaintiff was entitled to three or four hundred acres, and the defendant to four or five only; and though the defendant would have rather given up his part than be at the expense of a partition, yet it was decreed, and to be at the equal expense of both parties." The "case of Mr. Baines" there referred to was *Warner v. Baines* (*ubi sup.*). That was a case in which there were manifestly very great inconveniences indeed in giving effect to the application for partition, but Lord Hardwicke held on two occasions that the difficulty in making the partition was no objection to the making of the order for it. There are other cases to the same effect, the well-known

CHAN. DIV.]

MAYFAIR PROPERTY COMPANY v. JOHNSTON.

[CHAN. DIV.]

case of *Turner v. Morgan* (*ubi sup.*) being one of them. Then there is the case of *Baring v. Nash* (1 V. & B. 551). There the plaintiff was lessee for 500 years of one-tenth part of the property, the defendants being seised in fee of the rest, and the question was whether the owner in fee of the reversion of the plaintiff's one-tenth part, who was not a party, could be compelled to join in the partition. There the Vice-Chancellor said, at p. 553: "It is clear the absolute owner of a tenth part may compel the owners of the other nine to concur with him; and there would be no objection from the minuteness of this interest, the inconvenience, or the reluctance of the other tenants in common, if no objection could be taken to the plaintiff's title: partition being matter of right, whatever may be the inconvenience and difficulty." Then I was referred to the case of *Griffies v. Griffies* (*ubi sup.*), before Kindersley, V.C., in which the same law was incidentally laid down. It seems to me, therefore, that the right to a partition is clear. Then the question is as to the mode in which it should be carried out. I do not think it necessary in this case to go through the form of an inquiry in chambers or anything of that sort. It is obviously to the interest of the parties, and, as I understand it, they desire that the partition should be made by giving to the owners of the land to the west the western half of the wall dividing it longitudinally, and to the owners of the land to the east the eastern half of the wall; and I am prepared, therefore, at once to direct that the partition shall be carried out in that way, and that proper conveyances for the purpose be executed. So much for the action for partition; as to the costs of it I shall say something by-and-by. Then there is a counter-claim by some of the present defendants before me; and, as I understand, there is also a motion for a sequestration and committal to be disposed of. I have not heard any argument about that, or been reminded of any of the evidence that was given on that application, but, as I understand, all I have to deal with is the costs of that motion. The counter-claim of the defendants asks for "an injunction to restrain the plaintiffs from permitting the said concrete foundations and footings to continue in and upon the defendants' said land." Before referring to that I should say this with respect to the wall, which is a garden wall, and down to this time has belonged to the parties as tenants in common. Something has been suggested about there being an easement of support existing between the parties. In my opinion there is nothing of the kind. The wall and every part of it belonged to them as tenants in common. In my opinion, therefore, there is no ground on which it can be said that there is any dominant or servient tenement, and there is no ground on which it can be said that any easement of support exists at present. What has been their common property as owners down to the present time is now to be divided, and they are to be owners of the separate parts of it, and, in my opinion, each will have absolute control over what will then be his own land. Each, therefore, can deal with his own as he pleases. Then the counter-claiming defendants ask me to restrain the plaintiffs from allowing the concrete and bricks which they have placed upon the plaintiffs' land to remain where they are. It is not disputed

by Mr. Swinfen Eady that there has been a trespass committed with respect to them. No doubt the trespass is underground; it has not been visible to the eye, but the trespass has actually been committed. What is the effect of it? In my opinion, when the plaintiffs went upon the defendants' land, dug away the earth and put concrete and bricks upon that land, the effect of it was (I am not speaking now of the site of the wall, but of the adjoining land of the defendants) to make a present of those materials to the defendants. *Quicquid plantatur solo solo cedit*. Then I was asked to make an order which in effect would be a mandatory injunction directing the plaintiffs to enter upon the defendants' land and remove these footings and foundations. I do not see any reason for doing that. To begin with, there would be a difficulty about it, because the land which the counter-claiming defendants seek to compel the plaintiffs to enter upon is not in the occupation of either the one or the other, but of the tenants of those defendants; but independently of that, it seems to me that the remedy is in the hands of the defendants. The property is theirs. They can remove it if they like, and therefore, if there is an encroachment in respect of which they are suffering anything, they have the remedy in their own hands. I do not see, therefore, why I should order the plaintiffs to remove these foundations which the defendants can deal with as they like. However, it is clear that there is a trespass, and I think that the defendants are entitled to some damages in respect of it. I do not see that any material damage of any sort has been proved, beyond this, that there has been an encroachment, made deliberately and wilfully by way of trespass, which the plaintiffs had no right to make. The defendants are entitled to say that that was a serious interference with their rights, and that they are entitled to damages. As regards that, I think they are entitled by way of damages to the costs of removing the encroachment, and I intend to give them by way of damages the sum of 15*l.* which I think would cover the cost of removal. Then it was said on behalf of the plaintiffs that the defendants who make the counter-claim are not entitled to sue in respect of the trespass, because they are reversioners only, they having let the house to the other defendants. In my opinion that is not the law. In some cases, no doubt, a reversioner cannot sue for a trespass, but in many he can. I refer first to the well-known case of *Baxter v. Taylor* (4 B. & Ad. 72), in which a trespass had been committed by entering upon land in the occupation of the tenant, and it was held there that a trespass of that sort was not a matter in respect of which the reversioner could maintain an action, even though the entry was made in exercise of an alleged right of way. But in the judgment Taunton, J. states that "the action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant and to an action brought for an injury to the reversion against a stranger. *Jackson v. Peaked* (1 M. & S. 234) shows that, if a plaintiff declare as reversioner for an injury done to the reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto;

and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved." Then Park, J. says: "I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious." Here there was a taking of part of the land, carrying away of the existing materials, and putting in the foundations of a building that was clearly intended to be permanent, and by which, at any rate if they are left there long enough, a right to support would be gained. There are several other cases to the same effect. In *Simpson v. Savage* (1 C.B. N. S. 347) an action was brought by a reversioner for nuisance arising from the erection of workshops and forges on land adjoining his houses in the occupation of his tenants, and a nuisance arising from the smoke from the forges. The plaintiff failed because he failed to show an injury to the reversion, the lighting of fires in the forges, which alone caused the injury, not being in its nature permanent. Cresswell, J., who delivered the judgment of the court, said this: "After considering the authorities we are of opinion that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest instances of such an action are cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former cases the thing done was not removable or remediable during the term; in the third it was, but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance. The decision in *Jesser v. Gifford* (4 Burr. 2141) falls within the same principle. A window was obstructed. The obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. *Tucker v. Newman* (*ubi sup.*) belongs to the same class." [His Lordship also read from *Metropolitan Association v. Petch*, 5 C.B. N. S. 504; *Bell v. Midland Railway Company*, 10 C.B. N. S. 287; and *Kidgill v. Moore*, 9 C.B. N. S. 364.] Now, those being the principles of law to be applied here, I have found no difficulty in coming to the conclusion of fact, that what was done here by way of trespass was putting upon the defendants' land something which was intended to be permanent. As regards the relief that is sought, I have dealt with the application for an injunction by not granting the injunction, but giving damages. As to the declaration that the plaintiffs are not entitled to lateral support for their new building from the adjacent soil of the defendants, I do not see any reason for making such a declaration. The plaintiffs have never claimed any such right, and it is quite obvious that they cannot have acquired such a right at present; what they may have twenty years hence is another matter. In a case in which they do not claim, and never did claim, any such right, I do not see any ground for making the declaration negative the right. Then as regards the damages, I propose to give the sum I mentioned. With

regard to costs, the plaintiffs have been wrong, and they must pay the costs of the action, including the costs of the counter-claim.

Solicitors: Poole and Robinson; Bowling, Foyer, and Hordern; Arber and Lewis.

Jan. 11 and 12.

(Before NORTH, J.)

Re PRATT; PRATT v. PRATT. (a)

Will—Construction—Specific legacy.

A testatrix bequeathed to one daughter "800 pounds invested in 2½ Consols," to another daughter "700 pounds invested in 2½ Consols," and to her grandson "800 pounds invested in 2½ Consols." Neither at the date of her will, nor at the time of her decease, did the testatrix possess any 2½ per Cent. Consols; but there was at the date of her will and thenceforth to her death a sum of 1800l. 2½ Consols standing in the joint names of her deceased husband and herself.

Held, that the legacies were specific, not demonstrative, and did not fail, but were answered by the 1800l. 2½ per Cent. Consols, and must abate in the proportion of 1800l. to 2300l.

Mytton v. Mytton (31 L. T. Rep. N. S. 328; L. Rep. 19 Eq. 30) distinguished.

ORIGINATING SUMMONS for the determination of various questions arising upon the construction of the will of Frances Pratt.

The testatrix, a widow, who was a lodging-house keeper, at Singleton, in Sussex, by her will made in June 1891, in her own handwriting, proceeded as follows:

I give and bequeath to my son, William Pratt, five shares in the London and County Bank, also twenty pounds per year from property at Singleton, to be paid quarterly, left in trust. To my son, Richard Pratt, I give and bequeath five shares in the London and County Bank, also twenty pound per year from property at Singleton, to be paid quarterly, left in trust. To my daughter Charlott I give and bequeath 800 pounds invested in 2½ Consols, and fifteen pounds from property at Singleton, but should the foresaid Charlott Pratt marry her husband to have the intrest on the 800 as long as he lives, if children, then the money from the Singleton property, fifteen pounds, to be invested for them, and at the death of thire father to be equaled shared, left in trust, if no children the money to go back to the Pratt family. To my daughter, Elizabeth Burch, I give and bequeath 500 pounds paid for the goodwill of the Mile End Tavern, in Commercial-road, Landport, held jointly by Richard Pratt and Elizabeth Burch, also 700 pounds invested in 2½ Consols, and fifteen pounds per year from property at Singleton, her husband, Charles Burch, to have the interest on the 700 pounds as long as he lives, and the fifteen pounds from the Singleton property to be invested for her children, and at death of thire father to be equled shared, left in trust, money to be paid quarterly. To my grandson, Willam John Henry Camp, I will and bequeath 800 pounds invested in 2½ Consols upon trust to be paid him at the age of thirty-nine years, he leaves Her Majesty's service, in wich he is now serving as a sealer, left in trust, but should he be oblig to leave through sickness, then the trust is to pay out of it enough to keep him in his sickness. After all debts are paid, the money, if any, to be equld shared between William Pratt, Richard Pratt, Charlott Pratt, and Elizabeth Burch. The mangement of house Singleton property to be carried on by Charlott Pratt, garden and

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

CHAN. DIV.]

Re PRATT; PRATT v. PRATT.

[CHAN. DIV.]

stables by William Pratt, each to be paid twenty pounds per year wages out of property.

The testatrix died on the 5th March 1892, being at the time of her death possessed of freehold and copyhold properties at Singleton, and freehold property at West Dean, and also of twenty shares in the London and County Banking Company Limited, and other personalty. And although the testatrix purported by her will to dispose of the total sum of 2300*l.* 2½ per Cent. Consols, yet as a matter of fact she had not either at the date of her will or at the time of her decease any 2½ per Cent. Consols; but there was a sum of 1800*l.* 2½ per Cent. Consols, standing in the joint names of her husband John Pratt, who died in 1889, and herself which belonged to her.

The originating summons was taken out on the 25th July 1893, on behalf of Charlotte Pratt, spinster, the administratrix with the will annexed of the testatrix, for the determination (*inter alia*) of the question whether the legacies of 800*l.*, 700*l.*, and 800*l.* respectively, expressed to be invested in 2½ Consols by the will have or have not taken effect to any and what extent, the testatrix not having been possessed of any 2½ Consols, but having been possessed of a sum of 1800*l.* 2½ Consols at the time of her death.

Curtis Price for the summons.—The respective legacies of 800*l.*, 700*l.*, and 800*l.*, take effect as demonstrative, and not as specific legacies, and since the testatrix had no 2½ Consols, and not sufficient 2½ Consols to satisfy those legacies they must be made good out of the general estate, as appears from the case of *Mytton v. Mytton* (31 L. T. Rep. N. S. 328; L. Rep. 19 Eq. 30).

Wright Taylor for defendants to the summons entitled to the residuary estate of the testatrix.—The legacies are specific, and take effect out of the 1800*l.* 2½ per Cent. Consols belonging to the testatrix; but, as that sum is not sufficient to satisfy them, they must abate. The decision in *Mytton v. Mytton* goes beyond all other decisions on the point, and ought not to be followed. The language of the will in *Gillaume v. Adderley* (15 Ves. 384), cited in *Mytton v. Mytton* (*ubi sup.*) is very different from that in *Mytton v. Mytton* (*ubi sup.*), and also from that in the present case. The cases of *Robinson v. Addison* (2 Beav. 515) and *Re Gibson* (L. Rep. 2 Eq. 669), which were cited in support of the plaintiffs in *Mytton v. Mytton* (*ubi sup.*), do not afford grounds for the decision there. The decision in *Parrott v. Worsfold* (1 Jac. & W. 594) has been shown to be erroneous by Sir G. Jessel, M.R. in *Bothamley v. Sherson* (33 L. T. Rep. N. S. 150; L. Rep. 20 Eq. 304). The present case is governed by

Page v. Young, L. Rep. 19 Eq. 501;

McClellan v. Clark, 50 L. T. Rep. N. S. 616;

Hosking v. Nicholls, 1 Y. & C. Ch. 478;

Morley v. Bird, 3 Ves. 628;

Gordon v. Duff, 3 De G. F. & J. 662; 28 Beav. 519.

Seddon and Wihl for other defendants.

NORTH, J.—Questions like this, as to whether a legacy is demonstrative or specific, are very often difficult to answer; and I do not think it is by any means clear in this will. I quite understand two persons taking different views about it, but the conclusion I come to is, that there is a specific legacy in each case of the consols. One thing that weighs strongly with me is the fact that these three gifts of consols are throughout

the will associated with a number of other gifts three or four of which are clearly specific; as to three others—the gifts of certain sums out of rents—it is more difficult to say they are specific strictly speaking, but they are not general legacies most certainly; and they are not demonstrative legacies, because, if the Singleton property did not produce the total amount of these sums, the deficiency could not be made up from the general estate; and these gifts, therefore, of particular sums out of the income of the Singleton property I will not say are specific legacies, but are something in their nature very like specific legacies. The result, then, is this, that in all the cases where particular gifts are given by way of legacy they are either themselves specific, or something very like specific bequests. That is an ingredient I cannot ignore. Then to come to the gifts: I will take the first of them, because I can draw no distinction between the three. The first is this: "I give and bequeath 800*l.*" Now, supposing I stopped there, that would be a general legacy. But something more is added; it is "800*l.* invested in 2½ per Cent. Consols." What does that mean? What are those words put there for? They must be put there for some particular purpose. The question is, What purpose? If it is to be a general legacy, it does not matter where it is invested. It would be a legacy payable out of the general estate. If it were a demonstrative legacy, it would be "800*l.* paid out of my estate in any event, but preferably out of the 2½ per Cent. Consols." If it was 800*l.* lent to somebody in particular, it would be a specific bequest of that particular sum. If it was "800*l.* in the bag in my room," that would be a specific 800*l.*; and not the less so if there was more than 800*l.* in the bag. And so here "800*l.* invested in 2½ per Cent. Consols" seems to me to be adding some description to the term 800*l.*, and to be used for the purpose of showing that what is given is 800*l.* in Consols, and not 800*l.* generally. Therefore, looking at these words as used, I should say they meant *primâ facie*, "800*l.* invested at the present time in Consols," or "invested at my death in Consols" (it would not matter which so far as this question goes), and did not mean 800*l.* generally. And that is the conclusion I should come to on the will independently of cases. But I think the cases are all in favour of the same view. When I say all, I shall have a word to say about *Mytton v. Mytton* (*ubi sup.*) presently; but the cases which Mr. Wright Taylor mentioned all seem to me to go in that direction. [His Lordship went through the cases, and concluded:] Then the only other case is *Mytton v. Mytton* (*ubi sup.*), where the gift was this: "I give and bequeath all my money which shall be out at interest, invested in the funds, or otherwise secured at my decease, upon trust, in the first place, to pay thereout all my just debts, and funeral expenses, and testamentary expenses; and in the next place, to pay to my nephew, Henry Whitehead Mytton, the sum of 3000*l.* invested in Indian security, my said nephew, Henry Whitehead Mytton, to enjoy the interest of the same during his lifetime," and at his death the same was to go over in the way directed by the will. At the date of her will the testatrix had 3000*l.* invested in Indian securities, which were paid off before her death, and at her death she had no moneys invested in Indian securities of any description.

CHAN. DIV.] **BARTLETT v. THE WEST METROPOLITAN TRAMWAYS COMPANY.** [CHAN. DIV.]

The question was whether that bequest was specific or not. The Vice-Chancellor came to the conclusion that in that case it was not. He went upon the whole construction of the will, and far be it from me to say that he was not right in the conclusion he came to. I can see that there is a difference—or at least it occurs to me that there is a difference—in the case of a gift where you have the words “the sum of 3000*l.*” It may be taken there to indicate that the testator is dealing with a specific sum, and that is the sum the legatees are to take; and the reference to the investment is merely a secondary consideration. In the present case the words “the sum” are not found; and although I do not rely altogether upon the omission of those words as distinguishing the two cases, yet it seems to me that it would be much stronger to say that the gift of “a sum of 800*l.* invested in Indian securities” is specific. It seems to me that the investment is more a part of the description of the 800*l.* in this case than in a case where there is a separate reference to the sum itself as the object of the gift, the question of the investment being, as I say, a secondary consideration. How far that was one of the circumstances that influenced the Vice-Chancellor I do not know, but I do not consider that, in the view which I am taking, I differ from that case. But if there is no distinction between the two, then it seems to me that I am bound to follow the several cases which I have already referred to, so far as cases can be a guide as to the construction of the present will. If the will is to be construed on its own merits independently of cases, I certainly come to the conclusion that what was meant here is that the testatrix was apportioning out what she believed to be the sum of consols which she was able to dispose of among the several legatees in the proportions mentioned here; and I cannot explain how it is—no one can explain how it is—that she professed to dispose of the amount of 2300*l.* when she only had 1800*l.* But I am not satisfied from reading the will that she did consider that she had at the time 2300*l.* Consols to dispose of in this way. It may be that she knew exactly what she had, and that she intended to buy more to make up the difference. I cannot tell. But upon the will itself, independently of authorities, and looking at the other dispositions made by the will, the conclusion I come to is that she intended to divide the consols amongst these legatees of consols, and that the legacies to them were specific legacies.

A declaration was made that the legacies of 800*l.*, 700*l.*, and 800*l.* were specific, and did not fail, but must abate in the proportion of 1800*l.* to 2300*l.*

Solicitors: *J. J. Harlow*, for *A. Gregory*, Chichester.

Thursday, April 5.

(Before NORTH, J.)

BARTLETT v. THE WEST METROPOLITAN TRAMWAYS COMPANY. (a)

Practice — Tramways company — Debenture-holders — Sale of undertaking — Debenture-holders' action—Tramways Act 1870 (33 & 34 Vic. c. 78), ss. 42, 44.

*The West Metropolitan Tramways Company was incorporated in 1882 by a special Act of Parliament. It had issued debentures which became due in June 1893, but were not paid. Some of the holders brought an action for the realisation of their security. A receiver and manager had been appointed in the action (69 L. T. Rep. N. S. 560; (1893) 3 Ch. 437). The receiver now moved for a sale of the undertaking as a going concern, and at the same time applied for leave to spend 4000*l.* in his hands in the repair of old and purchase of new rolling stock, in order to enable the undertaking to be sold favourably.*

Held, that the court had power to sell the undertaking. The fact that the Tramways Act 1870, sects. 42 and 44, contemplates a sale by the promoters, and in case of insolvency a determination of their powers by the Board of Trade, shows that the Legislature were not providing for a perpetual control of the undertaking by the body of directors created by the Act, and distinguishes the case of a tramway company from railway or other companies, within the principle of Gardner v. The London, Chatham, and Dover Railway Company (15 L. T. Rep. N. S. 494, 552; L. Rep. 2 Ch. 201).

*Leave was also given to spend 4000*l.* in the receiver's hands as asked.*

THE West Metropolitan Tramways Company was incorporated by special Act of Parliament on the 10th Aug. 1882.

In pursuance of the powers given to them by this Act they had issued debentures for 50*l.* each, amounting in the whole to 32,500*l.* The debentures became due on the 20th June 1893.

The plaintiffs, who were holders of twenty of these debentures, having applied in vain for payment of the principal and the half-year's interest due on that day, commenced this action on June 21, 1893 on behalf of themselves and all other debenture-holders, claiming a declaration of charge, an account, and the appointment of a receiver and manager, and the realisation of their security.

On the 8th Aug. 1893 North, J. appointed a receiver and manager on the motion of the plaintiff: (the case is reported on this point, 69 L. T. Rep. N. S. 560; (1893) 3 Ch. 437.)

On the 11th Nov. 1893 judgment was delivered in the action, declaring that the holders of the mortgage debentures were entitled to a charge on the property comprised in the debentures, directing inquiries as to what was due, who were the holders, and what was the property charged by the debentures, and directing that any of the parties should be at liberty to apply to realise the property comprised therein.

By his certificate, dated the 20th Feb. 1894, the chief clerk certified that the property comprised in and charged by the debentures was “The Undertaking of the West Metropolitan Tramways Company, and all the tolls and sums of money arising thereupon, and all the estate, right, title, and interest of the company in the same.”

The receiver now moved for leave to sell the tramways as a going concern. There was evidence that the local authority had already recovered a penalty against the receiver for leaving a part of the tram line in bad repair. A meeting of the debenture-holders had been held, and a resolution passed, requesting the receiver to apply for an order for sale.

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.]

SMALL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

[CHAN. DIV.]

Cosens-Hardy, Q.C. and *Gregson* for the motion.—The Tramways Act 1870 (33 & 34 Vict. c. 78), s. 44, distinctly provides that the promoters may sell their undertaking with the consent of the Board of Trade. That power to sell distinguishes the case from that of mortgagees of a railway or other statutory undertaking. Sect. 42 of the same Act, which provides that in case of insolvency of the promoters the Board of Trade may declare their powers at an end, shows that the Legislature did not contemplate the undertakings being always carried on by the tramway company. Your Lordship made an order for sale on the 24th June 1889 in *Hope v. The Croydon and Norwood Tramways Company* (1887, H. 357), but the case is not reported. It would be more convenient that the receiver should sell out of court.

Bompas, Q.C. for the Hammersmith Vestry.—The undertaking ought not to be allowed to be sold until the line has been put into repair; moreover, a sale now may interfere with the right of the vestry to purchase at the end of twenty-one years under sect. 42 of the Act of 1870.

NORTH, J.—I do not see that the vestry have any *locus standi*. The Act gives them other and ample powers to enforce the repair of the line and their rights of purchase.

Vernon Smith for the tramway company.—The company do not oppose the sale, but I ought to call your Lordship's attention to the doubt expressed by *Stirling, J.* in *Re Portsmouth, Kingston, Fratton, and Southsea Tramway Company* (66 L. T. Rep. N. S. 671; (1892) 2 Ch. 362). In that case there was a summons for a sale, and *Stirling, J.*, doubting whether he had any jurisdiction to sell when the company was not in liquidation, directed the summons to stand over till after the hearing of a winding-up petition, and in his judgment on the hearing of that petition, he says (66 L. T. Rep. N. S. 673): "I take it to be decided that a debenture in the form of those now in question gives the holder no greater security than the undertaking as defined in *Gardner v. London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 494, 552; L. Rep. 2 Ch. 201). That is to say, all the creditor can get from his security is the fruit of the undertaking as a going concern; he cannot pull the undertaking to pieces or break it up so as to avail himself of the separate parts towards satisfaction of his debt."

NORTH, J.—I cannot say that I feel any difficulty. In the case referred to *Stirling, J.*'s attention appears not to have been drawn to the power of sale contained in the Tramways Act 1870. But the undertaking must be sold in court. If the receiver can get any offer he can bring in a proposal.

A summons by the receiver for liberty to spend 4000*l.* on the repairs of old and the purchase of new tramcars, in order to put the rolling stock in a position which would enable a purchaser to work the traffic during the summer, came on to be heard with the motion. The company not opposing, and there being strong evidence of the necessity for the expenditure, *North, J.* gave the leave asked for.

Solicitors: *Walter Webb and Co.; Watson, Sons, and Room; H. C. Godfrey.*

Saturday, Jan. 27.

(Before STIRLING, J.)

SMALL v. NATIONAL PROVINCIAL BANK OF ENGLAND. (a)

Mortgage of land—Trade machinery—Fixtures—Bill of sale—Rills of Sale Act 1878, ss. 4, 5.

S. by deed mortgaged to the defendants certain hereditaments, "together with the fixed and movable plant, machinery, and fixtures . . . now or hereafter fixed to or placed upon or used in or about the said hereditaments" to secure certain advances, and covenanted to keep the buildings which should from time to time be standing upon the hereditaments thereby assured, and "the said plant and machinery and fixtures, be in good repair, and insured against loss or damage by fire." The deed was not registered as a bill of sale. *S.* subsequently executed a deed of arrangement for the benefit of his creditors, of which the plaintiff was the trustee. The defendants, acting under their power of sale, had advertised the property and the plant and machinery for sale. On a motion by the plaintiff for an injunction to restrain the defendants from selling the fixed machinery:

Held, upon the construction of the mortgage deed, that the fixtures had been assigned as chattels, and not as incident to land; and that the deed was therefore void as regards the fixtures for want of registration.

Re Yates; Batchelder v. Yates (59 L. T. Rep. N. S. 47; 38 Ch. Div. 112) distinguished.

MOTION.

By an indenture of mortgage, dated the 9th March 1892, and made between *A. Stevenson* of the one part, and the defendant bank of the other part, it was witnessed that, for the purpose of securing the repayment of certain moneys, the mortgagor, as beneficial owner, granted and assigned unto the bank certain hereditaments and premises described in the schedule thereto as

A yard and premises fitted up as an engineering works, situate in Seller-street, comprising warehouse, pattern shop, &c., and 880 square yards of land (more or less) subject to certain rights of way, together with all and singular the fixed and movable plant, machinery, and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively.

The deed contained a covenant by the mortgagor to keep the buildings which should from time to time be standing upon the hereditaments thereby assured, and the said plant, machinery, and fixtures, implements and utensils in a good state of repair, and in perfect working order, and insured against loss or damage by fire. The deed also provided that the statutory power of sale should be exercisable at any time after the expiration of three calendar months next after the moneys owing on the security should have become payable, or immediately upon the mortgagor being adjudicated a bankrupt, or having a receiving order made against him, without regard to sect. 20 of the Conveyancing Act 1881, which section should not apply to any sale made by virtue of those presents.

The land and building comprised in the mortgage were used by the mortgagor for the purposes of his business of a millwright and engineer.

(a) Reported by *W. IVIMY COOK, Esq., Barrister-at-Law.*

From time to time he brought upon the premises certain plant and machinery, which was trade machinery within the meaning of sect. 5 of the Bills of Sale Act, 1878. Some of the machinery was, to a certain extent, fastened to stones or pieces of timber in the ground, and some of it to parts of the freehold buildings, but the evidence did not clearly show whether or not it was affixed to the freehold.

On the 29th Nov. 1893 the bank, acting under their power of sale, issued advertisements for the sale of the freeholds and fixed machinery.

By an indenture dated the 5th Dec. 1893 the mortgagor conveyed all his property to the plaintiff, in trust for his creditors. This deed was on the 11th Dec. 1893 duly registered under the Deeds of Arrangement Act 1887.

On the 13th Dec. 1893 the plaintiff commenced the present action against the bank, claiming by his writ (*inter alia*) an injunction to restrain the defendants from selling, offering for sale, dealing with, or otherwise disposing of as their own goods and chattels, the fixed machinery comprised in their mortgage, on the ground that the mortgage, as regards such machinery, was a bill of sale within the meaning of sect. 4 of the Bills of Sale Act 1878, and void by reason of its not having been registered as such.

This was a motion by the plaintiffs for an injunction in the terms of the writ.

Hastings, Q.C., and *Broomfield* for the motion.—The mortgage to the bank is a bill of sale within sect. 5 of the Bills of Sale Act 1878, and void for want of registration. The trade machinery was only attached to the ground for the purpose of steadying it, and therefore never became part of the freehold:

Hellawell v. Eastwood, 6 Ex. 295.

It is otherwise where machinery, by its mode of annexation, becomes a fixture:

Turner v. Cameron, 22 L. T. Rep. N. S. 525; L. Rep. 5 Q. B. 306.

Re Yates; Batcheldor v. Yates (59 L. T. Rep. N. S. 47; 38 Ch. Div. 112) is distinguishable on the ground that in that case there was no express assignment of the chattels, and registration, therefore, was unnecessary.

Buckley, Q.C. and *E. Beaumont* for the bank.—Even assuming that the bank's mortgage includes property which ought not to be included, it would only be void as regards such property:

Re Burdett; Ex parte Byrne, 58 L. T. Rep. N. S. 708; 20 Q. B. Div. 310.

The same point as is raised in this case was determined in *Re Yates; Batcheldor v. Yates* (*ubi sup.*), the only difference between that case and the present being that in the former the machinery was not specifically mentioned in the deed. No doubt a mortgage of realty, together with the fixtures thereon, requires registration, if the mortgagee is empowered by the deed to seize, sever, and sell the fixtures separately from the land:

Ex parte Barclay; Re Joyce, 30 L. T. Rep. N. S. 479; L. Rep. 9 Ch. 576.

Here, however, no such power is conferred upon the defendants.

Hastings, Q.C., replied.

STIRLING, J.—The question which I have to decide upon this motion is, whether the mortgagees

under the deed of the 9th March 1892 have any right to certain fixed machinery upon the mortgaged premises, having regard to the provisions of the Bills of Sale Acts. [His Lordship then stated the provisions of the deed and continued:] Now the question is whether that deed operates as a bill of sale with regard to this machinery, and with reference to that question it is necessary for me first of all to consider the provisions of the Bills of Sale Act 1878. Sect. 4 of that Act provides that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt. . . . The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed. . . ."

"Trade machinery" is defined by sect. 5 to mean "machinery used in or attached to any factory or workshop," exclusive of certain things which do not include the fixed machinery now in question. "Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following,—"certain purposes within which these premises fall. The question is whether this trade machinery is trade machinery separately assigned or charged, or whether it is, within the meaning of the Act, "assigned together with a freehold or leasehold interest in any land or building to which it is affixed." Upon that point there is authority which I have to consider. In the first place, it was decided by the Court of Appeal in *Re Burdett; Ex parte Byrne* (*ubi sup.*), that the mere fact of a bill of sale including property which it ought not to include, having regard to the provisions of the Act of 1878, did not make the bill of sale void *in toto*. I am asked to apply that decision to the present case. It was also decided in *Re Yates; Batcheldor v. Yates* (*ubi sup.*), that where there was a simple conveyance of land with a power of sale, the instrument effecting that was not a bill of sale within the meaning of the Act of 1878 as regards trade machinery, which passed only by virtue of being affixed to the land. The judgments of the learned judges of the Court of Appeal are of considerable length, and they are very instructive, but for my present purpose it seems to me that I may most conveniently sum them up in a few words from the judgment of Lindley, L.J. He says: "The question we have to decide is this, whether a mortgagee of a mill, under a mortgage framed as this is, can seize and sever and sell, apart from the land or mill, the trade machinery on it. If he can, then it strikes me, that as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale, and void because it is not registered. Now, in order to dispose of that question, we must look at the mortgage and see what it is. It consists of two distinct parts; first there is the conveyance, sub-

CHAN. DIV.]

SADLER v. WORLEY.

[CHAN. DIV.]

ject to a proviso for redemption, and then there is the power of sale. The two portions must be considered separately. For the purposes of the Bills of Sale Act it is necessary to ascertain the character of the instrument as a conveyance or assignment. Can anybody, with any regard to accuracy of language, say that a mortgage of land in fee simple is an assurance of personal chattels? It is impossible; and it is not the less impossible because the land by force of law carries with it things which are affixed to it, and which if detached from it would be personal chattels. Neither does trade machinery which follows the land become personal chattels for the purpose of considering the question whether a conveyance of the land is an assignment of it. The trade machinery passes as a portion of the land, not as personal chattels; and, if you look at this conveyance, you cannot find, from first to last, anything about personal chattels. If you can import into it all the general words found in sect. 6 of the Conveyancing and Law of Property Act, still you cannot come to the conclusion that this is an assurance of personal chattels, in the correct acceptance of the word. It is a mortgage of land, nothing else, nothing more." Now, contrasting that with the deed in the present case, and applying the law there laid down to the facts of this case, we have not here simply a conveyance of land; more than that, we have not simply a conveyance of land and fixtures, but of land "together with all and singular the fixed and movable plant, machinery, and fixtures, implements, utensils, now or hereafter fixed to, or placed upon, or used in or about the said hereditaments and premises respectively." In this deed, in that respect differing from that which was the subject of consideration in *Re Yates; Batcheldor v. Yates* (*ubi sup.*), we do find something about personal chattels, as they are plainly assigned *quâ* chattels, and not as an incident of the land. It is true that the assignment includes not merely movable chattels, but also the fixed plant and machinery. It is contended that the reference to fixtures in the deed is nothing more than an insertion of a portion of the words which would have been introduced into the deed by virtue of sect. 6 of the Conveyancing Act 1881, which provides (sub-sect. 2) that "a conveyance of land, having houses or other buildings thereon, shall be deemed to include, and shall by virtue of this Act operate to convey, with the land, houses or other buildings (*inter alia*), all outhouses, erections, fixtures, appertaining to the land, houses, or other buildings conveyed." In truth the contention comes to this, that the reference in the mortgage to the fixtures is so much surplusage. But the deed ought to be read so as to give effect, if possible, to every word contained in it, and I have to be satisfied that what is suggested was the meaning of the parties, that is that they intended merely to mention by way of precaution something which would have passed under a conveyance of land and buildings alone, without any reference to fixtures. I cannot come to any such conclusion. Not merely are the fixtures mentioned, but they are grouped together with the movable plant, the grant being "together with all and singular the fixed and movable machinery and fixtures," and it seems to me that the intention of the

parties was to confer on the grantees under the deed certain rights to the fixed plant, in addition to any rights which they might have as grantees of the land; that they should have, in fact, the same right as regards the fixed plant as they should have as regards the movable plant in immediate connection with which it was mentioned. That view receives some confirmation from the frame of the covenant for insurance by which the mortgagor covenants to keep insured not merely the buildings which are mentioned first, but also the plant, machinery, fixtures, implements, and utensils which are separately assigned. The covenant shows that the parties treated the plant and machinery as things which ought to be insured separately from the buildings. That being, in my view, the true construction of the deed, it falls within the first part of the passage I have read from the judgment of Lindley, L.J., in *Re Yates; Batcheldor v. Yates* (*ubi sup.*), namely, that the mortgagees can under it seize and sever and sell, apart from the land, this fixed trade machinery in it, and his Lordship lays it down that if you once find that, then the deed is to be regarded as a bill of sale, and void if it be not registered. If I had come to a contrary conclusion there would have been a further question to be decided, as to which it seems to me that the evidence is sufficient for an interlocutory injunction, although possibly not sufficient to enable the case to be completely decided as if this were now the trial. In any case it seems to me that I must grant an injunction to restrain the defendants from selling. It is admitted that they cannot properly sell apart from the land, and I think, under the circumstances which I have stated, that the decision in *Re Yates; Batcheldor v. Yates* (*ubi sup.*) does not apply, and that they cannot sell it along with the land. I accordingly grant an interim injunction as asked in the notice of motion.

By consent of the parties the hearing of the motion was treated as the trial of the action, and the injunction was made perpetual.

Solicitors: Ernest A. Fuller, for E. Brassey, Chester: Wilde, Berger, and Moore.

Feb. 28, March 1 and 4.

(Before KEKEWICH, J.)

SADLER v. WORLEY. (a)

Company — Debenture-holder — Equitable mortgage — Foreclosure.

The plaintiff, the holder of the whole of the first issue of the debentures of a company, took out a summons asking for an account, and that the said debentures might be enforced by foreclosure or sale, and for a receiver and manager. The debentures created a charge on all the property, funds, assets, and effects of the company, whatsoever and wheresoever, both present and future, including its uncalled capital. By the conditions indorsed on the debentures such charge was to be a floating security, and the principal money was to become immediately payable if default was made in payment of interest or in the case of the winding-up of the company. The interest was in arrear, and the company was in voluntary liquidation.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Held, that the doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure extends to a debenture-holder, and that there should be an order declaring the plaintiff entitled to foreclosure, and directing the company at the plaintiff's request to assign to him the several items of property comprised in the debentures.

THE plaintiff Nicholas Sadler was the holder of nine debentures, dated the 23rd Nov. 1891, of 500*l.* each, all carrying interest at 6 per cent., being the whole of the first issue of debentures of the Iddesleigh Mansions Limited. The defendants were the holders of debentures subsequently issued, the Iddesleigh Mansions Limited being also joined as a defendant.

This was a summons taken out by the plaintiff, asking that an account might be taken of what was due to him for principal, interest, and costs on his debentures, and that the debentures might be enforced by foreclosure or sale, and for possession, and a receiver and manager. The property was subject to a mortgage to secure 12,000*l.* and interest dated the 23rd Nov. 1891.

By the debentures the company agreed to pay on the 9th Nov. 1896 to the registered holder for the time being thereof the sum of 500*l.* with interest at the rate of 6 per cent. quarterly. The company thereby charged with such payments all its property, funds, assets, and effects, whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the mortgage of 12,000*l.* now existing or any mortgage or mortgages created in substitution thereof. The debenture was issued subject to the conditions indorsed thereon.

Condition 1 provided: This debenture is one of a series of debentures each for securing the principal sum of 500*l.* issued, or about to be issued, by the company. The debentures of this issue are to rank *pari passu*, subject as within mentioned, as a charge on the property hereby charged, and so that such charge shall be a floating security.

By condition 4 it was provided:

The principal money hereby secured shall immediately become payable if (a) the company makes default for a period of one calendar month in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal money, or (b) an order is made or an effective resolution is passed for the winding-up of the company.

Interest was paid to the plaintiff up to the 9th Feb. 1893, when it ceased to be paid, and on the 8th Nov. 1893 at an extraordinary general meeting of the company a resolution was passed to wind-up the company voluntarily, and Mr. R. J. Spicer was appointed liquidator.

Bramwell Davis for the plaintiff.—The question your Lordship has to decide is one of law, namely, whether a debenture-holder can have an order for foreclosure. [KEKEWICH, J.—Stirling, J. got over the difficulty in a case by ordering a sale, with liberty to the debenture-holder to bid.] The plaintiff is an equitable mortgagee; the chief asset of the company is a block of buildings called the Iddesleigh-mansions. The plaintiff is entitled to a foreclosure order.

See for the holders of the second and third issues of debentures.—Having regard to the nature of the property the subject of debentures, foreclosure is not possible. [KEKEWICH, J.—

You can have an order for sale, and sell to a single individual.] Yes—a sale in one sense; you offer for sale the property, but take a mortgage of uncalled capital. [KEKEWICH, J.—I see no difference in vesting by foreclosure and vesting by sale.] There is no property ascertained. [KEKEWICH, J.—That can be got over by inquiry.] This is a covenant to pay, and to charge assets to be available in certain events. In the case of *Tennant v. Trenchard* (20 L. T. Rep. N. S. 856; 4 Ch. App. 537), Lord Hatherley at page 542 of 4 Ch. App. says: "It has been argued with considerable force, having regard to the authorities, that if a person has a charge, the right to foreclose accrues. But, although some of the authorities appear to conflict with each other, it seems on the whole to be settled that if there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale, and not foreclosure." Then the plaintiff having a charge on the chattels is not entitled to foreclosure, but to an order for sale only:

Carter v. Wake, 4 Ch. Div. 605.

[KEKEWICH, J.—Suppose he had an assignment of the chattels.] If there were a legal mortgage, perhaps there might be foreclosure. Here there is no legal mortgage, no assignment, only an equitable charge:

Ross v. Army and Navy Hotel, 55 L. T. Rep. N. S. 472; 34 Ch. Div. 43;

Blaker v. Herts and Essex Waterworks Company, 60 L. T. Rep. N. S. 776; 41 Ch. Div. 399.

A debenture-holder is different even from an ordinary equitable mortgagee, and is not entitled to foreclosure.

Bramwell Davis in reply.—The question is, whether a debenture of the sort which includes all the property, funds, assets, and effects of a company, including its uncalled capital, can be the subject of foreclosure. If there was a mortgage of each item, the holder would be entitled to foreclosure. If the items are lumped together, that makes no difference. One objection to foreclosure is that this charge is a floating security. But, if there is a winding-up, then it is a specific charge on particular items. The only real asset is the Iddesleigh-mansions; I should be content with an order for foreclosure on that. [KEKEWICH, J.—Have you any precedent for foreclosure of a part of the property?] If I did foreclose on part, I should be barred from the rest, but I might reserve my right as to the rest. The difficulty here is the uncalled capital, there is no precedent of foreclosure as regards that:

Re Pyle Works, 63 L. T. Rep. N. S. 628; (1891) 1 Ch. 173.

The court has power to extinguish the right of the company. If I had an agreement for a legal mortgage, I could come here for specific performance. [KEKEWICH, J.—Not as to uncalled capital.] Yes; it is an assignment of a *chose in action*—a future debt. You can have a mortgage of a future debt, and when you give notice to the debtor that it is binding. [KEKEWICH, J.—There is a difference between unpaid and uncalled.] In *Page v. International Agency and Industrial Trust Limited* (68 L. T. Rep. N. S. 435) the uncalled capital was held to be included in the debentures under the word "assets." Fisher on Mortgages

CHAN. DIV.]

SADLER v. WOBLEY.

[CHAN. DIV.]

(4th edit., p. 481). It must be completed by a call being made. The creditor is entitled to call upon the company to make the call, then the equitable mortgagee is in the position of a legal mortgagee and entitled to all his remedies. That is the logical result of *Re Pyle Works*. If I can get an absolute assignment, then I can come to the court and say, Compel the company by *mandamus* or otherwise to make a call. The foreclosure would put me into the position to call on the company to pay me and redeem. As to the chattels, Seton on Decrees (5th edit., vol. 2, p. 1659, form 1), foreclosure of mortgaged stock, and cash in court; p. 1661, form 6, foreclosure of chattels brought upon or added to the property after the mortgage. In *Carter v. Wake* there was a mere pledge; if a deposit of title deeds confers a right to have a legal mortgage executed, an equitable mortgagee has the same right. Seton on Decrees (5th edit., vol. 2, p. 1695, form 3: "Debenture stock . . . having been deposited . . . let the defendant company . . . concur in all acts . . . necessary to complete the transfer of the said stock." On page 1701 of Seton, form 14 relates to a policy of assurance by deposit. At page 1705 the cases of *Carter v. Wake* and *Tennant v. Trenchard* are commented on. The relief to which an equitable mortgagee by deposit is entitled is foreclosure and not sale: (*James v. James*, 16 Eq. 153.) As to *chooses in action*, *Slade v. Rigg* (3 Hare, 35) and *Wayne v. Hanham* (9 Hare, 62). [KEKEWICH, J.—I must have evidence as to what items are of a fixed character.]

Cur. adv. vult.

March 14.—KEKEWICH, J. delivered the following written judgment:—The plurality of debentures may in some cases be a matter of importance, as where one debenture-holder purports to sue on behalf of all, or other debenture-holders are before the court but do not support the plaintiff; but in this case it is a matter of absolute indifference. All the debentures of the first series are held by the plaintiff, and his position is the same as if a single debenture had been issued to him. Again, there are the debentures of a company incorporated under the Companies Act 1862, and I am not troubled with the authority of *Blaker v. Herts and Essex Waterworks Company* (60 L. T. Rep. N. S. 776; 41 Ch. Div. 399), or the principle laid down in *Gardner v. London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 644; 2 Ch. App. 201), on which that authority proceeded. The plaintiff's debentures are in a form now familiar, as that of a floating charge, and the amount thereby secured is expressed to be charged by the company, "on all its property, funds, assets, and effects whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the mortgage for 12,000*l.* now existing, or any mortgage or mortgages created in substitution thereof." The floating character of the charge ceased according to the 4th condition indorsed on the debenture on the 8th Dec. 1893, when an extraordinary resolution was passed for the voluntary winding-up of the company. On that day the subject of the charge, which until then had been necessarily uncertain was ascertained, and from that time the debentures have been a charge on all the property then existing of the company. I am told that this includes leasehold property, which is the most valuable asset, but, apparently, there are

some other items, and I am not at liberty to consider the case on the hypothesis, which would remove many difficulties, of the leaseholds being the only property available. Can the remedy by foreclosure be properly applied, not only to them, but also to such other items as exist, including in particular the uncalled capital? That is the question for my decision. What is foreclosure? The answer shall be given in the words of Sir George Jessel (*Carter v. Wake*, 4 Ch. Div. at page 606): "The principle on which the court acts is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference has gone by nonpayment of the debt the court simply removes the stop it has itself put on." That is in strictness applicable only to a legal mortgage in the full sense of the term; that is to say, it is not in strictness applicable even to an equitable mortgage such as a puisne mortgage necessarily is, though expressed in legal form, and it is still less applicable to a mortgage by way of charge. Nevertheless, the court has got over the difficulty where the charge has been made by deposit of title deeds, and notwithstanding the absence of an accompanying memorandum with or without an agreement to execute a legal mortgage. In these cases, using again the words of Sir George Jessel in *Carter v. Wake*, "the court treats the deposit of title deeds as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage." It is sometimes stated that the remedy of an equitable mortgagee is foreclosure rather than sale, but no distinct authority to this effect was cited to me, and I have found none. There are many authorities that the remedy of an equitable mortgagee by deposit of title deeds is foreclosure (see for instance *James v. James*, 16 Eq. 153), but they do not extend beyond that particular class. There are, however, cases in which equitable mortgagees of property, other than land, have been held entitled to foreclosure. In one case cited in this connection (*General Credit and Discount Company v. Glegg*, 48 L. T. Rep. N. S. 182; 22 Ch. Div. 549), Bacon, V.C. granted the remedy to lenders on the security of railway shares and debenture stock, but it appears from the report that such shares and stock had been transferred into their names, with power of sale, and therefore the authority is scarcely apposite. There are, however, more pointed instances to be found in the 2nd vol. of the 5th edit. of Seton on Decrees. In these cases the judgment of foreclosure has been perfected by direction not always actually given, but necessarily consequent that the mortgagor do make over the mortgaged property to the mortgagee, so as to complete his irredeemable title by legal ownership. One of these (page 1661) deals with a mortgage of a pension, which was apparently assigned to the mortgagees, but in such form that an irrevocable power of attorney to enable them to receive it was required in event of foreclosure, so that something was necessary to complete the legal title, and the mortgage was in substance equitable. Another (page 1659) deals with consols in court, and the notes (pages 1662 and following) mention further cases on the same lines. In an earlier note (bottom of page 1583) it is stated, and I believe with accuracy, that the remedy of a judgment creditor has been, after

CHAN. DIV.]

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED.

[CHAN. DIV.]

me conflict of authority, settled to be foreclosure, and not sale. Is there any good reason why these authorities should not be extended, as apparently they never yet have been, to such a large class as is now under consideration? If there is any adverse principle of law or rule of practice, the question must be answered in the negative, or otherwise it is well to remember that foreclosure is not likely to be asked, and is still less likely to be asked successfully, except where the security is deficient, and that in that class of cases a remedy is peculiarly appropriate, and has a value for the mortgagee which can attach to none other. Of course I accept the judgment of Sir George Jessel in *Carter v. Wake*, that foreclosure is not applicable to a pledge of chattels. Perhaps the rule may be found to be inconsistent with the decrees of the court, but without pursuing an inquiry, suffice it to say that there is no edge here. *Tennant v. Trenchard* was cited, but the judgment in that case seems to me to proceed entirely on the special character of the contract, which made it improper for the trustee to destroy the trust property. But these are the assets of the company, and some of them cannot be realised except by the exercise of powers which are vested in the statute and articles of association in the company itself as represented by directors or liquidator. To take the most extreme and most embarrassing case, how can there be foreclosure of uncalled capital? It cannot be vested in the mortgagee, and the extreme limit of his right must be to have a power of calling on the directors or liquidator to exercise their power on his behalf. This sounds somewhat anomalous. But it must be remembered that a mortgage of uncalled capital can be effectually made, and the decisions sanctioning that would be idle if they did not also sanction the realisation of the mortgaged security. It is urged that such realisation must be by sale, the answer is that a sale is open to the same objection. Supposing the uncalled capital to be sold and assigned to a purchaser, how is he in any better position than the mortgagee; or rather, why could he be entitled to means of enjoying his property to which the mortgagee is not? I am reluctant to make an order, the like of which has never been made before. On the other hand, I ought not to hesitate to apply a principle to facts, which it seems to me to be properly applicable, merely because it has never yet been so applied. I will see why an agreement to execute an assignment on default of payment of the money lent could be implied on a deposit of title deeds or certificates of shares (which I think has been done, though I have not been able to put my hand on the case) and not to other property capable as between borrower and lender, and according to the reasonable experience of mankind, of being made the subject of similar contracts. There is this rather to be considered: Even if this debenture does not give, one might easily be framed so as to give, a right of foreclosure as regards the leased property comprised in it, and it would be difficult, I think, to recognise the right of foreclosure as regards part, and to deny it as regards the other part of the property comprised in the same debenture. I will not pursue this thought further now, but, if ever it has to be pursued, the doctrine of the court as regards opening foreclosure must be borne in mind. On the whole, I am of opinion that there should be an order declaring the plain-

tiff entitled to foreclosure, and directing the company at the plaintiff's request to assign to him the several items of property comprised in the debentures. This will require some little consideration in detail. Of course the order must follow as far as possible the usual form, and provide for redemption by any parties entitled to redeem. Mr. Eve, on behalf of holders of debentures of the second series, intimated that, though not now prepared to apply for a sale, he might wish to do so at a later stage. This, it seems, he can do without special reservation of liberty to apply for that purpose, which therefore I do not propose to insert, but he must take warning that his application can only be granted if at all upon fair terms to the plaintiff on the principle of *Woolley v. Colman* (46 L. T. Rep. N. S. 737; 21 Ch. Div. 169.)

Solicitors: *Hughes, Hooker, Buttanshaw, and Thunder; Poole and Robinson.*

March 10 and 14.

(Before KEKEWICH, J.)

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED. (a)

Company—Debenture-holder—Deferred security—Winding-up—Maturing of security.

A company was incorporated in 1887, and borrowed money by the issue of debentures bearing interest payable half-yearly on the 1st Jan. and the 1st July. By the debentures the company covenanted to pay to the registered holder the principal sum thereby secured on the 31st Dec. 1894, and the interest as aforesaid. The company thereby charged with the payment of such principal moneys and interest all the undertaking and property of the company both then present and future, to the intent that the debentures should be a first charge on the undertaking and property, and such charge should be a floating security. There were no conditions indorsed on the debentures. The plaintiff was the holder of five debentures. The company made default in the payment of interest due to the plaintiff on the 1st Jan. 1890, and on the 19th July 1890 an order was made for the winding-up of the company. The plaintiff brought his action, and the action came on, on motion for judgment, as a short cause. The proposed minutes were in the form of a declaration that the plaintiff and the other debenture-holders were entitled to a charge on all the undertaking and property for securing the principal moneys and interest owing upon the security of the debentures. Then an inquiry, what debentures had been issued, and which of them were still outstanding and unpaid. Then an account of what was due for principal and interest to the plaintiff and the debenture-holders. Held (dissenting from *Hodson v. Tea Company*, 14 Ch. Div. 859), that the winding-up of a company does not, in the absence of express conditions, have the effect that the money secured by the debentures becomes immediately payable, and the debenture a security immediately enforceable; the debenture-holder is entitled to a judgment which will protect him, and which will prevent his debtor the company from reaping any benefit from the property charged, but is not

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED.

[CHAN. DIV.]

entitled to immediate payment on the footing of the covenant. The Court made the order striking out from the minutes the words that the principal was due, owing, or unpaid.

THE writ in the action was issued on the 2nd July 1890, and the plaintiff claimed an account of what was due to himself and all other holders of the debentures for 25,000*l.* issued by the defendant company and for a receiver.

On the 5th Feb. 1894 the plaintiff delivered a statement of claim, wherein he stated that the company was incorporated in 1887. The capital of the company was 120,000*l.*, divided into 120,000 shares of 1*l.* each. Shortly after the date of its incorporation the company, in exercise of the powers conferred in the memorandum of association, raised a sum of 6000*l.* by the issue of sixty first mortgage debentures of 100*l.* each, bearing interest at the rate of 6*l.* per cent., payable half-yearly on the 1st Jan. and the 1st July in each year. The debentures contained covenants on the part of the company to pay to the registered holder thereof the principal sum of 100*l.* thereby secured on the 31st Dec. 1894, and to pay interest on the said principal moneys at the rate and on the days thereinbefore mentioned. The company thereby charged with the payment of such principal moneys and interest as aforesaid all the undertaking and property of the company both then present and future to the intent that all the debentures of the said series (which were limited to 250 debentures of 100*l.* each) should, without regard to the respective dates thereof, rank *pari passu* as a first charge upon the said undertaking and property, without any preference or priority one over another, and that such charge should be a floating security. [There were no conditions indorsed on the debentures providing that the principal should become payable if default were made in payment of interest, or if a winding-up was resolved upon or ordered.] The plaintiff then stated that he was the holder of five debentures. The company made default in payment of the half-year's interest due to the plaintiff on the 1st Jan. 1890; and on the 19th July 1890 an order was made for the winding-up of the company. The plaintiff's claim went on as follows: "The whole of the principal moneys secured by the plaintiff's debentures, amounting to 500*l.*, together with interest thereon from the 1st July 1889, is still unpaid and owing to the plaintiff."

The plaintiff claimed a declaration that he and the other debenture-holders were entitled to a charge on all the undertaking, property, and assets of the company for securing the principal moneys and interest in the said debentures mentioned; an account; that the charge contained in the said debentures might be enforced by foreclosure or sale.

On the 4th July 1890 a receiver had been appointed of all the property and assets comprised in the debentures.

This was a motion by the plaintiff on behalf of himself and all other the holders of debentures of the Universal Automatic Machines Company for an order in the terms of the minutes. The action came on as a short cause.

The proposed minutes were as follows:

Declare that the plaintiff and all other the holders of the debentures in the statement of claim mentioned are

entitled to a charge on all the undertaking and property of the defendant company for securing the principal moneys and interest owing upon the security of the said debentures. And let the following accounts and inquiries be taken and made, that is to say: (1) an inquiry what debentures have been issued by the defendant company, and which of them are still outstanding and unpaid, and what persons are the holders of the same respectively; (2) an account of what is due to the principal and interest to the plaintiff and the other holders of the said outstanding debentures; (3) an inquiry of what the property comprised in and charged by the said debentures consists, and in whom the same is vested. Adjourn further consideration into chambers. Liberty to apply.

Eve for the plaintiff.—[KEKEWICH, J.—The principal money is not "owing" until the 31st Dec. 1894.] When a company is wound-up, the money becomes immediately payable, and the security immediately enforceable:

Hodson v. Tea Company, 14 Ch. Div. 859:

Palmer on Company Precedents, 5th edit., p. 495.

The company did not oppose the motion for judgment.

Cur. adv. vult.

March 14.—KEKEWICH, J.—When this case came on as a short cause on Saturday, I took objection less perhaps to the order which was proposed than to the statement of claim upon which it was founded. The statement of claim is that of one Wallace suing on behalf of himself and all other the holders of debentures of the Universal Automatic Machines Company Limited that company being the defendants. It states the issue of certain mortgage debentures, of 100*l.* each, payable on the 31st Dec. 1894, a day which has not yet arrived, the interest on which is payable half-yearly, on the 1st Jan. and the 1st July in each year, and there is an allegation in the statement of claim that default has been made in the payment of interest. The debentures are stated to create a charge of the principal and interest on all the undertaking and property of the company, both present and future, and it is to be a floating security. Then the statement of claim goes on to allege that the whole of the principal moneys secured by the plaintiff's debentures amounting to 500*l.* together with interest thereon from the 1st July 1889 is still unpaid and owing to the plaintiff. The interest is not only unpaid but is payable and owing. But I took exception to the allegation that the principal money was owing. In reply to that objection Mr. Eve referred me to the case of *Hodson v. Tea Company*, where Hall, V.C., at page 862 of 14 Ch. Div. says: "It appears to me that, when a company comes to be wound-up, the arrangement for the continuance of the loan for a certain time necessarily comes to an end, the money becomes immediately payable, and the security immediately enforceable." In that case, apparently as in this, there were no such conditions as are now common for the principal money becoming payable if default is made in payment of interest, or if a winding-up is resolved upon or ordered. I am told by Mr. Eve that this is not a slip in such a condition being omitted, but in point of fact the debentures were issued without any such condition. If I could accept that statement of the Vice-Chancellor, I should of course hold here that the money is owing and payable. On consideration I do not feel at liberty to accept that. It

CH. DIV.] *Re* LOUTH MUNICIPAL ELECTION; *NELL AND OTHERS v. LONGBOTTOM.* [Q.B. DIV.]

not necessary, I think, for the decision is not supported so far as I am aware by any other authority, and to my mind it is so inconsistent with what I understand the law on the subject that I do not feel bound to follow the Vice-Chancellor's judgment, notwithstanding that it is now fourteen years old. I cannot see myself that where there is a covenant to pay a future debt not payable till the 31st Dec. 1894, a day which has not yet arrived, the covenant becomes enforceable, as for a debt payable *in presenti* because there is a winding-up. If this had been a covenant by a man to pay money on the 31st Dec. 1894, his bankruptcy would not have made the money presently payable, and I cannot for this purpose see any difference between the bankruptcy of a man and the winding-up of a company. The debt is provable of course, but the money is not payable. *Debitum in presenti solvendum in futuro.* Mr. Eve referred me to a passage in Mr. Palmer's book on Company Precedents (5th edit.), which we all turn to as stating the law on the subject. On that condition which is commonly found in this kind of debenture, he says at page 495: "According to a recent decision it only expresses that which the law implies: (*Hodson v. Tea Company*, 14 Ch. Div. 859.)" Of course I could not accept Mr. Palmer's approval of *Hodson v. Tea Company*, but if I found it was a decision approved by the profession, it would make me more reluctant to disregard it. There is a decision to which Hall, V.C. referred in *Hodson v. Tea Company*, namely, *Re Panama, New Zealand, and Australian Royal Mail Company* (22 L. T. Rep. N. S. 424; 5 Ch. App. 318), where Giffard, L.J. seems to me to put the law on a sounder footing. At page 322, 5 Ch. App., he says: "The moment the company comes to be wound-up, and the property has to be realised, that moment the rights of these parties, beyond all question, attach. My opinion is, that even if the company had not stopped, the debenture-holders might have filed a bill to realise their security." To my mind there is all the distinction in the world between the right to realise a security, and to sue on a covenant to pay. The principle is also to be found in a series of cases, which have now dropped out of sight, of which *Yescombe v. Landor* (28 Beav. 80) may be taken as a good example. In the Judgments Act (1 & 2 Vict. c. 110), are contained provisions, which make it impossible for a judgment creditor to proceed to enforce his security, until a certain time has elapsed, but that was construed by the court in several cases, and noticeably in *Yescombe v. Landor*, as giving the judgment creditor a right to prevent the judgment debtor making away with his property. The head-note is as follows: "A judgment creditor, though unable to proceed in equity to obtain the benefit of his charge before the expiration of a year (1 & 2 Vict. c. 110), s. 13, is, nevertheless, entitled to have the life interest of his debtor in lands at once impounded for his protection." And there are other cases about the same time applying the same principle. It seems to me that the debenture-holder is entitled to a judgment which will protect him, and which will prevent his debtor, the company, from reaping any benefit from the property charged, but is not entitled to immediate payment of the money on the footing of the covenant. When I look through the minutes very little need be altered.

Amended minutes.—Declare that the plaintiff and all other the holders of the debenture in the statement of claim mentioned are entitled to a charge on all the undertaking and property of the defendant company for securing the principal moneys and interest intended to be secured by the said debentures. And let the following accounts and inquiries be taken and made; that is to say: (1) An inquiry what debentures have been issued by the defendant company, and which of them are still outstanding, and what persons are the holders of the same respectively. (2) An account of what is due for interest to the plaintiff and the other holders of the said outstanding debentures. (3) An inquiry of what the property comprised in and charged by the said debentures consists, and in whom the same is vested. Adjourn further consideration into chambers. Liberty to apply.

Solicitors: *Slaughter and May.*

QUEEN'S BENCH DIVISION.

Feb. 27 and March 6.

(Before MATHEW and CAVE, JJ.)

Re THE LOUTH MUNICIPAL ELECTION; *NELL AND OTHERS* (pets.) *v.* *LONGBOTTOM* (resp.). (a)

Municipal election—Validity of votes—Salary attached to office—Right of candidate to vote for himself—Right of chairman to first vote—Disqualification—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 22 (3), 12 (1) (a) and (c), (2) (a), 61 (4).

At an election for the mayor of a municipal borough the votes for each of the two candidates being equal, the chairman gave a casting vote for the respondent, and declared him duly elected. There was a small salary attached to the office of mayor. The chairman, who was otherwise entitled to vote, had given a first vote for the respondent, and the respondent had voted for himself. One of the votes for the respondent was given by T., who had let a building to the council for a polling station at an election of councillors held some days before the election for mayor. T. was to receive and did receive payment for the use of the building for that purpose. One of the votes for the other candidate was given by G., who, at the date of his election as councillor some days before the election for mayor, was chemist to the council, and as such had supplied goods to the council, but after the date of his election as councillor he had supplied to the council only half a gallon of oil, which cost fourpence. Upon an election petition under the Municipal Corporations Act 1882, objections were taken to the above votes.

Held (1) that the vote of the respondent for himself was bad, upon the ground that, there being a salary attached to the office, the respondent had a "pecuniary interest" in the result within the meaning of sect. 22 (3) of the Act; (2) that the vote of T. was good, as his contract for the letting of the building was within the exception in sect. 12 (2) (a), as a lease of land; (3) that the vote of G. was bad, as at the time of election as councillor he, as chemist to the council, held an "office or place of profit in the gift of the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Q.B. DIV.] *Re* LOUTH MUNICIPAL ELECTION; NELL AND OTHERS *v.* LONGBOTTOM. [Q.B. DIV.]

council" within the meaning of sect. 12 (1) (a), and also had a "share or interest in a contract" within sect. 12 (1) (c), and had after his election as councillor sold to the council four-pennyworth of oil, and was therefore disqualified for being a councillor; (4) that the first vote of the chairman was good, as the chairman, being otherwise entitled to vote, did not lose his right to a first vote by reason of his being chairman.

The petition did not raise the question as to the disqualification of the voter T. Upon an objection taken to that effect,

Held, that to raise the question an amendment of the petition was necessary, and that in the absence of any explanation of the omission no amendment, even if possible, ought to be made, but that in this it was not necessary.

CASE stated for the opinion of the court pursuant to the order of a judge made under sect. 93, subsect. 7 of the Municipal Corporations Act 1882.

The borough of Louth is a municipal borough subject to the provisions of the Municipal Corporations Act 1882.

On the 9th Nov. 1893 an election for the mayor of the borough was held, and the respondent, Mr. Longbottom, and Joseph Cusworth, both being aldermen of the borough, were candidates, and were duly proposed and seconded, and the respondent was declared duly elected.

A petition was presented by the petitioners praying that it might be declared that the respondent was not duly elected, and that the said Joseph Cusworth was duly elected and ought to have been declared duly elected as mayor.

The retiring mayor was chairman of the meeting at which the election was held. There were twenty-three persons present at the meeting and during the election, and the persons who were present or voted were all entitled to be present and vote except as hereinafter appears. The votes were taken in the usual way by the chairman, when it appeared that eleven voted for the respondent, and eleven voted for Mr. Cusworth. Mr. Cusworth was present, but, being a candidate, did not vote.

Thereupon the chairman declared that there was an equality of votes, and that he gave his casting vote for the respondent, and, notwithstanding the protests made by the supporters of Mr. Cusworth, he declared the respondent duly elected as mayor.

One of the eleven votes given for the respondent was given by the chairman, who thus gave a first vote and afterwards a second or casting vote.

One of the eleven votes given for the respondent was given by the respondent, who thus voted for himself.

By a resolution of the town council on the 4th Feb. 1836, it was resolved that the mayor of the borough, for the time being, should be paid out of the borough fund a salary of 30*l.* for the execution of his office during his year. This resolution is still in force, and such salary has been paid to the mayors of the borough every year. The respondent was mayor of the borough in the year 1891-1892, and duly received the above salary.

One of the eleven votes given for the respondent was given by John Taylor, who was an alderman of the borough, and the owner of a building called "The Mart," which is occupied by himself and his son, who are in partnership, for the purposes of

the business of the firm. This building was let to and used by the council for a polling station at the election of councillors for the borough on the 1st Nov. 1893, on the terms that the firm should be paid, and they were paid by the council 2*l.* 2*s.* for the use of the building for that purpose.

The above evidence as to Taylor was taken subject to the objection made by counsel for the respondent that the petition did not raise this question, and that no amendment thereof could or ought to be allowed. It was agreed by the parties that the court should say whether any amendment of the petition was necessary, and, if necessary, whether it ought to be allowed.

One of the eleven votes given for Mr. Cusworth was given by William Griffin, who was a chemist and druggist in the borough. Mr. Griffin had on the 2nd Jan. 1893 been appointed chemist to the council of the borough, and had accordingly supplied goods to them on credit in the usual way of his trade.

Mr. Griffin was elected a councillor of the borough on the 1st Nov. 1893. On the 9th Nov. 1893, the day of the election for mayor, the sum of 1*l.* 13*s.* 4*d.* was due and unpaid to Mr. Griffin in respect of goods supplied by him to the police and fire brigade on behalf of the council. On that day an order was made upon the treasurer of the borough for the payment to Mr. Griffin of the sum due in respect of goods supplied to the police. The goods supplied to the fire brigade on behalf of the council were chiefly oil and other necessities for the fire engines, and were sold over the counter in the ordinary way of business, to the order of the superintendent of the fire brigade acting by the authority of the council.

All the goods, with the exception of half a gallon of oil, were ordered by the council and sold by Mr. Griffin before the 1st Nov. 1893, when he was elected councillor. The half gallon of oil, which cost fourpence, was ordered and sold on the 2nd Nov. 1893. Mr. Griffin was not in the shop at the time of such sale, but he had not resigned his appointment of chemist to the council.

The questions for the opinion of the court are: Whether upon the above facts the respondent was duly elected by a majority of lawful votes? Whether the said Joseph Cusworth was duly elected by a majority of lawful votes, and ought to be declared elected?

W. Graham for the petitioners.

A. T. Lawrence for the respondent.

The arguments, and the sections of the Municipal Corporations Act 1882 referred to, appear fully in the written judgment of the court.

Cur. adv. vult.

March 6.—The judgment of the court (Mathew and Cave, J.J.) was read by CAVE, J.—This is a special case stated with reference to the election of Mr. Longbottom as mayor of Louth. The first objection arose with reference to the fact that Mr. Longbottom voted for himself as mayor, that being an office to which, by a resolution of the town council passed Feb. 4th 1836, a salary of 30*l.* a year was attached. The vote so given was, it was alleged, rendered invalid by the Act of 1882, sect. 22 (3), which enacts that "a member of the council shall not vote or take part in the discussion of any matter before the

Q.B. DIV.] *Re LOUTH MUNICIPAL ELECTION; NELL AND OTHERS v. LONGBOTTOM.* [Q.B. DIV.]

council or a committee in which he has directly or indirectly, by himself or his partner, 'any pecuniary' interest." When Mr. Longbottom was proposed as mayor it is contended that he had a direct pecuniary interest in the result, and consequently was disqualified from voting on the motion. For the respondent it was urged that inasmuch as, by sect. 12 (1) (a), a man may be elected a councillor notwithstanding that he holds the office of mayor, and that such office may be a place of profit, he may also vote for himself as mayor notwithstanding that it may be a place of profit. It is difficult to see the bearing of this argument, and we are of opinion that the vote was bad, and must be struck off. As the votes were originally eleven for Longbottom and eleven for Cusworth, his opponent, this decision places Mr. Longbottom in a minority of one. The respondent thereupon contended that "one of the votes given for Mr. Cusworth—that of Mr. Griffin—was bad, inasmuch as at the time of his election as councillor he held an office or place of profit in the gift of the council—sect 12 (1) (a)—and also had a share or interest in a contract or employment with, by, or on behalf of the council, contrary to clause (c) of the same section and subsection. It appears that the appointment of chemist to the council entitles the person appointed, to supply goods in the way of his business as a chemist and druggist to the police and the fire brigade, and that Mr. Griffin had not resigned the appointment before his election, and had after his election supplied a member of the fire brigade, on behalf of the council, with fourpennyworth of oil. The first answer made to this was, that the contract was a very small one. That, however, is a matter into which we cannot enter, as the Legislature has not intrusted us with any dispensing power, and probably considered that the maxim of *obsta principiis* should apply to cases of this class. The second answer was, that sect. 42 of the Act provides that the acts and proceedings of a person in possession of a corporate office and acting therein shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified. When, however, we refer to sect. 87 (1), which provides that a municipal election may be questioned by an election petition, on the ground (d) that the person whose election is questioned was not duly elected by a majority of lawful votes, it is clear that although in ordinary cases the act of an unqualified person could not be questioned, yet that on an election petition the question whether a particular vote is a lawful vote is intended to be raised and decided. The objection, therefore, is fatal; and the votes are again equal. The next objection was one made by the appellants to the vote of John Taylor, who had let a building called "The Mart" to the council for the purposes of a polling station for the election of councillors on the 1st Nov. last, on the terms that he was to be paid two guineas for the use of it. A preliminary objection was taken on behalf of the respondent that the petition did not raise this question, and that no amendment of it would or ought to be allowed, and it was agreed that the court should say whether any amendment was necessary, and, if necessary, whether it ought to be allowed. We are clearly of opinion that to raise this question an amendment of the petition is necessary, and

that in the absence of any evidence of the circumstances under which the omission was made, and subsequently discovered and put forward, no amendment, even if possible, ought to be allowed. The objection, however, is of no importance in this case, as the contract seems to us to be within the exception in sect. 12, sub-sect. 2 (a), as a lease of land. An interest in a lease for a year would clearly be within the exception, and, therefore, a lease for a month, a week, or a day must equally be within it. This vote being good, the votes still remain equal. It was next objected on the part of the appellants that the chairman of the meeting at which the election was held was *ipso facto* disqualified from voting. No authority for this proposition was produced, and we cannot see why a member of a meeting otherwise entitled to vote should be disfranchised, either because he is entitled to preside by reason of his office, or because he is elected for that position by the votes of his fellows. It is true that very often he does not vote until it has been ascertained that the other votes are equal; but when that is the case the chairman votes, not because he is chairman, and as such has a vote only in the case of an equal division among the other members of the meeting, but by reason of his right to vote as a duly qualified member of the meeting. When, as the result of the chairman giving his vote, the numbers on either side became exactly equal, the common law appears to have provided no way out of the difficulty. The institution of a second or casting vote, as it is called, is the creature of the statute law, introduced for the purpose of avoiding the deadlock that would otherwise ensue. It was introduced into parish meetings by Sturges Bourne's Act many years ago, and is to be found in sects. 35 and 69 of the old Municipal Corporations Act of 5 and 6 Will. 4, c. 76. A similar provision is made, as to ordinary meetings, in the Act of 1882 by rule 11 of the second schedule. So, again, with regard to the election of aldermen, it is enacted by sect. 60 (6) that in case of equality of votes the chairman shall have the casting vote with a proviso that that is not to be understood as giving him a first vote if he is otherwise disqualified. The words there are, "although as an outgoing alderman or otherwise not entitled to vote in the first instance." A similar provision with reference to the election of mayor is found in sect. 61 (4), where the words are, "in case of equality of votes the chairman, although not entitled to vote in the first instance, shall have the casting vote." The words "although not entitled to vote in the first instance" appear to be inserted with the same intention as those inserted in sect. 60 (6)—that is to say, to make it clear that the gift of a casting vote was not intended to confer a right to a first vote when none such existed in fact. If the Legislature had intended in sect. 61 (4) (contrary to its manifest intention in other parts of the Act) to impose a positive disqualification on a chairman, one would have expected it to be done in express terms. The absence of any words equivalent to "as an outgoing alderman or otherwise," in sect. 60 (6) is probably attributable to the fact that the Legislature desired to make it clear no first vote was intended to be given where none previously existed, although not at the moment prepared, as in the case of the election

[CT. OF APP.]

PONSFORD v. THE NEWPORT DISTRICT SCHOOL BOARD.

[CT. OF APP.]

of aldermen, to specify a case in which such right to a first vote would not exist. In our opinion the vote was good. That makes the voting equal, and, as it is admitted that the chairman had a second or casting vote, and exercised such vote in favour of the respondent, it follows that he was duly elected, and that the petition must be dismissed. As, however, the petition was due, in great measure, to the conduct of the respondent in giving an illegal vote for himself, we are of opinion that it should be dismissed without costs.

Judgment for the respondent without costs.

Solicitors for the petitioners, *Collyer-Bristow, Russell, Hill, and Co.*, for Wilson and Son, Louth.
Solicitor for the respondent, *J. Plaskitt*, for Bell, Ingoldby, and Sharpley, Louth.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 17 and 20.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

PONSFORD v. THE NEWPORT DISTRICT SCHOOL BOARD. (a)

APPEAL FROM THE CHANCERY DIVISION.

"Disused burial ground"—*Partial user of burial ground—Order in Council—Restrictions—Metropolitan Open Spaces Act 1881 (44 & 45 Vict. c. 34), s. 1—Disused Burial Grounds Act 1884 (47 & 48 Vict. c. 72), ss. 2, 3—Open Spaces Act 1887 (50 & 51 Vict. c. 32), ss. 2, 4, and schedule.*

By virtue of the *Metropolitan Open Spaces Act 1881, s. 1, the Disused Burial Grounds Act 1884, s. 2, and the Open Spaces Act 1887, ss. 2, 4, and the schedule, the term "disused burial ground" includes any ground, whether consecrated or not, which has at any time been set apart for the purposes of interment, whether interments have taken place in it or not, and which has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused; and therefore the prohibition against erecting any building upon a disused burial ground contained in sect. 3 of the Disused Burial Grounds Act 1884, applies to a part of a cemetery which has been closed, though interments have not taken place in that particular part.*

Decision of North, J. (69 L. T. Rep. N. S. 687) affirmed.

By an agreement, dated the 7th Oct. 1892, the school board for the school district of Newport, in the county of Monmouth, agreed to purchase from Mr. Ponsford a piece of land described as being on the western side of Newport Old Cemetery, the same being divided from the cemetery by a wall and bounded on the north by a wall at the rear of Jones-street, and on the west side by a wall adjoining Clifton-place, and on the south side by Clifton-road, the same being 2a. 1r. 30p. or thereabouts, for the sum of 1000l.

It was admitted that the vendor knew the board were purchasing for the purpose of building a school.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

In 1842 a larger piece of land, comprising the land agreed to be sold, was conveyed to trustees for the Newport Cemetery Company.

This company was a joint-stock company governed by a deed of settlement under which the land was to be used as a cemetery, and it contained powers for the company to buy land and to sell or let any messuages, lands, or hereditaments belonging to the company, or pull down, remove, or alter any houses, chapels, or other buildings of or belonging to the company, which should for the time being appear inapplicable to the purposes of the company.

The whole of the land was inclosed by the company in one fence. No part of it had ever been consecrated. The eastern half of the land had been laid out with paths and planted in places with ornamental shrubs for immediate use as a burying ground, and had been largely used and almost filled up with graves. No burials had been made in the western part of the ground except on a narrow strip close to the northern boundary extending rather more than half the length of such western part. It was admitted that the part which had been so left unused had been kept tidy as part of the cemetery, though not laid out like the other and was not at first fenced off from it; and that both the occupied and unoccupied parts were known down to the year 1887 as Newport Old Cemetery.

By an Order in Council, dated the 15th Jan. 1878, and made under the Burials Act 1852 (15 & 16 Vict. c. 85), it was ordered that burials should be discontinued in the undermentioned parishes with the following modifications, viz. (*inter alia*), Newport: Forthwith wholly in the Old Cemetery of Newport, Monmouthshire, except in private vaults and graves which are free from water and which can be opened without exposure of remains or coffins, and that every coffin be covered with stone or brickwork properly cemented and not again disturbed, or by four feet of earth.

It was not disputed that in this order the term Old Cemetery included the unused part agreed to be sold as well as the part which had been used.

On the 20th Oct. 1885 the land then vested in the trustees for the cemetery company was conveyed by the surviving trustee, with the consent of all the persons who were members of or interested in the company, to trustees in trust to sell such parts and subject to such directions as should be agreed upon within three years by the parties beneficially interested.

A wall was afterwards built separating the unused part of the cemetery (being the land not agreed to be sold) from the other part.

By a memorandum indorsed on the last-mentioned deed, and dated the 10th Oct. 1888, the trustees were directed to sell all that part of portion of land described in the therein written indenture which had not been set apart and used as a place of burial, and this part of portion was described in the same words as in the contract with the school board.

By an Order in Council made on the 30th June 1890 it was ordered that the order of the 15th Jan. 1878 should be varied so far as it related to the Old Cemetery at Newport, and the following directions substituted:

That with the exception of the cemetery company land distinguished by a green colour on the plan do

[CT. OF APP.]

PONSFORD v. THE NEWPORT DISTRICT SCHOOL BOARD.

[CT. OF APP.]

posited at the Home Office, burials shall be discontinued forthwith and wholly in the Old Cemetery in Newport, in the county of Monmouth.

The land coloured green on the said plan was the land agreed to be sold. This land was in 1891 conveyed by the trustees to Ponsford, the vendor.

The school board raised an objection to the title that the land agreed to be sold was a disused burial ground within the definition in the Disused Burial Grounds Act 1884 as varied by the Open Spaces Act 1887, and therefore could not be built upon, and took out a summons under the Vendors and Purchasers Act 1874 asking for a declaration that the objection was valid, and that the vendor was unable to make a good title.

The summons was heard by North, J., who held (69 L. T. Rep. N. S. 687) that the land was a disused burial ground within the meaning of the Acts, and could not be built upon, and therefore the purchaser's objection was valid.

From this decision the vendor appealed.

Bailhache for the appellant.—This piece of ground has never been "set apart for the purposes of interment" within the definition clause, sect. 1 of the Metropolitan Open Spaces Act 1881. The only part of the cemetery which was set apart was the other piece in which interments actually took place. The land must be "irrevocably" appropriated to that purpose, or must be "a burial ground" *de facto* or *de jure*—in use or in trust:

Foster v. Dodd, 14 L. T. Rep. N. S. 327; 17 L. T. Rep. N. S. 614; L. Rep. 1 Q. B. 475, 487; L. Rep. 3 Q. B. 67, 75.

The fact that the ground was inclosed with a wall is not sufficient to set it apart, and nothing else was done to this particular piece to irrevocably set it apart for burials. It was not laid out as the other part of the ground was. The ground was not consecrated. This was a commercial company, and there was nothing in the deed of settlement which made the company trustees for the public or anyone else. They could at any time have used this piece of land for any other purpose, and could have set up a manufactory upon it. Besides, it has not been closed by the Order in Council. The effect of the order of 1890 was to repeal the Order of 1878, so far as it related to this piece of the ground. But if it is subject to the Order of 1878 that order does not close it, for it permits burial in private vaults.

E. Ford for the respondents.—The position of the chapel, which was built in 1842, and also that of the roads and paths then made, show that the whole of the land then purchased was "set apart for the purposes of interment." There is no authority that setting apart under the Act means an irrevocable setting apart. The settlement deed shows that the object of the company was to establish a cemetery, and no other user of the land is there suggested. All the land purchased in 1842 comes within sect. 4 of the Act of 1887, for under the Orders in Council of 1878 and 1890 it has been partially closed for burials, and it is therefore "a disused burial ground," and by virtue of sect. 3 of the Act of 1884 cannot be built upon. The effect of sect. 2 of the Act of 1887 upon the definition in sect. 1 of the Act of 1881 is to make a "burial ground" now mean any ground set apart for the purposes of interment, whether there is a burial in it or not.

LINDLEY, L.J.—In my opinion the construction of these Acts of Parliament is not so plain as one could wish; but still I have no doubt that the purchasers ought not to be compelled to take a title which would expose them to the risk of an indictment for building on the land purchased. The first point is whether we are to take this cemetery, that is, the whole of the land known as the "Old Cemetery," as a whole, and see whether it has been set apart as a cemetery for interments, or whether we should treat it as subdivided into bits, and see whether each bit has been so set apart. In my opinion we ought to look at the cemetery as a whole, and not in bits; and if we look at it as a whole, it appears to me that, as a matter of fact, it is to be set apart as a burial ground. I think that is so, notwithstanding the clause in the deed of settlement providing that the trustees may sell or let any part of the land. If they sell the land as a whole, it must be sold subject to the consequences of its having been set apart as a burial ground. The Disused Burial Grounds Act 1884, which is a prohibitive Act, says this in sect. 3: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church" and so forth. What is meant by a "disused burial ground"? For that we must look at the Acts of 1881 and 1887. The Metropolitan Open Spaces Act 1881 says this in sect. 1: "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." The rest of the definition has been repealed. Then the Open Spaces Act 1887 says this in sect. 4: "In the Disused Burial Grounds Act 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act 1881, as amended by this Act." That refers to the schedule to this Act of 1887, which schedule strikes out the words in sect. 1 of the Act of 1881, "and in which interments have taken place since the year 1800," and which words therefore I did not read. Then sect. 4 of the Act of 1887 goes on: "And the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council." Now, putting all these enactments together, and applying them to this case, it strikes me that the Old Cemetery cannot be built upon at all; that would be my view if I were trying an indictment or an information of the Attorney-General. In my opinion, therefore, the purchasers are right in their objection, and the appeal must be dismissed.

KAY, L.J.—I am of the same opinion. This burial ground—the whole of it—was bought by the cemetery company for the purpose of providing a place of interment for the dead. They bought this ground for that express purpose. They surrounded it by a wall, made roads and paths, and erected a chapel, and they buried in the ground to a very considerable extent, not—as the plan shows—in the whole of it, but they first buried on one side, and then in a strip on the northern portion of the other side. The unused portion of the ground has now been divided from the rest of the cemetery by a wall, and the question is whether any building can be erected on

[CT. OF APP.]

PONSFORD v. THE NEWPORT DISTRICT SCHOOL BOARD.

[CT. OF APP.]

that unused portion. With regard to that, the Disused Burial Grounds Act 1884 is said to apply. By sect. 3 of that Act it is provided that, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for enlarging a church," and so on. The expression is "any disused burial ground." But the Act contains a definition of a "disused burial ground." It says, in sect. 2: "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." Now, I pause there. Supposing that had been the condition of the statute law on this subject at the present time, and an Order in Council had been made prohibiting any further burials in this cemetery; then, of course, the part not used would be a "disused burial ground" within the words of this Act. But before Ponsford bought from the company this unused piece of ground, the Act of 1887 was passed, and that Act alters the definition of a "disused burial ground" in the Act of 1884, namely, "a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." It is no longer to mean that, but it is to mean what the Act of 1887 says. The Act of 1887 first of all alters the meaning of the expression "burial ground" (not "disused burial ground") in the Act of 1881, which says, in sect. 1, that, "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800." As the Act of 1881 originally stood, the term "burial ground" did not include any ground that had merely been "set apart" for interments, but any ground that had been so set apart, "and" in which there had been interments since 1800. Now, the Act of 1887 alters that, and says, in sect. 2, that "The Metropolitan Open Spaces Act 1881 is hereby repealed to the extent mentioned in the schedule to this Act;" and the schedule under the head of "Portions of the Metropolitan Open Spaces Act 1881 repealed" says, "In the same section"—that is, sect. 1 of the Act of 1881—"the following words occurring in the definition of a 'burial ground,' viz., 'and in which interments have taken place since the year 1800.'" So now you must read the term "burial ground" as meaning "any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." Thus the effect of that is, that the term means any ground which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not, because the words in the original Act of 1881, requiring that to make the ground a "burial ground" interments must have taken place within it, are expressly repealed. Therefore, the term includes any ground set apart for interments, and in which interments have not taken place. Then sect. 4 of the Act of 1887 says that, "In the Disused Burial Grounds Act 1884, and this Act, the expression, 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act 1881, as amended by this Act." That is to say, it shall mean any ground which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not.

Accordingly the next part of the section should be read thus: "and the expression 'disused burial ground' shall mean any burial ground"—that is, including any burial ground in which no interments have taken place—"which is not used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council." Now one sees the alterations in the law. In 1884 a "disused burial ground" only meant a burial ground in respect of which an Order in Council had been made for the discontinuance of burials therein. At the present day it means a piece of ground set apart for interments in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused. Now, we have to apply this state of the law to a particular piece of ground. This piece of ground, coloured green on the plan, was, in 1878, closed by an Order in Council, and burying in it was, by that Order in Council, prohibited. Then, afterwards, another Order in Council was made removing that prohibition; that is to say, allowing burials in this piece of ground, but no burials have ever taken place in it, and therefore it cannot be denied that it is in fact a burial ground which has not been used for burials. But it is said that it never was set apart as a burial ground, and therefore cannot be termed a "disused burial ground." The meaning now to be attributed to the term "disused burial ground" in the Act of 1884—namely, that it includes a piece of land set apart for interments, but in which interments have not taken place—makes that argument absolutely impossible. This ground was set apart as distinctly as any ground could be, though it is a ground in which no burials have ever taken place. I cannot escape the conclusion that this ground is within the express words of the Acts of Parliament—that this was ground set apart for interments; although no interments have ever taken place in it, it is, therefore, a "disused burial ground" within the Act of 1884, and the restriction in the Act of 1884 applies to this ground. Unless that is the conclusion to be drawn from the words of this Act of 1884, the result would be this—that a piece of ground in the middle of a cemetery, or in any part of a cemetery, in which there may have been no burials, cannot be treated as a disused burial ground. Another argument was that, to constitute a "burial ground," the ground must be irrevocably set apart as such, and that this piece of ground has not been irrevocably set apart as a burial ground, because there is a power of sale in the deed of settlement. I cannot hold this circumstance to take it out of the definition of a burial ground within the Acts. Accordingly, it appears to me that the learned judge below was right, and that the appeal must be dismissed.

SMITH, L.J.—The question we have to decide is, whether this piece of land has been "set apart for the purposes of interment." If it has been, it is within the Act of 1884; if it has not been, then the purchaser's objection fails. Mr. Bailhache has argued the case exceedingly well; but he has taken a number of isolated facts, and has said this does not, and that does not, and the other does not, constitute a setting apart within the meaning of the Act. He is quite entitled to put his argument in that way; but when I come to look at the

state of things in and since 1842, I ask myself whether this land has been "set apart for the purposes of interment." In the first place, I find that in 1842 this land was bought for the purposes of interment. In the second place, it was inclosed by a wall for those purposes. Therefore it was bought and inclosed as and for a burial ground. Thirdly, roads were made over the grounds in which interments took place, the roads being such as were necessary and convenient for carrying out interments. Fourthly, a chapel was erected for those purposes. In my judgment, this piece of land of two acres or thereabouts—the whole of it—was set apart for purposes of interment. As my brother Lindley says, the proper way to approach the question is to take the whole two acres together, and not a part of them, in order to see whether there has been a setting apart. It appears to me that the true construction of the statute, when applied to the facts, prevents us from saying that this land has not been set apart, and that we must hold the purchaser's objection to be well founded.

Solicitors: *Daubeny and Mead*, agents for *J. Hutchins*, Newport, Monmouthshire; *Warriner and Kinch*, agents for *Lloyd and Pratt*, Newport, Monmouthshire.

Thursday, Feb. 8.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

HURCUM v. TOWN CLERK OF WEST HAM. (a)
APPEAL FROM THE QUEEN'S BENCH DIVISION.

Parliament—Registration of voters—Description of qualification—Power to amend claim—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sects. 1, 2, 13.

The nature of the qualification of a Parliamentary and municipal voter to be placed on the occupiers list was described in the claim as "dwelling-house successive"; and the qualifying property as "13, D.-road, from 31, E.-road." The claimant had occupied 13, D.-road only throughout the qualifying period.

Held, that the qualification in respect of the occupation of one house being a different qualification from that in respect of two houses in succession, the revising barrister had no power to amend the claim by striking out the words "successive" and "from 31, E.-road."

Decision of Divisional Court (Lord Coleridge, C.J., Lawrence and Collins, JJ., ante, p. 29) affirmed.

THIS was an appeal from a decision of a divisional court (reported *ante*, p. 29), affirming the decision of the revising barrister for the borough of West Ham.

The appellant, C. P. Hurcum, sent in a claim to have his name inserted in Division 1 of the list of Parliamentary and municipal voters in the borough of West Ham, in the following terms:

Name of Claimant—Hurcum, Charles Philip. Place of abode—13, Disraeli-road. Nature of qualification—Dwelling House, Successive. Description of Qualifying Property—13, Disraeli-road, from 31, Eglington-road.

The revising barrister was asked to amend the claim by omitting the words "successive" and "from 31, Eglington-road," and would have done so, but he considered that, under 41 & 42 Vict. c. 26, s. 28, he had not power to do so, and ordered

the appellant's name to be expunged from the list, but stated a case. He stated that it was proved to his satisfaction that the claimant had been for the qualifying period the inhabitant occupier, as tenant, of 13, Disraeli-road, and that the claim was based upon a successive occupation of that and the other house mentioned therein, in consequence of a *bonâ fide* mistake.

C. E. Jones for the appellant.—There is a difference between entries in the lists and claims, and all the cases yet decided have been with reference to lists, and not to claims. Sect. 28, sub-sect. 1, of the Parliamentary and Municipal Registration Act 1878 provides (sub-sect. 1) that the revising barrister "shall correct any mistake which is proved to him to have been made in any list;" sub-sect. 2, that he "may correct any mistake which is proved to him to have been made in any claim;" (sub-sect. 13) that "except as herein provided . . . no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be; nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The latter part of that section does not refer to a claim, and the words "except as herein provided" refer to sub-sect. 2, so that the revising barrister has power to correct a *bonâ fide* mistake in a claim:

Ford v. Hoar, 53 L. T. Rep. N. S. 44; 14 Q. B. Div. 507;

Blossie v. Wheatley, 53 L. T. Rep. N. S. 49; 14 Q. B. Div. 504;

Ainslie v. Nicholson, 61 L. T. Rep. N. S. 809; 24 Q. B. Div. 144;

Reg. v. McKellar, 67 L. T. Rep. N. S. 527; (1893) 1 Q. B. 121.

The question in *Foskett v. Kaufman* (54 L. T. Rep. N. S. 64; 16 Q. B. Div. 279) was with reference to a list, and the object was to amend by adding some words to the qualification, and that, the court held, the revising barrister had no power to do. That is different to this case, where it is desired to omit some words in a claim. *Plant v. Potts* (63 L. T. Rep. N. S. 730; (1891) 1 Q. B. 256) was also a decision with reference to a list.

Roskill, for the respondent, was not called on.

LINDLEY, L.J.—I think that this case is concluded by decisions which are binding upon us, and which, in my judgment, are right. The counsel for the appellant, in his ingenious argument, has contended that there is a material distinction between lists and claims, and that the previous cases have been decisions upon lists, and he says that by sub-sect. 2 of sect. 28 of 41 & 42 Vict. c. 26, the revising barrister "may correct any mistake which is proved to him to be made in any claim or notice of objection." Then he says that the prohibition in sub-sect. 13, which prevents the revising barrister from altering the description of the qualification, does not apply to sub-sect. 2, as that sub-section is covered by the words at the commencement of sub-sect. 13, "except as herein provided." I agree that the words "except as herein provided" may, as a matter of grammar, apply to sub-sect. 2. But, if that is the true reading, it would make nonsense of sub-sect. 13. Sub-sect. 12 is important as throwing light upon the construction of sub-

[CT. OF APP.]

Re ARDEN.

[CT. OF APP.]

sect. 13. Reading those sub-sections together, I think that the words "except as herein provided" have reference to sub-sect. 12, and not to sub-sect. 2. If we were dealing with a list, Mr. Jones admits that his case would be hopeless unless he could induce us to upset three or four decisions. I cannot help thinking that the true view is this, that, when the revising barrister is dealing with an entry of qualification, whether in a list or claim, he may amend it if he can put the matter right under sub-sect. 12, but that, subject to that and in the absence of any declaration under sect. 24, he cannot make any alteration in the qualification. In *Plant v. Potts* (*ubi sup.*) it was held that a revising barrister had no power to alter an alleged ownership qualification in a list from "freehold house" into "leasehold house." "Houses in succession" and "house" are different qualifications; that is settled by authority, and, that being so, I think that the view taken by the revising barrister is right, and that the appeal fails.

KAY, L.J.—I am of the same opinion. In *Bartlett v. Gibbs* (5 M. & G. 81) it was distinctly held that the successive occupation of two houses was a different qualification from the continuous occupation of one house. And that case was followed in *Foskett v. Kaufman* (*ubi sup.*), where Lord Esher, M.R. says that "a qualification in respect of successive occupation of two dwelling-houses in a borough is a distinct qualification from a qualification by reason of the occupation of a single dwelling-house." We are asked here to alter the description of the qualification. [His Lordship read sub-sects. 2 and 13 of sect. 28 of 41 & 42 Vict. c. 26, and proceeded:] If sub-sect. 2 had stood alone, the revising barrister would have had power to do what the court is now asked to do, but it is followed by sub-sect. 13, and unless the words "except as herein provided" allow him to do so, the revising barrister cannot receive any evidence of mistake so as to alter the qualification, and the mistake cannot be proved as required by sub-sect. 2. It is said that those words refer to sub-sect. 2, but, in my opinion, they clearly refer to sub-sect. 12, and not to sub-sect. 2. I therefore agree that the appeal fails, and must be dismissed.

SMITH, L.J.—I am of the same opinion. It was decided in *Bartlett v. Gibbs* (*ubi sup.*) that the occupation of "houses in succession" constituted a different qualification from the occupation of a single house, and that decision was followed in *Foskett v. Kaufman* (*ubi sup.*). That being so, and applying the same principle to the present case, I think it is clear that it makes no difference whether words are taken away, such as the word "succession," from the entry of qualification, or whether words are added thereto, and so far this case is absolutely covered by authority. But then it is said that these cases were decisions on lists, and a distinction is sought to be made between a list and a claim. In my judgment sub-sects. 12 and 13 are limitations upon the general provisions of sub-sects. 1 and 2, and in construing these sub-sects. 12 and 13 I adopt the language of Lopes, L.J. in *Plant v. Potts* (*ubi sup.*). He there says: "After careful consideration I have come to the conclusion that they empower a revising barrister to correct an insufficient or inaccurate statement of qualification in the third column, provided such

correction does not involve a change or alteration of the qualification as it appears in the list." I cannot, in reading this sect. 28, so far as it relates to the power of the revising barrister to make corrections, discover that there is any difference between a list and a claim. I therefore think the revising barrister was right.

Appeal dismissed.

Solicitors: *Sedgwick and Sharman; Hilleary.*

Wednesday, Feb. 28.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re ARDEN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Costs—Compulsory purchase—Payment of purchase money out of court—Re-investment—Erection of new buildings—Lands Clauses Consolidation Act 1845 (8 Vict. c. 18), ss. 69, 80.

The costs, charges, and expenses of an investment of a fund paid into court by a public authority, under the Lands Clauses Consolidation Act 1845, in the erection of new buildings, and of obtaining the order, and the costs, charges, and expenses, including the architect's fees, properly incurred in or about or in relation to the contract for the execution of the works, were ordered to be paid by the public authority.

Drake v. Trafusis (33 L. T. Rep. N. S. 85; L. Rep. 10 Ch. App. 364) followed.

Decision of Stirling, J. affirmed.

A PETITION was presented for the re-investment of a portion of a fund paid into court in the year 1877 by the then Metropolitan Board of Works, as the purchase money for two houses, Nos. 34 and 35, Gray's Inn-road, taken by the Metropolitan Board of Works under their compulsory powers.

The houses formed part of the property of a deceased testator, Joseph Arden, devised by his will in trust for Richard Edward Arden for life, with remainders over.

It was desired to re-invest the money in the rebuilding of two other houses in Cable-street, Wellclose-square, held under the same trusts, and which, owing to decay, it was absolutely necessary to pull down and rebuild.

On the occasion when the Metropolitan Board of Works took the premises in Gray's Inn-road, the agreed purchase money (2500*l.*) was paid into court, and in pursuance of an order, dated the 12th July 1878, was invested in the purchase of 233*l.* 1*s.* 10*d.* India 4*l.* per Cent. Stock, now represented by the like sum of India 3*l.* per Cent. Stock.

The petition stated that, in addition to the sum of 1200*l.* mentioned in the contract relating to the proposed rebuilding, dated the 28th Dec. 1883, the architect's commission and the legal costs and expenses incurred in and about and in relation to the negotiation, preparation, and execution of the contract, and otherwise in relation thereto, beyond the costs to be paid by the London County Council—now representing the Metropolitan Board of Works—as thereafter prayed, would require to be provided for, which commission, costs, and expenses would probably amount to

(c) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

not less than the sum of 95*l.*, making, together with the sum of 1200*l.*, the aggregate sum of 1295*l.*

The petition accordingly asked that, upon the completion of the building and works upon the site of the messuages in Cable-street, Wellclose-square, in accordance with the contract, so much of the said sum of 2383*l.* 15*s.* 10*d.* India 3*¼*l. per Cent. Stock as would raise the aggregate amount of the sum of 1295*l.*, or such larger or less sum as should be certified to have been properly paid or to be properly payable for or on account of the buildings and works and the architect's commission in respect thereof, and the costs, charges, and expenses incurred or to be incurred by the petitioners in or about or in relation to the negotiation, preparation, and execution of the contract or otherwise in relation thereto, beyond the costs to be paid by the London County Council, as thereafter prayed (such extra costs, charges, and expenses to be taxed by the taxing master), might be sold; and that out of the proceeds of such sale the said several amounts might be paid to the several persons who should be certified to be entitled to receive the same respectively.

The petition also asked that, pursuant to the 80th section of the Lands Clauses Consolidation Act 1845, the London County Council might be ordered to pay to the petitioners their costs (including therein all reasonable charges and expenses incident thereto) of the investment of the moneys thereinbefore mentioned, in the erection of such buildings as aforesaid upon the site aforesaid, and of obtaining the order to be made upon this petition, and of all proceedings relating thereto (such costs, charges, and expenses to be taxed, &c.).

On the 27th Jan. 1894 the petition came on to be heard before Stirling, J., when his Lordship made the following order:

"This Court being of opinion that it is fit and proper that a sum not exceeding 1295*l.* should be raised out of the India 3*¼*l. per Cent. Stock in court, and should be applied as follows, that is to say, a sum not exceeding 1200*l.* in removing the buildings in the petition mentioned, and in erecting a new building on the site thereof, and a sum not exceeding 95*l.* for architect's fees, and the costs, charges, and expenses hereinafter secondly mentioned, this court doth order that such sums be raised (without deducting brokerage, the petitioners undertaking to pay the same) and paid as directed in the payment schedule hereto. And it is ordered that, pursuant to the 80th section of the Lands Clauses Consolidation Act 1845, the London County Council do pay to the petitioners their costs (including therein any reasonable charges and expenses incident thereto) of the investment of the moneys in the schedule hereto mentioned, and of obtaining this order, and of all proceedings relating thereto, such costs, charges, and expenses to be taxed by the taxing master. And it is ordered that it be referred to the taxing master to tax the costs, charges, and expenses of the petitioners, including the architect's fees, properly incurred in or about or in relation to the negotiation, preparation, and execution of the contract for the execution of the works in the petition mentioned, or otherwise in relation thereto beyond their costs, to be paid by the said London County Council as hereinbefore mentioned. And it is ordered that the funds in court be dealt with as directed in the schedule hereto."

The payment schedule contained (*inter alia*) the following directions:

Out of proceeds:—Pay the amount which shall be certified to the person or persons to whom same shall be certified as payable. Sell so much more of the stock as will raise the costs, charges, and expenses secondly mentioned in this order, including the architect's fees, but not to exceed 95*l.* altogether.

Out of proceeds:—Pay such costs, charges, and expenses.

The London County-Council now appealed.

Levett, Q.C. and *E. A. Geare* for the appellants.—First, we say that the application in this case ought to have been made by summons in chambers, and not by petition, it being analogous to an application for permanent investment under the Lands Clauses Consolidation Act 1845. The exact point was before the court in

Ex parte Jesus College, Cambridge, 50 L. T. Rep. N. S. 583.

Then we say that the order is wrong in directing the London County Council to pay the petitioners their costs, including therein any reasonable charges and expenses incident thereto of the investment of the moneys, and so on. Certain items, such as the architect's fees and the costs of the building contract and the like, ought not to be borne by the London County Council. They ought not to be ordered to pay anything more than the costs of the petition, if a petition was the right mode of proceeding:

Lands Clauses Consolidation Act 1845, ss. 69, 80;

Morgan & Wurtzburg on Costs, p. 40;

Seton's Judgments and Orders, 5th edit. vol. 3, p. 2024.

The building of houses is not equivalent, for the purposes of the Lands Clauses Consolidation Act 1845, to the investment of money in the purchase of land. The costs of obtaining orders for the investment of purchase money, paid by a railway company in alterations of almshouses, were held not to be borne by the company, inasmuch as such an investment did not come within the terms of sect. 80 of the Lands Clauses Consolidation Act 1845:

Re The Buckinghamshire Railway Company, 14 Jan. 1065.

[*KAY, L.J.*—The decision there appears to be in conflict with that in the case of *Drake v. Trefusis* (33 L. T. Rep. N. S. 85; L. Rep. 10 Ch. App. 364). It seems to me, however, rather a stretch of authority for the court to allow money paid in under the Act to be employed in erecting new buildings.] The words "any of the purposes aforesaid," used in the 80th section of the Lands Clauses Consolidation Act 1845, are confined to the purposes mentioned in that clause, and do not extend to those "purposes" mentioned in the previous part of the Act:

Re The Oxford, Worcester, and Wolverhampton Railway Company; *Ex parte Melward*, 27 Beav. 571.

In that case, a railway company having severed arable lands from farm buildings, it was held that the compensation money might be applied, under the Act of 1845, in the erection of new farm buildings; but that the railway company were not bound to pay the costs of obtaining the necessary orders for that purpose. That case

CT. OF APP.]

Re ARDEN.

[CT. OF APP.]

and the *Buckinghamshire Railway* case (*ubi sup.*) are clear decisions in favour of the appellants here on the meaning of sect. 80 of the Lands Clauses Consolidation Act 1845, which enumerates what costs are to be paid. Both those cases were considered in

Re Lathropp's Charity, 13 L. T. Rep. N. S. 784; L. Rep. 1 Eq. 467, 469.

[KAY, L.J. referred to *Re Leigh's Estate* (25 L. T. Rep. N. S. 644; L. Rep. 6 Ch. App. 887), where it was held that the court had jurisdiction to order re-investment of a fund in building or rebuilding houses on an estate, if beneficial thereto, and if the remaindermen did not object.] Under the 69th section of the Act of 1845 money paid into the bank by a railway company in respect of glebe land taken by them was ordered to be applied towards the cost of building a vicarage house, part of which was defrayed by the Governors of Queen Anne's Bounty. The costs of the petitioner were ordered to be paid by the railway company, under the 80th section of the Act; but the costs of the Governors of Queen Anne's Bounty to be borne by the petitioner:

Re Incumbent of Whitfield, 1 J. & H. 610.

[KAY, L.J.—The hiatus, if there be one, in the Act of 1845 seems to be supplied by sect. 5 of the Judicature Act 1890, which gives power to go beyond that statute. SMITH, L.J.—Yes; in *Re Fisher* (70 L. T. Rep. N. S. 62; (1894) 1 Ch. 450) it was decided by this court that where an Act enabling a public body to take land compulsorily contains no provision as to the costs of payment out of court of moneys paid in under the Act, the court has, under sect. 5 of the Judicature Act 1890, jurisdiction to order the public body to pay the costs of and incidental to a petition for payment out.] We submit that all the costs specified in the order of Stirling, J. are not such as ought properly to be borne by the appellants.

[KAY, L.J.—Why, if you are right in your contention, should the appellants pay any costs at all? If it is not payment out to a person becoming entitled and not an investment in land, no costs are payable at all.] We say that practically it is a payment out to the persons entitled, but not an investment in land.

Graham Hastings, Q.C. (*Charles Browne* with him) for the respondents.—This order is in accordance with an old and well settled practice. It is said by the appellants that the investment in this case was not an investment in land, and that the court has no jurisdiction to order payment of certain costs. But there are several cases, like *Re Speer's Trusts* (3 Ch. Div. 262), where the court has held that it has jurisdiction to order payment of costs as on an investment in land under the Lands Clauses Consolidation Act 1845, inasmuch as, in erecting new buildings, something is being done whereby a permanent increase of rent may be expected. I say that, because the investment in erecting new buildings in the present case is an investment in land, the appellants must pay all the costs as directed by the order. [He was stopped by the Court.]

Levett, Q.C. replied.

LINDLEY, L.J.—In this case there is an appeal against the form of an order made on a petition for payment out of a sum of money which has been paid into court under the Lands Clauses

Consolidation Act 1845. It seems that certain houses were comprised in a settlement, the details of which have only been told us in a general way, but sufficiently for the present purpose. Somebody is tenant for life, and somebody else is interested in remainder. The Metropolitan Board of Works took two of those houses in Gray's-inn. There are some other houses, 35 and 37, Cable-street, Wellclose-square, which are in such a state that the only businesslike way of dealing with them is to pull them down and rebuild them. The money which represents the two houses pulled down has been paid into court under the Lands Clauses Consolidation Act 1845. This is a petition to get some of it out, and to apply it in taking down and rebuilding the houses, 35 and 37, Cable-street, to which I have alluded. All that is right enough, and the only objection is that the London County Council—now representing the Metropolitan Board of Works—are ordered to pay some costs which they think ought not to fall upon them. The order has been read more than once. The substance of it is, that the court being of opinion that it is fit and proper that a sum not exceeding 1295*l.* should be raised and applied, as to a sum not exceeding 1200*l.*, in removing the buildings and in erecting new buildings on the site thereof, and as to a sum not exceeding 95*l.* in payment of architect's fees and the costs, charges, and expenses, the court ordered that such sum should be raised and paid as directed in the payment schedule. In the payment schedule we have this: [His Lordship read the payment schedule and continued:] Then it is ordered that "pursuant to the 80th section of the Lands Clauses Consolidation Act 1845, the London County Council do pay to the petitioners their costs, including therein any reasonable charges and expenses incident thereto, of the investment of the moneys in the schedule hereto mentioned, and of obtaining this order, and of all proceedings relating thereto." Then there is a direction to tax the costs, charges, and expenses of the petitioners, including the architect's fees properly incurred. The London County Council appeal, and they say that the order is wrong, because under this form of order costs may be thrown upon them which they ought not to bear, having regard to the 80th section of the Lands Clauses Consolidation Act 1845. What they say is, that they are afraid that something will be wrongfully charged against them under the head of "costs of the investment of the moneys in the schedule hereto mentioned." It appears to me that, looking at it as a matter of form, that certainly is right; because there are some "costs of the investment of the moneys in the schedule" which they obviously ought to pay; for example, the costs of getting the certificate which is referred to in the schedule. Those are "costs of the investment." There is something, therefore, which accurately answers the description of "costs of the investment of the moneys," and I do not think it would be right to strike that out. But it is said that under that order the appellants will be hit with the architect's fees and the costs of the building contract, and so on. As I construe this document I think that fear is not well founded. But if the taxing master does include in the taxation something which he ought not, then would be the proper time to object and decline to pay. That is the proper method of doing it. Mr. Levett has

put his case, to my mind, a great deal too high, having regard to the authorities. He has asked us, in point of fact, to review a long string of decisions upon the 80th section of the Lands Clauses Consolidation Act 1845, and asked us to say that the building of houses is not equivalent, for the purposes of that Act, to the investment of money in the purchase of land. If the matter were *res nova*, I think there is a great deal to be said in favour of his view. I think it is rather a stretch; but so far as regards the purposes of that Act it is now too late to object. The point was decided long ago—as long ago as in *Drake v. Trefusis* (*ubi sup.*). I agree that pulling down may not come under the same category. But if there is any part of this which is right, we cannot alter this order; and laying out the money in rebuilding the houses is, according to the decisions, within the 80th section. Therefore it appears to me to be quite right. I may observe that, in the case to which I have referred, of *Drake v. Trefusis* (*ubi sup.*), James, L.J. says this: "I am therefore of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground. But I consider that the proposed outlay in the erection of new farmhouses, cottages, and other buildings, whether in addition to those existing before, or in substitution for such as have become so ruinous that they must be taken down, is an allowable mode of applying the money, providing the judge is satisfied that it is beneficial to the estate." That appears to me to cover the present case; and under these circumstances I do not think this appeal ought to succeed on that ground. Then it is said that this petition is all wrong, and that the matter ought to have proceeded by way of a summons. That is entirely a matter in the discretion of the judge, and I do not consider that that point is open on this appeal. The appeal must therefore be dismissed with costs.

KAY, L.J.—I agree, and on the grounds stated by Lindley, L.J.

SMITH, L.J.—I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blazland.*

Solicitors for the respondents, *S. W. Johnson and Son.*

Feb. 6, 9, 10, and March 2.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

KEEP v. THE VESTRY OF ST. MARY, NEWINGTON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis—Obstruction of streets—Costermongers—Statute—Construction—Conflicting provisions—Repeal by implication—Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), s. 65—Metropolitan Streets Act 1867 (30 & 31 Vict. c. 134), ss. 6, 27—Metropolitan Streets Act Amendment Act 1867 (31 Vict. c. 5), s. 1.

The plaintiff, a costermonger, sued the defendants, who were the street authority of the district, for damages for seizing his truck. Notice had been given to the plaintiff to remove his truck, as it caused an obstruction to the traffic, and on his

refusal to do so it was seized. The defendants purported to act under the powers conferred by sect. 65 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.). At the time when the truck was seized the plaintiff was plying his trade in accordance with the police regulations relating to costermongers.

Held (dissentiente Kay, L.J.), that, under the Metropolitan Streets Acts of 1867, costermongers were at liberty to ply their trade in the way in which they invariably did carry it on—viz., with trucks and barrows—so long as they conformed to the police regulations, and could not be interfered with under Michael Angelo Taylor's Act; and that to that extent, and to that extent only, sect. 65 of Michael Angelo Taylor's Act was not impliedly repealed; but that, if they violated those regulations, they could be proceeded against under that Act, or the Acts of 1867.

Summers v. The Holborn District Board of Works (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612) considered.

Decision of the Divisional Court (Hawkins and Lawrance, JJ.) affirmed.

THIS was an appeal by the defendants from a decision of the Divisional Court (Hawkins and Lawrance, JJ.).

The facts of the case sufficiently appear from the judgments of the Lords Justices.

Horace Ivory for the appellants.—The question here is as to the right of the vestry to remove costermongers' barrows placed in the footways or carriageways of the streets. Since the decision of the Divisional Court in *Summers v. The Holborn District Board of Works* (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612) costermongers have claimed the right to so place their barrows, so long as they are plying their trade in accordance with the police regulations for the time being. But the vestry assert their right to proceed under sect. 65 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), which they contend has not been repealed. In *Summers's* case (*ubi sup.*) it was decided that, although there had been no express repeal, yet the Metropolitan Streets Acts 1867 (30 & 31 Vict. c. 134, s. 6, and 31 Vict. c. 5, s. 1) impliedly repealed sect. 65 of Michael Angelo Taylor's Act. That Act has been expressly incorporated in 25 & 26 Vict. c. 102, s. 73. But that fact was not brought to the notice of the Divisional Court in *Summers's* case (*ubi sup.*). Sect. 33 of the Interpretation Act 1889 (52 & 53 Vict. c. 63) enacts, that where an act constitutes an offence under two or more statutes, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either of those statutes. The decision in *Fortescue v. Vestry of St. Matthew, Bethnal Green* (65 L. T. Rep. N. S. 256; (1891) 2 Q. B. 170) does not in the least embarrass this court. The question there was not the same as in the present case. It was never disputed that the offence that was there dealt with was the same in the two statutes there referred to. That decision need not therefore be impugned. A vestry have the right to seize and sell a barrow placed on the footway or carriageway in a street, although no summons has been issued:

Brackley v. Vestry of St. Mary, Battersea, 23 Q. B. Div. 486.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

KEEP v. THE VESTRY OF ST. MARY, NEWINGTON.

[CT. OF APP.]

To that extent, at all events, Michael Angelo Taylor's Act remains unrepealed. So also it remains unrepealed in regard to its provisions directed against obstructions caused by hanging out furniture and other articles in front of houses. In that respect Michael Angelo Taylor's Act is not interfered with by the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120):

Wyatt v. Gems, 69 L. T. Rep. N. S. 456; (1893) 2 Q. B. 225.

That case was decided after the decision in *Summers's case* (*ubi sup.*). In *Fulham Board of Works v. Smith* (48 J. P. 375) it was held that a costermonger was liable to be convicted of an offence contrary to Michael Angelo Taylor's Act, namely, keeping a barrow standing in a street, as the prevention of such an annoyance was fully provided for (25 & 26 Vict. c. 102). The provisions of sect. 72 of the Highway Act (5 & 6 Will. 4, c. 50) are applicable to highways within the metropolitan area. That Act is supplementary to Michael Angelo Taylor's Act:

Back v. Holmes, 56 L. T. Rep. N. S. 713; 51 J. P. 693.

The police regulations show the view entertained by the authorities as to Michael Angelo Taylor's Act being still in force. I submit, therefore, that the proper construction of these statutes is, that the legislation is cumulative, and that Michael Angelo Taylor's Act is not repealed; and consequently that the vestry in the present case were justified in the course taken by them.

W. M. Thompson and J. D. A. Johnson for the respondent.—With the exception of *Summers's case* (*ubi sup.*), which we submit was rightly decided and ought to be upheld, the cases cited on behalf of the appellants do not assist in the least on the present point. So long as costermongers comply with certain specified regulations, they are entitled to deposit their goods on the streets; and goods placed on barrows are a deposit of goods on the streets. The various Acts are perfectly consistent, the object of the Legislature being that the police should have the control of the streets instead of the vestries.

H. Courthope Munroe watched the case on behalf of the Holborn District Board of Works.

Horace Avory in reply.—The court will have to decide that Michael Angelo Taylor's Act is repealed or the contrary, whether the costermongers were acting within the police regulations or not. The first Metropolitan Streets Act of 1867 admittedly does not touch Michael Angelo Taylor's Act. The second Metropolitan Streets Act of 1867 only protects costermongers, if at all, while they comply with the police regulations. The consequence would be, that where a costermonger's barrow is under the prescribed length Michael Angelo Taylor's Act must be treated as repealed; but where the barrow is over that length that Act must be treated as not repealed.

Cur. adv. vult.

March 2.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an action brought in the County Court by a costermonger against the defendants, for seizing his truck. They justify the seizure under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix, s. 65). The damages have been assessed at 8l. The County Court judge

gave judgment for the plaintiff, and his decision was affirmed by the Divisional Court without argument, but, following *Summers v. Holborn District Board of Works* (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612), leave to appeal was given. The action is a test action brought in order to have the above decision reconsidered, and the real question is whether the power given by the above Act can now be exercised or not; or, in other words, whether the above section is still in force, or has been repealed by later statutes, to any or what extent, as regards costermongers. The facts are not in dispute. It having been decided in the case referred to that sect. 65 of Michael Angelo Taylor's Act was no longer in force, costermongers have assembled with their trucks in such numbers in Walworth-road as seriously to obstruct the traffic along it. The defendants, not being satisfied that they had no power to prevent this obstruction, determined to assert their powers under the above Act, if still in force, and to have their right to do so tried in a court of law. They therefore gave the plaintiff notice to remove his barrow, and as he refused they seized it; and for this seizure he has brought this action. Whether, when the plaintiff's barrow was seized, it was actually obstructing the traffic is not clear on the evidence. The question was not left to the jury, both parties desiring that the case should raise the question whether Michael Angelo Taylor's Act was in force or not. For the same reason no question was raised as to whether the plaintiff was or was not acting contrary to the orders of the police. We cannot assume that the plaintiff was obstructing the traffic or disobeying the orders of the police, and we must deal with the case on that footing. The case turns on the provisions of a number of Acts of Parliament, which it is necessary to examine with care. The first is Michael Angelo Taylor's Act, passed in 1817, viz. 57 Geo. 3, c. xxix, s. 65. This section, abridged, is to the following effect: If any person shall place any stall, &c., or any goods, &c., on any part of the carriage or foot way in any street, or shall place any coach, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, upon any of the said carriageways, except for the necessary time of loading or unloading any cart, &c., and shall not immediately remove the same when required by the surveyor of pavements or by any other person employed by the commissioners having control of the pavements . . . it shall be lawful for a justice to issue a summons against any person accused of such offence, or the owner of such goods, carts, &c., and if the accused person be convicted, he and the owner of such goods, carts, &c., and the master of the person offending, shall forfeit 40s. for the first offence, and a sum not exceeding 5l. for every subsequent offence, and such penalties shall be paid to the treasurer of the Commissioners of Pavements. The section then goes on to enact that not only shall such penalties become payable, but it shall be lawful for any person appointed by the Commissioners of Pavements, without any warrant or other authority than the Act, to seize any such stalls, goods, carts, barrows, &c., together with the horses &c. if any, belonging to the same, with their harness, and in case any of the goods are perishable or be articles of food, they shall be immediately forfeited, but otherwise the persons seizing the stalls, goods, carts, &c., shall remove the same to

some place appointed for their reception or to some other convenient place, and be kept until payment of the above penalties; and in case the things seized are not claimed and the penalties are not paid, it shall be lawful for the commissioners to sell the same, and to pay the surplus to the owners after deducting the penalties and the costs, charges, and expenses of the seizure, removal, and sale. It will be seen from this enactment that two distinct methods are provided for putting a stop to the evils referred to in it: (1) there is a procedure by summons before a magistrate, and (2) there is the more summary method of procedure by the pavement commissioners. The section is so worded as to raise a doubt whether the second procedure is anything more than another method for compelling the offenders to pay the fines imposed upon them for their offences. The power to seize and forfeit perishable goods and articles of food is, however, opposed to this view, and it has been decided that the power to seize and sell may be exercised, although no summons has been issued, but that no fine can be levied or deducted without a conviction by a magistrate: (*Brackley v. Vestry of St. Mary, Battersea*, 23 Q. B. Div. 486.) This power to seize and forfeit, or seize and sell, as the case may be, is an independent power, the improper exercise of which, however, exposes those who abuse it to an action for damages. Further, the power to seize and sell applies as well to goods as to vehicles; both are mentioned, but no distinction is made between the remedies for putting them where they are forbidden to be put. A summons is as much applicable to the one as to the other, and the same is true of the power to seize and sell. The language of the Act shows that the two modes of procedure cannot be used to compel payment by the same person of two fines for the same offence. But one person might be fined in one way and another in the other way. For example, a servant may be fined by a justice, and his master may be fined also or may have his property seized and sold, and if he is convicted before a magistrate, but not otherwise (see *Brackley's case*, *ubi sup.*), the proceeds of his property may be applied in paying his fine; but if he is not so proceeded against, only the expenses can be deducted. Obstruction of traffic is not made a condition of liability to either proceeding, though no doubt one object was to prevent obstruction to traffic. When this Act was passed, the metropolitan police did not exist, and sect. 65 has no reference to police. The preamble to the Act in question shows what its objects were, and the Act applies to the whole of the metropolis within the then bills of mortality, and to the parishes of St. Pancras and St. Marylebone, with some few exceptions. The Act is not, however, printed among the public general statutes, but among the local and personal statutes; but by sect. 148 it is to be deemed and taken to be a public Act, and is to be judicially noticed as such without being specially pleaded. The question we have to consider is whether sect. 65, or, more exactly, whether the power to seize and sell thereby conferred, is still in force. No part of that section has been expressly repealed, but it is contended, and in fact it has been decided in *Summers v. Holborn District Board of Works* (*ubi sup.*), that the power in question has been impliedly repealed by later Acts of Parliament—viz., by 30 & 31

Vict. c. 134, s. 6, as explained by 31 Vict. c. 5, s. 1. Before examining these two enactments it is necessary to refer shortly to what has been done by the Legislature since 1817 with reference to the management and control of the streets of the metropolis. In 1839 the Metropolitan Police Act was passed (2 & 3 Vict. c. 47), and by sect. 54 of that Act a penalty of 40s. is imposed for many acts done in streets, and amongst others (by clause 6) for causing any cart, truck, or barrow to stand longer than may be necessary for loading or unloading, or so as wilfully to cause any obstruction in any thoroughfares. This enactment obviously covers some of the ground previously covered by Michael Angelo Taylor's Act, but sect. 74 of this same Act of 1839 renders it impossible to treat any part of the Act of 1817 as repealed by it, although no person can be punished twice for the same offence. So matters remained until 1855, when the first of the Metropolitan Local Management Acts was passed. In 1855, by 18 & 19 Vict. c. 120, the management of the metropolis was to a great extent placed under the control of vestries and district boards. By sect. 98 and following sections they are made surveyors of highways, and are intrusted with large powers of paving, repairing, and cleaning streets, and protecting persons from annoyances in them. But there is no provision in this Act which relates to the same subject-matter as sect. 65 of the Act of 1817, and, although sect. 247 repeals all local Acts inconsistent with it, there is no ground for saying that sect. 65 of the Act of 1817 is impliedly repealed by the Metropolitan Local Management Act 1855. This was, in fact, decided by *Wyatt v. Gems* (69 L. T. Rep. N. S. 456; (1893) 2 Q. B. 225). The Metropolitan Local Management Act 1855 has been amended by several subsequent Acts, two of which, viz., 19 & 20 Vict. c. 112, and 21 & 22 Vict. c. 104, were passed before 1862. They, however, in no way affect the subject under consideration. By the Metropolitan Local Management Act of 1862 (25 & 26 Vict. c. 102) the Act of 1817 is expressly referred to, and some at least of the powers of regulating streets—suppression of nuisances—thereby conferred are treated as still subsisting (see sect. 73), but the language of this section leaves the reader to find out, as best he can, which of those powers are in force and which not. This rendered it necessary to examine the former Acts, which I have accordingly done, and with the result that down to and including the passing of the Act of 1862 there are no grounds for holding that sect. 65 of the Act of 1817 had been repealed, and that there are grounds for holding that the Legislature recognised it as still in force. I come now to 1867. In that year two Acts relating to the matter in hand were passed, viz., 30 & 31 Vict. c. 134, s. 6, and 31 Vict. c. 5, s. 1, which amended it. Sect. 6 of 30 & 31 Vict. c. 134, is as follows: "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be absolutely necessary for loading or unloading such goods or other articles. Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding 40s. For the purpose of this Act the surface of any space over which the public have the right of way that intervenes in any street

[CT. OF APP.]

KEEP v. THE VESTRY OF ST. MARY, NEWINGTON.

[CT. OF APP.]

within the general limits of this Act between the footway and the carriageway shall, notwithstanding any claim of any person by prescription or otherwise to the deposit or exposure for sale of any goods or other articles on such surface, be deemed to be part of the footway." Sect. 1 of the amending Act provides: "The 6th section of the Metropolitan Streets Act 1867, prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations from time to time made by the Commissioners of Police with the approval of the Secretary of State, and so much of the said 6th section as refers to the surface of any space that intervenes in any street between the footway and the carriageway is hereby repealed." Sect. 6 of the first of those Acts in no way refers to vehicles of any kind, except so far as the words "loading or unloading" introduce the idea of a vehicle of some sort. The Act itself is a Metropolitan Police Act, and is to be read as one with the previous Acts of the same class (see sect. 28). As already seen, vehicles had been long previously provided for by sect. 54 of the Act of 1839. Sect. 6 of the Act of 1867 relates to goods and other articles for which no provision had been made by any of the previous Police Acts. The application of sect. 6 to goods and not to vehicles appears to me to be manifest, not only from the language of the section itself, but from a study of the series of Acts of which the Act of 1867 is one. This construction of sect. 6, moreover, is confirmed by sect. 1 of the enactment amending it (31 Vict. c. 5, s. 1), for sect. 6 is there referred to as a section prohibiting the deposit of goods in the streets. This is precisely what sect. 6 does. That section is not to apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the police regulations. The effect of those two Acts of 1867 on Michael Angelo Taylor's Act is certainly not easy to discover. They are both Police Acts, and there is no apparent intention to interfere with Michael Angelo Taylor's Act. Sect. 23 of the first of these Acts of 1867 and sect. 3 of the second link them on the principal Act of 1839, and sect. 74 of that Act shows that it and Michael Angelo Taylor's Act were intended to be both in force. But although the Police Acts from 1839 to 1867 do not, in my opinion, repeal Michael Angelo Taylor's Act, the two Acts of 1867, when read together, appear to me necessarily to exclude the application of that Act to costermongers, street hawkers, and itinerant traders, so long as they carry on their business in accordance with the police regulations. The two Acts of 1867 must be read together. I will so read them, in order to ascertain their application, first to the deposit of goods, and second to vehicles. Sect. 6 of the first Act of 1867 is a general prohibition against the deposit of goods in streets, applicable to all persons, and sect. 1 of the second Act introduces a conditional exception in favour of costermongers, &c. I agree with the view taken by the court in *Summers v. Holborn District Board of Works* (*ubi sup.*)—that these Acts must not be read in such a way as to render them illusory and deceptive. The second Act of 1867 was obviously passed because the first went too far, and I read the two Acts as amounting to a clear statutory permission to costermongers, &c., to deposit goods

in streets so long as they carry on their business in accordance with the police regulations. As regards vehicles there is unquestionably more difficulty. I do not know why goods and articles are mentioned in sect. 6 of the first Act of 1867. The word "articles" is not found in sect. 1 of the second Act of 1867, and I am not prepared to say that "articles" means "vehicles." I do not think it does. But the mode in which costermongers carry on their business in the metropolis is perfectly well known, and it is a matter of common knowledge that they cannot carry it on without trucks or barrows. Here, again, I think the second Act of 1867 would be illusory and deceptive if it were not read as a statutory permission by the Legislature to costermongers, &c., to carry on their business in the way in which they invariably do carry it on, provided only that they comply with the police regulations. This was the conclusion arrived at in *Summers's case*, for the special case stated that there was no evidence to show that the costermonger there was acting contrary to the police regulations. If in that case the court meant to decide that sect. 65 of Michael Angelo Taylor's Act was wholly repealed as to costermongers, &c., I think the court went too far. But the decision on the facts stated was, in my opinion, correct, and I concur in their view of sect. 27 of the first Act of 1867, and in their observations on the phrase "powers conferred by this Act" which occurs in that section. This view of the construction and effect of the Acts of 1867 is in no way opposed to 52 & 53 Vict. c. 63, s. 33, which was so much relied upon by Mr. Avory in his very able argument. That section enacts (*inter alia*), that where an act constitutes an offence under two or more statutes, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either of those statutes, but shall not be liable to be punished twice for the same offence. This enactment, when applied to the present case, leads to the following results, viz.: When costermongers, &c., carry on their business in conformity with the police regulations, no offence against any Act is committed, and the section has no application; but where costermongers, &c., disobey the police regulations, and also the directions of the vestry having jurisdiction over them, the section in question does apply, and such costermongers, &c., can be proceeded against either under the Police Acts or under Michael Angelo Taylor's Act, but they cannot be punished twice for the same offence. It is plain from this that the same person cannot be fined under both Acts for the same offence; but in the case supposed, I apprehend that he can be fined and have his barrow seized under Michael Angelo Taylor's Act. As in this case there is no evidence that the plaintiff was disobeying the police regulations, the appeal must be dismissed. But I cannot part with the case without expressing my regret that the law on a matter of so much importance to so many persons should be in a state of such obscurity and complexity. Both costermongers and vestries have much to complain of in the existing state of the statute law by which they are governed, and I trust that before long Parliament will give the matter the attention which it certainly deserves. The appeal will be dismissed, without costs.

KAY, L.J.—By sect. 65 of 57 Geo. 3, c. xxix., called Michael Angelo Taylor's Act, it was

enacted that if any person should place any goods on the footway or carriageway within the jurisdiction of the Act, except for the necessary time of loading or unloading, and should not remove them when required by the commissioners or other persons having control of the pavements, any justice of the peace for the locality might issue a summons and subject the offender to a fine of 40s. for the first offence, or for a subsequent offence not exceeding 51.; and, in addition, the commissioners might seize the goods or vehicles, and detain them until the penalty should be paid. By the 10 Geo. 4, c. 44, in 1830, a new and more efficient system of police for the metropolitan police district was established, and in 1839, by the Metropolitan Police Act (2 & 3 Vict. c. 47) various provisions were made for the metropolitan district, and amongst others, by sect. 54, every person who caused any cart, truck, or barrow to stand longer than was necessary for loading or unloading was made liable to a penalty of 40s., and to be taken into custody by the police without warrant; and by sect. 60, a like penalty was imposed upon any person who should throw or lay in any thoroughfare coals or other materials, except building materials, which were to be so placed or inclosed as to prevent mischief. Sect. 74 provides that nothing therein contained should be construed to prevent any person being liable under any other Act to any other or higher penalty, so that no one be punished twice for the same offence. Then came the Metropolitan Local Management Act (18 & 19 Vict. c. 120), which it has been decided did not interfere with 57 Geo. 3, c. xxix.: (*Wyatt v. Gems*, 69 L. T. Rep. N. S. 456; (1893) 2 Q. B. 225.) This is made quite clear by 25 & 26 Vict. c. 162, s. 73, which provided that the powers of the 57 Geo. 3, c. xxix., should apply to the metropolis as defined in that Act. The Metropolitan Streets Act (30 & 31 Vict. c. 134), s. 6, enacted, "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles"; and for each offence the penalty is not exceeding 40s. Spaces intervening between the footway and carriageway over which the public have a right of way are to be deemed part of the footway for the purposes of the Act. Sect. 27 provides that all powers conferred by that Act shall be deemed to be in addition to and not in derogation of any other powers conferred by any other Act of Parliament, and any such other powers may be exercised as if this Act had not passed; and by sect. 28 the Act is to be construed as one with the Metropolitan Police Acts. I am of opinion that sect. 6 does not relate to carts, waggons, or barrows, but only to goods and other articles which may be loaded or unloaded from them. It seems to have been thought that this provision might unduly interfere with costermongers, street hawkers, or itinerant traders, and accordingly, by 31 Vict. c. 5, it was provided that the 6th section of the last-mentioned Act, "prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders so long as they carry on their business in accordance with the regulations from time to

time made by the Commissioners of Police with the approval of the Secretary of State, and so much of the said 6th section as refers to the surface of any space that intervenes in any street between the footway and the carriageway is hereby repealed." This Act is to be construed as one with the Act part of which it repeals or suspends. It only relates to the deposit of goods, and has no reference to carts, waggons, or barrows. The Statute Law Revision Act 1875 (38 & 39 Vict. c. 66) repeals the last part of the section of 31 Vict. c. 5, as to the spaces between the footway and carriageway; 52 & 53 Vict. c. 63, s. 33, provides, "Where an act or omission constitutes an offence under two or more Acts, or both under one Act or at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of these Acts, or at common law, but shall not be liable to be punished twice for the same offence." It would, therefore, be impossible to say that sect. 65 of 57 Geo. 3, c. xxix., or any part of it was repealed by 2 & 3 Vict. c. 47, sect. 54, or by 30 & 31 Vict. c. 134, s. 6, and this has been decided in several cases: (see *Fulham Board of Works v. Smith*, 48 J. P. 375; *Back v. Holmes*, 56 L. T. Rep. N. S. 713; 51 J. P. 693.) Certain regulations have been made by the Commissioners of Police and approved by the Secretary of State as to the manner in which costermongers are to carry on their business. One set of these, made in 1869, points out that, so long and so long only as their business is carried on according to them, sect. 6 of the Metropolitan Streets Act 1867 will not apply to them. I assume that in the present case the regulations of the police have been observed by the plaintiff. What is the consequence? Simply that sect. 6 of the Act of 1867 does not apply to him—that is, wherever the costermonger is at liberty to place his barrow, he is not prevented by that statute from depositing goods and articles on the pavement or street; 31 Vict. c. 5, does not repeal or interfere at all with sect. 6 of 30 & 31 Vict. c. 134, except during the time in which the costermonger is obeying the police regulations. It does not repeal, it only suspends, the operation of that statute during that time. Of course, it cannot have any larger operation upon any of the other Acts relating to costermongers to which it does not refer. Does it suspend these Acts during the same period? I must assume that before the 30 & 31 Vict. c. 134, s. 6, none of the Metropolitan Acts, other than 57 Geo. 3, prohibited the deposit of goods on the pavement or in the street, as was done by the Act 30 & 31 Vict. c. 134, s. 6. The effect therefore is, that during the suspension of the 30 & 31 Vict. c. 134, s. 6, no Act, except 57 Geo. 3, prevents such deposit of goods. If 30 & 31 Vict. c. 134, had never been enacted, or if, being enacted, it had never been repealed or suspended, the powers of 57 Geo. 3 would not have been interfered with. It is argued that they are now interfered with, not because of the suspension of 30 & 31 Vict., but because of the condition attached to that suspension. The mere repeal or suspension of that statute would not have had this effect. It is ascribed entirely to the condition on which the suspension takes place. Is it within the power of a judicial tribunal to hold that, where a statute

CT. OF APP.]

KEEP v. THE VESTRY OF ST. MARY, NEWINGTON.

[CT. OF APP.]

says while costermongers observe the regulations of the police they shall be relieved from a disability imposed by a particular statute, this relieves them during the same period from other disabilities imposed by a different statute to which no reference is made? At any rate can such an inference be drawn as to a different disability not referred to or dealt with in any manner in the statute which is suspended? The suspended statute does not deal with their barrows, or with carts, waggons, and the like, only with goods and articles carried upon them. How can a condition attached to its suspension repeal or suspend another statute relating to carts, waggons, or barrows? In *Brackley v. Vestry of St. Mary, Battersea* (23 Q. B. Div. 486) the 65th section of 57 Geo. 3, c. xxix., came for consideration before the Court of Appeal, and was treated as being in full force. No one seems to have suggested that it was repealed or suspended. In *Summers v. Holborn District Board of Works* (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612), however, the question argued before us arose, and it was decided that the effect of 31 Vict. c. 5, was impliedly to repeal 57 Geo. 3, c. xxix., s. 65, because it was entirely inconsistent with it. That statute, it was held, said in effect: "If you carry on your business as you are directed by the Commissioners of Police, nobody shall interfere with you." I am quite unable to take this view. The Acts of 1867 read together, in my opinion, mean only this—no goods shall be allowed to rest upon any footway or street longer than may be necessary for loading or unloading them, except in the case of costermongers, street hawkers, or itinerant vendors, to whom this prohibition is not to apply so long as they carry on their business in accordance with the police regulations. The power which was given by the 57 Geo. 3 for the seizure of barrows does not seem to me to be inconsistent with this legislation, and in my opinion is neither repealed nor suspended by it.

SMITH, L.J.—The question in this case is one of importance to a large body of men who ply their trade in those streets of the metropolis to which Michael Angelo Taylor's Act (57 Geo. 3, c. xxix. (1817) applies, and also to the authorities having the control of streets, the point being whether a costermonger can be dealt with by a vestry under the provisions of sect 65 of that Act when he is carrying on his business in obedience to the regulations made in that behalf by the Commissioners of Police, approved of by the Secretary of State. It is not suggested that sect. 65 of Michael Angelo Taylor's Act has been expressly repealed, and in my judgment, for reasons I will now give, it is still in force unless it be as regards costermongers, street hawkers and itinerant traders who are earning their living in accordance with the regulations of the police. Michael Angelo Taylor's Act was an Act for better paving, improving, and regulating certain streets of the metropolis, and removing and preventing nuisances and obstruction therein. Sect. 65 has been read by Lindley, L.J., and I will not read it again. It was held by this court, affirming the judgment of Charles, J. in *Brackley v. Vestry of St. Mary, Battersea* (23 Q. B. Div. 486 (1889), that the power given by this section to the vestry to seize any goods or handbarrow was not dependent upon there having been a conviction under the prior part of the

section. The point, however, which is now raised, viz., whether this section was still wholly effective, was not taken or alluded to in the case. It was argued before us on behalf of the costermongers that Michael Angelo Taylor's Act was impliedly repealed by sect. 54, sub-sect. 6, of the Metropolis Police Act 1839 (2 & 3 Vict. c. 47), whereby it was enacted that every person who should cause any cart, carriage, truck, or barrow to stand longer than might be necessary for loading or unloading, or who by means of any cart, carriage, truck, or barrow, should wilfully interrupt any public crossing, or wilfully cause any obstruction in any public thoroughfare, should be liable to a penalty of not exceeding 40s. Apart from this section not covering the identical offences mentioned in sect. 65 of Michael Angelo Taylor's Act different answers may be given to this argument. First and foremost, sect. 74 of the Act of 1839 expressly enacts that it is not to repeal any local Act containing penalties. Secondly, twenty-three years after the passing of the Police Act of 1839, viz., in 1862, the Legislature in sect. 73 of the Metropolis Local Management Act (25 & 26 Vict. c. 102) recognised the then existence of Michael Angelo Taylor's Act, and as late as 1884 Stephen, J.—the Lord Chief Justice doubting, but not disagreeing—held that the provision about leaving handbarrows in a street in Michael Angelo Taylor's Act was not repealed by the Police Act: (*Fulham Board of Works v. Smith*, 48 J. P. 375.) Thirdly, that sect. 33 of the Interpretation Act 1889 (32 & 33 Vict. c. 63) enacts that, where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of these Acts or common law, but shall not be liable to be punished twice over, and that no contrary intention in this Police Act appeared. It is clear, to my mind, that there has been no repeal by implication of sect. 65 of Michael Angelo Taylor's Act by any Act prior to the Streets Amendment Act 1867, and what is the effect of this Act when read in conjunction with the Streets Acts 1867 as regards costermongers is now to be decided. In 1893 the Lord Chief Justice and Cave, J., in the case of *Summers v. Holborn District Board of Works* (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612), held that sect. 65 of Michael Angelo Taylor's Act was repealed by the Metropolitan Streets and Streets Amendment Acts of 1867 as regards costermongers. This being a decision upon a case stated by a justice in a criminal matter, no appeal could be had thereon; so the vestry of St. Mary, Newington (the present defendants) determined to raise the same point in a civil action and thus get to this court, and if necessary to the House of Lords, so as to review the decision in *Summers v. Holborn District Board of Works* (*ubi sup.*) with which they were dissatisfied. To bring this about the vestry seized the plaintiff's barrow in the Walworth-road, purporting to act under sect. 65 of Michael Angelo Taylor's Act. The plaintiff (the costermonger) thereupon brought trover for his barrow, and the vestry justified under sect. 65, and thus raised the point whether that section can be now relied upon against a costermonger or not. Although it

CT. OF APP.]

KEEF v. THE VESTRY OF ST. MARY, NEWINGTON.

[CT. OF APP.]

appears from the evidence that since the judgment in *Summers v. Holborn District Board of Works* (*ubi sup.*) in Feb. 1893 the costermongers have been continually breaking the police regulations of the 28th Dec. 1869 by what they did with their barrows in the Walworth-road, yet it was not proved that when the plaintiff's barrow was seized by the defendants he was then acting in contravention of the police regulations. This case must therefore be decided upon the assumption that the plaintiff when his barrow was taken was carrying on his business in accordance with the regulations made by the Commissioners of Police. Now, the Metropolitan Streets Act 1867 (30 & 31 Vict. c. 134) by sect. 6 enacts that, no goods or other articles should be allowed to rest on any footway or other part of a street, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be absolutely necessary for loading or unloading such goods or other articles, and that any person contravening this section was made liable to a penalty of not exceeding 40s. It was also enacted, that any space between the footway and the carriageway should, notwithstanding any claim of any person by prescription or otherwise to the deposit or exposure for sale of any goods or other articles on such space, be deemed to be part of the footway. By sect. 3 of the Streets Amendment Act 1867, that Act is to be construed as one with the Streets Act of 1867, and sect. 1 of the Amendment Act is as follows: "The 6th section of the Metropolitan Streets Act 1867, prohibiting the deposit of goods in the street, shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations of Police with the approval of the Secretary of State." It will be seen that the Amendment Act of 1867 does not only enact that sect. 6 of the Act of 1867 shall not apply to costermongers, &c., but goes beyond, and as to what is the true meaning of what it has enacted further, in my judgment, is the real point in this case. Now one thing is clear. If the costermonger does not carry on his business in accordance with the police regulations, then sect. 6 is to apply to him, and also, as it appears to me, sect. 65 of Michael Angelo Taylor's Act, for that section is not repealed by sect. 6 of the Streets Act 1867, or by any Act passed prior to the Streets Amendment Act of 1867, and if a costermonger cannot bring himself within this last Act and pray in aid its provisions, in my judgment both sect. 65 of Michael Angelo Taylor's Act, as also sect. 6 of the Streets Act of 1867, apply to him, and he can be proceeded against under either, so long as he is only proceeded against for the same offence. I will first read sect. 6 of the Streets Act of 1867 in the way the vestry say that it should be read, viz., that it only applies to the case of goods, and not to the vehicle containing the goods, and I will then read therein the Streets Amendment Act of 1867 (31 Vict. c. 5) and see how matters then stand. These two Acts, in my judgment, read together as follows: No goods shall be allowed to rest on any part of a street or be otherwise allowed to cause obstruction or inconvenience for a longer time than may be absolutely necessary for loading or unloading such goods, excepting in the case of a costermonger carrying on his business in accordance with the

regulations of the Commissioners of Police, sanctioned by the Secretary of State, in which case they may. This is the only way I can read these two sections together and give effect to the words, "so long as the costermonger carries on his business in accordance with the regulations from time to time made by the Commissioners of Police, with the approval of the Secretary of State." If this be not the true reading of the Streets Amendment Act of 1867, when read with the Streets Act 1867, and sect. 65 of Michael Angelo Taylor's Act is left wholly untouched, this piece of legislation is illusory and a sham. It is true that by it a costermonger, if he leaves goods in a street longer than is necessary for loading or unloading them, if he obeys the police regulations, avoids a penalty ranging from a farthing to forty shillings; yet, if this reading be not correct, and sect. 65 of Michael Angelo Taylor's Act is wholly repealed, in the same circumstances, and for the very same act, he is left liable to a penalty imposed by an Act passed just fifty years before of a minimum of forty shillings, to be increased if the offence is repeated to a possible 5l., together with the liability of having his barrow seized and impounded. I cannot think that this is the true interpretation of this legislation, and in my judgment these two sections of the Acts of 1867, when read together, as I am bound to read them, enact what I have stated as regards costermongers, street hawkers, and itinerant traders. These sections when so read are manifestly repugnant and contradictory to sect. 65 of Michael Angelo Taylor's Act, so far as costermongers are concerned. By sect. 65 under no circumstances is a costermonger to be allowed to place his goods upon a street after he has been told to remove them, whereas by the two sections of the Acts of 1867 he may if he obeys the police regulations. In other words, by sect. 65 of Michael Angelo Taylor's Act, if a costermonger does act A, it shall be an offence even if he conforms to the regulations of the police; whereas, by the statutes of 1867, if he does the very same act it shall not be an offence if he conforms to the same regulations. These statutes cannot, as it seems to me, as regards costermongers, stand together, and I also find the contrary intention appearing which is necessary to except the case out of the provisions of sect. 33 of the Interpretation Act 1889, for it seems to me impossible for the Legislature to have intended at one and the same time, for the same act, if a costermonger obeys the regulations of the police he shall, and yet shall not, be guilty of an offence. If the question in this case had arisen about the goods of a costermonger left resting in a street for a longer time than necessary for loading or unloading the same, in my judgment the Amendment Act of 1867 gives the costermonger liberty to carry on his business as regards his goods in accordance with the regulations of the police countersigned by the Secretary of State, and consequently he cannot be interfered with when so doing either by the vestry or the police. Now comes the next point: Are the appellants (the vestry) right when they say that sect. 6 of the Act of 1867 only applies to goods of the costermonger, and not to his barrow in which he conveys his goods. It would be a singular result if a costermonger obeying the regulations of the police as to his goods was to be free from molestation by either the vestry or the police; whereas, if he

CT. OF APP.] VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST LIM. [CT. OF APP.]

obeyed the regulations of the police as to his barrow, he was liable to be molested by the vestry. The words of the Amendment Act of 1867 are, "so long as they carry on their business," &c. Surely the business of a costermonger has as much to do with his barrow as with his goods. Who ever heard to the contrary? And I cannot think that the Act when it referred to his carrying on his business only had reference to his goods. I own that much is to be said in favour of the construction of sect. 6 of the Act of 1867 only applying to goods, and this is a difficulty; but I am not prepared to place this restricted construction upon it as is contended for by the vestry in view of the result which would thus be brought about. It seems to me that sect. 6 is capable of being read as follows: No article (this may include a handbarrow, for a handbarrow is an article) shall be allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be necessary for loading or unloading such article (*i.e.*, a handbarrow), and that this section is not necessarily confined to a costermonger's goods as distinguished from the vehicle in which he carries his goods. I am aware that the Amendment Act speaks of goods. The point taken that that part of sect. 6 which deals with the deposit or exposure for sale of any goods or other articles upon the surface between the footway and carriageway must refer to goods deposited or exposed for sale, and consequently cannot include barrows, in my judgment, is not well founded, for there are many spaces between a footway and carriageway where handbarrows and other vehicles are deposited or exposed for sale. The suggestion of Mr. Avory on behalf of the vestry, that the Amendment Act was passed to repeal this last part of sect. 6, and nothing more, is, in my opinion, untenable. I must also point out that, if sect. 6 of the Act of 1867 only applies to goods, as the vestry contend, the police regulations made on the 29th Dec. 1869 by the Commissioners of Police of the Metropolis, and approved by Her Majesty's Principal Secretary of State, for regulating the carrying on of the business of costermongers (street hawkers and itinerant traders included) within the metropolis, are as illusory as the statutes. These regulations deal with the barrows, carts, or stalls of costermongers, and how they are to be placed in the streets, which, if the vestry's construction of the Acts of 1867 is correct, should have been made applicable to goods only. For these reasons I am of opinion that, so long as a costermonger carries on his business in accordance with the regulations from time to time made by the Commissioners of Police, with the approval of the Secretary of State, he is at liberty to do so, and he is not liable, as regards either his goods or his barrow, to be proceeded against under sect. 6 of the Act of 1867, or under sect. 65 of Michael Angelo Taylor's Act. If, however, the costermonger does not conform to the police regulations, sect. 65 of Michael Angelo Taylor's Act, as also sect. 6 of the Act of 1867, stand untouched, and he may, as before stated, be proceeded against under either, but only under one for the same offence. It was said on behalf of the appellants that in the case of *Summers v. Holborn District Board of Works* (*ubi sup.*) the court had not had its attention called to the Interpretation Act of 1889, nor to the fact that Michael Angelo Taylor's

Act was incorporated into the Metropolis Local Management Act of 1862; and also that the court had not considered what would be the result if the costermongers had not carried on their business in accordance with the police regulations. That case was decided upon the admitted fact that the costermongers had obeyed the police regulations. In my judgment these criticisms do not effect the validity of the judgment arrived at; and I think, if confined to the case of a costermonger who obeys the police regulations, for the reasons above, that it was correct. I agree with Cave, J.'s construction of the word "powers" in sect. 27 of the Streets Act of 1867. The case of *Fortescue v. The Vestry of St. Matthew, Bethnal Green*, in April 1891 (65 L. T. Rep. N. S. 256; (1891) 2 Q. B. 170), which was cited, does not touch this case. In that case sect. 72 of Michael Angelo Taylor's Act was held to be repealed by the Metropolitan Building Act 1855, and the present question did not arise. Nor does the case of *Wyatt v. Gems*, in June 1893 (69 L. T. Rep. N. S. 456; (1893) 2 Q. B. 225), where it was held that sect. 65 of Michael Angelo Taylor's Act was not repealed, as regards the hanging out of articles in front of houses, by the Metropolis Management Act 1835, for in that case the court had not to deal with the Streets Acts of 1867. For the reasons above I am of opinion that the *pro formâ* judgment of the Divisional Court, which was given in accordance with that in *Summers v. Holborn District Board of Works* (*ubi sup.*), without argument, should be upheld, and this appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Lowless and Co.*
Solicitors for the respondents, *F. J. O'Brien Hale; Matthew H. Hale.*

March 14, 15, 16, 20, and April 7.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

VERNER v. THE GENERAL AND COMMERCIAL INVESTMENT TRUST LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Dividends—Excess of income over expenditure—Depreciation of capital—Reduction of capital—Ultra vires.

A motion was made to restrain the directors of a company from declaring a dividend on the ground that, although there was an excess of receipts over expenditure, there was at the same time a depreciation of capital. The company's capital of 600,000*l.* had all been issued and fully paid up, and converted into stock of two classes—preferred and deferred. It had also borrowed 300,000*l.* on debentures. These funds had all been invested in accordance with the memorandum of association, and the present market value of the investments was nearly 655,000*l.* Of this depreciation it was stated that 75,000*l.* was absolutely lost. Changes of investment had been made from time to time, with the result that 27,000*l.* had been realised and carried to a reserve fund. During the past year the receipts of the company from investments exceeded the expenditure by 23,000*l.*, and

(a) Reported by J. SANDERSON and E. A. SCRATCHLEY, Esqs., Barristers at-Law.

the directors proposed to declare a dividend out of this excess.

The company was formed to raise money and invest it in certain securities, and to receive the dividends and income thereof and apply them according to the articles. The articles provided for investment and for change of investment, and maintaining as nearly as possible the relative rights between capital and income. The receipts of the company in respect of income from investments were to be applicable (1) to the payment of a dividend at 5 per cent. per annum on the preferred stock; (2) to the payment of such a dividend on the deferred stock as the same should suffice to pay. The trustees had power to create a reserve fund to meet contingencies, or for equalising dividends, or for other purposes, and to declare interim dividends. Surplus assets in a winding-up were to be applied in repaying the amount paid up on preferred stock, and then on deferred stock, and the residue divided in proportion to the nominal capital held by members.

Held, that the payment of the dividend was not ultra vires.

Decision of Stirling, J. affirmed.

THIS was a motion by William Henry Verner to restrain the defendants, the General and Commercial Investment Trust, and the directors, from declaring and from distributing among the members of the company any dividend in respect of the financial year of the company terminating on the 28th Feb. 1894. The plaintiff, W. H. Verner, was suing on behalf of himself and all other stockholders of the defendant company.

The company was incorporated on the 26th Jan. 1888, under a memorandum and articles of association, with a capital of 600,000*l.* in 60,000 shares of 10*l.* each, all issued and fully paid up and converted into two classes of stock, preferred and deferred.

The company had also borrowed 300,000*l.* secured by a floating charge on all the assets of the company. The 900,000*l.* had been invested in securities authorised by the memorandum of association. The present market value of the investments was nearly 655,000*l.* Of the 240,000*l.* or thereabouts of depreciation, the judge found on the evidence that 75,000*l.* in respect of capital must be regarded as absolutely lost. The net result of changes made in the original investments was a gain of 27,000*l.*, which had been carried to a reserve fund, and this it was not proposed to touch. The receipts of income from investments for the past year exceeded the expenditure by 23,000*l.* The present motion raised the question whether, with a loss in respect of capital of 75,000*l.*, a dividend could lawfully be declared and paid.

The objects of the company were thus defined in the memorandum of association:

iii. (a). To raise money by share capital and invest the amount thereof in or otherwise to acquire and hold any of [certain investments therein specified]; (b) to borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company, or in any other manner; to receive money on deposit at interest or otherwise; and to invest the money so obtained in any such investments as aforesaid, provided that the total amount of bonds, mortgages, debentures, or debenture stock outstanding at any one time shall not exceed one half of the amount of the

share capital for the time being issued and subscribed; (c) to acquire any such investments as aforesaid by original subscription, tender, or otherwise, and whether or not fully paid up to make payments thereon as called up, or in advance of calls or otherwise; to subscribe for the same either conditionally or otherwise; to vary any such investments; and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company; (i) to receive dividends, income, profits, bonuses, and advantages of every description from time to time payable or receivable in respect of the company's investments, and to apply the same respectively, according to the provisions of the articles of association in force for the time being; (v) the capital of the company is 1,200,000*l.* divided into 120,000 shares of 10*l.* each, to be converted when and as from time to time fully paid up into equal moieties of preferred and deferred stock; the preferred stock to be entitled to receive a preferential dividend of 5 per cent. per annum, not cumulative, and payable only out of the profits of each year before any dividend for such year is paid on the deferred stock.

The material clauses in the articles of association were:

80. The share and debenture capital moneys of the company, including any moneys received from the payment off of investments or securities, shall, after paying thereout all expenses of a capital nature, be invested in investments and securities of the kind mentioned in the memorandum of association, with such limitations on the amount of any particular security held as therein provided.

81. The trustees shall, on making any change of investment or other financial transaction of the company, maintain as nearly as possible the relative rights of and separation between capital moneys and income, and shall deal with the same accordingly, and shall have power to make all appointments necessary in that behalf.

Art. 83 provided that an annual sum as therein specified should be set aside by the trustees out of the revenue of the company for management expenses.

By art. 84, subject to the rights of members holding share capital issued upon special conditions, the receipts of the company from the dividends, income, profits, bonuses, and advantages should be applicable for a 5 per cent. dividend for the particular year on the preferred stock, and then for such a dividend on the deferred stock as it might suffice for.

85. The trustees may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund.

Art. 86 gave power "where in the opinion of the trustees the profits of the company permit" to declare interim dividends on both classes of stock without the preferred stockholders having a right to have any deficiency on the year made up.

By art. 110 the surplus assets on a winding-up were to be applied—first, in repaying the holders of preferred stock the amount paid up, then the holders of deferred stock the amount paid up, and the residue divided among the members in proportion to the nominal amount of their capital.

Graham Hastings, Q.C. and A. R. Kirby, for the plaintiff, contended that the payment of a dividend under the circumstances would be *ultra vires*, and that *Lee v. Neuchâtel Asphalte Company* (61 L. T. Rep. N. S. 11; 41 Ch. Div. 1), and the judgments of Cotton and Lindley, L.JJ., had reference only

CT. OF APP.] VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST LIM. [CT. OF APP.]

to the particular case with which they were dealing. They also referred to

Lubbock v. British Bank of South America, 67 L. T. Rep. N. S. 74; (1892) 2 Ch. 198.

Buckley, Q.C. and *H. T. Eve* for the defendants. —The object of the company is not to traffic in securities, but to invest in certain securities and to divide the fruit of doing that; iii. (a) (b) of the memorandum gives power to raise and borrow money and to invest it, but there is a limitation on borrowing, and the creditors will only be creditors to one-third of the actual invested money; iii. (c) does not, we submit, speak of trafficking in securities; iii. (i) means to receive the substantial profitable income, and to deal with that; arts. 80, 81, contain a very careful provision for the separation of income and capital. Under art. 85 it is within the trustees' discretion to retain, but they are not bound to do so. Under art. 86, if the trustees declare an interim dividend and their anticipations of prosperity are not realised, the preferred stockholders may receive less than their 5 per cent. The effect of the judgment of Cotton, L.J. in *Lee v. The Neuchâtel Asphalte Company* is, that you may divide the fruits of a wasting property, and if the directors have acted fairly and reasonably in ascertaining that the division is of profits and not of capital, the court is very unwilling to interfere. *Lubbock v. British Bank of South America* would be in point if there had been an increase in value and it was proposed to divide the increased value. The question there was, whether under the constitution of the company their margin was divisible as dividend, and it was held that it was. [STIRLING, J.—Chitty, J. does not appear to have dealt with it on that footing.] Having regard to the objects of the company, if there is a loss which does not result from the carrying out of your objects you are entitled to disregard it. If the company three years ago retained sufficient to pay off its debts, the creditors have no interest in the matter. They referred to the judgment of Jessel, M.R. in *Re Ebbw Vale Steel, Iron, and Coal Company* (36 L. T. Rep. N. S. 308; 4 Ch. Div., at p. 831).

Hastings, in reply, referred to the judgment of Cotton L.J. in *Re Tambracherry Estates Company* (52 L. T. Rep. N. S. 712, 714; 29 Ch. Div. 689).

Cur. adv. vult.

March 6.—STIRLING, J., after stating the facts, said that, though the action was a friendly one, it was of great importance to the directors, for, if they paid dividends out of capital wrongfully, it would be a very serious thing for them in the event of the company subsequently going into liquidation, and it was from a legal point of view very important, this being the first time the court had been asked to declare whether dividends could lawfully be declared under such circumstances. His Lordship continued:—Up to a certain point the law upon the subject is clear. The general proposition may be usefully stated from the judgment of Lord Herschell, L.C. in *Trevor v. Whitworth* (57 L. T. Rep. N. S., at p. 459; L. Rep. 12 App. Cas., at p. 415). "The Companies Act 1862 requires (sect. 8) that in the case of a company where the liability of shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed

amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of a larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alterations shall be made by any company in the conditions contained in its memorandum of association." What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure on the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorised. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by the expenditure outside these limits, or by the return of any part of it to the shareholders. Experience seems to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867, provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be." On that it has been held, and is well-settled law, that where the annual receipts of a company do not exceed the expenditure, or there are no receipts at all, capital cannot be applied in the payment of dividends: (*Re Exchange Banking Company*; *Flitcroft's case*, 46 L. T. Rep. N. S. 474; 21 Ch. Div. 519; and *Guinness v. Land Corporation of Ireland*, 47 L. T. Rep. N. S. 517; 22 Ch. Div. 349.) It is not proposed, however, in the present case to resort to capital for payment of dividends. The question is whether the excess of receipts over expenditure can properly be applied in payment of dividends where there is at the same time a depreciation of capital. A similar question came before Sir George Jessel, the late Master of the Rolls, in *Re Ebbw Vale Steel, Iron, and Coal Company* (36 L. T. Rep. N. S. 308; 4 Ch. Div. 827). At p. 831 of 4 Ch. Div. the Master of the Rolls said: "I am very sorry that I cannot accede to this application, which is a most reasonable one, and I have no doubt that, if the Legislature amends the Act of Parliament, some provision will be made for enabling the court to do that which I think it cannot do at present. When a joint-stock company has lost a portion of its capital, nothing can be more beneficial to the company than to admit that loss—to write it off—and, if it chooses to go on trading, to trade with the diminished capital which remains, the dividend being declared on the capital actually remaining. The object of the present application is to authorise this to be done; that is, a portion of the share capital having been lost, it is desired that something should be written off each share, so as to make the share of less nominal value, and to enable the company—still going on trading—

CT. OF APP.] *VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST LIM.* [CT. OF APP.]

to pay a dividend on the amount of the capital actually remaining, but, as I understand the Companies Act 1867, such was not the object of the Act." It is not necessary to give the reasons why Sir G. Jessel thought the Act of 1867 did not apply. That case having been decided in January, in July was passed the Companies Act 1877. That Act recited as follows: "Whereas doubts have been entertained whether the power given by the Companies Act 1867 to a company of reducing its capital extends to paid-up capital, and it is expedient to remove such doubts," and sect. 3 provided: "The word 'capital,' as used in the Companies Act 1867, shall include paid-up capital, and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets. . . ." I believe that, after the passing of that Act, an order was made by the Master of the Rolls in the matter of that company, authorising the reduction of capital. Speaking for myself, I have always read the passage which I have just cited from the judgment of Sir G. Jessel as indicating his opinion to be that, where a loss of capital had occurred in a company governed by the Act of 1862, dividends could not be paid until the loss was made good. I think the Master of the Rolls regarded the balance-sheet of such a company in the same way as that of an ordinary trading partnership. On one side would be set down the assets at their value, estimated according to the best view that could be formed. On the other side—first, the liabilities, and secondly, the capital brought in; and if there is an excess of assets over liabilities and capital, that would represent profits out of which dividends might be declared and paid. The application of that rule in practice is not without difficulty, but that appears to be the view adopted by the Master of the Rolls in that case and in others. It was suggested that that was too extensive an application of the passage, and that the object of the petition was not to enable dividends to be paid, but to reduce the amount of the shares, so as to make them more marketable, it being clear that shares in a company with a capital of 50,000*l.* and paying a dividend of 6 per cent. would fetch a better price than shares in a company with a capital of 100,000*l.* paying a dividend of 3 per cent. If this be all that is intended I can scarcely suppose the Legislature would have been so ready to interfere by passing the Act of 1877. However that may be, the Act of 1877 does provide a means by which a company which has lost capital, or whose capital is to any extent unrepresented by available assets, may reduce that capital, and so be enabled to pay dividends on the reduced capital, and that has been largely done in practice. This is a consideration to which great weight ought to be given. Had I not the guidance of the Court of Appeal in *Lee v. Neu-châtel Asphalte Company* (61 L. T. Rep. N. S. 11; 41 Ch. Div. 1) I should perhaps have come to the conclusion that the only proper course would be to present a petition for reduction of capital before declaring any dividends. But, in my opinion, that would be inconsistent with the judgments delivered by the Court of Appeal in *Lee v. Neu-châtel Asphalte Company*. So far as the facts go, the decision in that case does not govern the present, but when the judgments are read it appears that the decision of the learned judges is based upon other reasoning. [His Lordship

then read those parts of the memorandum and articles of association above set out, and proceeded:] The result, therefore, of not declaring dividends and putting the excess of receipts to a reserve fund, will be to preserve the capital for the benefit of the deferred shareholders, and therefore in that respect the present company and *Lee v. Neu-châtel Asphalte Company* stand on the same footing. Having regard to articles 80 and 81, I read the words "profits, bonuses, and advantages" in the memorandum of association iii. (i.) and article 84 as meaning profits, bonuses, and advantages in the nature of incomes. The scheme appears to be to put the shareholders for the time being in the same situation as regards dividends as tenants for life are under an ordinary settlement of personal property, while the persons among whom the capital would be divided in the event of a winding-up are to stand in the position of remaindermen entitled to the corpus of the settled property. Tenants for life under such a settlement would take the whole income of all duly authorised investments, notwithstanding any increase or decrease in their value, and would not be entitled to share in any augmentation of value of the corpus, however great that might be, or however small, comparatively, the corresponding increase of income. I read the word "profits" in articles 85 and 86 as meaning excess of income over expenses of management, and, so reading the word, I think such excess is intended to be applicable for payment of dividends, notwithstanding shrinkage in the value of the investments or loss of capital occasioned thereby. The investments seem to me to constitute permanent assets—assets not to be expended in providing for the profit earned by the company within the meaning of the words of Cotton, L.J. These assets remained intact save by causes over which the company had no control; any diminution in their value arose from their own inherent nature, not from dealing with them by the company; it is not sought to expend a portion of them in providing for profit or dividend, and there is no likelihood, to use the phrase of Lindley, L.J., of any "cheating of creditors." Under these circumstances I think it is not made out that payment of a dividend is beyond the power of the company. I base my decision on the peculiar nature of the constitution of the company, and it must not be assumed that I should have arrived at the same conclusion if I had been dealing with an ordinary trading company—e.g., if the object of the company had been to carry on a stock-broker's business, and the investments had been ordinary stock-in-trade. It follows, from my view, that in this company the shareholders will not be entitled to divide for the purposes of dividend any increase in the value of the investments, however great. It was urged that, if this be so, my decision conflicts with that of Chitty, J. in *Lubbock v. British Bank of South America* (67 L. T. Rep. N. S. 74; (1892) 2 Ch. 198). The answer is, that the nature of the two companies is different. The British Bank of South America was evidently an ordinary trading company, which the defendant company is not.

From that decision the plaintiff now appealed.

Graham Hastings, Q.C. and *A. R. Kirby* for the appellant.

CT. OF APP.] VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST LIM. [CT. OF APP.]

Buckley, Q.C. and H. T. Eve for the respondents.

The arguments adduced in the court below were substantially repeated, and the authorities cited were again referred to.

Cur. adv. vult.

April 7.—The following written judgments were delivered:—

LINDLEY, L.J. read the judgment of himself and Smith, L.J.:—The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances. Such a proceeding may sometimes be very imprudent, but a proceeding may be perfectly legal and may yet be opposed to sound commercial principles. We, however, have only to consider the legality or illegality of what is complained of. As was pointed out in *Lee v. Neuchâtel Asphalte Company* (61 L. T. Rep. N. S. 11; 41 Ch. Div. 1), there are certain provisions in the Companies Acts relating to the capital of limited companies; but no provisions whatever as to the payment of dividends or the division of profits. Each company is left to make out its own regulations as to such payment or division. The statutes do not even expressly and in plain language prohibit a payment of dividend out of capital. But the provisions as to capital, when carefully studied, are wholly inconsistent with the return of capital to the shareholders, whether in the shape of dividends or otherwise, except, of course, on a winding-up, and there can, in my opinion, be no doubt that, even if a memorandum of association contained a provision for paying dividends out of capital, such provision would be invalid. The fact is, that the main condition of limited liability is that the capital of a limited company shall be applied for the purposes for which the company is formed, and that to return the capital to the shareholders either in the shape of dividend or otherwise is not such a purpose as the Legislature contemplated. But there is a vast difference between paying dividends out of capital and paying dividends out of other money belonging to the company and which is not part of the capital mentioned in the company's memorandum of association. The capital of a company is intended for use in some trade or business, and is necessarily exposed to risk of loss. As explained in *Lee v. Neuchâtel Asphalte Company* (*ubi sup.*) the capital, even of a limited company, is not a debt owing by it to its shareholders, and if the capital is lost, the company is under no legal obligation either to make it good or, on that ground only, to wind-up its affairs. If, therefore, the company has any assets which are not its capital within the meaning of the Companies Acts, there is no law which prohibits the division of such assets amongst the shareholders. Further, it was decided in that case, and, in my opinion, rightly decided, that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property without setting aside part of that money to keep the capital up to its original amount. There is no law which

prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking and in dividing the money annually yielded by it without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding-up of the company. A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But, in the absence of some special article or contract, there is no law to this effect, and, in my opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard and fast rule which would prevent a flourishing company either not in debt or well able to pay its debts from paying dividends so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law. It is obvious that dividends cannot be paid out of capital which is lost; they can only be paid out of money which exists and can be divided. Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realised and turned into money which may be divided amongst the shareholders, as was decided in *Lubbock v. British Bank of South America* (67 L. T. Rep. N. S. 74; (1892) 2 Ch. 198). But, although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape, and to divide as dividend the receipts, say, for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain. It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word "profits" is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inferences that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circ-

lating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law. The Companies Acts do not require even limited companies to keep accounts, still less to keep them in any particular form. The only enactment on the subject is sect. 26 of the Companies Act 1862, and Form D in the third schedule, and these relate solely to the nominal capital and calls. But, although this is so, yet, as a matter of business, accounts of some sort must be kept; and in order to show what has been subscribed by the shareholders, and what has become of the money so subscribed, and to show the results of the company's trading or business, it is practically necessary to keep a capital account, and what is called a profit and loss account, and as a matter of business these accounts ought to be kept as business men usually keep them. Accordingly, we find provisions for keeping such accounts in Table A in the appendix to the Companies Act 1862 (see arts. 78-82), and in the articles of association of most, if not all, companies. But there is no law which compels limited companies in all cases to recoup losses shown by the capital account out of the receipts shown in the profit and loss account, although care must be taken not to treat capital as if it were profit. This is in accordance with *Bolton v. Natal Land, &c., Company* (85 L. T. Rep. N. S. 786; (1892) 2 Ch. 124), which is the latest reported case on the subject. Further, it is obvious that capital lost must not appear in the accounts as still existing intact; the accounts must show the truth, and not be misleading or fraudulent. The Acts of 1867 and of 1877 are in no way inconsistent with these observations. They provide for the reduction of the nominal capital mentioned in the memorandum of association. They do not render it obligatory on a company which has lost some of its capital to reduce the nominal amount mentioned in its memorandum. There are advantages in doing so, and the Acts were passed to enable limited companies to obtain these advantages, but there is nothing in these Acts, any more than in the Act of 1862, which prevents a company which has lost part of its capital from continuing to carry on business and declaring and paying dividends. A law forbidding this may well have been considered by the Legislature far too rigid, and in their desire to check dishonest and reckless trading courts must be careful not to put tighter fetters on companies than the Legislature has authorised. It follows from what has been said above that the proposed payment of dividend in this particular case cannot be restrained. Stirling, J. has, in his judgment, examined the memorandum and articles of association so fully that I do not think it necessary to examine them again. It is plain there is nothing in them which requires lost capital to be made good before dividends can be declared. On the contrary, they are so framed as to authorise the sinking of capital in the purchase of speculative stocks, funds, and securities, and the payment of dividends out of whatever interest, dividends, or other income such stocks, funds, and securities yield, although some of them are hopelessly bad, and the capital sunk in obtaining them is lost beyond recovery. There is no suggestion of any improper juggling with the accounts, and there

is no payment of dividend out of capital. There is no insolvency, and we have not to deal with a petition to wind-up. Some capital is lost, but that is all that can be truly said, and that is not enough to justify such an injunction as is sought. The appeal must be dismissed.

KAY, L.J.—I should be sorry if it were held that a joint-stock trading company can properly estimate their profits in any way differing from that in which an individual or a partnership of individuals carrying on a similar business would do. An ordinary trader takes a yearly account of all the capital employed in his business, allows for any loss or depreciation in value, and carries the balance to the profit and loss account, from which he makes out the profit or loss of the year. In this mode a loss or depreciation of such capital affects directly the profits of the year, which are thereby diminished. But if upon the whole capital account there is a gain, this goes to swell the year's profits. In my opinion, a joint-stock trading company should do the same. The question in this case is, whether the capital employed by this company in making investments is capital employed in the business for the purpose of this usual mode of taking the year's account. If the company were formed for the purpose of buying stocks, shares, and the like, to sell again, and their business was to make profits on such resale, it is obvious that any profit or loss on such transaction must be estimated in the way I have stated. But this is not their business. They buy stocks, shares, and the like, and they have power to sell and change them. But they buy as investments, and do not look to the sale as the source of their profit. They buy, we are told, all sorts of investments, which nominally pay a large rate of interest—those, in short, in which a prudent man would not invest his own money. And the source of their profit is that, having very large funds intrusted to them by the confiding public, they are able, out of the income of these investments, to pay in most years something more to their shareholders than the 3 or 4 per cent. which represent at present the utmost income that can be obtained from safe securities. The natural result of such a reckless dealing with the moneys intrusted to them has followed in this case. There has been an actual loss of invested capital to the amount of about 75,000*l.* If the depreciation below the cost price of other investments be added to this, the loss is much greater. This company seems to have been courting the fate which has overtaken other similar companies which are now in liquidation. The company have power by their articles to form out of income a reserve fund before realising any dividend, and if they were to do this in order to make good the loss they have sustained, the directors would be acting within their powers. So, if the capital had been increased by a rise in value of the investments, I conceive that they might have realised some part of that increase, and distributed it as dividend. The question is whether they were compellable to do either of these things. It is argued that, in the events that have happened, if they do not replace the lost capital out of income, they will in effect be paying dividends out of capital. That is only another mode of trying the same question. If they are not bound so to replace the lost capital, they may divide the whole income among the shareholders, without devoting any of it to this purpose. I have

CT. OF APP.]

CROZAT v. BROGDEN AND OTHERS.

[CT. OF APP.]

not a very confident opinion in the matter, but on the whole I am not satisfied that there is any legal obligation on the directors to do this. The persons who have been so foolish as to take shares in this company seem to me, with their eyes open, to have entered upon a reckless and dangerous speculation, involving an almost certain loss and depreciation of capital. They seem to me to have authorised their trustees to make the investments which they have made. In the case of any ordinary trust it is not the right of any *cestui que trust*, where an authorised investment has failed, to require that it should be replaced out of the income of the reversionary investments. That would be sacrificing the interest of a tenant for life to that of the remaindermen. In this company the effect would be to give the deferred shareholders a benefit out of the income of the preference shareholders. I do not think this was the intention. By the memorandum of association it is provided (iii.(2)) that the objects for which the company is established are as follows: [His Lordship read them and continued.] Arts. 84 and 85 of the articles of association of the company provide as follows: "84. Subject to the rights of members holding share capital issued upon special conditions the receipts of the company from the dividends, income, profits, bonuses, and advantages payable or receivable in respect of the company's investments shall be applicable as follows: First, to the payment of a dividend for the particular year at the rate of 5 per cent. per annum on the preferred stock; second, to the payment of such a dividend on the deferred stock as the same shall suffice to pay. And the trustees may, with the sanction of the company in general meeting, declare a dividend to be paid to the members accordingly." "85. The trustees may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for any other purposes of the company; and may from time to time apply the whole or any part of such fund for any purposes of the company." These provisions seem to me to mean that any income received may be divided whether part of the capital is lost or not. At present I do not know of any law to prevent this, and it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings. I have no sympathy whatever with those who have become shareholders in such an undertaking. The objects and the effect of the operations of such companies is to give a fictitious value to other speculations as unsound as their own by keeping up the market price of the stocks and shares in which it is their business to invest. And the sooner that it is generally understood what the probable result of such transactions may be, the better it will be for the commercial and investing classes in general.

Appeal dismissed.

Solicitors for the appellant, *E. Flux, Leadbitter, and Paterson.*

Solicitors for the respondents, *Ashurst, Morris, Crisp, and Co.*

Wednesday, March 14.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

CROZAT v. BROGDEN AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Security for costs—Foreign plaintiff—Action upon foreign judgment.

The rule by which a foreign plaintiff is usually required to give security for costs is equally applicable when the action is upon a foreign judgment as when the action is upon any other claim.

APPEAL of the defendants from an order of the Divisional Court (Mathew and Collins, JJ.) setting aside an order of Grantham, J. at chambers, directing the plaintiff to give security for the costs of the action.

The plaintiff, a foreigner resident out of the jurisdiction, brought this action against the defendants to recover an amount due from their testator under a judgment of a French court of first instance, which had been affirmed by a French court of appeal.

The plaintiff applied for judgment under Order XIV. Unconditional leave to defend was given upon the allegation of the defendants that the judgment had been obtained by fraud. The master ordered the plaintiff to give security for costs to the amount of 21l.

The order giving the defendants unconditional leave to defend was affirmed by the judge at chambers, by the Divisional Court, and by the Court of Appeal.

The defendants delivered a defence alleging that the foreign judgment had been obtained by the fraud of the plaintiff.

The defendants obtained an order for further security for costs, and this order was affirmed by Grantham, J. at chambers.

The plaintiff appealed.

Crump, Q.C. (Atherley Jones with him) for the plaintiff.—Where a defendant is a judgment debtor, and the plaintiff brings an action on the judgment in a country where he is a foreigner, he is in a different position from a plaintiff who is merely suing on a contract not before sued upon. This distinction is well illustrated in the judgment of Blackburn, J. in *Godard v. Gray* (24 L. T. Rep. N. S. at p. 91; L. Rep. 6 Q. B. at p. 148), where he says: "But in England, such judgments" (that is, the judgments of foreign tribunals) "are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B. in *Williams v. Jones* (13 M. & W. at p. 633): 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.'" Here the burden is not on the plaintiff, but it is upon the defendants to get rid of the judgment, and so long as the judgment debt is unsatisfied and the costs do not exceed the judgment, the

(a) Reported by J. H. WILLIAMS and W. W. ORR, Esqrs., Barristers-at-Law.

plaintiff cannot be called upon to give security for costs:

Ferguson v. Kootenay Smelting and Trading Syndicate, 36 S. J. 461;

Re The Contract and Agency Corporation Limited, 57 L. J. 5, Ch.

Those cases are perfectly analogous to the present, and show that no security ought to be given by the plaintiff here. The defendants fought out the question on both the facts and the law, and they had full opportunity of making any application they chose before the French courts, but they made no such application. When an action is brought on a foreign judgment, if there is no defence at all, the case is within the principle of the cases cited. Here it is admitted there is a valid judgment and there is really no defence, as the defence now set up amounts in substance to a counter-claim to set aside this judgment on the ground of fraud, but all the evidence as to the alleged fraud was before the French courts, and the defendant had the opportunity of cross-examining the plaintiff there as to such fraud, and the French courts with the greatest care investigated every part of the case, and gave judgment for the plaintiff. That being so, and as this is not a case in which the plaintiff can or will put any costs on the defendants, he ought not to be ordered to give further security for costs.

E. Fordham Spence for the defendants.—The master and the judge were right in holding that a foreigner suing in this country on a foreign judgment came within the same principle as a foreigner suing upon a contract, unless special circumstances were shown, and that here no special circumstances were shown. The argument that all these matters were before the French courts is met by this, that all the evidence on which the charges of fraud are based was not before the French courts when the judgment was obtained. The defendants have since sworn to facts which, if true, would be a ground for setting aside the judgment. The cases referred to of *Ferguson v. Kootenay Smelting and Trading Syndicate* (*ubi sup.*), and *Re The Contract and Agency Corporation Limited* (*ubi sup.*), are absolutely different from the present, and there is no foundation to support the very broad proposition that a foreigner suing on a foreign judgment is entitled to sue without giving security for costs. [COLLINS, J.—A point against you here is, that all the facts now relied on by the defendants as proving fraud were before the French courts.] A foreign suitor can be in no better position with regard to giving security for costs by having sued and got a judgment in a foreign country than if he had sued here as plaintiff upon a contract which he has not before put in suit. Here no steps have been taken by the plaintiff between Nov. 1892 and Nov. 1893, and the action has been dragged on in the slowest possible manner since June 1891, and under the circumstances the defendants are entitled to some further security for their costs.

Crump, Q.C. in reply.

MATHEW, J.—I am of opinion that this appeal against the order increasing the security for costs must be allowed, but we leave the original order as to the 21st where it was. The reason why it appears to me the appeal ought to be allowed is this, that it is abundantly clear now that what is

sought to be done by the defendants is to have a re-trial of the matter and discuss over again points already decided by the French courts. The suggestion is that the defendants may be able to find further evidence to that which was before the French courts, and in that way that a different result may be arrived at. Every presumption is against them, and even these additional facts which have been brought to our attention, and the alleged counter-claim, it is certain now, were before the court and decided by the court, and decided upon a ground which really precludes the attempt that is now made to say that a different state of facts ought to have been found by the French court. Under these circumstances I think that we ought to act upon the analogy of the cases that have been cited, and say that there should be no order for further security for costs.

COLLINS, J.—I am of the same opinion. The argument for the respondents here goes the length of affirming that a person who sues on a judgment recovered in a French court stands in no higher or better position than the foreigner who sues in respect of any contract or obligation incurred either in France or elsewhere, which has not been the subject of a judgment. Now, however low a foreign judgment is put, it cannot be put as low as that. It was at one time thought it was an absolute estoppel. It possibly may not go so far as that, but it is strong *prima facie* evidence in favour of the plaintiff as to all the points which are to be taken as having been before the French courts. In this case we are not dealing with a judgment by default, but we are dealing with a judgment which was first obtained and was then the subject of a double appeal; and in the discussion of that case all the points that are now urged for consideration of the English court were before the French courts, and were dealt with by the French courts. Therefore it seems to me that the judgment recovered is *prima facie* proof that the defendants are wrong on all points in this suit. That being so, although it is competent for them to defend in England, I do not think they are in a position to insist upon security for costs.

Appeal allowed.

The defendants appealed.

Lawson Walton, Q.C. and *E. F. Spence* for the appellants.—There is no authority whatever for the proposition that there is any distinction at all between an action by a foreign plaintiff upon a foreign judgment and any other action by a foreign plaintiff, in the application of the ordinary rule as to making him give security for costs. It has always been the ordinary and regular practice to make a foreign plaintiff give security for costs in any action brought by him. The rule is thus stated by *Jessel, M.R.*, in *Re Percy Mining Company* (2 Ch. Div. 531): "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs." In *Pigott on Foreign Judgments*, at p. 185, it is stated that "In this respect no difference is made between an action on a foreign judgment and other actions." The cases which have been relied on by the plaintiff entirely fail to support the proposition that the case is different when the

CT. OF APP.]

JACOBS v. CRUSHA AND OTHERS.

[CT. OF APP.]

action is upon a judgment. In *Ferguson v. Kootenay Smelting and Trading Syndicate* (36 S. J. 461), the defendant had admittedly property of the plaintiff in his hands, and so, in effect, already held security for costs; and in *Re Contract and Agency Corporation* (57 L. J. 5, Ch.), the reason for refusing to order security for costs was the same. On an application for security for costs from a foreign plaintiff, it is immaterial whether the defendant has a good defence or not, and the court ought not to inquire into the merits of the defence:

The Edinburgh and Leith Railway Company v. Dawson, 7 Dowl. 573.

The defence which has been set up in this case is a good defence, if proved:

Abouloff v. Oppenheimer, 47 L. T. Rep. N. S. 325; 10 Q. B. Div. 295.

Crump, Q.C. and Geary for the respondent.—The action in the French courts, in which the plaintiff obtained this judgment, was fought out, and the judgment was affirmed by the Court of Appeal in France. There is, therefore, the strongest *prima facie* case in favour of the plaintiff. An action upon a foreign judgment does stand upon a different footing to ordinary actions of debt:

Williams v. Jones, 13 M. & W. 623:

Godard v. Gray, 24 L. T. Rep. N. S. 89; L. Rep. 6 Q. B. 149.

When a foreign plaintiff sues upon a foreign judgment it is a matter of discretion whether the court will, upon considering the defence set up, order security for costs or not. It is according to the comity of nations to enforce a foreign judgment, and not to place obstacles in the way of a person seeking to enforce it:

The City of Mecca, 41 L. T. Rep. N. S. 444; L. Rep. 5 P. D. 28.

There is no inflexible rule as to ordering security for costs by a foreign plaintiff; it is always a matter of discretion, and the Divisional Court has exercised its discretion in favour of the plaintiff.

Lawson Walton, Q.C. was not heard in reply.

LORD ESHER, M.R.—In my opinion we cannot interfere with the decision of the learned judge at chambers ordering the plaintiff to give security for costs. The Divisional Court have set aside that order, and have held that the discretion exercised by the judge at chambers should be overruled. For my own part I am inclined to think that it is a matter of discretion, and that the court is not always bound as a matter of course to order security for costs to be given by a foreign plaintiff. That discretion, however, is always exercised in one way unless there are exceptional circumstances in the case. In the Divisional Court that discretion was exercised by refusing to order security for costs upon the ground that the plea disclosed no real defence to the action. That was a mistaken ground, for the plea if it is proved will be a complete defence. The Divisional Court, therefore, exercised their discretion upon a wrong ground, and this appeal must be allowed.

LOPES, L.J.—In *Re Percy Mining Company (ubi sup.)*, the late Master of the Rolls, Sir G. Jessel, and in *Pray v. Edie* (1 T. R. 267), Buller, J. held that "the principle is well established that a person instituting legal proceedings in this

country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs." I have always understood that to be the rule, and that there is no difference between an action upon a foreign judgment and an action for any other debt. The Divisional Court have set aside the order of Grantham, J., at chambers, and the learned judges in the Divisional Court seem to have done so upon different grounds. Mathew, J. seems to have proceeded upon the ground that there was no real substantial defence to the action; but the plea is a good answer to the action if it is proved. I think that we must have come to that conclusion when the appeal under Order XIV. came before us. The ground, therefore, upon which Mathew, J. proceeded was erroneous. The ground upon which Collins, J. proceeded was that there was a distinction between an action upon a foreign judgment and an action for an ordinary debt, and that in the former case there was a strong *prima facie* case in favour of the plaintiff. I think that there is no such distinction. The order of the Divisional Court was wrong, and must be reversed.

DAVEY, L.J.—I am of the same opinion. Counsel for the respondent has admitted that no authority can be found in the reports, or in text books, showing that the court has ever refused to order security for costs to be given by a foreign plaintiff suing in the courts of this country except in the well-known exceptional cases of a cross action, or where money belonging to the plaintiff is already in the defendant's hands. I adopt the language of the late Master of the Rolls as quoted by Lopes, L.J. As to the ground upon which Mathew, J. acted in the court below, I think that, upon an application against a foreign plaintiff for security for costs, the court cannot go into the merits at all. It would be very inconvenient to do so, and the rule upon which security for costs is ordered has nothing to do with the merits of the case. If, as was suggested, the defence discloses no defence at all, the plaintiff can apply to have it struck out as being frivolous, and disclosing no real defence to the action. As to the grounds upon which Collins, J. based his decision, I must confess that his judgment surprised me. There is no authority that I am aware of for saying that, where an order for security for costs is sought against a foreign plaintiff, there is any difference between an action on a foreign judgment and an action upon any other cause of action.

Appeal allowed.

Solicitors: for the appellant, *Tatham and Lousada*; for the respondent, *Nokes and Stammers*.

Tuesday, March 20.

(Before LOPES and DAVEY, L.JJ.)

JACOBS v. CRUSHA AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Person suing in formâ pauperis—Action dismissed for non-appearance at trial—Action restored on condition of paying costs—No solicitor acting for pauper—Notice of motion not signed by a solicitor—Order XVI., r. 29.

(a) Reported by J. H. WILLIAMS and HENRY LEGER, Esqs., Barristers-at-Law.

A person suing in formâ pauperis, to whom no solicitor has been assigned, and for whom no solicitor is acting, may serve a notice of motion which is not signed by a solicitor.

When an action by a person suing in formâ pauperis has been dismissed upon his non-appearance at the trial, he may be ordered to pay costs as a condition of having his action restored.

APPEAL of the plaintiff from an order of the Divisional Court (Cave and Wright, JJ.) dismissing his appeal from an order of Charles, J.

The plaintiff had been admitted to sue in this action in *formâ pauperis*, under Order XVI., rr. 22-31.

When the action came on for trial before Charles, J., the plaintiff did not appear, but the defendants did appear, and the action was dismissed.

The plaintiff, alleging that he had been prevented from appearing by illness, applied to Charles, J. to restore the action, and the learned judge made an order that the action should be restored upon payment of five pounds by the plaintiff to the defendants for costs.

The plaintiff had not applied to have counsel or solicitor assigned to him, and no counsel or solicitor had been assigned him, and no solicitor was acting for him.

The plaintiff appealed to the Divisional Court against the order of Charles, J., his notice of motion not being signed by a solicitor.

Order XVI. provides :

Rule 29. No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor.

Plaintiff in person.—The judge has no power to impose upon a plaintiff admitted to sue in *formâ pauperis*, a condition of payment of money, with which necessarily he is unable to comply.

R. Brown, contra, for three of the defendants.—A plaintiff suing in *formâ pauperis* is debarred from coming here without a solicitor. By Order XVI., r. 29, his notice of motion must be signed by his solicitor, and if he has not a solicitor assigned to him he must take the necessary steps under rule 26; he cannot serve a notice of motion until he has successfully applied under that rule for the assignment of a solicitor to assist him, to sign his notice of motion, and to be responsible for its propriety under rule 30; a responsibility which may extend to personal liability for costs :

Martinson v. Clowes, 33 W. R. 555.

When a pauper litigant comes to the court for an indulgence, he can be ordered to pay the costs; for instance, a pauper cannot by amendment strike out defendants except on payment of their costs (*Daniell's Chancery Practice*, 1, p. 90); and in *Carson v. Pickersgill* (52 L. T. Rep. N. S. 950; 14 Q. B. Div. 859) the power is impliedly supported. [CAVE, J.—The point was not before them.] Not expressly, but the case was decided on this very order, and the whole subject of the rules about paupers was discussed. A pauper must pay costs for scandal in an answer :

Rattray v. George, 16 Ves. 232.

It is misconduct on the part of the plaintiff not to have appeared, and the learned judge would

only indulge him on the terms imposed. [CAVE, J.—I see that in *Wilkinson v. Belsher* (2 Brown's Chan. Cas. 272), on which the statement in *Daniell* is based, the costs of appearing were incurred before the plaintiff was admitted to sue as a pauper.]

A. Powell for the other defendant.—This is not an order for the payment of costs, it is merely a condition without which the indulgence asked for would be rightly refused. The plaintiff has been guilty of misconduct both in not appearing at the trial and in the way in which he obtained admission to sue as a pauper, and he ought to be dispaupered. [WRIGHT, J.—We cannot dispauper him here, the practice is by motion.] The Court has the power. [CAVE, J.—It certainly would not exercise it without giving the plaintiff an opportunity to file affidavits.]

The plaintiff in reply.—Rule 29 of Order XVI. only applies to the case where a solicitor has been assigned, and where, as in my case, no solicitor has been assigned, it does not prevent a pauper litigant from signing his own notice of motion.

CAVE, J.—I am of opinion that the objection taken on behalf of the defendants in this case must prevail. Part 4 of Order XVI. relates to proceedings by or against paupers. Rule 23 provides that the person desirous of suing as a pauper shall first lay a case before counsel for his opinion whether or not he has reasonable grounds for proceeding; then by rule 24 there must be an affidavit of the party or his solicitor that the case is true; that has to be produced together with the case submitted to counsel, and his opinion thereon before the tribunal to which the application is made; the person admitted to sue or defend as a pauper is not liable to any fees by virtue of rule 25, and by rule 26 counsel and solicitor may if necessary be assigned to assist him, and they are not at liberty to refuse assistance unless for good reason shown. It may be that assistance is not necessary in all cases, but rule 29 provides that "No notice of motion shall be served or summons issued, and no petition shall be presented on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor." That is an express provision that the notice of motion in such a case as this must be signed not by the plaintiff but by his solicitor, and there is good reason why it should be so. Otherwise there might be no end to the notices of motion served by a pauper plaintiff, and though the court might dismiss them all, that would be but a slight consolation to the other party, who would have to pay his own costs. It is therefore only proper and fair that the court should require to be satisfied that no proceedings but such as are reasonably necessary should be taken, and rule 30 has provided that "It shall be the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no notice is served, or summons issued, or petition presented without good cause." That rule shows why a solicitor should be required; nor does it inflict any hardship upon the pauper, because, if he wants to serve a notice of motion, he can get a solicitor appointed under the provisions of rule 26. Here there is no solicitor, and the notice is signed by the plaintiff himself, which is contrary to the rule, and his motion must therefore be dismissed.

CT. OF APP.]

Re BAWDEN; BAWDEN v. CRESSWELL.

[CHAN. DIV.]

WRIGHT, J.—I am of the same opinion, and I have only two things to add; one is that, if Mr. Brown is correctly instructed, there might be an application made in chambers to dispauper the plaintiff, and the other is that the facts ought to be laid before the public prosecutor.

Motion dismissed.

The plaintiff appealed.

The plaintiff, in person, contended that he could himself give a notice of motion on appeal to the Divisional Court; and that, as he was suing *in formâ pauperis*, Charles, J. had no power to order him to pay costs as a condition of allowing the action to be restored.

Reginald Brown for the respondents.—There is a case, which inadvertently was not brought to the attention of the Divisional Court, which says that a pauper can be heard in person:

Tucker v. Collinson, 54 L. T. Rep. N. S. 263; 16 Q. B. Div. 562.

That case, however, only decided that a pauper could argue his own case, like any other litigant, and it does not appear that the pauper in that case had not a solicitor. It does not decide that a pauper can give a notice of motion not signed by a solicitor. The order of Charles, J., imposing the payment of costs by the plaintiff as a condition of having his action restored, was rightly made. When a pauper applies for indulgence terms can be imposed upon him as upon any other litigant:

Foster v. The Bank of England, 2 Dowl. & L. 790; *Carson v. Pickersgill*, 52 L. T. Rep. N. S. 950; 14 Q. B. Div. 859.

The plaintiff replied.

LOPES, L.J.—This is an appeal by the plaintiff from the decision of the Divisional Court dismissing his appeal against an order of Charles, J. The plaintiff was permitted to sue *in formâ pauperis*, but did not have counsel or solicitor assigned to him. The action came on to be tried before Charles, J., but the plaintiff did not appear, and, the defendants being present, the action was dismissed. The plaintiff said that he was prevented by illness from appearing at the trial, and applied to Charles, J. to have the case restored. The learned judge allowed the case to be restored upon payment by the plaintiff of five pounds as costs to the defendants. The plaintiff did not pay that sum, but appealed to the Divisional Court, and asked to have the case restored without the imposition of any terms. The Divisional Court refused that application, and the plaintiff has appealed to this court. The ground of the decision of the Divisional Court was that the plaintiff could not be heard by reason of the provisions of Order XVI., r. 29, which says that "No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor." The plaintiff had served no notice of motion signed by a solicitor, and the Divisional Court thought that he was therefore precluded from making his application. The case of *Tucker v. Collinson* (*ubi sup.*) was not cited to the Divisional Court. The effect of the decision in that case is that rule 29 only applies when a solicitor has been assigned to a person suing *in formâ pauperis*, and does not apply when no solicitor has been so assigned.

In that case Lord Esher, M.R. said that rule 29 "seems only to apply where a solicitor has been assigned under rule 28," and the judgments are to the effect which I have stated. Our opinion is confirmed by the last words of the rule, which are "unless it is signed by his solicitor." I think, therefore, that the Divisional Court was wrong in holding that rule 29 precluded the plaintiff from appealing to that court, and I think that they would not have so decided if the case of *Tucker v. Collinson* (*ubi sup.*) had been brought to their attention. It is said that the learned judge had no jurisdiction to make the order that the plaintiff, suing *in formâ pauperis*, should pay five pounds costs as a condition of having his case restored. The authorities dispose of that contention. It is only necessary to refer to one case in which an application by a pauper for leave to amend was granted upon the terms of his paying certain costs: *Foster v. Bank of England* (*ubi sup.*). The principle of that case is that where a person suing *in formâ pauperis* comes to the court to ask for an indulgence, there is jurisdiction to impose terms upon him as the price of such indulgence. There are other cases to the same effect. That rule is perfectly reasonable, and is consonant with good sense. If a pauper litigant is in default he must pay the penalty, and reimburse the other side the extra costs which he has caused to them. Upon that ground I think that Charles, J. had jurisdiction to make the order, and I think that it would be wrong for us to interfere with that order. The appeal, therefore, must be dismissed.

DAVEY, L.J. concurred.

Appeal dismissed.

Solicitors for the respondent, *Avery and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 12 and 19, 1893.

(Before KEKEWICH, J.)

Re BAWDEN; BAWDEN v. CRESSWELL.
NATIONAL PROVINCIAL BANK OF ENGLAND v.
CRESSWELL. (a)

Will—Construction—Legacy—Residue—"Not otherwise disposed of"—Real estate—Mixed fund—Debts—Insufficiency of personal estate.

This was a summons taken out by a legatee to vary the chief clerk's certificate, who had found that the pecuniary legacies given by the will of the testator, were not charged on his residuary real estate. The testator after certain specific gifts bequeathed several specific legacies, including one to the applicant, and continued: "I give, devise, and bequeath all the real and personal estate to which at my death I shall be beneficially entitled, or of which at my death I shall have any general power to dispose beneficially by my will, and not otherwise disposed of, unto C. for his own use and benefit absolutely." The personal estate not specifically bequeathed, was insufficient for payment of debts.

Held, that the legatee was entitled to be paid out of the residuary real estate.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Held also, that, as between the pecuniary legatees and the residuary devisees, the pecuniary legatees were entitled to their legacies out of the residuary real estate, without any liability to contribute to the payment of debts; that the residuary devisees were bound to contribute rateably with specific legatees and devisees; and in ascertaining the proportion of his contribution, the value of the residuary real estate must be measured, not by the value less the legacies to be paid thereout, but by its value independently of the legacies.

THIS was a summons taken out by Cecilia Bryan, wife of R. Bryan, a legatee under the will of Mr. Bawden, to vary the chief clerk's certificate. The chief clerk had found that the pecuniary legacies, by the will of the testator, were not charged on his residuary real estate. The testator, who died in 1891, by his will dated the 25th Feb. 1886, after making certain specific gifts, bequeathed several specific legacies including one to the applicant, and gave the residue of his real and personal estate, in the following words:

And I give, devise, and bequeath all the real and personal estate to which at my death I shall be beneficially entitled, or of which at my death I shall have any general power to dispose beneficially by will, and not otherwise disposed of unto, S. B. Cresswell for his own use and benefit absolutely.

And he appointed S. B. Cresswell executor of his will.

The personal estate not specifically bequeathed was insufficient for payment of debts.

Renshaw, Q.C. and Whitaker for the plaintiff.—The legacies must be paid out of the mixed fund, because the words "not otherwise disposed of" mean residue:

Greville v. Browne, 7 H. L. Cas. 689, 697;
Hassel v. Hassel, 2 Dickens, 527;
Mirehouse v. Scaife, 2 My. & Cr. 695, 707;
Smith v. Butler, 1 Jones & La T. 692;
Green v. Dunn, 20 Beav. 6;
Peacock v. Peacock, 12 L. T. Rep. N. S. 299; 13 W. R. 516.

Upjohn for Cresswell, the residuary legatee.—I submit that the chief clerk was right. The testator does not use the word "residue." This case does not fall within the rule laid down in

Gainsford v. Dunn, 30 L. T. Rep. N. S. 283; 17 Eq. 405; and
Elliott v. Dearsley, 44 L. T. Rep. N. S. 198; 16 Ch. Div. 322.

KEKEWICH, J.—In order to ascertain the testator's meaning, using ordinary language, one has to be guided by two rules. One is of the first importance in the construction of a will, and the other goes side by side with it. The first is that expressed by many judges, notably by Lord Wensleydale in *Greville v. Browne* (*ubi sup.*), and again recently by Lindley, L.J., in *Re Morgan*; *Morgan v. Morgan* (69 L. T. Rep. N. S. 407; (1893), 3 Ch. 222), where he says, at the top of page 228 of (1893) 3 Ch.: "I do not see why, if we can tell what a man intends and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all

wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it." But if a series of decisions accepted by the profession establish certain words as meaning certain things, you give effect to that, and those words have that meaning; you are only construing according to the dictionary, namely the decided cases. Lord Wensleydale says in *Greville v. Browne*, at p. 703 of 7 H. L. Cas.: "If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed." It is unnecessary to inquire what his language might have meant, because the language he has used has been interpreted by judicial decision. I find in *Greville v. Browne* a clear and distinct rule which has been the basis of decision and advice ever since 1859. There Lord Campbell says, at page 697 of 7 H. L. Cas.: "If there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift." A general rule ought not to be frittered away by trifling distinctions. It means, if he has in effect given the rest or residue in such way that he intended the whole to form one mass, and then the legacies come out of it. Passages have been cited from the judgments of two eminent judges to show that words equivalent to residue ought to be used. In *Gainsford v. Dunn*, Jessel, M.R. says, at page 408 of 17 Eq., referring to *Greville v. Browne*, and similar cases: "Those cases were cases of a gift of residue of real and personal estate; but the result of the cases is this: that where you find a legacy followed by the gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund." I do not understand Jessel, M.R. to say you must have the word residue. I think, even if he meant you must find something equivalent to residue, that is too wide. In *Elliott v. Dearsley*, James, L.J. says at page 329 of 16 Ch. Div.: "Here the legacies are no doubt charged on the real estate by force of the word residue." I think it is wresting his language to an irrational result to say you must have the word residue. I should have thought the gift sufficient without the further words, and I think the legatee could only take what was left after payment of the legacies, and this is in thorough accord with *Greville v. Browne*, but I need not go so far. In *Hassel v. Hassel*, the words used are substantially the same as in the present case, and I cannot distinguish between them. The cases of *Mirehouse v. Scaife*, and *Smith v. Butler*, have dealt with this question, and, in both, *Hassel v. Hassel* was referred to, and the Lord Chancellors who respectively decided those cases [approve of *Hassel v. Hassel*, and that carries me the whole way. In my opinion the legatee is entitled to be paid out of the real estate.

CHAN. DIV.]

Re BAWDEN; BAWDEN v. CRESSWELL.

[CHAN. DIV.]

Dec. 19.—A further point was argued—namely, whether as between the pecuniary legatees, and the residuary devisee, the pecuniary legatees ought to bear a proportion of the contribution of the residuary real estate towards the payment of debts.

Renshaw, Q. C. and Whitaker for the pecuniary legatees.—For the purpose of measuring the contribution to be made by the residuary devisee, the residuary real estate ought to be valued as if it had not been charged with the legacies, and the amount so ascertained borne by the residuary devisee, the pecuniary legatees contributing nothing:

Raikes v. Boulton, 29 Beav. 41;

Re Saunders Davies; *Saunders Davies v. Saunders Davies*, 56 L. T. Rep. N. S. 153; 34 Ch. Div. 482.

Upjohn for the residuary devisee.—This case is different from the cases referred to by Mr. Renshaw. The pecuniary legatees ought to bear their proportion of the contribution:

Long v. Short, 1 P. Wms. 403;

Jackson v. Hamilton, 3 Jo. & La T. 702; 9 Ir. Eq. Rep. 430, 650.

[KEKEWICH, J. referred to Williams on Executors (9th edit.) p. 1565.]

KEKEWICH, J.—According to the construction which I have placed upon the will, these legacies are charged upon the residuary real estate, in aid of the personal estate, which in course of administration is the first fund for payment. The result will be that the residuary devisee if the personal estate is insufficient, will take not the residuary real estate clear, but charged with the amount of the legacies. The residuary devisee says, at any rate with some plausibility, that he does not get what the testator gave him, but something less, and his contribution to the payment of debts must be measured not by what the value of the estate would be independently of the charges, but by the clear bounty which falls to him, that is the residuary real estate less the charges. That is the principle of *Long v. Short*. Mr. Upjohn cited an Irish case of *Jackson v. Hamilton*, in which Lord Chancellor Brady followed the principle of *Long v. Short*, and Lord Chancellor Sugden also appears on a previous hearing of the same case, to have approved of *Long v. Short*. There is much to be said in favour of that view of the principle and of the authorities, but I am placed in this difficulty, that some six years ago this very point was considered by North, J., and dealt with by him in a reserved judgment, in which he discussed all the cases at length, and deliberately refused to apply *Long v. Short* to such a case as I have here. To my mind it would be most unsatisfactory for me to depart in any way from North, J.'s decision; it is now nearly seven years old, was a considered judgment, and, as far as I am aware, has not been departed from by any other judge, or treated as an unsatisfactory authority. During the argument I referred to the valuable work of Williams, J. on Executors, who at p. 1565 of the 9th edit. refers to *Re Saunders Davies*; *Saunders Davies v. Saunders Davies*, and treats it as inconsistent with *Long v. Short*. Supposing it is, ought I now to go back to the earlier decisions, or rather accept the deliberate judgment of North, J.? It seems to me, according to the principle which governs the decisions of judges, and the great

importance of making the law certain, I ought to follow the decision of North, J. rather than apply the earlier cases, and I do so the more readily because North, J. followed *Raikes v. Boulton* which was decided by Lord Romilly in 1860. Judgment was there given without any comment by the judge on the point. The case is classed with *Long v. Short* in Williams, J.'s note, but counsel has not called my attention to any criticism of the Master of the Rolls' decision, and my own notes to the case in Beavan's Reports do not indicate that it has been cited in any other case, except the one before North, J. Therefore I have nothing to help me. In *Raikes v. Boulton* it was really only a way of creating a portion by a trust term, and the Master of the Rolls declared the 10,000*l.* to be charged by the will so as to be raised free of costs and deductions, and that the devised real estate and specific legacies ought to contribute rateably towards the payment of the testator's debts. That declaration embodies the principle on which the court proceeded, and the manner in which it was to be worked out. I should conclude from it that the portioners ought not to contribute anything, but I have sent for the order (Reg. Lib. 1860, B. Fol. 1554), from which I find that this was so, and that the 10,000*l.* was not to contribute, but the devisee was to contribute according to the value of the whole estate as if it had not been charged with the 10,000*l.* by the will. North, J. in the case before him took precisely the same view of that decision. Then Mr. Upjohn, in his able argument, says that there is all the difference in the world between portioners and pecuniary legatees, and as against the latter he has a stronger case than as against portioners. His explanation does not satisfy my mind of the distinction. I cannot see any substantial distinction. In *Raikes v. Boulton* the property was devised to the eldest son. In *Re Saunders Davies* it was given in a different way in settlement, but the result was substantially the same. Now, according to the construction which I have placed upon the will, what have we here? A bequest of pecuniary legacies, which are therefore payable out of the personal estate with a charge of these legacies on the real estate in aid of the personal estate. What difference can it make whether they are charged on the real estate in the first instance, or charged in aid of the personal estate? Again what difference can it make whether they are payable in the first instance out of the personal estate? The effect of my judgment on the previous point, is to put this will on the same footing as a will devising the real estate to a trustee in trust to pay thereout such sums, if any, as are necessary to pay the legacies, and subject thereto in trust for the devisee. Whether the real estate is given through a trustee, or whether a term is given, or whether the legacies are to be raised by legal uses, seems to me to be quite immaterial. There is in effect a gift of the real estate subject to the legacies. They are charged on the real estate. I cannot see any substantial distinction between this case and the cases before North, J. and Lord Romilly, and, therefore, I must decline to go on to consider the interesting question, whether, if those two cases were out of the way, I should follow the decision in *Long v. Short*. I must hold on the authority of those two cases that the pecuniary legacies being charged on the real estate, the

CHAN. DIV.]

Re HICKS; *Ex parte* NORTH-EASTERN RAILWAY COMPANY.

[CHAN. DIV.]

legatees take their legacies out of the real estate without any liability to contribute to the debts, and that the residuary devisee takes subject to the charges, and that, notwithstanding that, he must contribute to the payment of the debts rateably with specific legatees and devisees, and in ascertaining his proportion, the value must be measured not by the value less the legacies to be paid thereout, but by its value independently of those legacies.

Solicitors: *W. W. Comins*, for *H. N. Bryan, Hindley*, Lancaster; *Reed and Reed*; *Sisney and Sisney*.

Saturday, March 17.

(Before KEKEWICH, J.)

Re HICKS; *Ex parte* NORTH-EASTERN RAILWAY COMPANY. (a)

Practice—Will—Construction—Payment out of court—Petition—Summons—Order LV., r. 2, sub-sects. 1 and 18.

This was a petition by the applicants, who claimed to be entitled under the will of W. H. deceased to one-fifth of a sum of 2437l. 1s. 9d. Consols in court, being the purchase money of freehold land belonging to the testator, and they asked for payment out to them. The title of the applicants depended on the proof of their identity and age, and of the deaths of the testator's widow, and of the applicants' father. There was also a question upon the construction of the will. The application was first made by summons in chambers, but Kekewich, J. held that he had not jurisdiction under Order LV., r. 2, sub-sect. 1, to deal with the matter by summons in chambers, and a petition was then presented.

Held, that Order LV., r. 2, sub-sect. 1, did not contemplate such a case as the present when there was a question of construction involved, nor was it a case in which the matter could be heard on summons under the discretion of the judge given by sub-sect. 18 of the same rule, and that therefore a petition was necessary.

THIS was a petition for the payment or transfer to the petitioners of one-fifth of a sum of 2437l. 1s. 9d. Consols, and 16l. 5s. 4d. cash representing the proceeds of land taken by a railway company in 1876 under the provisions of their special Act, and of the Lands Clauses Consolidation Act 1845. The title of the petitioners was derived under the will of William Hicks, who died in 1865.

By his will, dated the 12th April 1865, William Hicks appointed his sons, William Barnes Hicks and Isaac Hicks, executors and trustees thereof, and bequeathed his real and personal estate upon trust to permit his wife to have the use and enjoyment of one of his leasehold houses, as therein mentioned, and to get in and convert such part of his personal estate as should not consist of chattels real, and to invest the same, and out of the annual proceeds to arise therefrom, and out of the rents and profits of his real and leasehold hereditaments to keep his said real and leasehold hereditaments in good tenantable repair, and insured against loss by fire, and to pay the ground rents and other outgoings affecting the same, and to pay thereout an annuity of 60l. to his said wife during her life as therein mentioned,

and subject thereto, to stand possessed as to one undivided fifth part thereof, upon the trusts following:

For my son William Barnes Hicks during his life, and after his death the same one-fifth share and the annual income thereof, shall be in trust for such of the sons of the said William Barnes Hicks as shall be then living, and the issue male then living of such sons of the said William Barnes Hicks as shall be then dead, who either before or after the determination of the previous trusts shall attain the age of twenty-one years, or if more than one equally.

And after other provisions the will proceeded as follows:

And as to the other fifth parts or shares of the said real and personal estate upon such trusts, and with such powers, as to one such share each in favour of each of my sons, the said Isaac Hicks, Michael Hicks, and Thomas Hicks and his sons and more remote male issue, as shall correspond with the preceding trusts and powers in favour of the said William Barnes Hicks, and his sons and more remote male issue.

Michael Hicks died in 1873, and his two sons Isaac Hicks, and William Hicks, and Daniel Huntly, a mortgagee of the share of Isaac Hicks, applied for payment out to them of one-fifth of the fund in court. The testator's widow was dead. The application was first made by originating summons, and came before Kekewich, J. in Chambers, but was dismissed on the ground that the court had no jurisdiction to make the order upon summons, notwithstanding the submission of the parties. This petition was then presented.

Gatey for the petitioners.

W. Baker and Lavington for the respondents,

KEKEWICH, J.—The title of the petitioners depends upon the construction of the will. That construction may be perfectly plain to any judge, counsel, or chief clerk, but it is one which requires to be worked out by a lawyer. It appears to me that Order LV., r. 2 (1), is not applicable to a case where there is a question of construction, though that question may be an easy one. The rule appears rather to contemplate cases such as that of a gift to the eldest son of A. or to A., if he survives B. Nor is the matter one which can be brought within the general clause (18), which appears to refer to classes of business other than those previously mentioned, and not to enable the judge to direct that any particular matter shall be disposed of at chambers. These are my own views, but I was apprised that there is some want of uniformity of procedure, and I therefore thought it right to reserve consideration of the matter, and consult my brother judges. I did so with the result that I find there is a want of uniformity. If we were all agreed, or if my colleagues had agreed in any one view, I should certainly adopt it. But I found so much difference of opinion, that I came to the conclusion that my only proper course was to follow my own view. That I have done and must do again. If cases of this kind are to be brought before the court on originating summons, a new rule for that purpose must in my opinion be framed by the Rule Committee. I make the order as prayed.

Solicitors: J. E. and H. Scott, for Errington, Huntly, and Foster, Sunderland; Williamson, Hill, and Co., for A. K. Butterworth, York.

March 14 and 15.

(Before ROMER, J.)

SIMS v. LANDRAY. (a)

Vendor and purchaser—Specific performance—Memorandum drawn by auctioneer's clerk—Agency—Statute of Frauds (29 Car. 2, c. 3), s. 4.

In a sale by public auction, the auctioneer is the agent, not only of the vendors, but also of the purchaser, to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum of the particulars of the contract sufficient to satisfy the Statute of Frauds.

Where, at the conclusion of a sale, an auctioneer's clerk was authorised by a purchaser to enter his full name and address in a printed form of memorandum of sale, but the purchaser did not himself sign it, and afterwards repudiated the contract:

Held, that there was a sufficient signature by the authorised agent of the purchaser to satisfy the requirements of the Statute of Frauds, and specific performance of the contract must be directed.

On the 8th Aug. 1893 the plaintiffs, Frederick Sims, Bessie Sims, and others, caused to be put up for sale by auction by Messrs. Fowler and Son, at the Mart, Tokenhouse-yard, in accordance with certain printed particulars and conditions of sale, a piece of freehold building land in King's-road, Richmond, Surrey. This piece of land was described in the particulars and on a plan as Lot 2. There were only two lots to be sold at the auction. The defendant, Joseph Gilbert Landray, was duly declared the purchaser of Lot 2, at the price of 1850*l.* Directly it was knocked down to him, the auctioneer told his clerk to go and get the name and address of the defendant. At the termination of the auction the clerk filled in the printed form of the memorandum of sale with the full name and address of the defendant, he standing by at the desk the whole time, and looking over. This memorandum was as follows:

The Mart, London, E.C., Aug. 8, 1893.—Memorandum.—I, Joseph Gilbert Landray, of 6, Cedars-road, Beckenham, Kent, do hereby acknowledge that, at the sale by auction this day, I was the highest bidder for, and was declared the purchaser (subject to the foregoing conditions of sale) of the property described in the within particulars (as lot two) for the sum of 1850*l.*, and that I have paid the sum of 185*l.* by way of deposit, and in part payment of the purchase money, to Messrs. Fowler and Son; and I hereby agree to pay the remainder of the said purchase money and complete the said purchase according to the aforesaid condition.—Purchase money, 1850*l.*; deposit paid, 185*l.*; balance, 1650*l.*—As agents for the vendors Frederick Sims, Bessie Sims, George Sims, Alice Sims, and Emma Sims, we ratify this sale, and as auctioneers acknowledge the receipt of the said deposit of 185*l.*

The defendant did not at the time sign this memorandum himself, or pay the deposit. The defendant subsequently declined to sign the contract, or complete the purchase.

The plaintiffs brought this action claiming a decree for the specific performance of the contract. The defendant pleaded the Statute of Frauds.

Haldane, Q.C. and William Barnard appeared for the plaintiffs.—We submit that the memorandum is sufficient under the Statute of Frauds, although the purchaser's own signature does not

appear. The name of the purchaser was put in with his approval by the auctioneer's clerk. It need not be signed by the purchaser. That has been decided by authority. In the case of *Knight v. Crockford* (1 Esp. 189) there was a memorandum beginning in a similar manner in the handwriting of the defendant, but signed only by the plaintiff in the action; and that was held a sufficient signing by the defendant within the statute. It is clearly settled that an auctioneer is the lawful agent to sign for the purchaser:

Emmerson v. Heelis, 2 Taunt. 38.

By putting down the biddings, the auctioneer was there held to become the lawfully authorised agent for the purchaser, to sign the contract for him. So also the recital in the will of a testator that he had promised to guarantee a certain debt has been held to amount to a sufficient note or memorandum of the agreement within the Statute of Frauds:

Re Hoyle; Hoyle v. Hoyle, 67 L. T. Rep. N. 8. 674: (1893) 1 Ch. Div. 84.

The auctioneer's clerk was authorised by the purchaser to enter his name in the memorandum, and the purchaser is bound by it.

Neville, Q.C. and F. Stallard for the defendant.—No case has ever gone so far as to say that an auctioneer's clerk has authority to bind a purchaser. An auctioneer has no doubt authority to sign on behalf of the vendor, but not for the purchaser. Why should the purchaser even be called upon to sign at all, if the auctioneer can do it for him? In the case referred to of *Emmerson v. Heelis* (2 Taunt. 38) it was the course of business there to enter the bids in a book, and no contract was afterwards to be signed. It is totally different here. There was no book, and a contract was to be signed afterwards. What is required is a signature by the purchaser or his agent. Here the auctioneer's clerk did not sign or purport to sign within the alleged authority, even assuming that he had that authority. [ROMER, J. referred to Fry on Specific Performance, 2nd edit., ss. 511, 513.] All that the auctioneer's clerk did was to prepare a document for the purchaser's signature, and the purchaser never signed it. [ROMER, J.—It is rather startling, I agree, but the cases go to the extent contended for; the auctioneer's clerk had authority to make the memorandum by virtue of his office.] We submit that the authorities cited do not cover this case.

ROMER, J.—The only point is upon the Statute of Frauds. It is too late nowadays for the defendant to raise the point that he has raised in this action. It is settled now, and settled beyond all possibility of being successfully re-opened, that where there is a sale by public auction, and property is knocked down by the auctioneer to the highest bidder, the auctioneer is the agent not only of the vendor, but also of the purchaser, the highest bidder, and is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name of and on behalf of the purchaser, a memorandum of the particulars of the contract sufficient to satisfy the provisions of the Statute of Frauds. That is what the auctioneer, or his clerk, did in this case. Undoubtedly, the defendant here was the purchaser of the property. That is proved, and the only question is whether a memorandum has been signed sufficient to answer the

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

statute. Clearly there is a memorandum within the statute in this case. In it the name of the purchaser is stated, and what the price was. The only question is, was that signed by the purchaser or his agent? It was not signed by the purchaser, but it was signed by his agent, as has been settled by authority. Nothing turns here upon the question that the memorandum was written by the auctioneer's clerk, because that also has been settled. This point is dealt with in Fry, L.J.'s book on Specific Performance, 2nd edit., s. 513; 3rd edit., s. 529. And it is clear that the auctioneer's clerk had authority from the purchaser here to make such a memorandum of sale as the auctioneer's clerk did in fact make. The defendant was standing by when this memorandum was made out by the clerk, and clearly authorised him to make the contract. Under these circumstances, the defence in the action fails, and the plaintiff is entitled to have a decree for the specific performance of the contract.

Solicitors for the plaintiffs, *Trollope and Winckworth*, for Messrs. *Smith and Burrell*, Richmond.
Solicitor for the defendant, *Archibald Rogers*.

QUEEN'S BENCH DIVISION.

Friday, Feb. 2.

(Before MATHEW and COLLINS, JJ.)

CLEMENTS v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

Infant—Contract for or against his benefit—Rules of an insurance society—Employers' Liability Act 1880 (43 & 44 Vict. c. 42).

The plaintiff, an employé in the defendant company, had, when an infant, signed an agreement contracting himself out of the Employers' Liability Act 1880. By this agreement or contract the plaintiff became a member of the defendant company's insurance society under the following terms: The employers agreed to contribute to the funds of the society a sum equivalent to five-sixths of the premiums from time to time payable by the employé under the rules of the society. In consideration thereof the employé agreed to accept such contribution, and any advantages to which he might be entitled under the rules of the society, in satisfaction of and in lieu of all claims which he (or his representatives in case of death) might have under the Act of 1880 or any amending Acts. On the back of this form of agreement were the rules of the society, and also a declaration, signed by the employé, agreeing to be bound. By the rules, pecuniary relief in case of disablement arising from accident while in the discharge of duty was to be provided, also, if a committee of the society considered an injury had been caused by the gross negligence or wilful act of the employé, they might disallow, and if the member refused a medical man to see him he was to forfeit, the benefits of the insurance society.

Held, that the contract, being to secure the infant employment, and in which there was nothing to prejudice his interests, was for the benefit of the infant, and bound him.

THIS was an appeal from the decision of the County Court judge sitting at the Bloomsbury County Court.

The case raised the question whether an infant can contract himself out of the Employers' Liability Act 1880, so as to preclude him from enforcing the liability of his employers under the Employers' Liability Act 1880. The plaintiff was a young man about the age of twenty, who was injured while in the employ of the defendant railway company. The plaintiff brought his action against the defendant company, under the Employers' Liability Act, when the objection was taken that the contract he had entered into with the defendant company had therefore precluded him from bringing his action under the Act.

The agreement by which it was said that the plaintiff had contracted himself out of the Employers' Liability Act, and which had been signed by the plaintiff in entering the defendant company's service, was on a printed form, and was as follows:—

Form of agreement to be signed by members under Scale A, and by the person authorised to sign the same on behalf of the company employing them:—Memorandum of Agreement.—It is hereby mutually agreed between the London and North-Western Railway Company and William James Clements, of Brady-street, Whitechapel, who has requested to be admitted a member of the London and North-Western Railway Insurance Society, under Scale A, as follows:—

The employers agree to contribute to the funds of the society a sum equivalent to five-sixths of the premiums from time to time payable by the employé under the rules of the society, such contribution to be paid to the secretary of the society. In consideration thereof the employé agrees to accept such contribution, and any advantages to which he may be entitled under the rules of the society, in satisfaction and in lieu of any claims which he (or his representative in case of death) might or otherwise would have under the Employers' Liability Act 1880, or any Acts amending it.

On the back of this form were the particulars of Scale A and the rules of the London and North-Western Railway Company Insurance Society, showing the rate of weekly contributions, &c., and there was a declaration signed by the employé and agreeing to be bound.

The effect of the insurance was that, the payments being 2d. per week, in case of disablement the employé would receive 14s. per week as long as he was disabled, and when the society's medical man certified that the employé was only partially disabled he would receive a less allowance, and when no longer disabled the allowance would cease.

The following were some of the rules of the society referred to in the case:—

Rule 3. The object of this society is to provide pecuniary relief in cases of temporary or permanent disablement arising from accident occurring while in the discharge of duty, and also in cases of death.

Rule 31. If three days are allowed to elapse before a claim is made by or on behalf of an injured person, he shall be liable to forfeit all benefit up to the date upon which the claim shall be recognised in any way by the committee in respect of any accident which, through negligence, was not reported to the secretary within one calendar month from the date of the occurrence of such accident.

Rule 32. Subject to the committee's decision, no

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

allowance shall be granted to any member on account of any accident from the effects of which he shall have recovered, or resumed work before the date on which the application for the allowance shall have been forwarded to the secretary; and all applications for allowances must be made upon the form prescribed by the society, and must be certified by the station-master, goods agent, or foreman, and also by the head of the department in which such member is employed. A medical certificate to be furnished at least once a month, or any time the committee or secretary may require.

Rule 33. If, in the opinion of the committee, the accident is caused wilfully, or by gross negligence on the part of the insured, the insurance hereby effected may, as respects any claim arising out of the action, be disallowed.

Rule 36. In every case of a person upon the accident register being known to have been out of his house or lodgings after 9 o'clock p.m. between the 1st April and the 30th September, and after 7 o'clock p.m. between the 1st Oct. and the 31st March, the case will be discussed by the committee, and unless a satisfactory explanation can be given, a fine not exceeding one week's allowance may be inflicted; also in the case of any such person being intoxicated the allowance will be liable to forfeiture at the discretion of the committee.

Rule 37. Any member who is guilty of criminal misconduct shall forfeit all claim to the benefits of the society, either in the shape of allowances or returned half premiums.

From the date of the accident up to the time of the action the plaintiff had continued to receive an allowance from the fund.

The County Court judge gave judgment in favour of the defendant railway company on the ground that the contract entered into was for the benefit of the plaintiff.

The plaintiff appealed from the County Court judge's decision.

Minton-Senhouse for the plaintiff.—The agreement entered into with the defendant company by the plaintiff was not a contract for his benefit, and therefore comes under the well-known rule of law that contracts made with infants, if prejudicial to the infant, are void. The principle, that at common law no contracts were binding on infants except for necessities, has always been that infants may take advantage of contracts for their benefit, but may repudiate them if they are not for their benefit. Later equity held contracts of labour enabling infants to earn a living and by apprenticeship. Some of the provisions of the rules of this society were not for the benefit of the plaintiff, but the contrary. They imposed restrictions, and rendered the plaintiff subject to fines and penalties. This is specially so as regards rules 31, 32, 33, 36, and 37:

Comyn's Digest, vol. 3, pp. 564, 565;

Reg. v. Lord, 12 Q. B. 757;

Martin v. Gale, 36 L. T. Rep. N. S. 357; 4 Ch. Div. 428; 46 L. J. 84, Ch.;

Corn and another (apps.) v. Matthews and another (resps.) (Ct. of App.), 68 L. T. Rep. N. S. 480; (1893) 1 Q. B. 310;

De Francesco v. Barnum, 62 L. T. Rep. N. S. 40; 63 L. T. Rep. N. S. 433, 514; 45 Ch. Div. 430;

Leslie and others (apps.) v. Fitzpatrick (resp.), 37 L. T. Rep. N. S. 461; 3 Q. B. Div. 229; 47 L. J. 22, M. C.;

Menking (app.) v. Morris (resp.), 12 Q. B. Div. 352.

Shearman for the defendant company.—You have to look at the contract at the time the plain-

tiff entered into it. It was a contract obviously for the benefit of the infant, being a contract of employment; the necessary condition of the contract of employment was that plaintiff should enter into this agreement and be bound by the rules of this insurance society. The defendant company does not employ any persons who do not enter into these agreements. These agreements were obviously for the benefit of the *employees*, and, not being prejudicial, are binding on an infant. He dealt with each of the rules mentioned, and cited the following case:

Cooper v. Simmons, 7 H. & N. 707.

Minton-Senhouse in reply.—The contract of insurance was quite distinct from the contract of employment; it was entered into subsequently to the contract of employment, and the benefit of the insurance was lost on plaintiff leaving the respondent company's employment.

MATHEW, J.—This appeal must be dismissed. This is an action brought by an infant, under the Employers' Liability Act 1880, against his employers, the London and North-Western Railway Company. The defence set up is, that the plaintiff has contracted himself out of the Employers' Liability Act. The plaintiff, in answer to this, says that he was an infant at the time of entering into this contract, and that this contract is so prejudicial to his interest as to be void. It appears that it is made a condition of the company's employment of the plaintiff that he should become a member of a mutual insurance society, by which he would become entitled to compensation in case of disablement, even if not covered by the Employers' Liability Act, and in consideration of the plaintiff entering into the agreement the defendant company were to contribute largely to the funds of the insurance association. Now it was a contract of employment which is *prima facie* for the benefit of the infant—a contract which secured him employment, and was clearly for his benefit. The defendant company are entitled to say that there is nothing in the agreement which would prejudice the plaintiff's interests, and that this agreement is for his benefit. The law on the subject has been very clearly stated by the Master of the Rolls in his judgment in the case of *Corn v. Matthews*. That was a case of apprenticeship. The Master of the Rolls said (68 L. T. Rep. N. S. 482): "The rule laid down by Fry, L.J. is this, that the mere fact that some conditions are in favour of the infant apprentice, but some are against him, does not, upon the ground that some stipulations are against the infant, make the contract void. It would be impossible to frame any deed between master and servant in which there might not be some provisions against the servant. If we find any stipulation in the deed which makes the whole unfair, then it would be void. But the stipulation must be so unfair to render it void against the infant." Those observations equally apply to a contract of service and employment, with an infant, and the law was laid down in the same way by Fry, L.J. in the case of *Francesco v. Barnum (ubi sup.)*. I concur in these statements of the law. I can conceive a case where there may be in some event a small penalty or a forfeiture of some small interest, but in which the contract, nevertheless, on the whole is fair, and such stipulations, therefore, would not make the contract void. The cases referred to were

Q.B. Div.]

THE LORD ADVOCATE v. BOGIE AND OTHERS.

[H. OF L.]

cases very different from this case. The question in this case is, whether there are in the regulations of the mutual insurance society incorporated in this contract of service any stipulations so unfair as to make the contract void? *Prima facie* this contract is beneficial to the infant because it is for his employment and his protection from the consequences of injuries caused by accidents, against which the law might not protect him. Is there anything in the conditions of the insurance which renders the whole of the contract void? I think not. Reference has been made by the learned counsel for the plaintiff to certain rules which, it was said, would be prejudicial to the assured member. Rule 31 says: [His Lordship read it.] Is there anything unreasonable in that rule? Surely not. The object plainly is, that the insurance society shall know when a claim is about to be made; and if they find that the party hangs back and makes no claim for a month, then he is not to be allowed his claim. That is perfectly reasonable; it only secures fair opportunities for inquiries and investigations, "so that," as the next rule (32) provides, "no allowance shall be granted to any member on account of any accident from the effect of which he shall have recovered or returned to work before the date on which the application shall have been sent." That again is quite reasonable. Then as to rule 34, which says that, "If in the opinion of the committee the accident is caused wilfully or by gross negligence on the part of the insured, the insurance thereby effected may, as respects any claim arising out of that accident, be disallowed." That surely is perfectly reasonable, and does not go much, if at all, beyond the law as to contributory negligence. Then as to rule 36, which says: [Reads it.] That is reasonable, the object being to deter persons insured from any conduct or course of living which may protract their recovery. So as to rule 37, there is nothing unreasonable in that—a rule against criminal misconduct. And these are not instances of forfeiture properly so called—forfeiture within the rule of law which protects infants from forfeiture—for these are not forfeitures of any vested right already acquired, but of future benefits accruing from the mutual insurance. These are the rules of the insurance which have been dwelt upon as unreasonable, and as vitiating the contract; but I am clearly of opinion that the contention fails. In my opinion the conditions were not unreasonable, and the contract was beneficial to the infant. I think, therefore, that the judgment of the County Court judge was right, and that this appeal must be dismissed.

COLLINS, J. concurred.

Appeal dismissed, with leave to appeal.

Solicitor for the plaintiff, *Edward Clarke*.

Solicitor for the defendant company, *C. H. Mason*.

House of Lords.

March 2, 5, and 6.

(Before the LORD CHANCELLOR (Herschell),
Lords WATSON, ASHBOURNE, and MORRIS.)

THE LORD ADVOCATE v. BOGIE AND OTHERS. (a)

ON APPEAL FROM THE FIRST DIVISION OF THE
COURT OF SESSION IN SCOTLAND.

Will—Probate and legacy duty—Bequest to executors of another testator—Statutes 48 Geo. 3, c. 149; 55 Geo. 3, c. 184; 8 & 9 Vict. c. 76; 23 Vict. c. 15; 44 Vict. c. 12.

A testatrix bequeathed a share of her residuary personal estate to M. and in the event of his predeceasing her, which he did, to his "executors and representatives whom I do hereby appoint to be my residuary legatees."

Held (affirming the judgment of the court below), that only one probate and legacy duty was payable, namely, under the will of the testatrix, and that no second duty under the will of M. was payable, as the property in question was not part of his estate at the time of his death, nor personal estate which he had "power to dispose of" within the Stamp Duties Act of 1845 (8 & 9 Vict. c. 76).

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland, sitting as the Court of Exchequer, and consisting of the Lord President (Robertson), Lords Adam, McLaren, and Kinnear, who had affirmed a decision of the Lord Ordinary (Lord Wellwood) in an action brought by the appellant, as representing the Crown, against the respondents, who were the executors and trustees under the will of one Robert Methven, deceased.

The case is reported in 20 Ct. Sess. Cas. 4th series, 429.

The question involved was, whether the respondents, the executors of Robert Methven, who were the residuary legatees to the extent of one-third of the movable estate of Miss Jessie Scott, were bound, in addition to the inventory (probate) and legacy duties paid thereon as part of her estate, also to pay inventory and legacy duties thereon as if the said third share of Miss Scott's residue were part of Robert Methven's estate. Miss Scott by her will bequeathed one-third of the free residue of her whole movable means and estate, at the time of her death to Robert Methven, and failing him by his predeceasing her—an event which happened—to his executors and representatives whomsoever whom she appointed to be her residuary legatees. By the judgment of the Court of Session, delivered in Jan. 1890, in an action of multiple poiding raised by Miss Scott's executors, to which the respondents, Robert Methven's executors, and also his brother and next of kin were parties, it was decided on a construction of Miss Scott's settlement that the respondents, as executors nominate, were entitled to the third share of the residue in question (*Scott's Executors v. Methven's Executors*, 17 Court Sess. Cas. 4th series, 389). The appellant contended that double duty was payable on the bequeathed property—one duty under Jessie Scott's will and a second under Robert Methven's

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.]

THE LORD ADVOCATE v. BOGIE AND OTHERS.

[H. OF L.]

will. The court below held that only one duty was payable.

The *Lord Advocate* (Balfour, Q.C.), the *Solicitor-General* (Sir J. Rigby, Q.C.), and *Patten MacDougall* (of the Scotch Bar) appeared for the appellant, and contended that duty was payable under Methven's will. This property was part of Methven's estate, although it had not fallen into possession at the time of his death; or, in the alternative, it passed to his executors by virtue of a power exercised by him. They can only take under one by virtue of his will, and it becomes an addition to his personality, upon which duty is payable. If this property is made part of the personal estate of the deceased for any purpose, it is so for the payment of probate duty.

Sir H. James, Q.C., *Lorimer* and *Shaw* (both of the Scotch Bar), and *Henderson* for the respondents, argued that Methven had no vested interest in this property, or power of disposing of it at his death, so as to make it liable to duty under his will. The effect of the will of the testatrix is simply to appoint Methven's executors to be the executors of her will and to administer her residuary estate. If property were left to the trustees of a charity originally created by a will, to be administered in accordance with the trusts of that will, no duty would be payable under the will of the original testator.

The *Lord Advocate* in reply.—The property should be dealt with as increased in value under the Act 44 Vict. c. 12.

At the conclusion of the arguments their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Herschell).—My Lords: The question raised in the present case is whether inventory duty and legacy duty are to be paid in respect of a certain part of the estate of Miss Scott, which passed to the executors of Mr. Robert Methven. Robert Methven left a trust disposition and settlement and died. By this trust disposition and settlement the defenders were his trustees and executors, and became entitled to his heritable and movable estate. Miss Scott, who had made a trust disposition in the lifetime of Robert Methven, by that disposition provided with regard to the free residue of her whole movable estate and effects in these terms: "I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell equally between and amongst them share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." Of course there is no question that inventory duty must be paid upon the third of the residue which is now in question passing under Miss Scott's will; and there is no question that legacy duty must be paid in respect of the disposition to which I have just called your Lordships' attention. The question is whether a second duty is payable. Miss Scott survived Robert Methven, and therefore the gift to him personally never took effect. At the time from which her will must be regarded as speaking Robert Methven was dead. His estate had passed under this trust disposition to his executors, and was then ascertained. It has been held, and it is not now in dispute, that the effect of Miss Scott's trust disposition was not to vest

in the executors of Robert Methven, the defenders, and the respondents here, a beneficial interest in the property left by Miss Scott, namely, one-third of her residue; that what they took they took as executors, and that they were bound to deal with this third of the residue in precisely the same way as they had to deal with the estate, which had passed to them under Robert Methven's will: (*Scott's Executors v. Methven's Executors*, 17 Court Sess. Cas. 4th Series, 389.) Under these circumstances, it is contended on behalf of the Crown, who are the appellants at your Lordships' bar, that inventory duty is payable in respect of the moneys which thus came to the executors of Robert Methven as part of Robert Methven's estate, and that legacy duty is payable by the beneficiaries under Robert Methven's will, who of course will take, by virtue of this disposition of Miss Scott's, the money which so passes to the executors of Methven. It may be that under circumstances such as I have detailed it would be neither unreasonable nor unjust that this second duty, as it is called, should become payable; but with that your Lordships have not to deal. It can only be payable if it falls within the taxing provisions which have been enacted by the Legislature with reference to inventories and legacies. The Stamp Duties Act of 1815 (55 Geo. 3, c. 184) defines as the estate liable to inventory duty or probate duty "the personal estate and effects of any person deceased." Now the contention on behalf of the appellants is, that the effect of Miss Scott's disposition, coupled with Methven's, was to make this third of the residue of Miss Scott's estate part of the personal estate and effects of Robert Methven. Of course it had never belonged to Robert Methven; at the time of his death it could in no sense be said to be his or any part of his estate. The contention is, that the effect of Miss Scott's disposition is to add it to his personal estate, and to make it as much a part of his personal estate as if it had belonged to him in his lifetime. The only question which your Lordships have to consider is whether it has been in that sense so completely made a part of his personal estate as that within the words of the Stamp Duties Act, which I have read, it must be regarded as part of "the personal estate and effects of the deceased." The will of Miss Scott, as I have said, must be taken as speaking from the time of her death; and it appears to me to be precisely the same as if she in her lifetime had given the money to the executors of Methven to be used by them as executors in the same way as the other money which came to them as executors; I cannot think that there is any difference, because she made this disposition by will, because in her will she had made Robert Methven himself a beneficiary in case he had survived her. One must look at the state of things at the time from which the will speaks. I think that the effect of her disposition was so to vest this money in the persons who were to administer Robert Methven's estate, as that they would have to administer it precisely as if it were part of Robert Methven's estate. I will go so far as to assume that, so far as it was possible for her to do so, she made it a part of his personal estate. But admitting all that, it does not follow that the legal effect of what she did was to make it, for the purposes of this statute, that which it really was not, a part of "the personal estate of

H. OF L.]

THE LORD ADVOCATE v. BOGIE AND OTHERS.

[H. OF L.]

the deceased," which *prima facie* means the personal estate which has been his. For many purposes it would no doubt be regarded in precisely the same way; but the learned Lord Advocate said that the question was whether it was impossible for her to make it so. It seems to me, however, that the question rather is whether what she has done necessarily has the effect of making it a part of the personal estate of the deceased within the meaning of the statute. If it has, of course the duty follows; but I cannot think that this is the result. It appears to me that the effect cannot be said to be more than this; it is to be held by the same persons and administered in the same way and dealt with altogether as if it were part of the personal estate; but I do not think that it makes it part of the personal estate, or could make it part of the personal estate within the meaning of this statute. And it seems to me difficult to resist that conclusion when it was admitted (or perhaps I should hardly say admitted) by the Lord Advocate, that if different words having precisely the same effect had been used by Miss Scott a duty would not have been payable; he admitted that, if she had described in different words what is said to be the legal effect as to the persons to administer, the mode of administration and the persons who would benefit, it would have been difficult to contend that it would then have become a part of the personal estate. It seems to me that the only difference which can be suggested would have been that in the one case the duty would have been payable, and in the other it would not, although precisely the same legal result had been brought about by the use of different words. I think this view of the case is strongly confirmed by the statutes to which attention has been called. So far as I am aware, the first statute which made an inventory obligatory is the 48 Geo. 3, c. 149, s. 38, which provides in respect of any person dying after the 10th Oct. 1808, having personal or movable estate or effects in Scotland, that before they are dealt with there shall be "a full and true inventory" on oath, containing a statement "of all the personal or movable estate and effects of the deceased already recovered or known to be existing." Of course, that would have been satisfied in this case by an inventory made out shortly after Robert Methven's death and before Miss Scott's death, upon obtaining confirmation. The statute proceeds to deal with cases, which of course would frequently occur, in which, although a full statement was made of all the estate and effects of the deceased then known, it might be afterwards discovered that there was some property forming part of that estate which had not been known at the time when the inventory was made. Then the statute proceeds in these terms, "If at any subsequent period a discovery shall be made of any other effects belonging to the deceased, an additional inventory of the same shall be in like manner exhibited"; and there are very considerable penalties imposed if that is not done. The statute therefore appears to contemplate that all that is required to supplement an honest statement of the property of the deceased in the first instance, is a further statement of any property subsequently discovered "belonging to the deceased." Whatever may be the case with regard to the expression "personal estate and effects of the deceased," which can conceivably

be regarded as an entity that may be added to, it seems to me impossible to contend that the words "belonging to the deceased" could have any application to a property which never belonged to him, and was, as is suggested, added to his personal estate after his death. Those words occurring in the latter part of the section appear to me to be very cogent in the interpretation of the earlier words of the section, which indicate the nature of the property that is to be included in the inventory, and strongly support the view that it would not include that which a person took steps to make and intended to make, so far as could be done, a part of the personal estate and effects of the deceased. In the subsequent Act, the Act of 1881 (44 Vict. c. 12), which provides also for the payment of further probate duty, it is enacted in sect. 32 that, "if at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate," then "the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit." There, again, the test is made "the personal estate and effects of the deceased at the time of the grant of probate"; and that provision would clearly be inapplicable to the case where, after the grant of probate, owing to the dispositions of the will of another person, money or property was, in the way suggested, added to the personal estate, because, of course, it would not come within the words "were at the time of the grant of probate of greater value than the value mentioned in the certificate." For these reasons, I think that the taxing clauses do not apply to the portion of Miss Scott's estate which came to the executors of Mr. Methven; and all the illustrations which have been put, and all the questions which have been asked, really seem to me to depend upon the answer to that question. If, within the Act, it has become part of the personal estate and effects, then no doubt probate would be required to make title to it. If it has not so become part of the estate, then probate would not be required to make title. When once that question is answered, all the other questions seem to be answered fully and without difficulty. I will not detain your Lordships more than a moment upon the suggestion that, if it is not within the words of the statutes I have quoted, it is within the words of the Stamp Duties Act of 1860 (23 Vict. c. 15). It seems to me impossible to say that it was any part of "the personal or movable estate and effects which" a person "shall have disposed of by will under any authority enabling such person to dispose of" as he thought fit. The only question remaining is, whether the beneficial interest can be regarded as subject to the payment of legacy duty by the beneficiaries. That depends upon the construction of the Stamp Duties Act of 1845 (8 & 9 Vict. c. 76), which defines as a legacy liable to duty "every gift by any will or testamentary instrument of any person which, by virtue of any such will or testamentary instrument, is or shall be payable, or shall have effect, or be satisfied out of the personal or movable estate or effects of such person, or out of any personal or movable estate or effects which such person hath had or shall have had power to dispose of." It seems to me impossible

H. OF L.]

WILSON v. MCINTOSH.

[Priv. Co.]

to say that any moneys which may be received, by virtue of the dispositions which have been under consideration, by the persons who are named as beneficiaries in Mr. Methven's will, who in consequence of Miss Scott's disposition would take certain further benefits, are received as gifts by Mr. Methven's will which, by virtue of that will, are payable out of any personal estate of his or any "personal estate" which he had "power to dispose of." For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

Lord WATSON.—My Lords: I also am of opinion that the judgment appealed from ought to be affirmed. I do not wish to suggest that Miss Scott could not have made such a disposition by her will in favour of the beneficiaries under the executory of Robert Methven as would have entitled the Crown to claim payment of duty. She unquestionably could have directed the trustees of Methven, whom she made her executors, to pay these duties to the Crown; and that direction would have been as imperative as any other direction to be found in her request. I do not think it is necessary to speculate how far she could have accomplished that object of making the Crown entitled to these duties by an endeavour to give her estates in such terms as would make it an estate which had belonged to the deceased at the time of his death, or would make it so much a part of the estate which he left as to put it in the same position under these statutes as if it had in point of fact belonged to him. I am satisfied that none of these things were either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being, not that the fund which she committed to them should become part and parcel of the deceased's estate—Methven's estate—or to suggest that it had ever belonged to him, but in order that it might be administered by the trustees as a separate estate, separate from his, but in the same manner and subject to the same conditions as if it had originally been the property of Methven himself.

Lord ASHBOURNE.—My Lords: I entirely concur. The claim of the Crown is practically for the recovery of a double duty; and for the reasons stated by the Lord Chancellor I think their case has entirely failed.

Lord MORRIS concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, Sir W. H. Melville (Solicitor of the Board of Inland Revenue), for Philip J. Hamilton Grierson (Solicitor for Scotland of the Board of Inland Revenue).

Solicitor for the respondents, D. E. Chandler, for William Black, Edinburgh.

Judicial Committee of the Privy Council.

Jan. 18 and Feb. 10.

(Present: The Right Hons. Lords WATSON, HALSBURY, MACNAGHTEN, and MORRIS, Sir R. COUCH, and DAVEY, L.J.)

WILSON v. MCINTOSH. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Real Property Act (26 Vict. No. 9), ss. 22 and 23—Amending Act (41 Vict. No. 18), ss. 4 and 21—Caveat—Lapse—Waiver.

Where an application has been made to bring land under the Real Property Act of New South Wales (26 Vict. No. 9), and a caveat has been entered, but no proceedings have been taken under it within three months, as required by sect. 23 of the Act, it is competent for the applicant to waive the limit of time, and the lapse of the caveat; and stating a case for the opinion of the court more than three months after the lodging of the caveat will be held to operate as a waiver.

Judgment of the court below reversed.

Phillips v. Martin (11 N. S. W. Law Rep. 153) approved.

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Windeyer and Foster, J.J., Stephen, J. dissenting).

The facts appear fully from the judgment of their Lordships, where the sections of the Colonial Acts of Parliament are set out.

J. Ashton Cross appeared for the appellants.

The respondent did not appear, and the appeal was consequently heard *ex parte*.

At the conclusion of the argument for the appellant their Lordships took time to consider their judgment.

Feb. 10. — Their Lordships' judgment was delivered by

DAVEY, L.J.—In this case their Lordships are under the disadvantage of not having had the case of the respondent argued by counsel on his behalf. They will therefore abstain from any expression of opinion on the points argued for the appellant beyond what is strictly necessary for the decision of the appeal. The facts of the case are as follows: On the 8th Jan. 1887 the present respondent lodged an application in the office of the Registrar-General to bring under the Real Property Act (26 Vict. No. 9) certain lands comprising about forty acres. The applicant's title (it is alleged) depended on the will of one Cornelius Sheehan, a former owner of the lands, whereby he devised his real estate to his then wife Isabella Sheehan for life with remainder to the applicant in fee. In his declaration in support of the application he declared that there was no person in possession or occupation of the said lands adversely to his estate or interest therein, and (in general terms) that there did not exist any fact or circumstance whatever material to the title which was not thereby fully and fairly disclosed to the utmost extent of the applicant's knowledge, information, and belief. On the 12th May 1887 the present appellant duly lodged a caveat against the land being brought under the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

WILSON v. MCINTOSH.

[PRIV. CO.]

provisions of the Act, but she did not take any proceedings to establish her title to the land or apply for an injunction restraining the Registrar-General from bringing the land under the provisions of the Act. The appellant denied the title of the respondent on the allegation that Isabella Sheehan, the former wife of the testator Cornelius Sheehan, died in his lifetime, and that the testator had subsequently married again and thereby revoked his will, and she further alleged that she and those through whom she claimed had acquired a title to the land by possession under the Statute of Limitations. On the 1st Nov. 1887, and more than three months after the lodging of the caveat, the respondent, in pursuance of sect. 21 of the Real Property Act Amendment Act, stated a case for the opinion and direction of the Supreme Court and the same was duly filed. On the 4th Nov. 1887 the respondent applied for and obtained an order of the court directing the appellant to state and file a case on her behalf, and in compliance with such order the appellant on the 18th Nov. 1887 stated and filed a case accordingly. The respondent took no steps to have issues settled, or to have the case set down for argument before the court, or to obtain the decision of the court on the questions thereby raised between the parties, and in fact the respondent, having obtained from the appellant a statement of her case, did not further proceed with his application. But on the 24th July 1890 the respondent served the appellant with notice of motion to have the appellant's caveat set aside and removed, on the ground that the appellant having failed to take any proceedings within three months after filing of the caveat, as provided by sect. 23 of the Real Property Act, the caveat had lapsed. It appeared from the appellant's affidavits in opposition to the motion that on the 8th May 1888 her solicitor inquired by letter what the respondent intended to do in the matter, and whether he intended proceeding with the case, and not having received any answer he sent his clerk to inquire, and the clerk stated that the respondent's solicitor informed him there was some dispute between him and his client as to costs, and gave the clerk to understand he would have nothing more to do with the matter. On the other hand, the respondent's present solicitor made an affidavit of his belief that his client was not aware until recently that the appellant had not obtained an injunction. On the 8th Aug. 1890 an order was made removing the caveat which is the subject of the present appeal. The material sections of the Real Property Act are the 22nd and 23rd, which are in the following terms: "The Registrar-General, upon receipt of any such caveat within the time limited as aforesaid, shall notify the same to such applicant proprietor, and shall suspend further action in the matter; and the lands in respect of which such caveat may have been lodged shall not be brought under the provisions of this Act until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the court having jurisdiction in the matter. After the expiration of three months from the receipt thereof every such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged shall within that time have taken proceedings in any court of

competent jurisdiction to establish his title to the estate, interest, lien, or charge therein specified, and shall have given written notice thereof to the Registrar-General or shall have obtained from the Supreme Court an order or injunction restraining the Registrar-General from bringing the land therein referred to under the provisions of this Act." In sect. 4 of the Amending Act (41 Vict. No. 18) it is provided: "Where any caveat against an application to bring land under the principal Act shall have been lodged in pursuance of the twenty-first section by any person (hereinafter called the caveator) claiming such land or a portion thereof or an interest therein adversely to the applicant it shall not be necessary for such caveator to take proceedings in any court to establish such claim, but the applicant may state a case for the opinion and direction of the Supreme Court upon the matter, and the caveator may apply to the said court for an order on the Registrar-General, as provided by the twenty-third section, to restrain him from proceeding until the further order of the court. And the court may make such an order and may in its discretion direct the caveator to lodge in the court on or before a certain day a case on his own behalf stating whether he claims in his own right or under another person, together with such other particulars (if any) as the court shall think fit to order, and the court shall thereupon direct an issue or issues to be tried by a jury as to any fact or facts, or should no fact be in contest, may decide the matter upon the case stated, and, for the purposes aforesaid, may make all such orders as the court shall think fit, and the decision of the court finally upon the matter shall be conclusive on the parties and on the Registrar-General and Commissioners. And the cost of every proceeding under this section shall be borne by the party finally unsuccessful." Their Lordships are of opinion that the limitation of time contained in sect. 23 is introduced for the benefit of the applicant to enable him to obtain a speedy determination of his right to have the land brought under the provisions of the Act without being embarrassed by the filing of a caveat which is not proceeded with in due time. It was argued on behalf of the appellant that the effect of sect. 4 of the Amending Act is to prevent the lapse of the caveat by reason of the caveator not taking any proceedings, inasmuch as it is thereby provided that "it shall not be necessary for such caveator to take proceedings," and liberty is given to the applicant to take the initiative by stating a case, and no time is limited within which the case must be stated. Their Lordships do not think it necessary to express any opinion upon this point or upon the question whether, if the caveat was lapsed, the caveator is concluded and deprived of every other means of asserting her title. Their Lordships are of opinion that the maxim *Quilibet potest renunciare juri pro se introducto* applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by sect. 23, and that the respondent did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both of which steps assumed and proceeded on the assumption of the continued existence of the caveat. In holding that it was competent for an applicant to waive the lapse their Lordships do not under-

PRIV. CO.] ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA. [PRIV. CO.]

stand that they are differing from the learned judges in the court below. In *Phillips v. Martin* (11 N. S. W. Law Rep. 153) the facts were very similar to those in the present case, with the addition that issues had been settled on the cases stated and had been tried by a jury who found against the applicant, and proceedings had then been taken unsuccessfully for a new trial ending in an appeal to this board. In the course of his judgment on that case the Chief Justice said: "Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into the court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after doubtless much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the court in his favour, asks the court to do that which but for some reasons known to himself he might have asked the court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is in my mind a clear principle of equity, and I have no doubt that there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts." Their Lordships agree with these observations of the Chief Justice, and think that they apply to the present case, notwithstanding that the respondent did not think fit to obtain a decision of the court on the case which he had compelled the present appellant to state. Windeyer, J. distinguished the case of *Phillips v. Martin* from the present case on the ground that the case has not gone so far as it went in *Phillips v. Martin*. The learned judge said: "In *Phillips v. Martin* the applicant brought the case before this court, and obtained a decision, and from that decision he unsuccessfully appealed to the Privy Council, and that case was decided upon the clear principle of law that where, although the court has no jurisdiction, the parties have allowed it to exercise jurisdiction and to go to the length of pronouncing judgment, the unsuccessful party cannot then turn round and deny the jurisdiction of the court. That principle, however, has no application in the present case." Their Lordships cannot regard these circumstances as making any difference in principle. The respondent in the present case invoked the jurisdiction of the court to compel the appellant to state her case, and the appellant did so, and no doubt incurred costs in doing so and all the risk involved in showing her title. If it be once admitted that an appellant may waive the lapse it is a question of fact on the circumstances of each case whether there has been a waiver or not. Their Lordships agree with the observations of Stephen, J. on this part of the case. Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed and the original motion refused with costs. The respondent must also pay the costs of this appeal.

Solicitors for the appellant, *Parker, Garrett, and Parker*.

Dec. 12, 13, 1893, and Feb. 24, 1894.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), LORDS WATSON, MACNAGHTEN, and SHAND, and Sir R. COUCH.)

THE ATTORNEY-GENERAL FOR ONTARIO v. THE ATTORNEY-GENERAL FOR CANADA. (a)
ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Law of Canada—British North America Act 1867, s. 91, sub-sect. 21—Powers of provincial Legislature—Bankruptcy and insolvency—Revised Statutes of Ontario 1887, c. 124, s. 9—Assignment for the benefit of creditors—Ultra vires.

By the British North America Act 1867, s. 91, sub-sect. 21, the exclusive power of legislation with reference to bankruptcy and insolvency is conferred upon the Dominion Parliament.

Held (reversing the judgment of the court below), that an enactment in the Revised Statute of Ontario 1887, c. 124, s. 9, postponing judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act, was not ultra vires of the provincial Legislature, as it relates to a purely voluntary assignment.

THIS was an appeal from a decision of the Court for Ontario sitting as a court of first instance upon a constitutional question referred by the Lieutenant-Governor of the province under the provisions of the 53 Vict. c. 13, Ontario Statute.

The question submitted by the Lieutenant-Governor to the said court was as follows: "Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, chapter 124, and entitled 'An Act respecting assignments and preferences by insolvent persons?'"

The section in question was a reproduction of sect. 9 of the 48 Vict. c. 26 (Ontario Statute), as amended by sect. 2 of the 49 Vict. c. 25, and was in the following terms:

An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands.

The case came on for argument before the Court of Appeal for Ontario, composed of Hagarty, C.J., and Burton, Osler and MacLennan, J.J.A., who, on the 9th May 1893, pronounced judgment, declaring that the question submitted to them should be answered in the negative, and that the said 9th section was not within the powers of the Legislature of Ontario.

Hagarty, C.J. considered that the case came within the reasoning of the judgments in the case of *Clarkson v. Ontario Bank* (15 Ontario Appeals, 116) and in the case of *Reg. v. County of Wellington* (17 Ontario Appeals, 615), which last-mentioned case, under the name of *Quirt v. The Queen*, was affirmed by the Supreme Court of Canada (19 Supreme Court Reports, 510). He stated that he retained the opinion expressed in these judgments, and was of opinion that the Act containing the section in question created a new system for the administration of insolvent estates,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.] ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA. [PRIV. CO.]

interfering with the ordinary laws as regards debtor and creditor, that it was impossible to separate sect. 9 from the rest of the Act, and that the section was *ultra vires*.

Burton, J.A. arrived at the same conclusion, upon the ground that the case was concluded by the decision of the Supreme Court of Canada, in *Quirt v. The Queen*, above mentioned. He stated that, if not bound by that decision, he would have arrived at an opposite conclusion for reasons which had been stated by him at large in an earlier case of *Edgar v. The Central Bank* (15 Ontario Appeals Cases, 183) and argued with *Clarkson v. The Ontario Bank*.

MacLennan, J.A. dissented, being of opinion that the case was not governed by *Quirt v. The Queen*, and agreeing with the judgment of Burton and Patterson J.J.A. in *Edgar v. The Central Bank*.

Osler, J.A. declined to express an opinion on the case.

Blake, Q.C. (of the Canadian Bar), *Haldane, Q.C.*, and *R. Bray* appeared for the appellants and argued that the section dealt with matters which fell within the class of subjects assigned to the provincial Legislature, and did not necessarily deal with bankruptcy and insolvency within the meaning of sect. 91 of the British North America Act, nor apply to insolvent persons only. It deals with matters of procedure. There has been no bankruptcy legislation by the Dominion Parliament. They cited

L'Union St. Jacques de Montreal v. Bélisle, 31 L. T. Rep. N. S. 111; L. Rep. 6 P. C. 31;

Cushing v. Dupuy, 42 L. T. Rep. N. S. 445; 7 App. Cas. 409;

Citizen's Insurance Company v. Parsons, 45 L. T. Rep. N. S. 721; 7 App. Cas. 96;

Russell v. The Queen, 46 L. T. Rep. N. S. 889; 7 App. Cas. 829;

Hodge v. The Queen, 50 L. T. Rep. N. S. 301; 9 App. Cas. 117;

Bank of Toronto v. Lambe, 57 L. T. Rep. N. S. 377; 12 App. Cas. 575.

Sir *R. Webster, Q.C.* and *Carson, Q.C.* (of the Irish Bar), for the respondent, contended that this section related to bankruptcy and insolvency within the meaning of sect. 91 of the British North America Act 1867, and was *ultra vires* of the provincial Legislature.

Blake, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Feb. 24.—Their Lordships' judgment was delivered by

THE LORD CHANCELLOR (Herschell).—This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that province. The decision complained of was an answer given to a question referred to that court by the Lieutenant-Governor of the province in pursuance of an Order in Council. The question was as follows: "Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, chapter 124, and entitled 'An Act respecting assignments and preferences by insolvent persons?'" The majority of the court answered this question in the negative; but one of the judges who formed the majority only concurred with his brethren because he thought the case was governed by a

previous decision of the same court; had he considered the matter *res integra* he would have decided the other way. The court was thus equally divided in opinion. It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the provincial Legislature by sect. 92 of the British North America Act 1867, which enables that Legislature to make laws in relation to property and civil rights in the province unless it is withdrawn from their legislative competency by the provisions of sect. 91 of that Act which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency. The point to be determined therefore is the meaning of those words in sect. 91 of the British North America Act 1867, and whether they render the enactment impeached *ultra vires* of the provincial Legislature. That enactment is sect. 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting assignments and preferences by insolvent persons." The section is as follows: "An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands." In order to understand the effect of this enactment it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act." The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it. The second section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or give any of them a preference. Then follows sect. 3, which is important: Its first sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereafter provided, for the purpose of paying, rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts. The second sub-section enacts that every assignment for the general benefit of creditors which is not void under sect. 2, but is not made to the sheriff nor to any other person with the prescribed consent of the creditors, shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith. The 5th sub-sect. states the nature of the consent of the creditors which is requisite

PRIV. CO.] ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA. [PRIV. CO.]

for assignment in the first instance to some person other than the sheriff. These are the only sections to which it is necessary to refer in order to explain the meaning of sect. 9. Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the Province and in the Dominion. The enactments of sects. 1 and 2 of the Act of 1887 are to be found in substance in sects. 18 and 19 of the Act of the province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory. This Act was in operation at the time when the British North America Act came into force. In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875 which, after being twice amended, was, together with the Amending Acts, repealed in 1880. In 1887, the same year in which the Act under consideration was passed, the provincial Legislature abolished priority amongst creditors by an execution in the High Court and County Courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided for by that Act. Their Lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *primâ facie* within the legislative powers of the provincial Parliament. Executions are a part of the machinery by which debts are recovered, and

are subject to regulation by that Parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution. But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency. It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the province of Canada was precisely analogous to what was known in England as the bankruptcy law. Moreover the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his insolvency doubtful, and desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the ninth section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been *intra vires*, supposing section nine had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires* by reason of them. Moreover, it is to be observed that by sub-sect. (2) of sect. 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act. At the time when the British North

PRIV. CO.]

THORNE v. HEARD.

[CT. OF APP.]

America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the province of Canada. Attention has already been drawn to the Canadian Act. The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors. It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for. It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the word "bankruptcy" and "insolvency" in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate. In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence. Their Lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be

reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

Solicitors for the appellant, *Freshfields and Williams*.

Solicitors for the respondent, *Bompas, Bischoff, Dodgson, Coxe, and Bompas*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 12, 13, and 24.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

THORNE v. HEARD. (a)

APPEAL FROM THE CHANCERY DIVISION.

Trustee—Breach of trust—Fraud of agent—Liability of trustees—"Party or privy" to fraud—Trust property "still retained" by trustee—Trustee Act 1888 (51 & 52 Vict. c. 59), s. 8.

The defendants, as trustees of a marriage settlement, were first mortgagees of leasehold hereditaments. The plaintiff was transferee of a second mortgage of the same premises. In 1878 the defendants sold the mortgaged premises under their power of sale. A solicitor who acted for the defendants and plaintiff in the matter fraudulently represented himself to the defendants as the plaintiff's agent to receive the balance of the purchase money due to the plaintiff as second mortgagee, and the defendants accordingly allowed him to receive it, but he never paid it over to the plaintiff, though he continued down to 1891 (when he became bankrupt) to pay the plaintiff interest as on the amount due on his second mortgage. Subsequently the plaintiff brought this action against the defendants for accounts, and for payment of what should be found due to him.

Held, that the solicitor, in paying the interest as on the amount of the second mortgage to the plaintiff down to 1891, had not acted as the defendants' agent, or on their behalf; that the plaintiff's claim was accordingly not kept alive against the defendants by such payment; that the fraud of the solicitor could not be treated as perpetrated or concealed by the defendants; that the defendants had not been "parties or privy" to the fraud; and that the money was neither "still retained by" them nor had been "converted to their own use" within the meaning of sub-sect. 1 of sect. 8 of the Trustee Act 1888, and, therefore, by virtue of that section, the claim was barred by the Statute of Limitations.

Decision of Romer, J. (68 L. T. Rep. N. S. 791) affirmed.

By a deed of the 5th Aug. 1868 certain leasehold premises near Torquay were mortgaged by W. Stabb to S. Maunder for 1000*l.*, and the mortgage contained the usual power of sale.

By deeds dated the 25th June 1869 and the 22nd Nov. 1870 Stabb created further mortgages on this property.

(a) Reported by W. C. RISS, Esq., Barrister-at-Law.

[CT. OF APP.]

THORNE v. HEARD.

[CT. OF APP.]

By a deed dated the 12th Sept. 1871 the mortgage of the 5th Aug. 1868 was transferred to the then trustees of the marriage settlement of James Searle, a solicitor, and it ultimately became vested in the defendants, Heard and Marsh, the existing trustees of the settlement.

By deeds of the 15th March 1872 and the 18th March 1872 the mortgages of the 25th June 1869 and the 22nd Nov. 1870 were transferred to the plaintiff, Henry Thorne.

Throughout these transactions Searle acted on behalf of the mortgagor. He also acted as solicitor to the plaintiff and the defendants on the occasion when they took their mortgages; and from 1872 he, on behalf of the mortgagor, paid to the plaintiff the interest on his securities as it became due.

In Jan. 1878 the defendants sold the mortgaged property, under the power of sale contained in the deed of the 5th Aug. 1868, for 1700*l.* The sale was conducted by Searle, who received the purchase money on behalf of the defendants. At this time there was due to the plaintiff as second mortgagee the sum of 333*l.*, and there was also due to Searle himself, as third mortgagee of the same property, the sum of 375*l.* 3*s.* 6*d.* After paying to the defendants 1000*l.*, the amount due on the mortgage, there remained in his hands a balance of 700*l.*, which he accounted for to the defendants by handing them two receipts dated the 5th Feb. 1878. The first receipt was as follows:

Received of Messrs. H. E. Heard and W. Marsh the sum of 333*l.*, being principal money due to Mr. H. Thorne on two further charges by way of mortgage on "The Nest," Torquay, Devon, dated respectively the 25th June 1869 and the 22nd Nov. 1870, and I undertake to deliver to them the indentures dated the 15th and 18th March 1872, being transfers of such mortgages, and Mr. Thorne's receipt indorsed thereon, within fourteen days from this date. (Signed) JAMES SEARLE.

The second was as follows:

Received of Messrs. H. E. Heard and W. Marsh the sum of 375*l.* 3*s.* 6*d.*, being the balance of the purchase money of "The Nest," Torquay, Devon, sold to Mrs. E. Stewart for 1700*l.* (after their retaining the sum of 1000*l.* due on their first mortgage, and paying to Mr. H. Thorne the sum of 333*l.* due to him on mortgage of the same premises, subject to the first security to them), the sale thereof having been carried out by Messrs. H. E. Heard and W. Marsh with the approval of Mr. H. Thorne and at my request. (Signed) JAMES SEARLE.

The defendants appeared not to have read these receipts. Searle, instead of paying the plaintiff, appropriated the whole of the surplus moneys to his own use, but he continued to pay interest to the plaintiff on his securities in the same way as he had done previously to the sale until August 1892, when he was adjudicated a bankrupt, and the plaintiff then for the first time discovered that the property had been sold.

The plaintiff by this action claimed that the defendants were liable to account to him for the surplus sale moneys, and asked for an account on that footing. The defendants relied upon sect. 8 of the Trustee Act 1888, which extends to trustees the benefit of the Statute of Limitations "in any action or other proceeding against a trustee, or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the pro-

ceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his own use."

Romer, J. held (68 L. T. Rep. N. S. 791) that the defendants were entitled to the benefit of the Statute of Limitations, as the case did not fall within any of the exceptions mentioned in sect. 8 of the Trustee Act 1888.

From this decision the plaintiff appealed.

Cozens-Hardy, Q.C., J. W. Clydesdale, and W. A. Peck for the appellant.—The defendants are liable for the fraud of Searle, their agent, acting within the scope of his authority. He having been their agent to receive the money, it is still "retained by" them within the meaning of sect. 8 of the Trustee Act 1888. They were guilty of culpable negligence in omitting to see that Searle paid over the money to the plaintiff in accordance with the terms of the receipt, and they left the surplus of the proceeds of the sale in Searle's hands without any direction as to its application, and without any inquiry as to what he did with it. They were therefore "party or privy" to the fraud within the meaning of the section. It is not necessary that the trustees should be criminally or morally inculpated in the fraudulent act. The defendants are not therefore entitled to the benefit of the Statute of Limitations under that section. There was concealed fraud in this case, and the cause of action only accrued when the fraud was discovered in 1892:

Blair v. Bromley, 2 Ph. 354;

Moore v. Knight, 63 L. T. Rep. N. S. 831; (1891) 1 Ch. 547;

Gibbs v. Guild, 46 L. T. Rep. N. S. 135; 9 Q. B. Div. 59.

Chadwyck Healey, Q.C. and Creed for the respondents.—The money was not "retained" by the defendants within the section when it was misappropriated by Searle. It must be in fact under the control of the trustees, either actually in their hands or in the hand of some agent from whom they can get it. It does not apply if the money has been lost by negligence or otherwise. "Still" means at the date of the writ. The object of this provision is to prevent a trustee pleading the Statute of Limitations and retaining for himself a fund which has been in his possession for over six years, but which is really a trust fund. No moral fraud is suggested against these defendants. If the defendants are to be fixed with constructive notice of the contents of the receipts (they say they did not read them) so as to be made liable under them, they are also entitled to any benefit which they give them. In the receipts Searle treats himself as the agent of the plaintiff. In order to make a principal liable for the fraud of his agent, the act must be within the scope of his authority and for the benefit of the principal. Here Searle committed the fraud for his own benefit only, and the defendants are not liable:

The British Mutual Banking Company Limited v. The Charnwood Forest Railway Company, 57 L. T. Rep. N. S. 833; 18 Q. B. Div. 714.

The statute began to run in favour of the respondents in 1878. In order to disentitle a defendant to the benefit of the statute the fraud must be something concealed by him, and not by some other person. The case of *Blair v. Bromley* (*ubi sup.*) was a case of a partnership, and the transac-

tion was a partnership transaction. The defendants cannot be made liable on the ground of concealed fraud, as if it had not been concealed they would not have been liable.

Covens-Hardy, Q.C. in reply.

Cur. adv. vult.

JAN. 24.—LINDLEY, L.J. (after stating the facts as above, and observing that the statements in the receipt that the 333*l.* had been paid to Thorne, and that the sale was with his approval, were utterly untrue) said:—The liability of the defendants is clear, unless they are protected by sect. 8 of the Trustee Act 1888, which makes the Statute of Limitations applicable to trustees in certain cases. The section was evidently intended to give considerable protection to honest trustees who have incurred personal liability by committing some breach of trust. [His Lordship read the section and continued:] Upon this enactment and the facts of this case two questions arise, viz., (1) when did the plaintiff's right of action accrue? (2) if it accrued more than six years before the commencement of the action, does the case come within one of the exceptions to which the Statute of Limitations is made inapplicable? First, as to the time when the cause of action accrued to the plaintiff. The defendants, as first mortgagees, sold in Jan. 1878. Searle, as their solicitor, received the purchase money and paid them, and undertook to pay the plaintiff out of the balance. There was no fraud, and consequently no concealed fraud, in this transaction. The plaintiff's right to be paid by the defendants accrued as soon as they received the purchase money from the purchaser, and the receipt of that money by Searle was clearly a receipt by the defendants, he being their agent to receive it for them. The fraud which was concealed occurred after this transaction, and after the right sought to be enforced in this action accrued to the plaintiff. The fraud was the misappropriation by Searle of the plaintiff's money to his own use, and the concealment of that fraud was effected by the continued payment of interest to the plaintiff by Searle, purporting to act on behalf of the mortgagor, whose solicitor he also was. The fraud thus perpetrated and concealed by Searle cannot, in my opinion, be treated as perpetrated or concealed by the defendants. They, in fact, knew nothing of it; and in perpetrating and in concealing the fraud Searle was not acting, or even purporting to act, for the defendants. He was acting fraudulently in his own interest, pretending to the defendants that he had authority from Thorne to receive the amount due to him, and undertaking to remit it to him, and pretending to Thorne that his security was still subsisting, and paying interest to him accordingly. Consistently with *The British Mutual Banking Company Limited v. The Charnwood Forest Railway Company (ubi sup.)*, these frauds of Searle cannot be regarded as the frauds of the defendants, i.e., as frauds committed by their agent for them, or for their benefit, and for which they are legally responsible, although completely innocent of all fraud themselves. The case of *Blair v. Bromley (ubi sup.)*, which was relied upon as showing that in equity the cause of action ought to be regarded as accruing when the fraud was discovered, and not before, is clearly distinguishable. In that case the fraudulent transaction was itself the cause of

action, and the innocent partner was liable for that fraud, and it was concealed by the fraudulent partner, both when the fraud was committed and afterwards whilst he was a member of the firm, as well as after he had retired from it. *Moore v. Knight (ubi sup.)* was a similar case. In both cases the fraud and its concealment in the first instance were, though committed by one partner, imputable to the firm, and under those circumstances the cause of action was held not to accrue until the fraud was discovered. The law applicable to the Statute of Limitations in cases of concealed fraud was carefully examined by this court in *Willis v. Earl Howe* (69 L. T. Rep. N. S. 358; (1893) 2 Ch. 545), which was an action for the recovery of land, and the right of the plaintiff turned on 3 & 4 Will. 4, c. 27, s. 26. The point whether sect. 26 applies only to frauds committed by the defendant, or those through whom he claims, or whether it extends to frauds committed by strangers, was there alluded to by Kay, L.J., and he, following Kindersley, V.C. in *Petre v. Petre* (1 Drew. 371, 397), expressed his opinion that the fraud to avail the plaintiff must have been committed by the defendant, or some person through whom he claimed. This accords with Lord Redesdale's opinion in *Hovenden v. Lord Annesley* (2 Sch. & Lef. 634). He puts the doctrine of concealed fraud thus: He says that the defendant's conscience is so affected that he ought not to be allowed to avail himself of the statute or lapse of time. *Willis v. Earl Howe*, moreover, decided that a fraud committed and concealed, even by the defendant or one of his predecessors in title, would not avail the plaintiff if the fraud and its concealment were subsequent to the wrongful entry which gave the plaintiff, or his predecessors, a right to bring ejectment. This last point had in fact been already decided by the House of Lords in *Lawrance v. Lord Norreys* (62 L. T. Rep. N. S. 706; 15 App. Cas. 210). No question of agency arose in *Willis v. Earl Howe*, but that case has a very important bearing on the present, for the statutory enactment on which the case turned is a legislative recognition and expression of previously well-settled principles in equity, and those principles were and are applicable to all kinds of property, and not to real property only. Although, however, the equitable doctrine respecting concealed fraud is based on the moral injustice of allowing a man to take advantage of his own fraud and concealment, I am of opinion that, if the defendants were liable for Searle's fraud and concealment, the cause of action against the defendants would not have accrued to the plaintiff until its discovery by him, or at all events until he might have discovered it with reasonable diligence. The Trustee Act 1888, sect. 8, has in no way altered the principles which determine the time when a cause of action accrues: (*Moore v. Knight (ubi sup.)*). In the case of a breach of trust a cause of action founded upon it accrues to the *cestui que trust* upon the commission of the breach of trust (*Re Swain*, 65 L. T. Rep. N. S. 296; (1891) 3 Ch. 233), unless that breach of trust is a fraudulent breach of trust, and is concealed by the trustee committing it, or by some person for whom he is legally responsible. In this case the plaintiff's cause of action against the defendants was a breach of trust committed by them, but not a fraudulent breach of trust; the fraud and its concealment were subsequent to

CT. OF APP.]

THORNE v. HEARD.

[CT. OF APP.]

the breach of trust, and were both attributable to Searle, who committed the fraud and concealed it, not for the defendants, nor even ostensibly for them, but really for himself, and pretending to act, first, for the plaintiff, and afterwards for the mortgagor. I come, therefore, to the conclusion that the plaintiff's cause of action against the defendants accrued in Jan. 1878—i.e., more than six years before the commencement of the action, and that the Statute of Limitations protects the defendants, unless the case falls within one or other of the exceptions mentioned in sect. 8 of the Trustee Act 1888. I pass, therefore, to the second of the questions before stated. Sect. 8 contains three exceptions—viz., (1) frauds to which the trustee has been party or privy; (2) cases in which trust property is still retained by the trustee; (3) cases in which a trustee has converted trust property to his own use. The third exception need not be further alluded to in the present case. Counsel for the appellant contended that the facts of this case brought it within the first exception, but I am clearly of opinion that they do not. It is only by a misuse of language that a person who in fact knows absolutely nothing of the fraudulent conduct of another, who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is, liable in law for frauds which he has not committed, but to say that he is party or privy to them is quite another matter, and is only true when he has personally in some way participated in them. The defendants were, in my judgment, in no sense whatever either fraudulent themselves or parties or privies to the fraud of Searle. It was next urged that the case fell within the second exception, and that the defendants still retained the plaintiff's money. This, however, again is, in my opinion, not true in fact. The word "still" refers to the commencement of the action, and the use of the word is important. A trustee may be liable to make good trust money, with interest, as if it were still in his hands, and yet he may not in fact have it. But, in construing this statute, we have to ascertain whether in fact the trust property sought to be recovered is "still retained" by the trustee. That question ought to be answered in the affirmative if he, or any agent for him, has it so that he can get it; but in the negative if it has been lost, whether by his negligence or otherwise. The second exception applies to, and is confined to, cases in which at the date of the writ the trustee still retains—i.e., has in his hands or under his control—the trust property, or the proceeds thereof, sought to be recovered. The second exception assumes that the property sought to be recovered exists, and can be recovered. But, at the date of the writ in this action, the defendants had not in fact got the money sought to be recovered, nor had they it under their control. They had, in fact, lent it and lost it. But for the statute they would be liable for it with interest; but the statute protects them, for in no proper sense of the expression can they be said still to retain the money. The appeal must, therefore, be dismissed with costs.

KAY, L.J.—In 1878 the first mortgagees of certain real property sold it for 1700*l.* 1000*l.* of this went to pay off their mortgage, and there remained a surplus of 700*l.* The plaintiff was second mortgagee of the same property for 333*l.* He now sues the first mortgagees for this balance.

Undoubtedly the first mortgagees became trustees of the surplus proceeds: (*Matthison v. Clarke*, 3 Drew. 3; *Charles v. Jones*, 56 L. T. Rep. N. S. 848; 35 Ch. Div. 544; *Magnus v. Queensland National Bank*, 58 L. T. Rep. N. S. 248; 37 Ch. Div. 466.) They have not paid the plaintiff any part of it, and *prima facie* they are liable. But they claim the benefit of the Statute of Limitations by virtue of sect. 8 of the Trustee Act 1888, and if they have not been party or privy to any fraud or fraudulent breach of trust, or have not retained the trust fund, or have not converted it to their own use, they may succeed in this defence, provided that six years have elapsed since the cause of action accrued. The circumstances are very peculiar. At the time of the sale the defendants were the first mortgagees, the plaintiff was the second, and Searle, a solicitor, was the third. Previously to the sale Searle had been accustomed to pay interest on the mortgages as solicitor for the mortgagor. Searle acted in the sale as solicitor for the vendors, the first mortgagees. By their authority he received the whole of the purchase money. He paid to them 1000*l.* in discharge of the first mortgage. He retained the 700*l.* surplus proceeds. He gave to the first mortgagees two receipts, one for 333*l.* "on account of principal money due to" the plaintiff on his mortgage, and by the same document Searle undertook to deliver the mortgage deeds of the plaintiff to the first mortgagees within fourteen days from the 5th Feb. 1878, the date of the receipt. The other receipt was for the balance of the purchase money, and was delivered the same day, and with it Searle gave a separate undertaking to hand over his own mortgage deeds to the first mortgagees. If these receipts and undertakings had been brought to the knowledge of the defendants it might be argued that the nature of Searle's possession of the surplus proceeds was changed as between him and the first mortgagees. But their attention was not called to them, and, although Searle handed them with other papers to the first mortgagees, they were entirely ignorant of the contents of them. In fact, they left the surplus proceeds of the sale of the property in Searle's hands without any direction as to their application and without any inquiry as to what he did with the money. Searle kept the money in his own possession, applied it to his own use, and became bankrupt in 1892. The plaintiff, the second mortgagee, first discovered these facts after Searle's bankruptcy, and on the 30th Aug. 1892 he brought this action against the first mortgagees. On the 3rd Jan. 1878 Searle had written to the plaintiff informing him that the mortgaged property was under contract for sale, and saying that the solicitors to whom the abstract was sent required to see the plaintiff's mortgage. The plaintiff thereupon sent the mortgage to Searle, who returned it in Jan. 1879. Except this intimation the plaintiff knew nothing of the sale, and was never informed that a sale had been carried out. Of course the defendants are liable, unless the statute to which I have referred protects them. It has been argued that they were party or privy to Searle's fraud. Even if it could be said that they were liable for his fraud, it is another thing to say that they were party or privy to it. I think that those words in the statute indicate moral complicity, which is not suggested in this case. Then the defendants cer-

tainly did not convert the money to their own use. Therefore neither of those exceptions can apply. Did they retain the money? That is more doubtful. Searle's receipt of the money as their agent and by their direction was equivalent to a receipt by the defendants. It absolved the purchaser, and neither against him nor against the persons entitled to the surplus could they be treated as not having received it. Then, while the money remained in Searle's hands without any change in the nature of his possession of it, I should think that his retention of it was a retention by the first mortgagees. Mr. Chadwyck Healey argued, and I am inclined to accept his argument, that the intention of the exception in the statute was to prevent a trustee using the bar by lapse of time to enable himself to appropriate a trust fund, which he had not appropriated but had the power of appropriating. Money in the hands of an agent, from whom it could be recovered by the trustee, would be in this position, and it could not be the intention of the statute that the trustee might bar the *cestui que trust* and then recover the money from his own agent and keep it. For example, if the trustee had paid the money to his own separate account at a bank, not mixing it with his own money, so long as he could recover it from the banker I should think he retained it within the meaning of this exception in the Act. Up to the moment of Searle's bankruptcy the first mortgagees might have recovered the money from him, and until then I think the exception applied as to the whole. I am inclined to think that any dividend which they can obtain in the bankruptcy would be in the same position. But it is not necessary to decide this, because we are informed that the estate will pay no dividend. I am, therefore, compelled to conclude that, after Searle's bankruptcy and at the date of the writ in this action, the defendants did not "still retain" these moneys. Thus far I have been treating the case as though the six years began to run from the time when Searle received the money. It would if the plaintiff had been aware of such receipt. It was the duty both of Searle and the defendants to inform the plaintiff of this, and it was certainly a fraudulent act on Searle's part to omit to do so and to apply the money to his own purposes. The time would only begin to run against Searle from the discovery of his fraud in 1892. This was always the rule in equity, and since the Judicature Act it is the rule in all branches of the High Court: (Judicature Act 1873, ss. 23 and 24, subsect. 1; *Gibbs v. Guild*, *ubi sup.*) It is argued that the defendants are liable for the fraud of their agent which their breach of trust by leaving the money in his hands enabled him to commit, and that, therefore, time did not begin to run in their favour until the plaintiff discovered this fraud. For this proposition the authority of *Blair v. Bromley* (*ubi sup.*) was cited. In that case a retired partner in a firm of solicitors was held liable for the fraudulent representation of his copartner, William Bromley, that a fund intrusted to the firm for investment on mortgage had been so invested. In fact it was not, but the money was used by the firm, though without the knowledge of the partner who was sued. Lord Cottenham held (2 Ph. 360) that the liability which arose from the representation was "merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be

placed in the same situation as if the fact represented were true," and that the fraudulent partner might bind his copartner "by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one," and his Lordship continues: "I am therefore of opinion that William Bromley's partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud." That is, that, although the retired partner was not an accomplice in the fraud, and indeed had no knowledge or means of knowledge of it, and therefore, of course, did not conceal the fraud in any sense, he could not avail himself of any lapse of time before the discovery of the fraud by the person injured by it. In *Moore v. Knight* (*ubi sup.*) it was held by Stirling, J. that this decision was not affected by the statute we are now considering. It seems to follow that, when a principal is liable for the fraud of his agent, time does not begin to run so as to bar the remedy against him until the injured person has discovered the fraud. And to invoke this doctrine it is not necessary to prove concealment of the fraud by the principal. Now, in *Blair v. Bromley* the retired partner had the benefit of the fraud. Is the principal liable for the fraud of an agent from which he obtains no benefit, but which was committed solely to benefit the agent? In *St. Aubyn v. Smart* (19 L. T. Rep. N. S. 192; L. Rep. 3 Ch. App. 646) receipt of money by one of several partners with the knowledge of the others was held sufficient to make them all liable, although the firm did not benefit, the partner who received the money having paid it to his private account, from which he drew it out and absconded. Wood, L.J. said: "It is a fraud of one partner for which the other is liable." But in the earlier part of his judgment the Lord Justice treats the money as having been received by the firm and by them paid to the private account of the partner who misappropriated it. In *Barwick v. The English Joint Stock Bank* (16 L. T. Rep. N. S. 461; L. Rep. 2 Ex. 259, 265) Willes, J. stated the general rule to be, "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." This passage was cited with approval by Lord Selborne in *Houldsworth v. City of Glasgow Bank* (42 L. T. Rep. N. S. 194, 196; 5 App. Cas. 317, 326), and it was deliberately decided in *The British Mutual Banking Company Limited v. Charnwood Forest Railway Company* (*ubi sup.*) that the words "for the master's benefit" in that statement of the doctrine are essential, and that where an agent in the course of his employment committed a fraud, not for his principal's benefit, but for the benefit of himself, and the principal did not benefit by the fraud, he could not be made liable for it. On the whole, I come reluctantly to the conclusion that the cause of action did accrue when Searle first received the money, and that the 8th section of the Trustee Act 1888 bars the remedy against the defendants. The case seems a very hard one; the plaintiff has been deprived of his property by a breach of trust of which he knew nothing and without any fault

CT. OF APP.]

THORNE v. HEARD.

[CT. OF APP.]

or negligence of his own. But the proximate cause of his loss is the fraud and bankruptcy of Searle, to whom the statute would give no protection. By that fraud the defendants have not benefited, and I think they cannot be made liable for it.

SMITH, L.J.—This action is brought by the plaintiff to have an account taken of certain moneys which in the year 1878 came into the defendants' possession as trustees for the plaintiff, the real question being, whether the defendants can avail themselves of the provisions of sect. 8 of the Trustee Act of 1888 (51 & 52 Vict. c. 59), and set up against the plaintiff's claim that his cause of action did not accrue within six years before action brought. On the 5th Feb. 1878 the defendants, who were trustees and first mortgagees of certain premises at Torquay to secure 1000*l.*, sold them under their power of sale, and realised thereby the sum of 1700*l.* The plaintiff was second mortgagee of the premises to secure the amount of 333*l.*, and a solicitor named Searle, who was then a well-known local practitioner, and trusted by all parties, had a third charge upon the property. Upon the sale being effected, the proceeds—viz., the 1700*l.*—were, with the defendants' assent, received by Searle. He handed 1000*l.* of this over to the defendants, to satisfy their mortgage debt, and gave the receipts which have already been referred to by the Lords Justices who have preceded me. The defendants at the time did not read these documents; they placed them with their trust papers, believing that everything would be in order and honestly and efficiently carried out by Searle. It now appears that Searle, instead of handing over to the plaintiff the sum of 333*l.* due to him, as he undertook to do, misappropriated it to his own use, and kept the fact of the sale concealed from the plaintiff, and, to effect this, paid and continued to pay the plaintiff interest upon the 333*l.* down to the year 1892, upon the footing that his second mortgage was still extant. In August of that year Searle became bankrupt, and his defalcations were discovered, and the present action was then commenced. It is not disputed that, but for sect. 8 of the Trustee Act of 1888, upon which the defendants rely, they would be liable to account to the plaintiff. It will be seen that there are three exceptions to the privilege conferred by this section: (1) If there has been a fraud or fraudulent breach of trust to which the trustee was party or privy; (2) if the trust property or its proceeds is still retained by the trustee; (3) if the trust property has been converted to the trustee's own use. In either of such cases the trustee is not to have the benefit of the section. These exceptions are framed to meet the cases of trustees who have been either guilty of fraud, or who are holding by themselves or their agents, or have converted to their own use, the trust property; in other words, who are themselves fraudulent, or are appropriating or have appropriated the trust property to themselves. As to the first exception, it is clear to me that the defendants have not been party or privy to the fraud of Searle. A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has in fact been committed by another for his own benefit. As to the second exception, the question is, Was the 333*l.* still retained by the defendants—mark the word "still"—at the

time of action brought? In my judgment, a man cannot be said to retain that which in fact he has not got, and which he has no power of getting. It is true that the defendants, fourteen years before action brought, had in their possession the 333*l.*, for the receipt by their agent Searle was a receipt by them. It is also true, as argued by Mr. Cozens-Hardy, that they never consciously parted with the possession of these moneys, for they thought nothing more about them; but this is not decisive of this point. Suppose these moneys had before action brought been stolen from the defendants, and the thief had remained unknown and the money unrecovered, can it be said that the trustees "still retained" them? It seems to me that it is impossible to so hold—that upon the facts of this case the defendants did not retain these moneys within the meaning of this section when the action was brought. There is no pretence for saying that at this time Searle was holding the money for the defendants; it had been made away with by him without the defendants' knowledge, and we are told that any dividend coming from his estate is not worth considering. In my judgment, the second exception does not apply to these defendants. It is conceded that they are not within the third exception. But it is argued for the plaintiff that his cause of action only accrued to him upon discovery of Searle's fraud, immediately before the issue of the writ in 1892, and that the defendants consequently cannot prove their defence, that the plaintiff's cause of action arose six years before suit. It appears to me that *prima facie* the plaintiff's cause of action against the defendants arose in the year 1878, when the defendants by their solicitor, Searle, received the 333*l.*, and which the defendants then neglected to hand over to the plaintiff. It is, however, answered that, although this might be so but for Searle's fraud, yet his fraud, intentionally concealed from the plaintiff, kept him in ignorance of his rights; that Searle's fraud was the defendants' fraud, and that time therefore did not begin to run against the plaintiff until the time when he might with reasonable diligence have discovered the fraud. I agree that, if an action had been brought by the plaintiff against Searle for an account, he could not set up the Statute of Limitations. It would in such action have been a good replication to a plea of the Statute of Limitations, that the plaintiff did not discover, and had not reasonable means of discovering, the defendants' fraud until within six years before action brought. The case of *Gibbs v. Guild* (*ubi sup.*) has held this to be so. It will be noticed that Searle's fraud was wholly disconnected with the defendants, and only came into existence after the defendants had failed to hand over the moneys, as they should have done in 1878, to the plaintiff, and therefore after the cause of action against them had accrued. It has been held by this court, and not, I think, for the first time, in the case of *The British Mutual Banking Company Limited v. The Charnwood Forest Railway Company* (*ubi sup.*), where the authorities are collected, that a principal cannot be sued for the fraudulent acts of his agent, even though the agent purported to act within the scope of his employment, if, when he committed the fraud, he did so, not in the interest of his principal, but in his own interest. If the plaintiff was attempting

to sue the defendants for damages occasioned to him by reason of the fraudulent acts of Searle, he could not, in my judgment, succeed, because a principal is not responsible for his agent's fraud which is perpetrated in his own interest. Then why are the defendants not to be allowed to rely upon what the statute permits them to set up and rely on, if they have not been guilty of some fraud themselves or of some fraud for which they are responsible? I can see no answer to this, and it appears to me that the defendants are entitled to rely upon the statute, and that Searle's fraud does not incapacitate them from doing so. But it was said that the case of *Blair v. Bromley* (*ubi sup.*) decided the contrary, and that no cause of action arose until the fraud was discovered. In that case one partner in a firm of solicitors was sued for a fraudulent misrepresentation made by his partner in relation to a matter within the limits of the partnership business, and which continued by concealment after the dissolution of the firm. Lord Cottenham held that the fraudulent misrepresentation was the representation of the firm, and that the cause of action against the innocent partner did not therefore arise till the firm's fraud was discovered. In the present case, as before pointed out, Searle's fraud was not the defendants' fraud, and hence the distinction between the two cases. Stirling, J., in the case of *Moore v. Knight* (*ubi sup.*), held that the decision in *Blair v. Bromley* was not affected by the Trustee Act of 1888, s. 8, and pointed out how the case rested upon principles of law relating to misrepresentation and partnership. It was not contended in this court that the payment of the interest by Searle to the plaintiff took the case out of the statute. In my opinion the judgment of Romer, J. must be upheld, and the appeal dismissed.

Solicitors for the plaintiff, *Mear and Fowler*, agents for *G. H. Thorne*, Nottingham.

Solicitors for the defendants, *Yarde and Loader*, agents for *Prickman and Risdon*, Exeter.

Thursday, Feb. 8.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

GREEN v. THE CHELSEA WATERWORKS COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Waterworks company — Bursting of main—Damage—Liability of company.

A main belonging to a waterworks company burst, and the water flooded the plaintiffs' premises, causing considerable damage.

Held, that the company being authorised by Act of Parliament to lay the main, and having been guilty of no negligence, were not liable in damages to the plaintiffs.

Decision of Mathew, J. affirmed.

Rylands v. Fletcher (19 L. T. Rep. N. S. 220; L. Rep. 3 E. & I. App. 330) distinguished.

THIS was an appeal from a decision of Mathew, J. on further consideration in an action tried before him with a special jury on Nov. 29 and 30, 1893.

The plaintiffs were fly proprietors, carrying on their business at 141, Upper Richmond-road,

Putney, and the defendants were a waterworks company, authorised by certain statutes, namely, the Chelsea Waterworks Acts 1852, 1875, and 1887 (15 & 16 Vict. c. clvi.; 38 & 39 Vict. c. cviii.; 50 & 51 Vict. c. xciv.), to construct and maintain certain waterworks.

The plaintiffs in their statement of claim alleged that the defendants had laid down and were the owners of a main water-pipe which passes along Putney-hill and near to the plaintiffs' premises, and that this water-pipe was constantly filled with large quantities of water, and that on the 10th Jan. 1889 the said main water-pipe burst and the water therefrom poured down into the plaintiffs' premises, and did great damage to the plaintiffs' premises, horses and stock, and other property thereon; and in the alternative they claimed for loss and damage through the defendants' negligence.

The defendants pleaded that they were empowered by their Acts and obliged to construct and maintain these waterworks, and that the main was duly laid and maintained under and in pursuance of their statutory powers, and not otherwise.

They also pleaded that the statement of claim disclosed no cause of action, on the ground that the defendants, being under a statutory obligation to supply water, were not liable for damage by its escape, unless caused by the negligence of the defendants, and they denied that they were guilty of any negligence, and they said that the main was properly and skilfully constructed and laid down and kept in proper repair.

The jury found that the damage to the plaintiffs' premises was not caused by the defendants' negligence in the management of their mains, and the learned judge then reserved for further consideration the question whether the defendants were liable as insurers.

Henry Kisch for the plaintiffs.—By their private Acts the defendant company were not bound to lay down these pipes; they were only authorised and empowered to do so, and the powers given by those Acts were permissive only and not compulsory, as we see by the sections of the Acts which say that "it shall be lawful" for the company to do such and such things. That being so, the defendants clearly fall within the principle of *Rylands v. Fletcher* (19 L. T. Rep. N. S. 220; L. Rep. 3 E. & I. App. 330), and by the decision in that case they are clearly liable for the damage caused to the plaintiffs. The cases relating to railway companies, and relied on by the defendants, are wholly different from the present case, as those cases are decided upon the principle that the act authorised to be done was unlawful *per se*, and therefore actionable but for the statutory powers. In those cases, therefore, there was an irresistible inference that the Legislature must have sanctioned the unlawful act. In the present case, on the other hand, the thing authorised to be done—namely, the storing of the water in the mains—was lawful *per se*, which fact distinguishes the case from those cases where the act authorised to be done would have been unlawful but for the statutory powers. By giving such powers to the waterworks companies the Legislature could not have intended to place companies in a better position than private persons would have been in if the damage had been caused by a private person storing large quantities of water on his

CT. OF APP.]

GREEN v. THE CHELSEA WATERWORKS COMPANY.

[CT. OF APP.]

premises. If the bursting of the pipe and the damage caused thereby had been a necessary consequence of the laying down of the mains and the storage of water therein, then the case might fall within the principle of the cases applicable to railway companies, such as the cases of

The London, Brighton, and South Coast Railway Company v. Truman, 54 L. T. Rep. N. S. 250; 11 App. Cas. 45;

Vaughan v. The Taff Vale Railway Company, 2 L. T. Rep. N. S. 394; 5 H. & N. 679;

Cattle v. The Stockton Waterworks Company, 33 L. T. Rep. N. S. 475; L. Rep. 10 Q. B. 458;

The Hammersmith Railway Company v. Brand, 21 L. T. Rep. N. S. 238; L. Rep. 4 H. of L. 171;

Snook v. The Grand Junction Waterworks Company Limited, 2 Times L. Rep. 308;

National Telephone Company v. Baker, 68 L. T. Rep. N. S. 283; (1893) 2 Ch. 186.

Where the terms of a statute are not imperative, but permissive—as in this case—the fair inference is, that the Legislature intended that the powers thereby conferred should be exercised strictly in accordance with private rights:

Metropolitan Asylum District v. Hill, 44 L. T. Rep. N. S. 653; 6 App. Cas. 193.

In *Dixon v. The Metropolitan Board of Works* (45 L. T. Rep. N. S. 312; 7 Q. B. Div. 418) the reason of the decision for the defendants was that the language of the special Act was compulsory—that is, that it compelled the Board of Works to do the work complained of. If the above cases are carefully read, the principle of the decision in each case is, that the act authorised to be done could not be done without doing the act complained of, and therefore there is an irresistible inference that the Legislature impliedly authorised the act complained of, and made that legal which otherwise would have been illegal.

Sir R. E. Webster, Q.C., Moulton, Q.C. and English Harrison for the defendants.—The case is really concluded by the finding of the jury that there was no negligence on the part of the defendants in the management of their mains. Although the company were not compelled to lay down the pipes they were bound to keep these pipes full of water, and as there was no negligence on their part they are not liable for the damage caused by the bursting of a pipe. The case does not fall within *Rylands v. Fletcher* (*ubi sup.*), but within the cases applicable to the liability of railway and other companies, and comes expressly within the decision of *Dunn v. The Birmingham Canal Company* (27 L. T. Rep. N. S. 683; L. Rep. 8 Q. B. 42).

MATHEW, J.—I am of opinion that my judgment must be for the defendants. Mr. Kisch agrees that he is asking me to lay down for the first time the proposition that a waterworks company ought to be treated as insurers in a case of this kind; in other words, that they ought to be taken to have obtained their powers from the Legislature on the understanding that they should be responsible for things which no reasonable care or skill could prevent. It is opposed to one's notion of what has been assumed, to say the least of it, in many of the arguments with reference to the liability of water companies. Now, we have the analogy of the railway companies and of other undertakings of that sort, and we have numerous decisions with reference to the position

of such companies. Over and over again it has been laid down that they are not insurers, and, so long as they exercise their statutory powers with reasonable care and skill, they are relieved of any liability for damage which may be occasioned to adjoining proprietors. In this particular case the waterworks company obtained from Parliament the power to construct reservoirs, and to carry their mains and pipes under public thoroughfares, with the obligation that, when once the works are constructed, they shall continue to supply the public. It is clear that with no amount of care or skill can they prevent the bursting of one of their pipes, and the consequent damage that may be occasioned to those who may be living near to where the bursting has taken place. It is said that it would be reasonable to suppose that Parliament intended to impose upon them this obligation, namely, the obligation of insurers. But it is manifest that, although the particular injury may not be one of frequent occurrence, it is one that is incidental to the exercise of their statutory powers; in other words, it is impossible to carry on their undertaking without a liability of this sort. That being so, it is not because the damage may be frequent or constant in the case of a railway company, and only occasional in the case of a waterworks company, that any sound distinction can be drawn. The principle of one set of cases appears to me to be distinctly applicable to the other. This waterworks company could not carry on its business or exercise its statutory powers without exposing those who are adjoining proprietors to the risk of such damage as has been sustained in this case. I therefore think that my judgment must be for the defendants upon this point.

From this decision the plaintiffs appealed.

Henry Kisch, for the appellants, in addition to the cases above mentioned, referred to

Mayor, &c., of Southport v. Ormskirk Union Assessment Committee, 69 L. T. Rep. N. S. 852, 853; (1894) 1 Q. B. 196, 199;

Sadler v. The South Staffordshire and Birmingham District Steam Tramways Company, 23 Q. B. Div. 17.

Sir Richard Webster, Q.C., Moulton, Q.C., and English Harrison, for the respondent company, were not called on.

LINDLEY, L.J.—In my opinion this is an experiment which ought not to succeed. Mr. Kisch has exercised his ingenuity in inviting the court to lay down the law differently from the way in which it ought to be laid down. So far as the action is based on negligence it is not maintainable, because the jury have found that there was no negligence. Then on what principle can the defendants be held liable except negligence? It was argued that the company were liable by reason of the doctrine in *Rylands v. Fletcher* (*ubi sup.*), and it was said that this was like the case of a landowner who stores water on his land so as to become a source of danger to his neighbours, and that consequently the defendants were bound to show that they were relieved by the Acts of Parliament under which the company was constituted from the duty of keeping the water in their pipes. The fault of that argument is in the major proposition. *Rylands v. Fletcher* was not a case of a company authorised to lay down water pipes by Act of Parliament. It was a case of a

private individual storing water on his own land for his own purposes. There was no negligence on his part, but the principle of that case, as explained by Lord Blackburn in his judgment in the Court of Exchequer Chamber (14 L. T. Rep. N. S. 526; L. Rep. 1 Ex. 279), was that "the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . This, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." And this is cited with approval by Lord Cairns, L.C. in his judgment in the House of Lords on appeal from that court. It is possible that that principle might have been applied to companies having statutory authority to make railways or carry water, but the court has declined to extend it to such cases. The same argument was used without success in the case of *Dunn v. The Birmingham Canal Company* (*ubi sup.*), where, without any negligence on the part of the company, water from the canal had flooded the plaintiff's mine. It was there held that the defendants were not liable expressly on the ground that the doctrine of *Rylands v. Fletcher* was inapplicable to a company which was doing what it was authorised to do by Act of Parliament. That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision. Here the defendant company were only doing what they were authorised to do by their Act, and as they were not guilty of negligence they are not liable for damage. The appeal fails, and must be dismissed with costs.

The other Lords Justices concurred.

Solicitor for the plaintiffs, A. Pope.

Solicitors for the defendants, Hollams, Sons, Coward, and Hawkeley.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, Dec. 13, 1893.

(Before CHITTY, J.)

Re LORD SUDELEY AND BAINES AND CO. (a)

Will—Settlement—Tenant for life—Expiration of limitations—Power of sale—Duration of power—Reasonable time for purpose of distribution—Discretion of trustees.

A testator gave his trustees a power to sell his residuary estate, at such times as they should think fit, for the purpose, as held upon the true construction of the will, of its more convenient distribution among the objects of his bounty, after certain life estates had come to an end.

Held (following a dictum of Jessel, M.R., in *Peters v. Lewes and East Grinstead Railway Company*, 45 L. T. Rep. N. S. 234; 18 Ch. Div. 429), that the power was not void as infringing the law against perpetuities, but could be exercised within

a reasonable time after the death of the life tenants, and that the trustees could give a good title to the purchaser of the property.

ADJOURNED SUMMONS.

The Hon. Algernon Gray Tollemache, by his will dated the 31st Jan. 1874, among other devises and bequests, gave and devised his six freehold houses in the Strand, numbered 194, 195, 196, 197, 198, and 226, to his wife, Frances Louisa Tollemache, for her life or during her widowhood, and after her death, or marrying again, the testator directed that the said freehold houses should fall into his residuary real estate thereafter disposed of. And he authorised the trustees of his will to sell either by public auction or private contract, at such times, for such prices, and on such terms and conditions as they should think fit, all or any portion of the residuary real estate; and for that purpose he directed them to convey the same by deed to any purchaser or purchasers thereof. The other provisions of the will are detailed in the judgment.

The testator died on the 16th Jan. 1892, and his will, with six codicils, was proved by Lord Sudeley and J. A. Bertram on the 12th Feb. 1892.

The testator's freehold houses in the Strand were put for sale by auction on the 20th July 1893.

The purchasers, by their requisitions, raised the question whether the power of sale given by the will to the trustees had not expired in consequence of the estate having become absolutely vested in fee simple in the beneficiaries under the will.

Summonses were taken out by both the purchasers, asking for a declaration that the vendors, the executors and trustees, had no subsisting power to sell the hereditaments, and that good title thereto had not been shown in accordance with the particulars and conditions of sale.

Both summonses were adjourned into court.

Farwell, Q.C., Whiteway, and F. L. Wright for the purchasers.—The power of sale came to an end on the vesting of the fee in the beneficiaries:

Lantsbery v. Collier, 2 K. & J. 709.

In *Peters v. Lewes and East Grinstead Railway Company* (45 L. T. Rep. N. S. 234; 18 Ch. Div. 429) the power of sale was for the purpose of division. The dictum of Jessel, M.R. in that case, that the power could be exercised within a reasonable time after the death of the life tenant, was not referred to by the other Lords Justices. They referred also to

Re Cotton's Trustees and the School Board for London

46 L. T. Rep. N. S. 813; 19 Ch. Div. 624;

Mower v. Orr, 7 Hare, 473;

Cornick v. Pearce, Ib. 477.

Byrne, Q.C. and Sefton Strickland for the vendors.—The power of sale is exercisable within a reasonable time after the death of the life tenants. We rely on the dictum of Jessel, M.R., in *Peters v. Lewes and East Grinstead Railway Company*. They also referred to

Re Tweedie and Miles, 27 Ch. Div. 315.

Farwell, Q.C. replied.

CHITTY, J.—The purchasers object to the title on the ground that the power of sale contained in the testator's will was not subsisting at the time of the sale. The testator died in Jan. 1892, and the sale took place in July of this year. The power of sale runs thus: [His Lordship read the power, and continued:] In regard to a point

CHAN. DIV.]

Re LORD SUDELEY AND BAINES AND CO.

[CHAN. DIV.]

raised by the purchasers I am of opinion that the words directing the trustees to convey the real estate sold to any purchaser are sufficient to show that the testator intended that the legal estate in fee simple should pass to his trustees. The trustees, according to the power, are to sell at such times as they shall think fit; there is no other limitation of the period within which they may exercise the power. Now, as regards powers of sale in settlements, whether by deed or by will, where there is no limit of time, as sometimes but rarely is the case, to show that the power must be exercised within lives in being and twenty-one years afterwards, that is, the period allowed by the law against perpetuities, the law appears from *Lantsbery v. Collier* (*ubi sup.*) and other authorities, to stand settled in this way. These unlimited powers can be exercised only while the purposes of the settlement remain unexhausted. A familiar illustration is afforded by an ordinary strict settlement by deed, where the legal estate is taken by tenants for life in succession with limitations in tail; and in such cases the unlimited power of sale is supported on the ground that the tenant in tail in possession can bar the power. In other cases, where the settlement is not of a strict nature, the rule which I have mentioned has been applied, and the function of the court is to look through the instrument to see whether the purposes are or are not exhausted; and the general rule is that, where, to use a familiar expression, the estate is "at home"—is vested absolutely in some person or persons in fee simple—that power is no longer exercisable as against the estate and interest which those persons thus take. It is a question of intention, and on looking through the instrument the court has to come to the conclusion whether or not it was the intention that the power should be exercised after the estate in fee simple was thus vested in possession. There came before the Court of Appeal in *Peters v. Lewes and East Grinstead Railway Company* (*ubi sup.*) a question in regard to the power of sale that was contained in the will of one Hopkinson. The trustees there took the legal estate on trust for the testator's wife for her life, and after her death to assure it to three persons in equal shares for their separate use as tenants in common, with a gift over in favour of their respective issue in an event which did not happen, and the power of sale was conferred in express terms "for the purpose of division." Sir G. Jessel, M.R. expressed his opinion that that power of sale did not determine on the death of the tenant for life, but was exercisable within a reasonable time afterwards for the purpose of division. He said: "As it has long been the habit of conveyancers to frame powers of sale in general terms, the courts have had to consider how they are to be limited so as to bring them within the rule; and the courts have decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when by reason of the expiration or cesser of the limitations contained in the settlement, whether made by will or deed, the absolute interests come into existence"—by which I understand him to mean fall into possession—"then the power is considered to be at an end; and, inasmuch as no settlement can be valid either by will or deed under which absolute limitations do not come into existence within the prescribed

period, that makes all the powers valid. That is the doctrine which is laid down not only in *Lantsbery v. Collier* (*ubi sup.*), but in a long line of cases. But that does not appear to me to have any application to a case where the power is to take effect on the coming into existence of the absolute limitations; or, to put it in other words, it does not apply to a power where there is nothing but absolute limitations of interests given in the first instance. Suppose, for instance, a man having a dozen children gives his real and personal estate to trustees upon trust to divide amongst his twelve children, and, for the purpose of making the division, he empowers his trustees to sell. That is not, in my opinion, an invalid power. The trustees are bound to make a division in a reasonable time . . . and no one would say that twenty-one years was a reasonable time. . . I agree, if all the children, being free from disability, concur in calling upon the trustees to convey, that puts an end to the trust, and, of course, to the power also." But when the children, in the supposed case, do not so concur, he considers the power is still exercisable, and upon the construction of the instrument within a reasonable time, a reasonable time being in such a case a time well within that which is allowed by the law against perpetuities. Now, he makes a pertinent observation on the will before the court, where the power, as I have said, was "for the purpose of division," that it is much more convenient to make a division by selling the property and dividing the money than by allotting undivided shares—a remark which is, of course, peculiarly applicable to real estate, and to real estate which, according to the limitations, has to be divided among numerous persons. There the only mode of obtaining a sale would be through the medium of the Partition Acts. Now, it is true that the other Lords Justices refrained altogether from expressing any opinion on this point, and consequently it is rightly said by the purchasers that this was the opinion of Sir G. Jessel alone, and, having regard to the decision of the court, they are justified in saying that this was not more than a dictum on his part. But I see no reason to think that the opinion there expressed by the late Master of the Rolls is incorrect, or that it was not in accordance with the previous authorities bearing upon the point. In *Re Cotton's Trustees and the School Board for London* (*ubi sup.*) Sir E. Fry had before him the question of a power of sale conferred on trustees, limited, however, as to its exercise by express terms to the period allowed by the rule against perpetuities; and the question he had to decide was, whether this power, to which no objection could be raised of a general kind, was still exercisable, although the property had become vested absolutely in persons who were *sui juris*. He treated that question as one of the intention of the settlor, whether the power remained exercisable after that event of vesting in possession, and he examined the limitations and the terms of the will for the purpose of seeing whether that intention was sufficiently fulfilled. Now, it is observable that, in the power he had before him, there was no purpose of division expressed, but he collected from the rest of the instrument that there was such an intention, and manifested in such a manner that he was justified in saying that the power was intended to be exercised for the purpose

of a division. The result, then, of these two authorities, and particularly the last, is that, on the question before me, I have to examine the other parts of the instrument for the purposes of ascertaining whether the intention is sufficiently shown that the power should be exercised after the death of the tenants for life for the purposes of a division. It appears by way of admission, I think, that the persons beneficially entitled in the events which have happened to the testator's residuary real estate are some twenty or so in number, and that with regard to one-fourth, the division, whether it is to be portional division or actual division, is a division among sixteen persons in seventeen shares, one taking two shares, and bringing the portions in regard to the one-fourth to a sixty-eighth part of the whole. Now I will shortly examine the will with the view already stated. There is a devise and bequest of the testator's real and personal estate in England, Ireland, and the colony of New Zealand to his brother Frederick and to his niece Olivia, and to Mr. Hanbury Tracey, now Lord Sudeley. I stay for a moment to mention that the testator died a very wealthy man, leaving, it is said, property in New Zealand, England, and elsewhere, amounting to a million and a quarter or thereabouts, and that left in England consisting in great part of houses in the Strand and elsewhere, the value of which is estimated to be some 75,000*l*. The trusts which he declares are to pay the income to his brother during his life. There had been in an earlier part of the will a specific devise under which the testator's widow took the rents of the specific property during her widowhood. That, of course, would be a prior life interest to the life interest that I am now reading. After the death of his brother, his wife and two sisters and the survivors and survivor of them during their joint lives and the lives of the survivors and survivor of them, take the income among them, and after the death of the survivor he gives his residuary real and personal estate in the following manner: Half he gives to his brother Frederick in fee, and then he makes a provision for the event, which did happen, of his brother dying in his lifetime. He says that, in that event, the devise and bequest of the half so made in favour of his brother is not to lapse, but is to be taken as part of his real and personal estate so as to pass under his will or to his estate in the same manner, as far as circumstances allowed, as if he had survived him. The testator appears to have apprehended that that devise and bequest of one-half to his brother, or to follow his brother's estate, might fail for some reason or other, or simply because his brother's will might err against the rule of perpetuities or the law of mortmain, or for some other reason, and he makes this provision in the event of that last devise and bequest not being according to law, and therefore void. Then he gives this half to his brother Frederick's only child for her life, and at her death, or in case she shall have died before him, then follow these words: "My will is, that it shall be divided share and share alike between any children she may have who shall live to attain the age of twenty-one, or, being a daughter, shall marry under that age, except the eldest son." Now it is quite true that this contingent devise to his brother Frederick's child and her children has not taken effect; but still, in construing a will for the purpose for which I am now examining it,

it seems to me not unreasonable to take this disposition into consideration. I find the words there pointing to an actual physical division among the children of the testator's niece Ada. He says it shall be divided. Now, I am quite conscious that words of division are often found, and, speaking generally, or speaking with reference to many instances at least, the words import no more with regard to real estate than a notional division; that is to say, that they take as tenants in common in undivided shares. But there is certainly something peculiar in this language which speaks of this share with the imperative direction that it shall be divided. There are other parts of the will where somewhat similar expressions are used, and I deal with them somewhat cautiously, admitting that what I have already stated is often correct; but I say by this will it appears to me there is a pointing to an actual division. For the vendors it was not argued that the trustees have a power of allotting; on the contrary, it was said, and I think on the whole rightly said, that the trustees had no such power. They could not allot specific portions of the real estate to any of the beneficiaries in respect of, or on account of, the beneficiaries' particular shares. Then the testator goes on to deal with the remaining half, and he says, as to the other or remaining half, "dividing the said half into two equal shares." These are words to which I have already alluded. Then there comes a devise and bequest which is, according to what I have explained with regard to real estate between trustees, a declaration of trust, but in point of fact in favour of his brother Hugh, "and in case my brother Hugh shall die in my lifetime," by which event the devise and bequest to him will lapse, then he devises and bequeaths that share equally, share and share alike, "to all the children of my brother Hugh, except his eldest son." That devise and bequest was revoked by the codicil, but that revocation is not material to the purpose for which I am now reading the will, which is to ascertain the testator's intention with regard to the power of sale, there was in the case of the children of Ada. The testator is contemplating a division among the class of persons who may be interested. Then, as to the remaining share of this second half, he devises and bequeaths that to be equally divided, share and share alike, between his niece Olivia, the five before-mentioned children of his brother Arthur, such of the before-named five children of his late niece Louisa, such of the before-named three children of his late niece Emelia, and such of the before-named three children of his late niece Adelaide as should live to attain twenty-one, or being a daughter should marry under that age. The result is, that there is contemplated by the testator on the face of his will a distribution of property among numerous persons, and, as I have said, a distribution at the present time that (according to the events which have happened) is among no less than twenty persons or thereabouts, and in the shares and fractions which I have stated; and then comes the power of sale, a power in terms to be exercised at such time as the trustees think fit. It appears to me that I am justified in holding that, on the true construction of this will, the testator intended that this power should subsist for the purpose of making the more convenient distribution among the objects of his bounty. The power, therefore, is

CHAN. DIV.]

STODDART v. SAVILE.

[CHAN. DIV.]

not obnoxious to the rule against perpetuities. It is a power that must be exercised within a reasonable time after the life estates have come to an end. I think the power, as was admitted in the argument for the purchasers, was one that could have been exercised during the life of the longest liver of the tenants for life, and I think that it did not determine upon the happening of that event, but that there was a reasonable time—as the Master of the Rolls said in the case to which I have referred—after the life estates dropped, allowed and intended by the testator for the exercise of this power; and there is no question, such as there was in the case of *Re Tweedie and Miles* (*ubi sup.*), before Pearson, J., where there was a trust for sale, and not a mere power. There is no question that the power has been exercised within a reasonable time. I can find no argument of any weight adverse to the conclusion at which I have arrived in any of the cases. I mention it merely to show that I have not overlooked the argument on that head. The result therefore is, that I think the power was and is subsisting.

Solicitors: *L. Basil Thomas; Maddisons; J. A. Bertram.*

Nov. 23 and 29, 1893.

(Before CHITTY, J.)

STODDART v. SAVILE. (a)

Marriage settlement—Wife's property—Ultimate trust for next of kin—Die "without having been married"—Child of marriage.

By a marriage settlement certain property belonging to the wife was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default to pay the income thereof to her for life, and after her death for such persons as she should by deed or will appoint, and, subject to any such appointment, in trust for the persons who under the statutes for the distribution of intestates' estates would on her decease have been entitled thereto if she had died possessed thereof intestate and "without having been married." The wife died without having made any appointment, leaving one child of the marriage.

Held (dissenting from Emmins v. Bradford, 42 L. T. Rep. N. S. 45; 13 Ch. Div. 493), that the words "without having been married" were satisfied by confining them to the exclusion of the husband, and that the trust funds went to the child.

By the settlement, dated the 10th Oct. 1868, made on the marriage of Georgiana Stoddart with Sidney Godolphin Quicke, certain property of the value of about 5000*l.* belonging to the intended wife was assigned to trustees upon trust to dispose of the same as she should from time to time by writing direct, and in default to pay the income thereof to her for life for her separate use, and after her death, as to the property or so much thereof as should not have been disposed of during her life under such direction, for such persons as she should by deed or will appoint, and, subject to any such appointment, "in trust for the person or persons who under the statutes for the distribution of intestates' estates would on the decease of the said Georgiana Stoddart have been

entitled thereto if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take in the shares in which the same would have been divisible between them under the same statutes."

Mrs. Quicke by her will appointed a life interest to her husband, who predeceased her, but did not otherwise exercise her power of appointment under the settlement, and died in August 1890, leaving an only son and a mother and sisters, now represented by nephews and nieces, surviving her, and an originating summons was taken out to determine the question whether the son took under the ultimate trust as next of kin of his mother, or whether the words "without having been married" excluded the son by necessary implication.

Farwell, Q.C. and *Sefton Strickland*, for the nephews and nieces, argued that, there being no special context, the words "die without having been married" must be read in their ordinary sense, and that the persons who would have been the next of kin of Mrs. Quicke, if she had died a spinster were entitled:

Emmins v. Bradford, 42 L. T. Rep. N. S. 45; 13 Ch. Div. 493.

They also referred to

Dalrymple v. Hall, 16 Ch. Div. 715;

Re Sergeant, 26 Ch. Div. 575.

Levett, Q.C. and *E. Ford*, for the son, argued that the words must be read as intending to exclude the husband only, and that all the authorities, except the case of *Emmins v. Bradford*, were in favour of the son. They cited

Wilson v. Atkinson, 11 L. T. Rep. N. S. 220; 4 De G. J. & S.;

Re Ball's Trusts, 40 L. T. Rep. N. S. 880; 11 Ch. Div. 270;

Upton v. Brown, 41 L. T. Rep. N. S. 340; 12 Ch. Div. 872;

Re Arden's Settlement, W. N. 1890, p. 204;

Pratt v. Mathew, 22 Beav. 328; 8 De G. M. & G. 522;

Clarke v. Colls, 9 H. L. C. 601.

Farwell, Q.C., in reply.

CHITTY, J.—The controversy turns on the ultimate trust in the marriage settlement of the late Mrs. Quicke, and arises between her only son and her nephews and nieces. The settlement excludes the husband, and makes no provision for the children of the marriage. It is in very simple form. The property, between 4000*l.* and 5000*l.* in value, belonged to the wife, Mrs. Quicke, and was assigned to trustees upon trust, to dispose of the same as she should from time to time by writing direct; and in default to pay the income to her for life for her separate use; and after her death, as to the property, or so much as should not have been disposed of during her life under her direction, for such persons as she should by deed or will appoint, and subject to any such appointment, in trust for the persons or person who under the statutes for the distribution of intestates' estates would on her death have been entitled thereto if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take in the shares in which the same would have been divisible under the same statutes. Mrs. Quicke did not exercise her power of appointment with reference to the funds in question. The trust, then, is for the blood relations of the wife, to be ascertained according to the hypothesis, the

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

PIDDOCKE v. BURT.

[CHAN. DIV.]

terms of which are stated. The question as to the meaning of the words "without having been married" in an ultimate trust of this kind in a marriage settlement has been before the courts on several occasions, and the decisions are conflicting. On the one side are *Wilson v. Atkinson* (*ubi sup.*), decided by Knight-Bruce and Turner, L.J.J.; and *Re Ball's Trust* (*ubi sup.*), and *Upton v. Brown* (*ubi sup.*), both decided by Sir Edward Fry; and *Re Arden's Settlement* (*ubi sup.*), decided by Stirling, J. in Nov. 1890, which support the son's contention; and on the other side stands *Emmins v. Bradford* (*ubi sup.*), decided by Sir G. Jessel, which is in favour of the nephews and nieces. In *Wilson v. Atkinson* there was no doubt a context. The settlement contained no express provision for children or issue. The context was a declaration that for the purposes of the ultimate trust an illegitimate child of the wife should be deemed to be her lawful child. She left no lawful issue. Sir J. Romilly put a strict construction on the trust and declaration, holding that all issue were excluded, and that the effect of the declaration was merely to place the illegitimate child in an excluded class. This decision, remarkable as it was for its strictness and perfect consistency, was reversed by the Court of Appeal. Both the Lord Justices, as I read their judgments, rested their decisions, not merely on the declaration as special context, but also, as an independent ground, on the meaning which ought generally to be attributed to the words "die without having been married" in an ultimate trust for next of kin in a marriage settlement. Turner, L.J., said that if it were necessary to construe the terms of the trust for the next of kin independently, and without qualifying them by the subsequent declaration, still, in his judgment, the trust for the next of kin ought not to be so construed as to exclude children, and that in either view the illegitimate child was entitled to the fund. In commenting on this case, Sir G. Jessel appears to have surmised that there was some other context besides that stated in the reports. But I find myself unable, in the face of the reports, to supply by conjecture any context except that which appears in the reports themselves. When Knight-Bruce, L.J., speaks of the context forbidding the reading of the words as signifying "without having been married to anyone," and that he thought so independently of the declaration, I understand him to be using the term "context" in the broad sense of a marriage settlement. Sir E. Fry, in the two cases before him, both being cases on marriage settlements, and without any other context, held the words insufficient to exclude the wife's issue, and following (as he stated in the second case) what he took to be the real principle of the Court of Appeal in *Wilson v. Atkinson*, interpreted the words as introduced merely to exclude any husband of the wife. Sir G. Jessel denied that there was any such principle, and he accordingly explained *Wilson v. Atkinson*, and declined to follow *Re Ball's Trust* and *Upton v. Brown*. Notwithstanding his explanation, I cannot help concurring with Sir E. Fry, that the Court of Appeal did proceed on a general principle. The words do not in express terms exclude issue. The exclusion of issue, if issue are to be excluded, is founded on the legal inference which follows from not having been married; for of course a woman who has never been married can never in

point of law have had or leave issue. But the Court of Appeal appears to have declined to treat this legal inference, which is not expressed in terms, as being sufficient to show that the father and mother intended by their marriage settlement to exclude the issue of the marriage, or to prefer collateral relations to their own children, and, consequently, to have considered the words satisfied by confining them to the exclusion of any husband. *Re Arden's Settlement* having been cited only from the Weekly Notes, I thought it right, before giving judgment, to see Stirling, J. I have ascertained from him, and am authorised to state, that the note of his judgment is substantially correct, and that in the conflict of authorities he thought it right to follow the Court of Appeal and Sir E. Fry. His decision then adds one more authority in favour of the son. I consider that I am bound, by the preponderating weight of authority, to decide, as I do, that the son takes.

Solicitors: *Roy and Cartwright*; *H. Seaborne*.

Friday, Dec. 21, 1893.

(Before CHITTY, J.)

PIDDOCKE v. BURT. (a)

Attachment—Partnership—Order for payment against partner—Fiduciary capacity—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 4, sub-sect. 3.

A partner receiving money on account of the firm does not receive it in a fiduciary capacity so as to be liable, under sect. 4, sub-sect. 3 of the Debtors Act, to imprisonment for disobeying an order for payment thereof.

THIS was a motion by the defendant that a writ of attachment might issue against the plaintiff for his contempt in not obeying an order directing him to pay a sum of 479l. 2s. 6d. to the receiver in the action.

The action was one for dissolution of the partnership which had existed between the plaintiff and the defendant, and by an order made in the action dated the 21st June 1893, a receiver was appointed by consent, upon the application of the plaintiff, to receive, collect, and get in the outstanding debts and other moneys owing, belonging, payable, or which might be paid, to the firm of Piddocke and Burt, solicitors.

On the 23rd Aug. 1893, the defendant obtained a four-day order against the defendant for payment by him to the receiver of 479l. 2s. 6d. in his hands, belonging to the partnership estate or to the clients of the partnership business, and this order had been duly served on the plaintiff; but as he did not pay the money, or any part of it, the defendant now moved that a writ of attachment might issue against him.

The greater portion of the 479l. 2s. 6d. consisted of rents and other moneys belonging to clients of the firm, and admittedly received by the plaintiff in a fiduciary capacity, and the remainder consisted of money received by him on account of costs owing to the firm.

Church for the defendant.—The sums received by the plaintiff on account of costs were received by him in a fiduciary capacity, in the same way as money received by a London agent for a country solicitor is (*Litchfield v. Jones*, 58 L. T. Rep. N. S. 20; 36 Ch. Div. 530); or money received

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

Re GASKELL'S SETTLED ESTATES.

[CHAN. DIV.]

by an auctioneer (*Crowther v. Elgood*, 56 L. T. Rep. N. S. 415; 34 Ch. Div. 691); or by a receiver (*Re Gent*, 60 L. T. Rep. N. S. 355; 40 Ch. Div. 190); and he is therefore within the exception in sub-sect. 3 of sect. 4 of the Debtors Act 1869. He also referred to *Marris v. Ingram* (41 L. T. Rep. N. S. 613; 13 Ch. Div. 338), and *Middleton v. Chichester* (L. Rep. 6 Ch. Ap. 152).

W. Baker for the plaintiff.—The circumstances of the present case are entirely different from those in the authorities referred to. A partner does not stand in a fiduciary relation to his copartner with regard to moneys received by him on account of the partnership:

Knox v. Gye, L. Rep. 5 H. L. 656.

Church in reply.

CHITTY, J.—The Debtors Act 1869 has now been in operation a long time, nearly a quarter of a century, and during all this time no application has ever been made, so far as I know, by one partner for a writ of attachment against another partner, who has received money on account of the partnership business, which he has failed to pay over to some third person, or into court under an order for payment. That in itself is a somewhat striking fact in opposition to the present motion, because, during all these years, there must have been many such cases as to the receipt of partnership moneys. The bare question I have to decide is whether one partner who receives money belonging to the partnership on account of himself and his copartner—I am stating the case strictly—receives it in a fiduciary capacity. Counsel for the applicant has argued that the money was received in a fiduciary capacity; but none of the cases he has cited and relied on establish this proposition. Kay, J. and the Court of Appeal have decided in *Crowther v. Elgood* (*ubi sup.*) that an auctioneer is in a fiduciary capacity with respect to the money produced by the sale of goods intrusted to him; but the case of an auctioneer is quite different from that of a partner; an auctioneer receives the purchase money paid for the goods in the same capacity towards the vendor, whose agent he is for their sale, as that in which he received the goods, and that capacity is fiduciary. Mr. Church says that one partner receiving partnership moneys is the agent of the other partners, but that will not carry him far enough, because it is not every agent who is fiduciary; therefore the analogy he seeks to establish between the present case and that of an auctioneer receiving purchase money and making default when ordered to pay it to a receiver or into court, fails. In *Marris v. Ingram* (*ubi sup.*) the defendant was clearly a person acting in a fiduciary capacity, as well as liable to account, and in each of the cases relied on by Mr. Church, the money was not the money of the agent receiving it, but of some other person. The case of a partner is quite different from these cases, because he receives money belonging to the firm on behalf of himself and his copartners, and it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership, that is, on behalf of himself and his copartners, received it in a fiduciary capacity towards the other partners. The law allows one partner—one of several joint creditors—to receive the whole debt on account of the firm to whom it

is due, and I am unable to recognise any such distinction, as was endeavoured to be made by Mr. Church, between the case of a partner receiving money of the firm and not accounting for it, and that of a partner overdrawing the partnership account, because if this distinction were true, it would apply to every case where one partner wrongly overdraws the partnership account. The result therefore is that I must refuse this application, but under the circumstances I decline to give the respondent any costs.

Solicitors: *Prior, Church, and Adams; Edmonds and Edmonds.*

Jan. 17 and 18.

(Before CHITTY, J.)

Re GASKELL'S SETTLED ESTATES. (a)

Settled land—Application of capital money—New roof to house—Heating apparatus—“Addition to or alteration in” building—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 25—Settled Land Act 1890 (53 & 54 Vict. c. 69), s. 13, sub-sect. ii.

The placing of a new roof on a house in substitution for an old roof, which, at the time the tenant for life succeeded to the settled estate, was so dilapidated that it was useless to repair it, Held to be an “alteration” within sect. 13 sub-sect. ii. of the Settled Land Act 1890, and, being reasonably necessary and proper to enable the house to be let, the cost of the new roof allowed to be paid out of capital money; but the erection of a heating apparatus for the purpose of rendering the house more comfortable and convenient for occupation held not to be an “addition to or alteration in” the building within the same sub-section, and the cost thereof not allowed to be paid out of capital money.

THIS was a summons taken out under the Settled Land Acts by Henry Brooks Gaskell, the tenant for life of certain settled estates at Kiddington, near Woodstock, in the county of Oxford, which comprised a mansion-house called Kiddington Hall, asking that the trustees might be authorised to pay out of capital moneys the cost of various improvements on the house which had been executed by him, as being “additions and alterations reasonably necessary or proper to enable the same to be let” within sect. 13, sub-sect. ii. of the Settled Land Act 1890.

In Oct. 1889, when the applicant succeeded to the estates, Kiddington Hall, which was an old-fashioned house, was in a bad state of repair, and he having determined to let the hall, was advised that certain works were absolutely necessary before he could reasonably expect to let the same at a fair rent.

These works consisted (amongst others) of (a) a new and efficient method of warming by means of a boiler and pipes the house, which was of large size, and being built of stone and standing upon clay was cold; (b) an alteration in the main entrance, which would provide a billiard room, and render the house less cold and draughty; and (c) the restoration of the roof, which was in a most dilapidated condition. The works had been executed, and the hall was now let. The cost of the heating apparatus was about 394l.; a sum of

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

Re GASKELL'S SETTLED ESTATES.

[CHAN. DIV.]

298*l.* had been spent on the structural alterations to the main entrance, and about 760*l.* had been expended in re-roofing the hall. The affidavits in support of the application alleged that the mansion house was built of stone at the end of the 17th century, and that in Oct. 1889 there was no proper method of heating it, and that it was essential in order to bring the internal accommodation and conveniences up to the modern standard of comfort, to provide some method of keeping the house warm; that the original design of the house had been altered about the middle of the 18th century, and the main entrance made through the old billiard room, with the result that the house was made more cold and draughty, and the billiard room became the entrance hall and unfit for its intended use; and that under these circumstances it was most desirable to replace the entrance where it was originally designed to be, and that the effect of this alteration when carried out was to provide a comfortable billiard room, and to render the house less cold and draughty, and also to provide a lavatory on the ground floor; that the roof and chimney stacks were in a dilapidated and dangerous condition, that the roof leaked to such an extent as to endanger the timbers, and injure the walls and floors of the upper rooms; and that it was absolutely essential to rebuild one of the chimney stacks, which might at any moment have fallen; and that the roof was so thoroughly bad that it was not advisable to attempt to repair it, and that all these improvements were reasonably necessary and proper both for the occupation of the house by the tenant for life, and to enable the same to be let.

F. L. Wright, for the applicant, referred to

Re Lord Gerard's Settled Estate, 69 L. T. Rep. N. S. 393; (1893) 3 Ch. 252;

Re De Teissier's Settled Estates, 68 L. T. Rep. N. S. 275; (1893) 1 Ch. 153;

Re Newton's Settled Estates, W. N., 1890, p. 24.

Micklem for the trustees.

CHITTY, J.—Under sub-sect. ii. of the 13th section of the Settled Land Act 1890, the tenant for life asks to be allowed the costs of a heating apparatus for Kiddington Hall, amounting to about 394*l.*, and one of the items of expenditure now under consideration. This sub-section provides that improvements authorised by the Act of 1882 shall include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." It is very precise in its terms: the addition or alteration is to be to or in the building, and the question is whether the heating apparatus is such an addition, or such an alteration. The apparatus consists of a boiler and pipes, which no doubt have made the house more convenient for occupation; but the rendering of the house more convenient for enjoyment by the tenant for life or his sub-tenant is not sufficient to bring the case within the sub-section. Sect. 13 of the Settled Land Act 1890 is an enlargement of sect. 25 of the Settled Land Act 1882, and having looked at that section again for the purpose of considering whether any of the improvements there mentioned are analogous to the one under discussion, the nearest I can find are those provided for by sub-sect. xiii., "pipes and other works" for the supply and distribution of water for domestic consump-

tion; but reservoirs, wells, and tanks are also specifically mentioned, and the cost of providing a fresh water supply has often been allowed under that sub-section, but that does not go far enough for the present case. There is nothing analogous to a heating apparatus in sect. 25 of the Act of 1882. However convenient this heating apparatus may be to the tenant for the time being of the house, it is not an addition or alteration within the sub-section. The court is bound to be on its guard in dealing with applications like this by tenants for life, who are naturally very anxious to have these kind of improvements paid for out of capital moneys; indeed, the present application shows how dangerous it is to take too wide a view of the scope of this section, because to do so may have the effect of causing the court to unduly subject the Act to the strain of a benevolent construction in favour of tenants for life. The result, therefore, is that I must decline to allow the costs of this heating apparatus to be paid for out of capital moneys. The change in the main entrance and the minor alterations consequent thereon appear to have been alterations in the structure of the building, and as they seem to be fit and proper in other respects, and reasonably necessary to enable the house to be let, they are, in my opinion, within sect. 13, sub-sect. ii., and I will allow the 298*l.* expended for this purpose. I now come to the expenditure of between 700*l.* and 800*l.* for a new roof to the house. The case made out by the tenant for life is that the roof was so dilapidated that it was useless to repair it—a mere waste of money; the chimney stacks were dangerous, and the water came through into the upper rooms, and the house was therefore uninhabitable as it stood at the time when the tenant for life came into possession. The question I have now to decide is whether placing a new roof upon the house is an "addition to or alteration in" the building within the meaning of sub-sect. ii. of sect. 13. That the work is an improvement within the 25th sect. of the Act of 1882 as being for the benefit of the settled estate is clear, and that the work is not mere repair is incontestable; but it is said on behalf of the trustees that the building has not been either altered or added to, and if this is correct, then the case is not within the sub-section. Every case of this kind must be considered in accordance with its circumstances, and the present is not the case of an attempt by a tenant for life to get repairs allowed at the expense of the inheritance. A question of a meta-physical nature arises as to the identity of the house. Is a house with a rotten roof, after the roof has been taken down and replaced by a new roof similar in character, the same house? The trustees say it is; speaking strictly, I should say that it is not the same house. The old roof let the water through into the bedrooms, the new roof does not, and anyone who had lived in the house before this alteration was carried out, on going back to it afterwards and finding it thoroughly dry, would at once say it was not the same house. However, it is not necessary to have recourse to such reasoning as this, and I cannot see any ground on principle for putting a very strict construction on the sub-section of the Act. Cases on covenants to repair in leases are not of much assistance in determining the question, though, as I pointed out in the course of the argument, these covenants

CHAN. DIV.]

Re TAYLOR; TAYLOR v. WADE.

[CHAN. DIV.]

must be construed with reference to the state of the buildings at the time of the demise, and a landlord has no right to expect to get a new house in the place of an old one: (*Payne v. Haine* 16 M. & W. 541.) The result, therefore, is that I come to the conclusion that the placing of a new roof on this house in substitution for that which for all practical purposes was not a roof, was an alteration in the building within the meaning of the sub-section. I think this is a fair construction of the Act as between the tenant for life and the inheritance, there being no question that the alteration (if an alteration within the sub-section) was reasonably necessary and proper to enable the house to be let. For these reasons I will allow the amount expended on re-roofing the house.

Solicitors: *Waterhouse, Winterbotham, Harrison, and Harper.*

Thursday, Feb. 22.

(Before CHITTY, J.)

Re TAYLOR; TAYLOR v. WADE. (a)

Administration—Specific bequest of profits of business—Legatee debtor to estate—Retainer by executors.

Where the legatee of the profits of a business directed to be carried on by the executors is a debtor to the testator's estate, the executors have a right to retain moneys in their hands representing profits as against the debt due from the legatee.

JOSEPH TAYLOR was a partner in the firm of J. W. and J. L. Taylor. The partnership articles provided that the partnership should continue for a period of fourteen years from the 11th Oct. 1884, and gave the partners, other than Herbert Taylor, power to appoint persons by will to succeed to their shares of the business. Joseph Taylor by his will, dated the 26th Feb. 1889, appointed the plaintiffs Ethel Ada Taylor and John Slack Taylor, and the defendant Herbert Taylor, executors and trustees of his will, and he bequeathed to or in trust for various persons pecuniary legacies amounting in the aggregate to 25,000*l.*; and after reciting that he had lent to the said Herbert Taylor, and that there was then due from him on promissory notes, 5600*l.*, being the amount of his contribution to the capital of the firm, he nominated and appointed his executors to succeed him in the business upon trust that his executors should during the period which should elapse before his son Archibald Taylor should attain the age of twenty-one years, continue the co-partnership and carry on the said business as therein mentioned; and the testator bequeathed his share of and in the said business and the capital and goodwill thereof to the plaintiffs upon trust that they should during the period which should elapse before the attainment of the age of twenty-one years by the said Archibald Taylor, or the death under that age of both Aubrey Taylor and the said Archibald Taylor, pay to Herbert Taylor during his life, and whilst neither of the said Aubrey Taylor and Archibald Taylor should have attained the age of twenty-one years, the whole of the profits of his (the testator's) share in the business, and immediately Archibald Taylor should have attained the age of twenty-one years,

the testator gave his share of the capital and goodwill of the business to Aubrey Taylor and Archibald Taylor in equal shares.

By a codicil dated the 22nd of March 1890, the testator revoked the appointment of the said Herbert Taylor as an executor and trustee of his will.

The testator died on the 23rd Feb. 1891, at which time Herbert Taylor owed him the said sum of 5600*l.*, which amount still remained owing to the testator's estate.

By an indenture dated the 26th May 1891, Herbert Taylor assigned all his share and interest in the capital and profits of the business to trustees for the benefit of his creditors.

The plaintiffs carried on the business, and having in their hands a sum of 1256*l.* 17*s.* 10*d.*, representing profits which had accrued in respect of the testator's share in the business, a summons was taken out by them to have it determined whether they ought to retain this sum and any further profits which might thereafter accrue in respect of such share, before Aubrey Taylor and Archibald Taylor attained the age of twenty-one years, in or towards payment of the amount due to the testator's estate by Herbert Taylor, or whether they ought to pay the whole or any part of the same to the trustees of the deed of assignment of the 26th May 1891.

Butcher, for the plaintiffs, argued that they were entitled to retain the moneys in their hands against the debt owing from the estate of Herbert Taylor.

C. W. Cecil Procter, for the trustees of certain trust legacies, supported the plaintiffs' contention.

Buckmaster, for the trustees of the deed of assignment, argued that the rule which applies to a specific devise or a specific bequest of leaseholds or chattels, applied to the specific bequest in the present case, and that the executors had no right of retainer. He referred to

Cherry v. Boulton, 4 My. & Cr. 442;

Courtenay v. Williams, 3 Hare, 539;

Re Akerman, 65 L. T. Rep. N. S. 194; (1891) 3 Ch. 212.

Grosvenor Woods, Q.C. and *Theobald* for Herbert Taylor.

CHITTY, J.—Under the gift to the executors they have in hand a sum of 1256*l.* 17*s.* 10*d.* representing the profits on the testator's share in the partnership. These profits are given to his son Herbert. It is argued for Herbert and his assignees that there is no right of retainer, because the gift of these profits is a specific gift. The law is settled that as against a specific devise, which is outside the duties of the executors, there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds, there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If in such cases the right did not exist, it would be not a right of retainer, but of lien. Now, if this rule were universal, there would be no right of retainer in the present case. But I find here on either side a liquidated demand. The executors have money in hand payable to the legatee, and I think I should be unnecessarily narrowing the doctrine of retainer were I to hold that the right did not exist in this case. The person to pay and the person to receive are the same. The mass of the estate

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

Q.B. Div.]

HOOD AND SONS v. YATES; DERRETT, Claimant.

[Q.B. Div.]

is diminished by the nonpayment of a debt which is due to the testator's estate from the legatee. In my opinion, the executors have the right of retaining these profits as against the debt due from the legatee.

Solicitors: *Wade and Lyall; Tatham and Procter; Crosley and Burn.*

QUEEN'S BENCH DIVISION.

Thursday Nov. 30, 1893.

(Before WILLS and WRIGHT, JJ.)

HOOD AND SONS v. YATES; DERRETT, Claimant. (a)
Practice—Interpleader order—Power of district registrar to issue—Order XXXV., r. 6.

A district registrar has no power to make an interpleader order.

THIS was an appeal by the Sheriff of Warwickshire from Kennedy, J. in chambers, upholding the decision of a master who had refused to issue an interpleader order.

An action had been brought in the Birmingham District Registry. The plaintiff had recovered judgment, and execution had issued from the district registry. On the sheriff seizing certain goods as the goods of the defendant, the claimant had given notice of his claim to them. On the 9th Nov. the sheriff had issued an interpleader summons out of the Central Office, returnable before Master Walton, and before him the objection was successfully taken that the summons should have been applied for from the district registry at Birmingham. Kennedy, J. upheld this decision.

Channell, Q.C. and H. E. Duke for the sheriff.—The powers of the district registrars have their origin in sect. 60 of the Judicature Act of 1873 (36 & 37 Vict. c. 66), and sects. 62 and 64 define their extent. By Order XXXV., r. 1, these powers are extended to a later period in the course of an action, i.e., "down to and including the entry of final judgment." Then rules 4 and 5 give certain specific matters arising after judgment, which "shall" be taken in a district registry, when the cause or matter out of which they arise is proceeding there. Then rule 6 is as follows: "Where a cause or matter is proceeding in a district registry, the district registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by these rules a master or chief clerk is precluded from exercising." It is contended on the other side that this covers the issue of an interpleader summons. But, in the first place, this is not a case in which it can be said that the cause or matter is proceeding in the district registry, for it is really a new matter, originated by the interpleader summons. Secondly, rule 6 does not really confer any fresh powers on the district registrar. It only gives him power to deal with the matters mentioned in rules 4 and 5. Hence, the use of the word "may" instead of "shall," as in the two previous rules. If rule 6 is to receive an unlimited interpretation, the two previous rules would not be necessary. If, however, the rule is to be interpreted as conferring fresh powers on the district registrar, it still does not prohibit the exercise of the same powers by the master in

London. Had the intention been to give the district registrar exclusive jurisdiction the word "may" would never have been used instead of "shall," as in the other rules. If, then, this jurisdiction of the master still exists, it should have been exercised. In many cases it is far more convenient that the application should be made in London than in a district registry, which is not necessarily in the county of the sheriff who has taken the goods. In practice this course has often been taken.

W. E. Hume Williams for the judgment creditor.—In the vast majority of cases all the parties in interpleader proceedings will, as in this case, be resident within the jurisdiction of the district registrar, so that there is an overwhelming balance of convenience in favour of allowing the application to be made to the district registry. Taking it in its natural meaning, the order clearly authorises this course. Order XXXV., r. 6, expressly gives power to do anything, that is within the jurisdiction of a master, in any cause proceeding in a district registry. And Order LIV. r. 12, shows that interpleader proceedings are within the jurisdiction of a master. To construe the rule in any other sense is simply to disregard the plain meaning of the words. There is nothing to show that it is limited to the matters treated of in the two previous rules. If I am right as to the meaning of the rule, there is no ground for my friend's second contention that, since the rule only says the district registrar may deal with these matters, the master in London may also do so, and should have done so here. The answer to this is simply that the master has exercised his discretion, and has refused the interpleader summons. Then the last part of sect. 64 of the Judicature Act of 1873, "and all such other proceedings in any such action as may be prescribed by rules of court shall be taken, and, if necessary, may be recorded in the same district registry," is also sufficiently wide to extend the jurisdiction of the district registrar to interpleader. For interpleader is a proceeding in the action:

Hamlyn v. Betteley, 43 L. T. Rep. N. S. 790; 6 Q. B. Div. 63; 50 L. J. 1, C. P.;

Collis v. Lewis; Claridge, claimant, 57 L. T. Rep. N. S. 716; 20 Q. B. Div. 202.

Another fact which tends to show that jurisdiction in interpleader is conferred on the district registrar at any rate by Order XXXV., r. 6, is, that the words of that rule are almost identical with those of Order LIV., r. 12, by which such power is given to the masters in the Queen's Bench Division. The resemblance of the two rules can hardly be accidental.

Channell, Q.C. in reply.

WILLS, J.—I must say that, for my own part, I have come reluctantly to the conclusion which I have reached in this case, namely, that it is a *casus omissus*, that it was not contemplated by the rules. The facts of the case would tempt one to strain the interpretation of the rule if one could. Goods have been seized to the value of 15l. The question arises, who is entitled to the goods? All the parties concerned live in Birmingham, and the proceedings already taken in the case have been in the district registry there, so it would seem very desirable that the interpleader proceedings should be taken there too. But where the rules

Q.B. Div.]

HULBERT AND CROWE v. CATHCART.

[Q.B. Div.]

are clear we must construe them as we find them, and we can only say that the present difficulty seems to point to the desirability of an amended Order XXXV., r. 5. Sect. 64 of the Judicature Act (36 & 37 Vict. c. 66) seems simply to throw us on the rules. Now what are these rules? Rule 1 of Order XXXV. provides that proceedings down to and including final judgment shall be taken in the district registry. Rule 3 extends this jurisdiction to writs of execution for enforcing any judgment in a cause or matter proceeding in a district registry, and to summonses under the Debtors Act 1869. This, perhaps, gives an extension to the meaning of "cause or matter," since it treats it as still subsisting after the entry of final judgment. Then comes rule 5, which in similar words extends the jurisdiction to five other subject-matters, among which interpleader is not included. This rule also shows that the words "cause or matter" are not to be taken in a strict sense. Then comes rule 6, a clause so wide in its terms that, if it is to receive the interpretation for which the respondent contends, it would render the three rules I have already mentioned unnecessary. It enacts that, where a cause or matter is proceeding in the district registry, the district registrar may exercise all such authority and jurisdiction as may be exercised by a master. No doubt there is a cause or matter proceeding, within the meaning of this rule, but if the rule is not to be interpreted at all in the light of the preceding rules, but given the fullest meaning it could bear if it stood alone, it will render, not perhaps quite all, but at all events large portions, of those rules unnecessary. My brother Wright, J. has pointed out other objections to this construction of the rule during the argument, and will deal with them. I concur in the view he takes. We need not decide whether the word "may" in this rule is mandatory or gives a mere discretion. I do not think that there was any intention to enlarge by rule 6 the powers given to the district registrar in the previous rules, or to authorise him to make an interpleader order.

WRIGHT, J.—I am of the same opinion. There are two points which are fatal to the contention for the respondent. I may put them thus: It is said that rule 6 gives the registrar the full powers of a master in London wherever they are applicable, including jurisdiction in interpleader proceedings. Now I say, on the other hand, that this rule only applies to the powers given in the earlier rules. In the first place, this becomes abundantly clear if we look at the old rules. There is a rule there corresponding to rule 6, and yet the Rule Committee, in drawing up the rules of 1883, have thought it necessary to insert rule 5, which was not in the rules of 1875; but everything contained in rule 5 would have been covered by rule 6 had it borne the meaning contended for. The second point is, that in rule 5 and the preceding rules there is at the end a limitation on the powers conferred, "unless the court or a judge shall otherwise order." But in this rule, which according to the contention before us is a much larger rule, we find no such limitation. This is strong to show that the interpretation contended for is wrong, and that the intention of rule 6 is to give the registrar the powers of a master for the purpose of the jurisdiction already given by the earlier rules.

Appeal allowed.

Solicitors for the sheriff, *Taylor, Hoare, and Box*, for R. C. Heath, Warwick.

Solicitor for the judgment creditor, *H. Pumphrey*, for J. W. Phillips, Birmingham.

Tuesday, Dec. 5, 1893.

(Before WILLS and WRIGHT, JJ.)

HULBERT AND CROWE v. CATHCART. (a)

Practice—Writ of sequestration—Recovery of judgment—Order XLI., r. 5; Order XLII., rr. 3, 6; Order XLIII., r. 6.

An ordinary judgment for the recovery of a debt is not an order to pay money into court or do any other act in a limited time within the meaning of Order XLIII., r. 6, nor a judgment for the recovery of any property other than land or money within Order XLII., r. 6, and therefore cannot be enforced by a writ of sequestration. Sequestration is a proceeding not applicable in a case in which there has been no contempt.

THIS was an appeal by the defendant from a decision of Bruce, J. in chambers confirming an order of a learned master.

The defendant was a married woman having separate property, and the plaintiffs, who had been her solicitors, brought an action against her for their costs. Having got judgment in the action they obtained the order now appealed against, which was that "the defendant pay the amount recovered by the plaintiffs against her in the action within ten days from the service of this order, and in default of such payment that the plaintiffs be at liberty to issue a writ of sequestration against the defendant's separate property."

The defendant, who appeared in person, was stopped by the Court. [WRIGHT, J.—What power had the master to order payment within ten days?]

W. Howland Roberts for the plaintiffs.—The procedure is under Order XLIII., r. 6, and under Order XLI., r. 5. The former order gives power to enforce by a writ of sequestration an order to do any act within a limited time. An order to pay money within a limited time is an order to do an act within a limited time within the meaning of this rule:

Wilcock v. Terrell, 39 L. T. Rep. N. S. 84; 3 Ex. Div. 323.

Order XLI., r. 5, requires that every order or judgment requiring any person to do any act shall state the time within which it shall be done. The order here fixes the time within which the defendant is to do the act ordered in the judgment, that is, to pay the money; and as soon as this time is fixed the provisions of Order XLIII., r. 6, become applicable. [WILLS, J.—What power is there in this court to convert an ordinary judgment into an order to pay money.] Judgments in the Court of Chancery have always been enforced in this way. Order XLII., r. 3, gives power to enforce a judgment for the payment of money by any of the modes by which a judgment of any court whose jurisdiction is transferred to the High Court might have been enforced. Sect. 16 of the Judicature Act of 1873 transfers the jurisdiction of the Court of Chancery to the

(a) Reported by MERVYN LL. PERL, Esq., Barrister-at-Law.

Q.B. Div.]

SALE v. PHILLIPS.

[Q.B. Div.]

High Court. There is, therefore, power to make this order. A similar order has been made before against the present defendant, and this is the only way in which we can get the fruits of our judgment against her. *Hyde v. Hyde* (59 L. T. Rep. N. S. 529; 13 Prob. Div. 166) shows that the form of our order is right.

WILLS, J.—We have come to the conclusion that this order must be rescinded on the ground that there was no jurisdiction to make it. The case is not altogether free from difficulty, and we have listened to a very able argument, in which Mr. Roberts has tried to show that there is this power to use a writ of sequestration to enforce an ordinary judgment for the recovery of money. The only way, however, in which he can put it is this: In Order XLII., r. 3, it is said that a judgment for the recovery of money may be enforced "by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof." The argument, then, is that, inasmuch as in the Court of Chancery there was (as he assumes) power to make an order for the payment of money, and that order could be made to develop into a writ of sequestration, therefore a similar order could now be made, and could be made to develop in the same way in this court. But that can hardly be. We are told that a judge may supplement an order for the payment of a certain sum of money, such as is ordinarily made in a Chancery suit, by an order fixing the time within which it shall be paid. I should doubt whether this is so, except, perhaps, where the mention of a time had been accidentally omitted from the first order; but assuming that this is so, it does not follow that the order can, as we are told, be made to develop into a writ of sequestration in a court of common law. A judgment in a common law action is not an order to a person to pay a sum of money. The form taken by the judgment is that the successful party do recover so much. To make an order for the person from whom the sum is to be recovered to pay in a limited time is wholly to alter the nature of the remedy. The master had no power to make such an order. I should have thought this from looking merely at Order XLII., r. 3. But rule 6 makes it much plainer. It says that a judgment for the recovery of any property other than land or money may be enforced by writ of sequestration. That is very like saying that a judgment for the recovery of money cannot be enforced by sequestration. It is true that in this case the order of the master is interposed between the judgment and the sequestration by which it is to be enforced, but practically the effect is to develop the judgment into a writ of sequestration. Then, as my brother pointed out during the argument, it is doubtful whether sequestration is a proceeding which will apply at all in a case of mere nonpayment of money. At any rate, in *Ex parte Nelson*; *Re Hoare* (42 L. T. Rep. N. S. 389; 14 Ch. Div. 41), doubts were expressed on this point by judges who were certainly very great lawyers. Another objection is, that sequestration is a proceeding for contempt, and therefore this order is of the nature of an order in contempt, so that it seems that to make such an order would, until the person on whom it is to be made is actually in contempt, be a violation of the

principles laid down by the House of Lords in *Stonor v. Fowle* (58 L. T. Rep. N. S. 1; 13 App. Cas. 20). For several reasons, therefore, I think that the appeal must be allowed.

WRIGHT, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiffs, *Hulbert and Crowe*.

Wednesday, Jan. 24.

(Before Lord COLERIDGE, C.J. and DAY, J.)

SALE v. PHILLIPS. (a)

Local government—Liability for expenses incurred for use of fire-engine—"Owner of lands and buildings"—Town Police Clauses Act 1847 (10 & 11 Vict. c. 89), s. 33.

Sect. 33 of 10 & 11 Vict. c. 89, enacts that, where fire-engines and their appurtenances and the firemen are sent beyond the limits of the special Act for extinguishing a fire, the owner of the lands and buildings where such fire shall happen shall defray the expense incurred. Sect. 171 of the Public Health Act 1875 (38 & 39 Vict. c. 55) incorporates the provisions of 10 & 11 Vict. c. 89, with respect to fires with that Act; and sect. 4 of the same Act defines the word "owner" as the person receiving the rack-rent of the lands or premises in connection with which the word is used.

Held, that the definition of "owner" in sect. 4 of the Public Health Act 1875 applies to the "owner of lands and buildings" in sect. 33 of 10 & 11 Vict. c. 89, and therefore that a yearly tenant of lands and buildings outside the limits of the urban district to which a fire-engine has been sent is not liable for the expenses incurred.

Lewis v. Arnold (32 L. T. Rep. N. S. 553; L. Rep. 10 Q. B. 245) overruled.

SPECIAL CASE stated by justices of Leominster, in the county of Hereford. The terms in which the case was stated were, as far as material, as follows:—

At a petty sessions, holden at Leominster, on the 1st Sept. 1893, an information which was preferred by the appellant, the town clerk of the borough of Leominster, being a district to which the Public Health Act 1875 applies, against the respondent, under sect. 33 of the Town Police Clauses Act 1847, was heard before us. The said information charged that on the 11th Feb. 1893 the mayor, aldermen, and burgesses of Leominster (acting by the council as the urban sanitary authority for the said borough) did send, or cause to be sent, to a farmhouse and buildings and premises, known by the name of Wheelbarrow Castle, and situated in the parish of Stoke Prior, in the county of Hereford (of which farmhouse, buildings, and premises the respondent was therein alleged to be the owner within the meaning of sect. 33 of the said Towns Police Clauses Act 1847), a fire-engine with its appurtenances and firemen, for the purpose of extinguishing a fire there, and that in so sending the said fire-engine, with its appurtenances and firemen, and in respect thereof, the said authority incurred expenses, and had also a charge against the said William Phillips for the use of such engine with its appurtenances and for the attendance of the

(a) Reported by MERVYN LL. PERL, Esq., Barrister-at-Law.

Q.B. Div.]

DE MATTOS v. BENJAMIN.

[Q.B. Div.]

said firemen; that the total amount of such expenses and charge was the sum of 43l. 18s. 9d., and that a difference had arisen between the authority and the respondent as to the liability of the respondent to pay the same.

Upon the hearing of the said information, one witness was called who proved that, on the 11th Feb. 1893, in consequence of an alarm being given, the fire-engine belonging to the authority, with its appurtenances and firemen, was despatched to a fire of farm buildings at Wheelbarrow Castle Farm, which farm is outside the limits of the borough of Leominster, but in the neighbourhood of the said limits, and is in the occupation of the respondent as tenant from year to year. That the Earl of Meath is the owner thereof, and that his agent is Mr. V. W. Holmes, of the borough of Leominster, bank manager.

It was contended for the appellant, that the said William Phillips was the owner of the said farmhouse, buildings, and premises, within the meaning of sect. 33 of the Town Police Clauses Act 1847, upon the authority of *Lewis v. Arnold* (L. Rep. 10 Q. B. 245); and for the respondent, reference was made to the more full report of *Lewis v. Arnold* in 32 L. T. Rep. N. S. 553, and it was contended that the respondent was not such owner within the definition of the term "owner" in the Public Health Act 1875, s. 4, with which Act the Town Police Clauses Act 1847, ss. 30-33, is by sect. 171 of the Public Health Act 1875 incorporated, but that the Earl of Meath, or his agent Mr. Holmes, was such owner, and the person liable to pay such charges.

We are of opinion that the facts of this case differed materially from those of *Lewis v. Arnold* (*ubi sup.*), and that the action should have been taken against the "owner" of the farmhouse, buildings, and premises, the Earl of Meath, and we dismissed the said information, and ordered the appellant to pay to the respondent 1l. for costs.

Corner (with him *A. Hughes*) for the appellant.—The respondent is the owner of the lands and buildings in question within the meaning of sect. 33 of the Town Police Clauses Act 1847. The word "owner" in that Act has no technical meaning at all. It is quite possible that Lord Meath would also be liable as owner for the expenses incurred, but that they can be recovered from the occupier is clear from the case of *Lewis v. Arnold* (32 L. T. Rep. N. S. 553; L. Rep. 10 Q. B. 245). It is true that at the date that case was decided the Public Health Act 1875 was not in force, but a definition of "owner" almost word for word the same as that in sect. 4 of that Act was incorporated with the Town Police Clauses Act 1847 from sect. 2 of the Public Health Act 1848 (11 & 12 Vict. c. 63). That case is therefore an authority directly in point. The purpose for which the Town Police Clauses Act 1847 was incorporated with the Public Health Act 1875 had no connection with the definition of the word "owner" in sect. 4. Apart from that definition, there would be no difficulty in holding that a tenant from year to year is an owner. In *Woodward v. Billelicay Highway Board* (11 Ch. Div. 214) Jessel, M.R. held that such a tenant was the owner of land within the meaning of sect. 65 of the Highway Act (5 & 6 Will. 4, c. 50).

Bosanquet, Q.C., for the respondent, was not called upon.

LORD COLERIDGE, C.J.—This appeal must be dismissed. It is clear that *Lewis v. Arnold* (*ubi sup.*) must have been decided under a misapprehension, and looking at a fuller report than that in the Law Reports it appears that the judges who decided the case were told that there was no definition of the word owner in that Act of Parliament, and were not told that there was one in another statute. I am not prepared to say that, if there had been no such definition, the decision of the magistrates in this case would have been right. But now that we are told that the word "owner" has received an interpretation at the hands of Parliament, we cannot possibly go outside of the definition so laid down.

DAY, J.—I quite concur. *Appeal dismissed.*

Solicitor for the appellant, *H. Andrews*, for *W. T. Sale*, Leominster.

Solicitors for the respondent, *Chester and Co.*, for *Weyman and Weyman*, Ludlow.

Wednesday, Jan. 24.

(Before Lord COLERIDGE, C.J., and DAY, J.)

DE MATTOS v. BENJAMIN. (a)

Gaming—Bets made through agent—Right of principal to recover—Gaming Act 1892 (55 Vict. c. 9).

The Gaming Act 1892 does not prevent a principal from recovering from an agent through whom he has made bets money paid to the agent by a third party in respect of the bets.

THIS was an appeal by the plaintiff from a judgment of Mr. Commissioner Kerr, in the City of London Court, in an action brought to recover 15l. 2s. 8d., as money had and received by the defendant to the use of the plaintiff.

The defendant had been employed to make certain bets for the plaintiff, and, the plaintiff winning the bets, had received the 15l. 2s. 8d. from the losers. The learned commissioner dismissed the action on the ground that the bets were gaming transactions within 8 & 9 Vict. c. 109, s. 18, and that the plaintiff was therefore prevented by the Gaming Act 1892 from recovering money paid in respect of them.

The Gaming Act 1892 (55 Vict. c. 9), s. 1, enacts that:

Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or for any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

Sect. 18 of 8 & 9 Vict. c. 109, enacts that:

All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void.

E. H. Carson for the appellant.—Before the Gaming Act of 1892 there were betting cases of two different classes which occasionally came before the court. To the one class belonged cases like the present, in which a principal in a betting

(a) Reported by MERVYN LL. FREEL, Esq., Barrister-at-Law.

Q.B. Div.]

Re BEYTS AND CRAIG; *Ex parte* THE TRUSTEE.

[IN BANK.]

transaction endeavoured to recover money paid to his agent. Of the other class, *Read v. Anderson* (51 L. T. Rep. N. S. 55; 13 Q. B. Div. 779) is a good instance. In those cases the claim sought to be enforced was by the agent against a principal on whose behalf he had made bets for the payment of which he sought to be reimbursed. Our contention is that, while the statute covers the latter class of cases, it does not affect the former. In the court below the learned judge of the City of London Court, thinking that the intention of the Legislature was to put an end to transactions like the present, assumed that the statute actually did so; but, looking at the words of the Act, there is absolutely nothing under which the present case could come, unless it were the words "or otherwise." [He was stopped by the Court.]

Cannot for the respondent.—The Act of 1892 has made a change in the position, both of the principal and the agent. It is clear that the agent cannot sue the principal; it is therefore unlikely that the Legislature should have left the principal his action against the agent. On looking at the Act, it is quite clear that the words, especially in the latter part of the section, are quite wide enough to support the view that the right to sue is taken away from principal and agent alike where the transactions in which they are concerned are made null and void by the Act of 8 & 9 Vict. Nor is any injustice done in a case like the present, if this is the true interpretation of the Act. It is not as if the defendant had received money from the plaintiff in order to make the bets, and then refused to account to him for the money won. The bets were made with the defendant's own money. If he had lost, he would have been deprived by the Act of any remedy against his principal. In the same way, now that he has won, he is protected by the statute against any action the plaintiff may bring against him.

Lord COLERIDGE, C.J.—I cannot entertain a doubt on this matter. The Act of Parliament did what was reasonable and right. It made all parts of the transactions to which it applies illegal, including the act of a person who, as a commission agent, effects an illegal contract. That is perfectly right and reasonable. But it did not go on to enable a person who has received money on behalf of another to retain it for his own use. It did not enact that, if a sum of money is paid by A. to C. to pay over to B., B. may set them both at defiance, and put the money into his own pocket. I have no hesitation in saying that the judgment must be reversed.

DAY, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Day, Russell, and Co.*
Solicitor for the respondent, *Porteous.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Monday, March 12.

(Before WILLIAMS, J.)

Re BEYTS AND CRAIG; *Ex parte* THE TRUSTEE. (a)

Bankruptcy—Solicitors' costs—Verbal agreement with debtors to conduct their defence—Petition—Order on solicitors to refund.

Debtors entered into a verbal agreement with solicitors to defend them on a criminal charge, and also to look after their business affairs, and paid to the solicitors a sum of 250l.

The solicitors had at the time no knowledge of any act of bankruptcy having been committed by the debtors.

Subsequently the debtors presented their petition, and on bankruptcy ensuing the trustee claimed from the solicitors the return of the money.

Held, that the solicitors' authority was determined by the presentation of the bankruptcy petition, and that, subject to any claim for costs incurred prior to that date, the solicitors must repay the money to the estate.

THIS was a motion for an order that Messrs. Irvine, Hodges, and Borrowman, solicitors, should pay over to the trustee in bankruptcy a sum of 250l. received by them from the debtors.

The debtors were shipowners, and on the 29th June prior to their bankruptcy they were arrested on certain charges of fraud, and on the same day an interview took place between the debtors and the respondents Messrs. Irvine, Hodges, and Borrowman, solicitors, at which the solicitors undertook to conduct the debtors' defence and to look after their affairs, in return for a sum of 250l., which was then paid to the solicitors; this agreement was verbal. The solicitors had no notice at the time of any act of bankruptcy having been committed by the debtors. On the 4th July the debtors presented their own petition. A Mr. Arthur Cooper was appointed special manager of the property, and on bankruptcy ensuing on the 15th July Mr. A. Cooper was appointed trustee of the bankrupts' estate. The bankrupts' defence was conducted and their business affairs were looked after by the respondents down to the 8th Aug., and the respondents expended in out-of-pocket expenses 68l. On the 22nd Aug. Mr. A. Cooper died, and his brother Mr. E. Cooper was appointed trustee. Mr. Hodges and his clerk were now called as witnesses, and deposed that an interview took place between Mr. Hodges and Mr. A. Cooper after the 4th July and before the 8th July, and that in the course of that interview Mr. Hodges mentioned to Mr. Cooper that he had received money from the bankrupts, but nothing was said about an agreement; that Mr. A. Cooper knew Mr. Hodges was defending the bankrupts, and that he never while alive requested the return of the money; that there were six hearings at the police-court, and that they believed Mr. A. Cooper was there on each occasion; that the Chartered Bank of India and China were prosecutors; that Mr. Cooper had all the bankrupts' books including their cheque-book counterfoils.

The trustee applied that the respondents might be ordered to repay the balance of the 250l., after

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

THE CELTIC KING.

[ADM.]

deducting their costs up to the date of the petition.

Muir Mackenzie for the trustee.—This money ought not to be retained by the solicitors. The question seems to be really, Was this money irrevocably the solicitors' money, or was it in their hands merely to meet further costs? If the latter, it belongs to the creditors; if the former, then *Re Charlwood*; *Ex parte The Trustees* (70 L. T. Rep. N. S. 383; (1894) 1 Q. B. 643) will apply. The agreement here was merely verbal, it was not a binding agreement under sect. 4 of the Attorneys and Solicitors Act 1870 (33 & 34 Vict. c. 28); it did not bind either party. The money was therefore not irrevocably the solicitors' money, and they must now account for it. *Re Pollitt*; *Ex parte Minor* (67 L. T. Rep. N. S. 715; (1893) 1 Q. B. 175, 455), turned on the revocability of the employment, and it was said that bankruptcy put an end to the employment. In *Re Lewis*; *Ex parte Munro* (35 L. T. Rep. N. S. 857; 1 Q. B. Div. 724), the money was paid, and the solicitor agreed to conduct the defence for 300l., but the client afterwards revoked the agreement.

Reed, Q.C. and *Hansell* for the solicitors, respondents.—The solicitors not only defended the bankrupts, but looked after their business as shipowners, and ought to be allowed to retain their 250l. The agreement here was a binding one, as the solicitors were bound to defend the bankrupts. They had no knowledge of any act of bankruptcy, or even of the monetary position of the bankrupts when the bargain was made. They had never acted for them before. The mere accident that there was no signed agreement cannot affect the matter; the solicitors could have got no more; they bargained to do the work, they did it, and the client got the benefit. In *Re Pollitt* there was a simple deposit, the money remained the client's money, it was not actually paid over; further, the services were rendered to the estate. Here there was a personal right in the bankrupts to be defended which they could insist on being carried out, and the trustee could not have prevented it. *Beckham v. Drake* (2 H. L. Cas. 579) shows that the right to enforce the contract remained in the bankrupt, and not in the trustee, and *Re Lewis* shows that the money could not be sued for. Next, on the evidence it is clear that the trustee stood by; he was appointed on the 15th July, he knew that the respondents were acting for the bankrupts, and he never revoked the agreement; the money paid by the bankrupts, therefore, remained the property of the solicitors until revocation by the trustee. In any event the trustee cannot recover more than the balance after deducting the taxed costs up to petition filed. Lastly, if *Re Sinclair*; *Ex parte Payne* (53 L. T. Rep. N. S. 767; 15 Q. B. Div. 616) is right, their liberty was in jeopardy, and they were entitled to expend this money on their defence.

Muir Mackenzie.—We have always offered to allow the respondents their costs of all work done before revocation; i.e., before petition:

Re Spackman; *Ex parte May*, 62 L. T. Rep. N. S. 266.

WILLIAMS, J.—This raises a question of some importance, and I should have been anxious to give the matter further consideration had it not been that this kind of question has often been

before the courts of late. On the facts it is plain that the sum of 250l. was simply paid to the solicitors against charges to be incurred for professional services to be rendered by the solicitors. In my judgment the solicitors' authority was determined on the bankruptcy petition being presented. It seems to me that, subject to any claim for costs incurred before then, the solicitors are liable immediately to pay this sum over to the estate. Mr. Hansell tried to make use of the case of *Beckham v. Drake* to avoid these conclusions. There is nothing in that case to show that the assignees in bankruptcy would not have the right immediately to determine any authority given by the bankrupt to an agent to expend money for him, even though such money was originally deposited with the agent to be spent on matters personal to the bankrupt. I should like to be able to decide in favour of the solicitors, for it is an extremely hard case, and it was for this reason that I allowed evidence to be called to see if there was any acquiescence by the trustee in those services being rendered, as, if I found that in fact there was such acquiescence, I should have been able to decide this in favour of the solicitors, with the result that the trustee might have been obliged to repay the money to the estate. I trust that something may be done to remedy the law in this respect, for at present it is extremely hard upon bankrupts, and on solicitors, accountants, and others who may render services to a bankrupt at a time when he is struggling against a criminal charge.

Solicitors for the applicant, *Clarke, Rawlins, and Co.*

Solicitors for the respondent, *Irvine, Hodges, and Borrowman.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 16, 20, 22, and 23.

(Before BARNES, J.)

THE CELTIC KING. (a)

Mortgage—Prior charter—Sale by mortgagees—Right of purchaser with notice of ship's engagements—Delivery up of certificate of registry—Merchant Shipping Act 1854, s. 50.

A shipowner agreed with the defendants to provide a ship (then building) which should be run and worked by them in their line under their control and discretion. The agreement was to continue in force for five years, and was to be binding on the owner's executors and administrators. The ship was completed and registered on the 3rd Jan. 1891. On the 5th Jan. in the same year she was mortgaged by the owner to a company to secure an account current. The mortgagees had no notice of the engagements subsisting with the defendants. On the 30th Nov. 1892 the owner gave a second mortgage on the ship to the plaintiff to secure an account current. The plaintiff was aware of the existence of the contract with the defendants, and inferred that the terms were onerous.

On the 17th Oct. 1893 the owner died, and the first mortgagees took possession of the ship.

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

ADM.]

THE CELTIC KING.

[ADM.

and transferred her by a bill of sale to the plaintiff. At the time of the sale the plaintiff knew the terms of the agreement under which the ship was being worked in the defendants' line. Subsequently the plaintiff entered into a contract to sell the ship to a firm which knew the nature of the contract with the defendants.

The plaintiff moved for an order that the defendants should deliver up to him the certificate of registry of the ship. It was agreed to turn the motion into the trial of the action without pleadings, and that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in a manner contrary to the provisions of the agreement.

Held, that the plaintiff was entitled to have the certificate of registry delivered up to him.

The defendants' application for an injunction refused upon the ground that the first mortgagees, who had no notice of the ship's engagements, were entitled to realise their security by selling the ship free of her engagements, and that the plaintiff, although he had notice of her engagements, was entitled to the same rights as were possessed by his vendors, the first mortgagees.

THIS was a motion that the defendants, who were the charterers of the steamship *Celtic King*, should forthwith deliver up to the plaintiff, Mr. Frank Ross, the registered owner of the *Celtic King*, her certificate of registry, and in the alternative for an injunction against the further detention of the certificate by the defendants.

It was agreed at the hearing that the defendants should be taken to have moved for an injunction restraining the plaintiff from dealing with the ship in derogation of certain agreements entered into with the defendants by William Ross, the deceased brother of the plaintiff, whilst the ship was building. In the year 1889 Mr. William Ross entered into an agreement with the defendants to provide them with two steamers to be run in their line. One of these steamers was the *Celtic King*. She was to be fitted up for the frozen meat trade, and the defendants were to have all the powers of a charterer of a vessel chartered on time charter. The agreement was to remain in force for five years.

The *Celtic King* was completed and registered in Jan. 1891, and was within two days of registration mortgaged by Mr. William Ross to the Marine Securities Corporation Limited, who had no notice of the arrangement with the defendants. The plaintiff, Mr. Frank Ross, in 1892, became the second mortgagee of the *Celtic King*, he at that time knowing that she was being employed by the defendants under some agreement with Mr. William Ross, the terms of which he inferred to be onerous.

Mr. William Ross died in Oct. 1893, and a few days after his death the Marine Securities Corporation, the first mortgagees, took possession of the ship. In December of the same year the corporation transferred her by bill of sale to the plaintiff, who at this time was fully aware of the terms of the agreement with the defendants.

In Dec. 1893 the plaintiff entered into a contract to sell the *Celtic King* to Messrs. Allport and Hughes, who were also aware of the terms of the agreement under which she was employed in the defendants' line, and applied for the certificate of registry. The defendants refused to part with

the certificate, alleging that they required it for the purpose of the vessel being navigated in their line.

The plaintiff now moved for an order that the defendants should deliver up to him the certificate of registry of the ship. At the suggestion of the learned judge it was agreed that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in derogation of the agreement between Mr. William Ross and the defendants, and further, to turn the motion into the trial of the action without pleadings.

An application on behalf of Messrs. Allport and Hughes to be made parties with a view to determining their rights was opposed by the defendants, and the learned judge declined to make an order.

Sir Walter Phillimore and Lauriston Batten for the plaintiffs.—The plaintiff is entitled to the original object of the motion, namely, the certificate. He is the owner, and no one can hold it as against him. Sects. 43 and 50 of the Merchant Shipping Act 1854 support this contention. The certificate is subject to no lien:

Gibson v. Ingo, 6 Hare, 112.

Secondly, the plaintiff or his vendee is entitled to navigate this ship, because he derives his title from the original mortgagees, who had no notice of the contract. Thirdly, the decision in *De Mattos v. Gibson* (28 L. J. 165, 498, Ch.) goes too far.

Bigbam, Q.C. and *J. A. Hamilton* for the defendants.—The rule in *Collins v. Lamport* (34 L. J. Ch. 196) applies to the case of a contract entered into before the mortgage as well as to a contract entered into after it. On this point the question of notice is immaterial. It is also contended that a person who stands in the position of a mortgagee—having the equitable right—affected with notice of a condition of things which makes it inequitable for him to avail himself of his security, cannot improve his position by buying up the title of the first mortgagee. Further, the court will not order the delivery up of the certificate where it appears that it is to be used for an illegitimate purpose, as in this case to defeat the agreement:

Collins v. Lamport, 11 Jur. N. S. 1; 34 L. J. 196, Ch.;

The Vindobala, 60 L. T. Rep. N. S. 657; 13 P. D. 42; 6 Asp. Mar. Law Cas. 376;

De Mattos v. Gibson, 28 L. J. 165, 498, Ch.;

Lumley v. Wagner, 1 De G. M. & G. 604; 21 L. J. 898, Ch.

Assuming the plaintiff to be bound by the contract, he is not entitled to interfere with its performance unless he can show that his security is prejudiced by the contract:

The Fanchon, 5 P. Div. 173.

With respect to the second point, there are no cases to be found in which second mortgagees with notice have bought the first mortgagee's title in the case of ships. They referred to

Fisher on Mortgages, 4th edit., p. 611;

Hiles v. Moore, 15 Beav. 175;

Willoughby v. Willoughby, 1 T. R. 763.

[BARNES, J.—But those are all cases of tacking.] We submit that the first mortgagees, though they could transfer to anyone else, cannot do so to the plaintiff. We ask for an injunction restraining

ADM.]

THE CELTIC KING.

[ADM.]

the plaintiff or his agents from sailing or permitting the sailing of the ship contrary to the provisions of the agreement.

Sir Walter Phillimore, in reply, cited

37 & 38 Vict. c. 78, s. 7, as repealed by 38 & 39 Vict. c. 87, s. 129;

White and Tudor, Leading Cases in Equity, 6th edit., vol. 2, p. 43.

This is a case of sale by the first mortgagee, and is not tacking at all. The rule in *Tulk v. Moxhay* (2 Ph. 774; 18 L. J. 83, Ch.) is applied to persons by *Lumley v. Wagner* (21 L. J. 898, Ch.), and to things by *De Mattos v. Gibson* (28 L. J. 165, 498, Ch.). In the present case the mortgagee would not necessarily know that the ship had engagements, as the mortgage was arranged before the ship was registered, or had a name. Without notice no one would expect that a ship was running in a particular line for three years. Assuming the plaintiff to be bound by the contract, such a contract does prejudicially affect the mortgagee's security. [BARNES, J.—What is the position of a mortgagee taking a mortgage of a vessel under charter?] There is no privity of contract between himself and the charterer. If, however, the vessel is at sea with goods on board, he may become bailee of such goods; and if the vessel is in port ready to load, he may be taken to be fixed with constructive notice of the contract, and thus brought within the rule in *Collins v. Lamport*. So far from a purchaser being necessarily subject to the engagements of the ship, he cannot sue on the charter-party:

Splidt v. Bowles, 10 East, 279.

Even if *De Mattos v. Gibson* is good law this case is wider, and no injunction should be granted:

Whitwood Chemical Company v. Hardman, (1891) 2 Ch. 416.

[BARNES, J.—In all the cases the person by whom the contract could be performed was in existence; here William Ross is dead, and his estate is being administered in chancery. This might have considerable weight in my judgment.] There is no such equity as suggested by the defendants. The only equity is that defined in:

Braudlyn v. Ord, 1 Atk. 571;

Louthier v. Carlton, 2 Atk. 241;

Sweet v. Southests, 2 Bro. C. Cas. 66;

M'Queen v. Farquhar, 11 Ves. 467.

The injunction sought for is in any case too wide. The only order that could be made would have to be limited by *Collins v. Lamport*. The present plaintiff has sold disclosing these contracts to his vendee, and there is nothing from which he can be restrained.

BARNES, J.—This action was commenced on the 12th inst., and by the arrangement made between the parties—an arrangement which is, I think, to be regarded as most businesslike—I have been enabled in a very short time after the writ was issued to hear the whole case as between these two parties, and to dispose of all the questions which are raised between them. It seems to me that the case, even confined to the two parties who are actually before me, raises some rather important questions, and I think that these questions have been extremely ably argued. The plaintiff's case is that he desires delivery up of the certificate of registry of the steamship *Celtic King*, of which he is the registered owner, which certificate is in

the possession of the defendants and held by them. The matter of that claim having been brought before me on motion, it appeared that the real question it was intended to raise in substance was whether or not this vessel was still bound by arrangements made between her former owner and the Tyser Line, so that the plaintiff should not be able to have the certificate without seeing that those arrangements were carried out. It was thereupon agreed to turn the motion into the trial of the action without pleadings, and that all questions between the parties should be disposed of as if the plaintiff had made whatever claim he was entitled to make, and as if the defendants had made any claim they were entitled to make. Their claim, according to the argument of Mr. Bigham, partly consisted of an answer to the application for the delivery of the certificate by suggesting that it ought not to be delivered under the circumstances; and that if it were delivered there ought to be an injunction against Mr. Frank Ross, the plaintiff, to the effect that he and his agents should be restrained from sailing, or permitting the sailing, of the ship, contrary to the provisions of the agreement which I have referred to. Therefore, whatever the precise form in which it is asked, it means that Mr. Frank Ross shall be restrained from in any way dealing with or disposing of this ship without seeing and arranging that she shall not be used outside and independently of the agreement with the Tyser Line. The facts which give rise to the question are these: Mr. William Ross was about to build two steamers, and, on the 19th Aug. 1889, he entered into an agreement with Mr. W. H. Tyser, on behalf of a company about to be formed, with the object of establishing a line of steamships to be called the Tyser Line. That agreement recites that Mr. William Ross had agreed to provide at least two steamers to be run by the company, as part of their line, on the terms mentioned; and the two steamers were referred to as being in course of building. One of them was the *Celtic King*. The agreement provided that Ross and Co., which I suppose is the firm of Mr. William Ross, should at their own expense cause and procure both steamers to be duly completed and ready for sea, and fitted with refrigerating machinery, and insulating chambers (which should not be removed from the vessel during the currency of the agreement except by mutual consent) provided by the company, and capable of carrying about 900 or 1000 tons weight of frozen meat each. Then there are various provisions, including one by which Ross and Co. are to have the right to substitute vessels of equal size and power for those specified. It is provided that the steamers should be run and worked by the company, and for that purpose they are to be under the control and direction of the company, who are to have all such powers and discretion as a charterer would have if the steamers had on time charter been chartered to the company. Nevertheless the agreement was not to be deemed to constitute the company the charterers of the steamers, or as incurring any liabilities as such, but the position was to be that the steamers were being worked on account and at the cost and risk in all respects of Ross and Co., as owners, as if on each voyage the vessel were laid on the berth for loading on owner's account, the company occupying the position of loading brokers or agents, with the additional

ADM.]

THE CELTIC KING.

[ADM.]

control provided for. Nothing in the agreement was to interfere with the rights reserved to Ross and Co. in the agreement of same date between themselves and the Tyser Line. The latter agreement, it is stated, is not material. In the next clause the company are to use their best possible endeavours to secure profitable employment for the vessels, and for that purpose they have power to charter the vessels, and to make arrangements for loading or for pooling the earnings. There are a great many provisions about accounts and agents, and Ross and Co. appear to have the power of appointing the captains, though there is a provision that if there is any objection on the part of the company they can remove them. Then there is a provision for the amount of commission to be paid by Ross and Co. to the company, and the agreement is to continue in force as regards each of the steamers for five years. The agreement is to continue, notwithstanding changes in the firm of Ross and Co., and is to be binding on Mr. Ross' executors and administrators. This agreement was adopted by the company on the 10th Sept. 1889, and it was provided that it should be binding upon Ross and Co. and the company, the company being in existence at this date. Although these agreements were made in 1889, the *Celtic King* was not completed and registered until the 3rd Jan. 1891, and on the 5th Jan. of that year she was mortgaged by Mr. William Ross to the Marine Securities Corporation Limited, to secure an account current. That mortgage was registered on the 6th Jan. 1891. The agreement for that mortgage was, I think, to secure the sum of 30,000*l*. It appeared from the evidence that that arrangement was made in Dec. 1890, some time prior to the register of the ship, though the actual mortgage was not completed until the ship had been registered. I think it is clear that at that time the mortgagees had no notice of the contracts of 1889 with the Tyser Line. The secretary of the corporation has been called, and the effect of his evidence is that there was no notice of these contracts by the mortgagees, and that the mortgage was taken because the board thought it was a fair ship and the advance a very good one, and there was nothing in the discussion except as to what sort of a ship she was. The next transaction was a mortgage, dated the 30th Nov. 1892, which was a mortgage from William Ross to Frank Ross, the present plaintiff, to secure an account current, so that Frank Ross became the second mortgagee of the ship. It is important to notice that at the time when he took the second mortgage, according to the admissions contained in a letter by the solicitors of the 17th Jan., the plaintiff was aware that the vessels were being employed by the defendants under some agreement between them and Mr. William Ross, and that the plaintiff, though he did not know the terms of the agreement, had inferred that they were onerous. The vessel seems to have been employed in the Tyser Line from shortly after her completion until the month of October in last year, and Mr. Tyser stated that at the present time there were no subsisting agreements specifically relating to this ship for the carriage of goods out or home by her, but that she formed one, I think, of six ships which ran in the line, and that having made general agreements for the carriage of goods they expected him to carry out those engagements, partly by the use of this ship, as well as by the

others. That is the state of affairs when Mr. William Ross died on the 17th Oct. 1893. On the 24th Oct. the Marine Securities Corporation took possession of the ship, and I understand from the evidence that then, or at any rate before the sale to Frank Ross, which occurred later on, Mr. William Ross was in default under his mortgage to them. Mr. William Ross' will appears to have been proved by one executor, and it is stated that an action has been brought in the Chancery Division by Mr. Frank Ross, for the administration of his estate. Sometime between the death of Mr. William Ross and the end of the year negotiations took place between Mr. Frank Ross and the representatives of the Tyser Line with a view to the future employment of this ship on terms which appear to be, and I think Mr. Tyser stated they were, somewhat more favourable to the shipowners than the arrangements embodied in the original agreement. These negotiations seem to have resulted in nothing, but on the 4th Nov. there is a letter from the Tyser Line to the Marine Securities Corporation, in which they refer to the agreement with them, which it is said in that letter the Marine Securities Corporation were familiar with. But the corporation on the 6th Nov. disclaim any familiarity with the terms of the agreement, and say it cannot in any way affect or prejudice their rights as first mortgagees, and that if the Tyser Line entertain a contrary opinion they are referred to their solicitors. Mr. Frank Ross seems to have entered into negotiations with the Marine Securities Corporation for the purchase of the ship and one or two others, and on the 6th Dec. 1893 she was transferred by bill of sale from the corporation, acting as mortgagees under their power of sale on the default of the original owner, to Mr. Frank Ross, and mortgaged by Mr. Frank Ross on the same day to the corporation to secure a current account. That transaction was the result of two agreements of the 6th Dec., by which Mr. Frank Ross bought this ship and two others, and as part of the transaction granted a mortgage upon the *Celtic King* for, I think, 22,000*l*. The transaction appears to have been a *bona fide* one, and I cannot help thinking that the Marine Securities Corporation, on the death of Mr. William Ross, required a proper mortgagor to deal with in the future navigation of the ship. The net result was that Mr. Frank Ross became the owner of the *Celtic King*, with a mortgage upon her to the corporation, which has now, I think, been brought down to the extent of having only 750*l*. due upon it. The vessel herself lay here from October until now, and then this dispute is brought to a crisis. I have pointed out what the plaintiff's knowledge was at the time he took his mortgage, and it is admitted that before he purchased from the Marine Securities Corporation he knew all about these agreements with the Tyser Line, and appears to have had them before him. On the 20th Dec. 1893, Mr. Frank Ross, having become the owner of the ship, entered into a contract to sell her to Messrs. Allport and Hughes, and Mr. Hughes has to-day stated that before he entered into the contract he had before him the contracts with the Tyser Line, and submitted them to his solicitor, so that he had notice of them. Then the Tyser Line, seeing that the vessel is practically being taken out of their line, communicate with both Mr. Frank Ross and Messrs. Allport and Hughes,

ADM.]

THE CELTIC KING.

[ADM.]

and the plaintiff, Mr. Frank Ross, applies for the certificate of registry. The substance of the defendant's contention is stated in a letter of the 22nd Dec. in answer to an application of that kind. "Under the agreement with the late Mr. William Ross," write the defendants' solicitor, "our clients are entitled to have the steamer run in their line, and are entitled to the document which they require for the purpose of the vessel being thus navigated." Mr. Frank Ross still insists through his solicitors on having the certificate, and no doubt wants it for the purpose of complying with his contract of sale to Messrs. Allport and Hughes. The latter say in answer to communications from the Tyser Line, that "Your relations with William Ross, and your communications with Frank Ross, do not appear to concern us." They add that they have bought the ship free from all cumbances, and do not hold themselves bound by any engagements of William Ross, or any other owner of the ship. The result of all that is the writ to which I have referred, and the application on the part of the plaintiff to deliver up. Application seems to have been made before the magistrate under the 50th section of the Merchant Shipping Act, but the magistrate, thinking there were reasonable grounds for withholding the certificate, seems not to have interfered, leaving the parties to fight out their rights elsewhere. The plaintiff now asks for the certificate, and says he is entitled to it, independently of any question raised as to the rights of the parties to the user of the ship, under the 50th section, which says: "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever, which any owner, mortgagee, or other person may have or claim to have on or in the ship described in the certificate." I think that the plaintiff's contention on this point of the case is correct, both having regard to the terms of the Act and the decision in the case of *Gibson v. Ingo* (6 Hare, 112). Therefore I think he is entitled to succeed in obtaining an order against the defendants for the delivery up of the certificate, which is really being asked for for the purposes of the navigation of the ship, being wanted by the plaintiff to hand over to those who are about to navigate her. The question is what navigation she ought really to be engaged in. The delivery up of the certificate is not the real point, though, of course, as a matter of form, it ought to be handed over to those who are entitled to it, and I think that must be my order so far as the certificate is concerned. The defendants contend that it ought not to be handed over, because the question is as to how the ship is to be employed. I have said that I think it should be handed over, but that the proper form for the defendants' application, if they can maintain it, is for an injunction to restrain the plaintiff from dealing with the ship in derogation of the agreements. That raises the serious question in this case. The parties before me are only Frank Ross and the Tyser Line, and though the purchasers of the ship, Messrs. Allport and Hughes—the purchasers in the sense that they have made their contract, though, as I understand, they have not got their transfer—have asked to be made parties with a view of determining their rights, and the plaintiff desired that that should be done, the defendants

have refused to accede to that suggestion, and only wish the matter decided between them and Mr. Frank Ross. With that refusal on their part, I do not feel that I could make an order that they should have someone as defendants to their counter-claim whom they did not wish to sue, though I think it extremely advisable that the rights of all parties should have been determined once for all. However, there it is, and I have only to consider the defendants' application for an injunction against the plaintiff. Mr. Bigham takes two points. First, that the mortgagee is bound by the contract made before his mortgage, although he had no notice of that contract. I think there is little or no authority for that general proposition, but I do not think it is necessary in this case to express with any definiteness what is the general rule upon that point, because there may be cases in which, although there is no actual notice, the mortgagee ought to assume that the ship is occupied in some ordinary employment. Without further consideration I should not like to express myself too positively upon that general proposition. But the facts here are very different indeed from the case of the ordinary employment of a vessel under ordinary loading or ordinary charters. The mortgagees, as I pointed out, took their mortgage almost immediately the ship was registered, under an arrangement made actually before she was registered, and under these circumstances I do not see how the mortgagees could in any way assume or be bound to assume that there was a contract of this particular character, affecting the ship for the next five years. In fact, they knew nothing whatever about it. I do not think that, having regard to the dates and facts, the first mortgagees when they took their mortgage would be bound by the terms of this particular contract, bound in the sense that they could not sell the ship free of it if they chose to enforce their security. There is a further point which it is important to bear in mind. It is said on the defendants' side that the contracts would not very appreciably affect the security of the mortgagees. I confess I cannot take that view. It seems to me that the matter speaks for itself; that where there is a contract of this particular character it would be, and is, prejudicial to the security if the mortgagees were to be obliged to admit that he could not sell the ship, or realise his security in the open market free from that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time, as things are good or as things are bad. It is a contract which binds the vessel for a very long period, and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were tied down by the terms of that bargain. It follows that if the vessel were put up for sale without being freed from these arrangements, the mortgagees would not be able adequately to realise their security. Therefore I think that with regard to that first proposition the first mortgagees really were in this case entitled to realise their security upon the default of their mortgagor by selling the ship without being hampered by the engagements made under the contracts with the Tyser Line. But Mr. Bigham says that it is not so with regard to this particular purchaser, because he took his mortgage with notice of the position of the ship,

ADM.]

Re HOWELL THOMAS; JAQUESS v. THOMAS.

[CT. OF APP.]

as stated in that letter of the solicitors to which I have referred, and of course had full notice of the agreements before he completed his purchase, and therefore that he ought not to be allowed to deal with the ship in any way in derogation of the agreements. But there again cases have been cited to me which show that a purchaser with notice from a purchaser without notice is entitled to rely on the title of his vendor, because otherwise that vendor would be restricted in his powers of sale, and that is exactly the position in which these mortgagees would be. If they could not sell to a person in the position of Mr. Frank Ross, then, even if he offered a higher price than anybody else, they could not avail themselves of that offer, because he would have notice of the terms on which the ship was previously engaged. There are two other points taken as an answer to this application for an injunction. The first is that there is really nothing to restrain the plaintiff from doing so, because the case is analogous to that of *De Mattos v. Gibson* (*ubi sup.*), where the position of the mortgagor was such that practically the contract with him was at an end. This case, I confess, seems in one sense very near to that, because of the position in which the death of Mr. William Ross has placed his estate, but that point has not been dealt with so far as showing what the executors propose to do about these vessels. I cannot help thinking that they did not intend to go on, but I am not going to dispose of this case on that particular point. There is another point, namely, that the motion really ought to be against Messrs. Allport and Hughes; that they have had notice of the agreement, and therefore Mr. Frank Ross has done all that he need do, because, it is said, he is entitled to sell the ship, and if he sells it to a person who has notice of the contract he has not done anything to defeat or in derogation of the agreements. I think there is a good deal in that point, and I cannot help thinking that as a matter of business the defendants were not wise in not disposing of that matter once for all in this case. But, after all, that is putting the case on a somewhat narrow ground, and though I think it is possible that that contention may be correct, having regard to the form of application which was put forward in *Collins v. Lamport* (34 L. J. Ch. Div. 196), I prefer to put it on the broader ground I have taken, that I do not think, in the circumstances of this particular case, the mortgagees were disentitled to sell the vessel free of these engagements, and that Mr. Frank Ross was entitled to take up the position which they themselves had. Although one can see quite well that the Tyser Line may feel a certain hardship in having made this particular contract, and in not being able to strictly insist upon it, they have their remedy, if it is open, against the estate of Mr. William Ross. I think myself that while on the one hand it is important that you should be able to charter vessels in the ordinary way without interference by mortgagees other than is necessary to protect their security, yet, on the other hand, a mortgagee who takes his rights without notice of any particular contract affecting the ship in this way, ought not to be prevented from realising his security. Therefore, the conclusion I have come to is, that the plaintiff must have an order in his favour for the delivery up of the certificate, and that the defendants' counter-

claim must be decided against them. The plaintiff must have the costs of the suit.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb, and Whetton.*

Solicitors for the defendants, *Clarke, Rawlins, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 5, 6, 7, 8, and 16.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re HOWELL THOMAS; JAQUESS v. THOMAS. (a)
APPEAL FROM THE QUEEN'S BENCH DIVISION.

Solicitor and client—Costs—Taxation—Claim for delivery of bill of costs resisted on the ground of maintenance and champerty in the proceedings—Illegal transaction—Doctrine as to, not applicable to the exercise of the jurisdiction of court over its own officers.

The doctrine laid down by Lord Mansfield in Holman v. Johnson (Coup. 341, 343), and recently acted upon by the Court of Appeal in Scott v. Brown and Co. (67 L. T. Rep. N. S. 782; (1892) 2 Q. B. 724)—that no court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality—has never been applied, and ought not to be applied, to the exercise of the jurisdiction of the court over its own officers.

One of the defences by a solicitor to a claim for the delivery of a bill of costs, and an account of moneys paid in connection with certain litigation, was that the work which the solicitor was employed to do was illegal, on the ground of maintenance and champerty, and that no assistance ought therefore to be afforded by the court to either party as against the other.

Held, that such a defence in the case of a solicitor could not be set up as a ground of immunity from the jurisdiction of the court, and must be regarded as wholly untenable, and that the order asked for must be made.

Decision of the Divisional Court (Mathew and Collins, JJ.) affirmed.

W. LAWRENCE, a person living in America, claimed to be entitled to property of large value, called the Townley Estates, situate in this country. Lawrence was a man of no means, and was unable to incur the expense of prosecuting his claim, and several persons in America subscribed large sums of money, amounting altogether to about 11,000*l.*, to enable him to maintain the necessary litigation upon the terms that if it was successful they should be repaid out of the property recovered. The arrangement was to be carried out by means of bonds executed by Lawrence, which were to be made charges on the estate.

The fund thus subscribed was intrusted to Colonel Jaquess, who came to England, and, acting under a power of attorney from Lawrence,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

[CT. OF APP.]

Re HOWELL THOMAS; JAQUESS v. THOMAS.

[CT. OF APP.]

instructed Howell Thomas to act as solicitor in the litigation on behalf of Lawrance.

On the 9th June 1886 an action of *Lawrance v. Lord Norreys* was commenced in the Queen's Bench Division, which was dismissed; and afterwards an action in the Chancery Division between the same parties (59 L. T. Rep. N. S. 703; 39 Ch. Div. 213), which was eventually dismissed as frivolous and vexatious by the House of Lords (62 L. T. Rep. N. S. 706; 15 App. Cas. 210).

In all those proceedings Thomas acted as solicitor for the plaintiff, but he subsequently ceased to practise as a solicitor.

Colonel Jaquess alleged that he had paid large sums of money to Thomas out of the fund which had been subscribed in America, and he took out a summons calling upon him to deliver his bill of costs, and an account of the moneys received by him. The master granted the application, and the Divisional Court (Mathew and Collins, JJ.) affirmed his decision.

Thomas now appealed to the Court of Appeal. His grounds of appeal were: first, that the relation of solicitor and client never existed between himself and Colonel Jaquess; secondly, that if such relation did exist there was a special agreement between them which precluded the delivery of a bill of costs and taxation; thirdly, that all accounts between them had been settled, except as to a sum of 4000*l.* which Thomas alleged that he did not receive as a solicitor; and fourthly, that the work which Thomas was employed to do was illegal on the ground of maintenance and champerty, and that no assistance ought therefore to be given by the court to either party as against the other.

Murphy, Q.C. and *W. Willis Q.C.* (*Danckwerts and Loehnis* with them) for the appellant.—As to the first three points, we rely on the evidence which has been adduced. As to the fourth point, we say that the appellant is not liable to account to the respondent, inasmuch as the whole transaction between them was illegal on the ground of maintenance and champerty. Where money is paid under an illegal contract which has been partially carried into effect the money cannot be recovered back:

Kearley v. Thomson, 63 L. T. Rep. N. S. 150; 24 Q. B. Div. 742;

Taylor v. Bowers, 34 L. T. Rep. N. S. 938; 1 Q. B. Div. 291;

Bone v. Ekless, 5 H. & N. 925.

The court will not allow itself to be made the instrument of enforcing obligations arising out of an illegal transaction, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality:

Scott v. Brown and Co., 67 L. T. Rep. N. S. 782; (1892) 2 Q. B. 724;

Holman v. Johnson, Cowp. 341, 343.

If a plaintiff cannot maintain his cause of action without showing as part of such cause of action that he has been guilty of illegality, then the courts will not assist him in his cause of action:

Taylor v. Chester, 21 L. T. Rep. N. S. 359; L. Rep. 4 Q. B. 309.

[SMITH, L.J. referred to *Hampden v. Walsh* (33 L. T. Rep. N. S. 852; 1 Q. B. Div. 189). LINDLEY, L.J. referred to *Taylor v. Lendey* (9 East, 49), as supporting the same contention.]

Rolland for the respondent.

Willis, Q.C. replied.

Cur. adv. vult.

March 16.—The following written judgment of the court (Lindley, Kay, and Smith, L.JJ.) was delivered by

LINDLEY, L.J.—[After considering the facts of the case, his Lordship stated the opinion of the court on the first three points to be—that the relation of solicitor and client did exist between Thomas and Colonel Jaquess; that the agreements and letters which were in evidence left Thomas's costs to be dealt with according to the ordinary rules applicable to solicitor and client; that there was no settled account which could preclude the taxation of the bill of costs; and that the sum of 4000*l.* was paid to Thomas as a solicitor, and must be brought into his account in the usual way. His Lordship continued as follows:] We come now to the last point, viz., the illegality of Thomas's retainer on the ground of maintenance and champerty. It was certainly startling to hear counsel of eminence contend that a solicitor and officer of the High Court could set up such a defence against a client invoking the jurisdiction of this court to compel such solicitor to deliver a bill of costs and cash account for work done and money received by him in his character of such solicitor. Is every rascally solicitor to invoke his own rascality as a ground of immunity from the jurisdiction of the court? Or is the court to listen to a solicitor who, after acting for and advising his client and taking his money, is mean enough to denounce him and set up the illegality of the client's conduct as a reason why the court should not call its own officer to account? Or is the court judicially to hold that, although it may strike such a solicitor off the rolls, it cannot legally compel him to do that which every man with a spark of honour would do without hesitation, viz., account to the client who has employed him? We emphatically protest against any such notion. The court expects and exacts a high standard of honour on the part of solicitors to their clients, and ought not to listen, and will not listen, to such a scandalous defence as that set up by Thomas in this case. We do not blame counsel for arguing such a point. They did their duty in raising it, and in deference to them we have considered it; but, having done so, we dismiss it as wholly untenable. The doctrine laid down by Lord Mansfield in *Holman v. Johnson* (Cowp. 341, 343), and recently acted upon by this court in *Scott v. Brown* (67 L. T. Rep. N. S. 782; (1892) 2 Q. B. 724) has never been applied, and, in our opinion, ought not to be applied, to the exercise of the jurisdiction of the court over its own officers. We may, however, add that there is no proof that either Jaquess or Thomas was to share the estate if recovered, and that it did not concern Thomas where Jaquess got money from. Thomas was not employed to raise money for Jaquess, and Thomas's payment was not conditional on money being illegally raised. This really disposes of the appeal, which must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Wontner and Sons*.
Solicitor for the respondent, *F. Roll*.

CT. OF APP.]

HANBURY v. HANBURY.

[CT. OF APP.]

Wednesday, April 11.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

HANBURY v. HANBURY. (a)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Divorce—Permanent maintenance—Income of respondent—Profits of partnership business—Undrawn profits—Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 32—Matrimonial Causes Act 1866 (29 & 30 Vict. c. 32), s. 1—Order for security.

In a petition for maintenance by a wife who had obtained a decree absolute for the dissolution of her marriage, it appeared that the husband's income was derived from a share in the profits of a firm of which he was one of the partners.

*The petitioner moved to vary or add to the report of the registrar on her petition upon the basis that the undrawn profits of the business formed part of the income of the respondent. It was decided by Sir Francis Jeune that the respondent must be ordered to secure permanent maintenance for the wife, upon the basis of one-third of the whole of his share of the average profits to which he had been entitled during the three preceding years, viz., 3300*l.*, although by the terms of the partnership he was only entitled to draw a limited amount of the profits, unless with the consent of his partner.*

The respondent appealed.

*Held, that too high an estimate had been formed of the average profits of the business when taking them at 3300*l.* a year, but that the proper amount would be 2400*l.*; that circumstances might occur, the order being final, to reduce the amount of the profits, and the health of the respondent might prevent his continuing in the business.*

*Held, therefore, that an order must be made under sect. 32 of the Matrimonial Causes Act 1857, that the sum of 300*l.* (in addition to the 500*l.* a year already secured by the marriage settlement), instead of 600*l.* a year as fixed by Sir Francis Jeune, should be secured by way of permanent maintenance for the petitioner.*

Order of Sir Francis Jeune varied accordingly.

THIS was a motion on behalf of the petitioner, Clara Martha Hanbury, to vary or add to the report of the registrar upon her petition for permanent maintenance, filed on the 5th Jan. 1893.

The decree absolute was pronounced on the 20th Dec. 1892, for dissolution of the marriage on the ground of the adultery and cruelty of the respondent Ernest Osgood Hanbury. The custody of the five children of the marriage, who, at the date of this application, were aged respectively fifteen, thirteen, eleven, ten, and seven years, was, by the decree, given to the petitioner.

The respondent was in partnership as a brewer.

The respondent's capital in the said business was reported to be 15,323*l.* 13*s.* 5*d.*, and his share of the profits for the years 1890, 1891, and 1892 was 3651*l.*, 3555*l.*, and 3551*l.* respectively. By the articles of partnership, the respondent was not allowed, without the consent of his partner, to draw more than 2400*l.* a year on account of profits. The balance of profit due to him in each year, after deducting his monthly drawings, was carried to his credit in the partnership books

under a separate account called "Undrawn Profits Account."

On or before the 7th Oct. 1890 the amount standing to the credit of the respondent, in respect of his "undrawn profits," was 5515*l.*; but, between that date and the 8th Feb. 1892, various sums had been drawn out by the respondent, with the consent of his partner, amounting altogether to 1600*l.*, and made up as follows: 200*l.* on the 7th Oct. 1890; 200*l.* on the 7th Nov. 1890; 100*l.* on the 3rd March 1891; 200*l.* on the 23rd March 1891; 300*l.* on the 9th Oct. 1891; 300*l.* on the 23rd Nov. 1891; and 300*l.* on the 8th Feb. 1892. The "undrawn profits" were thereby reduced to 3915*l.*, and by the withdrawal of other sums, subsequently to the 8th Feb. 1892, the fund was further reduced to 3415*l.* by the month of June 1893.

By way of mortgage on the business there had been raised, for the respondent's benefit, the sum of 5000*l.*, made up as follows: 1000*l.* on the 23rd May 1892; 2500*l.* on the 15th Nov. 1892; and 1500*l.* on the 31st Oct. 1893.

The respondent had, therefore, drawn upon the business, within three years, the sum of 6600*l.*, in addition to his ordinary drawings of 7200*l.* during those three years.

The respondent owned two policies of assurance upon his own life in the Clerical, Medical, and General Assurance Society for 2000*l.* each, the premium on each of which was 50*l.* a year.

By an indenture of settlement bearing date the 5th Aug. 1885, the respondent covenanted to pay a capital sum of 8000*l.* out of his business to the trustees of the settlement, and 500*l.* a year until the sum of 8000*l.* should be paid, upon certain trusts therein mentioned, for the benefit of the petitioner and the children issue of the marriage. The said sum of 500*l.* a year had not been paid since the commencement of the divorce suit.

It was contended before the registrar, on behalf of the petitioner, that the undrawn profits of the business formed part of the income of the respondent, subject only, as to its being drawn upon, to the consent of the respondent's partner. The registrar reported on the 13th Dec. 1893, as follows:

"It seemed to me that the undrawn profits were used as further capital in the business, and so contributed to the earnings of the income.

"The income of the respondent would, therefore, amount to 200*l.* a month, i.e., 2400*l.* a year.

"It is submitted that 800*l.* a year should be secured as maintenance for the petitioner and the sum of 250*l.* a year as maintenance for the children issue of the marriage."

The articles of the partnership provided (*inter alia*) that neither partner should enter into any bond or become surety or security with or for any persons; that neither partner should do or knowingly suffer anything whereby or by means whereof any property of the partnership might be seized, attached, or taken in execution; and that the residue of the net profits of the business should belong to the partners in equal shares, and immediately after the net profits of any year should have been ascertained the shares of the partners might be drawn out by them respectively as they should think fit, save only that no partner should at any one time draw out such an amount as not in the judgment of either partner to leave a sufficient balance to the credit of the partner.

(a) Reported by H. DURELY GRAZEBROOK and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

CT. OF APP.]

HANBURY v. HANBURY.

[CT. OF APP.]

ship at their bankers to answer the impending current payments to be made by the partnership in the course of the business.

The petitioner moved for an order to vary or add to the said report, upon the basis that the undrawn profits of the business formed part of the income of the respondent.

On the 29th Jan. 1894 the motion came on to be heard before the President, Sir Francis Jeune.

Bargrave Deane for the petitioner.—The respondent's profits in the business amount, in the three years in question, to 10,757*l.*, or an average of 3585*l.* The petitioner is entitled to one-third of this amount in addition to the allowance of 50*l.* a year for each of the children.

Barnard for the respondent.—The registrar was quite right in reporting that only 2400*l.* a year is income. There is no property within the Divorce Act of 1857 (20 & 21 Vict. c. 85), s. 32, upon which maintenance can be secured. The case, therefore, falls within the later Act (29 & 30 Vict. c. 32). [The PRESIDENT.—I held recently that, where there was a going concern, that could be taken into account.] In that case, however, the husband was the sole owner of the business. A man cannot charge his share in a partnership without being liable to forfeit the whole of his interest. If the respondent were turned out of the business and his money had to be invested, it would produce very little. *Jardine v. Jardine* (6 P. Div. 213), which was a decision of the full court, is binding, and is an authority for the contention that maintenance cannot be secured upon property of this kind. The order in that case was made under the Act of 1866. That Act only applies in cases where there is no property upon which an allowance can be secured, and the decision in *Jardine v. Jardine* (*ubi sup.*) amounts to this, that the court cannot make the present order under sect. 32 of the Act of 1857, and that capital in a business is not property upon which maintenance can be secured. [The PRESIDENT.—Surely, to say that the court can act upon the first, is not equivalent to saying that there is no power to make an order under the second Act?] Yes; on the terms of the preamble to the Act of 1866, and the words in sect. 1 “in every such case.” These words can only refer to what is mentioned in the preamble:

Medley v. Medley, 47 L. T. Rep. N. S. 556; 7 P. Div. 122.

Even if the court should hold that it has a discretion, it should exercise that discretion by making the present order under the Act of 1866, which would give the respondent the right to come to the court hereafter to ask that the amount should be reduced, if his income should fall off. [The PRESIDENT.—Why cannot this be secured upon the profits?] That would be no security if the partnership came to an end. The court ought to protect a man whose property is locked up in a business. The terms of the deed of partnership distinctly preclude the respondent from giving security or from doing anything whereby the property of the partnership might be seized. If the maintenance cannot be secured on the capital of the partnership, it cannot be secured upon the income. If income were “property,” there was no necessity for the Act of 1866. Where is the line to be drawn? The report is also not quite fair as to the allowance for the

children. The proper order would be that the petitioner should receive 50*l.* a year for each child until such child reaches the age of sixteen years.

The PRESIDENT.—The first point raised is as to the amount which ought to be allowed for the maintenance of the petitioner and the children of the marriage. The registrar has taken 2400*l.* as the annual income of the husband, and upon that basis has recommended 800*l.* a year as a proper allowance for the wife, and 250*l.* a year for the five children. The question is, what can reasonably be taken as a correct estimate of the respondent's income in the future? To arrive at that estimate, it is usual to take as a basis of calculation the actual figures of the past three years. I see no reason to suppose that the respondent's income will be less in future than it has been in the past, and although it may be that he will only be able to draw 2400*l.* from the business in each year, except with the consent of his partner, he will always be in a position to draw, with his partner's consent, the surplus profits which fall to his share, and, if his partner withholds his consent, the surplus profits remain in the business and go to swell his income till such time as he may be allowed to draw them. The difference between 2400*l.* and the respondent's actual income in the three years in question is made up of sums which he may get as income at once, or which, if left in the business, bear interest. There is, therefore, no reason why I should not treat his future income as approximately the same as that of the past. I am not sure that some small allowance ought not to be made for capital which has been withdrawn, and I think 200*l.* would be a reasonable deduction to make from the annual income in that respect. This would reduce the average income to 3385*l.*, or, in round figures, 3300*l.* A third of that is 1100*l.*, and that is a proper amount, in my judgment, to be allotted to the petitioner. The 500*l.* a year payable under the existing deed must, of course, come off that, because the petitioner cannot have it twice over. The sum of 600*l.* a year will, therefore, have to be provided for the petitioner by the respondent, in addition to the 500*l.* a year already secured by the marriage settlement. Then comes the question, is the order for that sum to be made under the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), s. 32, or under the Matrimonial Causes Act 1866 (29 & 30 Vict. c. 32)? The petitioner desires the sum to be secured under the earlier Act, and I see no reason why it should not be so. All that *Jardine v. Jardine* (6 P. Div. 213) decides is, that where one is dealing with property in a business, it is not necessary that the order should be made under the earlier statute, but that the court may avail itself of the later Act. Both, of course, could not be used, and the only doubt raised in the case of *Jardine v. Jardine* (*ubi sup.*) was as to whether the Act of 1866 was available. I can understand that where the court is dealing with a business of a very fluctuating kind, as was the case in *Jardine v. Jardine* (*ubi sup.*) where the profits had been 18,000*l.* in one year and nothing in another, it would be both unwise and improper to order the respondent to secure maintenance upon it. In the present case, however, I am dealing with a well-defined income of very even amount, arising year after year from the profits of the respondent's business.

and I see no reason whatever why that should not be made the subject of security. The particular form of security will be considered by the conveyancer who draws the deed. The suggestion in regard to the children seems reasonable. I make an order that the respondent do secure 600*l.* a year to the petitioner by way of permanent maintenance, in addition to the 500*l.* a year already secured; and, further, that the respondent do also secure for the five children the yearly sums of 70*l.*, 60*l.*, 50*l.*, 40*l.*, and 30*l.*, or 250*l.* a year in all, the lowest amount to drop out as each child successively attains the age of sixteen years.

From that decision the respondent now appealed.

Bayford, Q.C. (*Barnard* with him), for the appellants, contended: first, that the registrar was right in treating the available income as 2400*l.*, and that the amount of the maintenance should be reduced to 800*l.* per annum; and secondly, that the order should not be made to secure the income under sect. 32 of the Matrimonial Causes Act 1857, but for payment under the Matrimonial Causes Act 1866. He also pointed out that to order a charge on the share of the respondent in the brewery might result in a dissolution of the partnership by reason of the partnership articles. (*LOPES, L.J.* referred to *Benyon v. Benyon* (1 P. Div. 447) as to the right of a petitioner to apply for an increased provision out of the income of the respondent.)

Inderwick, Q.C. (*Bargrave Deane* with him) for the petitioner.—There are two points in this case; first, as to the amount which ought to be allowed for the maintenance of the petitioner and the children; secondly, as to the security to be given by the respondent. I submit that the sum should be secured under sect. 32 of the Matrimonial Causes Act 1857, which empowers the court, in every case of dissolution of marriage, to order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life. The Matrimonial Causes Act 1866 is not applicable to a case like the present. It was passed to meet the case of persons earning weekly wages. [*LOPES, L.J.*—The case of *Jardine v. Jardine* (6 P. Div. 213) has extended the Act beyond weekly wages.] Although not now limited to weekly wages, the Act only applies to orders made for the joint lives of the husband and wife. It only applies to a case where the husband cannot make any security. (*KAY, L.J.*—The words of the preamble to the Act of 1866 seem expressly to provide for payment to the wife during the joint lives of the husband and wife. In terms the Act of 1866 only applies to a case where the husband has no property. *LOPES, L.J.*—The decision in *Medley v. Medley* (47 L. T. Rep. N. S. 556; 7 P. Div. 122) rather seems to contemplate a case where there was no property.] There is nothing to prevent the court from making any order under sect. 32 of the Act of 1857 which is applicable to the case. [*LINDLEY, L.J.*—Why cannot the order be made under both statutes?] I have never known a case in which such an order has been made under both Acts. The words of the Act of 1866 would seem to preclude the making of any order of the kind now asked for where the husband has any pro-

perty which can be secured. The only case in which an attempt was made to obtain an order under both Acts was *Medley v. Medley* (*ubi sup.*), and it was not successful. Then as to the nature of the security to be given by the respondent, a warrant of attorney would be the proper course:

Morris v. Morris, 31 L. J. 33, Prob;

De Stern v. De Stern, 31 L. J. 34, Prob., note.

No reply was called for.

LINDLEY, L.J.—This is an appeal from an order of the President of the Probate and Divorce Division directing the respondent to secure, in addition to the 500*l.* a year already secured, the annual sum of 600*l.* for the term of the petitioner's life or until she marries, and for that purpose the matter is to be referred to one of the conveyancing counsel to settle the deed. The learned judge proceeded upon the theory that this gentleman's income under the partnership articles amounted to 3300*l.* a year. In one sense it does, because the annual profits for the last three or four years have amounted to that sum. But, under the partnership articles, to which our attention has been drawn, it is tolerably obvious that he cannot draw more than 2400*l.* a year without the consent of his copartner. The copartner may object to his withdrawing more if in his judgment the necessities of the business render it undesirable to draw more. Practically, it means this: that Mr. Hanbury cannot get, in respect of his annual profits, more than 200*l.* a month without the consent of the copartner. Under those circumstances it does strike us that the learned judge ought not to have considered the respondent's available income as more than 2400*l.* per annum. Then there is this circumstance also, that, in consequence of the state of health of Mr. Hanbury, it is quite possible that this partnership may be dissolved before his death, and if so, an order that he should pay as much as 1100*l.* per annum permanently to the wife for life might be very onerous indeed. It might amount to the whole income to which he is entitled, and, according to the Act of Parliament under which this order is made, he could not get a reduction in the amount ordered to be paid. Under these circumstances we think that it will be right to substitute the annual sum of 300*l.* for the annual sum of 600*l.* and then leave the conveyancing counsel of the court to exercise his ingenuity to devise the best security which he can, having regard, of course, to the terms of the partnership articles. That disposes of everything except the costs, and I think that, this being a case between husband and wife, the husband ought to pay them. The order is made under the earlier Act, and not under both Acts.

LOPES and *KAY, L.JJ.* concurred.

Order varied.

Solicitors for the petitioner, *Routh, Stacey, and Castle.*

Solicitors for the respondent, *Hanbury, Hutton, and Whitting.*

APP.] *Re ARBIT., LONDON COUNTY COUNCIL AND LONDON STREET TRAMWAYS CO.* [APP.]

March 12, 13, 15, and April 12.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE LONDON STREET TRAMWAYS COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Tramways company—Compulsory purchase of undertaking by local authority—Principle of valuation—London Street Tramways Act 1870 (33 & 34 Vict. c. clxxi.), s. 44.**In determining the value of the undertaking of a tramways company which was being compulsorily purchased by the London County Council, under sect. 44 of the London Street Tramways Act 1870, the referee appointed in accordance with that section treated the value as being the cost of construction less depreciation.**Held, that the purchasers were not to pay for the profit which they might make by the use of what they bought, and were not to compensate the vendors for their loss of profit; and that, therefore, the referee had rightly estimated the value in determining that only that portion of the undertaking represented by the cost of constructing the tramways in situ was to be paid for.**The Stockton and Middlesborough Water Board v. The Kirkleatham Local Board (69 L. T. Rep. N. S. 661; (1893) A. C. 444) considered.**Decision of the Divisional Court (Mathew and Collins, JJ.) reversed.*APPEAL by the London County Council from a decision of the Divisional Court (Mathew and Collins, JJ.), *ante*, p. 97.

Finlay, Q.C. and G. M. Freeman, for the appellants, relied on the case of *The Stockton and Middlesborough Water Board v. The Kirkleatham Local Board* (69 L. T. Rep. N. S. 661; (1893) A. C. 444), where it was held by the House of Lords that in fixing the price to be paid for the pipes, mains, and fittings of a waterworks company, the arbitrator should value such pipes, &c., as plant *in situ* capable of earning a profit, and should not include compensation for the loss of the right to supply water in future.

Sir Richard Webster, Q.C., Cripps, Q.C., and H. Sutton for the respondents. *Cur. adv. vult.*

April 12.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal from an order of the Divisional Court remitting back to an arbitrator an award on the value of a tramway and other property belonging to the London Street Tramways Company, but taken by the London County Council under the powers of a special Act of Parliament (33 & 34 Vict. c. clxxi.). The question raised by the appeal is, whether the arbitrator was right in point of law in valuing the tramway at what it would cost the London County Council to make it, or whether he ought to have ascertained what the tramway company could have let it for to a person who could use it, and then to have capitalised its annual value so ascertained. The question thus raised turns on the true construction of sect. 44 of the Act above mentioned. The section provides as follows: "The Metropolitan Board of Works may, if by resolution passed at a special meeting they so decide, within

six months after the expiration of a period of twenty-one years from the passing of this Act, and within six months of the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under either of the two next preceding sections, with the approval of the Board of Trade, by notice in writing require the company to sell, and thereupon the company shall sell to them their undertaking upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway and all lands, buildings, works, materials, and plant of the company suitable to and used by them for the purposes of their undertaking, such value to be, in case of difference, determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs; and when any such sale has been made all the rights, powers, and authorities of the company in respect to the undertaking sold, or, where any order has been made by the Board of Trade under either of the next preceding sections, all the rights, powers, and authorities of the company previous to the making of such order in respect of the undertaking sold, shall be transferred to, vested in, and may be exercised by the Metropolitan Board of Works in like manner as if that board had been authorised by this Act to construct the tramways and had been named in this Act instead of the company." The meaning of this section is, in my opinion, plain up to a certain point. The substance of it is as follows: (1) The London County Council is entitled (in the events specified in the section) to require the tramway company to sell to them their undertaking. (2) The sum to be paid is the value, at the date of the notice referred to in the section, of the tramway and other property mentioned in the section. (3) But no allowance is to be made for past or future profits of the undertaking, nor for compulsory sale, nor for any other consideration. (4) When the sale has been made the London County Council will have the same right to work the undertaking as the tramway company had before. The short effect of this is that the value of the tramway and other property at the date of the notice is to be ascertained as between a buyer and a seller, but no allowance is to be made for goodwill, compulsory sale, severance, injury to other property of the vendors not sold, nor for anything whatever beyond the value of the tramway and other property which is to be paid for. So far the matter is plain. But the real difficulty now arises. How is the tramway to be valued? The first thing to ascertain is the meaning of "the tramway." It is not the undertaking; it does not include the statutory power of lengthening an existing way nor of making other lines of rails authorised to be made, but not made at the date of the notice, nor does "tramway" include the business of the tramway company. "Tramway" means, in my opinion, the line of rails which the company were empowered to make and maintain, and which the company had laid down at the date of the notice. The next thing to ascertain is, What is the value of the tramway in this sense? My answer is, What anyone would give

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

APP.] *Re ARBIT., LONDON COUNTY COUNCIL AND LONDON STREET TRAMWAYS CO.* [APP.]

for it. But how is this to be ascertained? The vendors have only a right of user (sect. 20); they have no land to sell; they have only an easement so far as the land is concerned, but they have an exclusive right to use the tramway (sect. 29) and to grant licences to other persons to use it (sect. 37). These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale. But are the purchasers to pay for the right of user? The right of user clearly adds to the value of the tramway; if it were not for the right of user the value of the tramway would be only the value of so much old iron. The right of user cannot, then, be ignored and be wholly disregarded. Apart from the direction that no allowance is to be made in respect of past or future profits of the undertaking there would be no difficulty. The tramway would be valued as something yielding profit; the rails and the goodwill—i.e., the profit to be expected from their use—would both be valued, and the value thus ascertained would be the value of the tramway. But then no allowance is to be made for profit, and the problem is thus reduced to the question, What is the value of the tramway to a purchaser entitled to use it, but who is not to be charged anything in the shape of an allowance of past or future profit of the undertaking? The arbitrator has answered this question by saying that the value is what it would cost the purchaser to lay down the tramway. After much consideration I have come to the conclusion that he is right. Excluding the value of old iron on the one side and all allowance in respect of past or future profit of the undertaking on the other, there appears to me nothing left except to say that the present value is either what the tramway cost to make, less some deduction for depreciation for wear and tear, or what it would cost the purchasers to make if they had to make it themselves. Cost price is well known to be no real criterion of the value of an outlay on land. What the result of the outlay will fetch if sold is often much more and often much less than the outlay which has produced it, and the arbitrator was quite justified in not adopting this mode of valuation. There remains only the other, which has been adopted. He has adopted it because he finds it impossible to value the tramway by ascertaining what it would let for without taking into account and indirectly making an allowance for past or future profits of the undertaking, which the statute directs him to exclude. It was urged with much force by the counsel for the tramway company that to take profit into consideration in order to ascertain the value of property is one thing, to make an allowance for profit in addition to such value is a totally different thing, and that whilst the statute prohibits any such allowance or addition, it is quite silent as to the mode of valuing the property which is to be valued and paid for. It was urged that to construe the words which state what allowances are to be excluded as directing that no regard is to be had to the fact that the tramway company are selling property of great value for use at the time of sale is to put a forced and unnatural con-

struction on those words, and to lose sight of what is the key to the whole section, viz., that the county council are to buy the undertaking and to pay for the value of the corporeal property which they take over, but are to pay nothing more. This argument very much impressed me. But, having carefully considered it, I have come to the conclusion that to give effect to it will be indirectly to make the county council pay for the use of the tramways and to make them pay some thing for past or future profit which the Act, in my opinion, did not contemplate. The arbitrator says distinctly that this is the reason why, after admitting evidence of what rent could be obtained from a tenant, he ultimately felt unable to act upon such evidence in making his award. The evidence thus admitted, but not acted upon, was based on the profit which could be made by a purchaser of the tramway. But this mode of valuation is, in my opinion, only admissible in cases where an allowance for such profit can properly be made by the vendor, and not in a case where such an allowance is expressly excluded. I may add, however, that I do not attach importance to the argument of the counsel for the county council, based on the words of the last part of sect. 44, which vests the rights of the tramway company in the county council as if they had constructed the tramway and had been named in the Act; for, although at first sight these words support the contention of the county council, yet very similar words are found in sect. 46, which applies to other purchasers, who, I apprehend, would have to pay for the undertaking valued in the usual way, and not for the value of the tramways without any allowance in respect of past or future profit of the undertaking. The crucial point is whether the county council, buying the undertaking under sect. 44, are to pay for the right to use the tramway when they have acquired it? In my opinion they are not to pay for this right, although, as I have already pointed out, its existence cannot be wholly ignored. There is no injustice in this conclusion, because the tramway company paid nothing for the acquisition of their right to use the public streets when they laid down their tramways. The conclusion at which I have thus arrived is, I think, strengthened by sects. 42 and 43, which relate to what is to be done if the tramway company cease to use their tramways, or become insolvent. In that case the tramways may be removed at the expense of the company without any compensation, unless their powers are purchased by the county council under sect. 44. In the cases provided for by sects. 42 and 43, any valuation based on profit cannot, I think, have been contemplated by the Legislature. The case appears to me one of great difficulty, far more difficult than the *Kirkleatham* case (69 L. T. Rep. N. S. 661; (1893) A. C., 444), which was so different from the one before us that it is really of little or no use as a guide for the interpretation of the statute with which we have to deal on the present occasion. The result arrived at is, however, the same in both cases, viz., that the purchasers are not to pay for the profit which they may make by the use of what they buy, and are not to compensate the vendors for their loss of profit. This, in my judgment, is the key to the problem which we have to solve. I agree, therefore, with the conclusion arrived at in Scotland in the case of the *Edinburgh Tram-*

ways, and am unable to adopt the view taken by the Divisional Court and by the Lord President, who differed from his colleagues in the Scotch case.

KAY, L.J.—The question in this case is, what is the true construction of the statute 33 & 34 Vict. c. clxxi., by which the London Street Tramways Company was incorporated. This Act authorised them under certain restrictions to lay down tram lines in certain streets in London, and to have the exclusive right of running tramcars with flanged wheels upon them. This privilege was granted without exacting any payment to anyone, but the condition of the grant is expressed in sect. 44, which has been read by Lindley, L.J. "Their undertaking," in that section, means the goodwill, expectation of future profits, the tramway, and all lands, buildings, works, materials, and plant of the company, suitable to and used by them for the purposes of their undertaking. This would be, *prima facie*, the meaning of the word "undertaking." But the context which requires payment of the value of the tramway, lands, buildings, works, materials, and plant makes it clear that the word "undertaking" describing that which is sold includes all those, and is used in its most comprehensive sense. Then, secondly, it is clear that the price to be paid is not the value of the undertaking, but of something less than the undertaking. The price to be paid is the value of the tramway, and all lands, buildings, works, materials, and plant. And in computing such value no allowance is to be made for past or future profits of the undertaking, nor any compensation for compulsory sale or other consideration whatever. The words "exclusive of" must mean that the "value" which is to be the measure of the price is not to include any such allowance. What is the value of the tramway, excluding any such allowance? It must be the then value of the construction—the physical thing—putting entirely out of sight its profit-earning capacity. I think the appellants' suggestion that it means the sum for which at the time of the sale a contractor would make and hand over such a tramway in its then condition probably is as near a correct description of the meaning as can be given. The same consideration applies to the then value of the lands, buildings, works, materials, and plant. In estimating their value no allowance is to be included for past or future profits of the undertaking. The value of each is to be taken disregarding the profit that may be made by the use of them in carrying on the undertaking. In short, the meaning of sect. 44 is that the tramways company having obtained the power of making and using the tramways gratuitously, are subjected to this condition, that at the end of twenty-one years they may be required to hand over their whole undertaking to the urban authority on being paid the then value of the structure and plant, without any allowance for its capacity of making profits. This is not an unreasonable condition. The undertaking may succeed or fail. In either case the price to be paid is the same. The urban authority represents the grantors of the right to make the tramway and to use it, and sect. 44 provides in effect for a redemption of that grant after the end of twenty-one years on the terms of making full compensation for the outlay of the tramways company without any allowance for goodwill, past or

future profits. This is the view taken by Sir F. Bramwell, the arbitrator to whom the computation of the price was referred. It was taken to be the meaning of a like provision by another arbitrator, Mr. Tennant, in a similar case, and his view was adopted in a very lucid and able judgment by the Lord Ordinary in an action in Scotland. That judgment has now been affirmed, on the 17th March last, by the Divisional Court in Scotland, consisting of Lord Adam, Lord McLaren, Lord Kinnear, and the Lord President, the last named learned Lord dissenting from the rest of the court. The tramways company have adduced a body of evidence by experts familiar with the business of tramways. These gentlemen have not taken the books of the tramways company and found from them what profits the company were actually making. I can only suppose it was thought that would make the fallacy of their calculation too apparent. But, from an examination of the locality and of the number of persons using the tramcars, they have prepared an estimate of the gross receipts. From this amount they have deducted the outgoings, and the result is the net profit made by the tramways company. One half of this net profit, it is said, is the rent which would be given by a person or company buying the whole undertaking as a going concern, with power to carry it on as the tramways company have been doing. They then capitalise that sum by multiplying it by twenty, and the result is the value which, in the opinion of these witnesses, ought to be paid. It is argued that the value so arrived at does not contain any allowance for profit. The fallacy seems to me apparent. As the learned judge in the Scotch case said, if the tramways company had let the undertaking at that rent, the rent would be all the profit they would make. Indeed, they might have some outgoings to deduct, so that this actual profit might be less. To give twenty years of that profit and then to say that no allowance for profit is made is a contradiction so startling that I am surprised that it should be argued. On this method of computation the price to be paid varies directly with the profit. If the profit were 19,000*l.* a year the rent would be 9500*l.*, and a twenty years' purchase would be 190,000*l.* If the profit were 5000*l.* a year the rent would be 2500*l.* and the price 50,000*l.* Indeed, if the tramway buildings and plant were all to be valued on this principle, I should have thought that the company would get a good price for the goodwill of their concern. Twenty years' purchase of half the profits equals ten years' purchase of the whole, and not many trading concerns would sell for more than that. But we are told that a company like this having a monopoly by statute would sell for more. Even if that is so, some allowance for profit is included in the value so arrived at, and this is what the Act provides. Then it is argued that, notwithstanding the exclusion clause, the Act does not provide some allowance for profit. It was sought to lessen the meaning of the word "undertaking" and to enlarge that of "tramway." The interpretation clause was referred to, according to which "tramways" is to mean the same as "undertaking." In the first place, the word is not "tramways" but "tramway;" and secondly, if it were "tramways" the context shows that it does not mean "undertaking" in sect. 44. In many sections of the statute the plural word

APP.] *Re ARBIT., LONDON COUNTY COUNCIL AND LONDON STREET TRAMWAYS CO.* [APP.]

"tramways" is used where it would be impossible to read it as "undertaking." But, if it had that meaning, it really would not assist the argument of the company. The section would then run thus: They are to sell the undertaking at the then value of the undertaking without any allowance for past or future profits. The words of exclusion would have the same force in either case. It is argued that the use of the word "exclusive" shows that the value of the tramway would include no allowance for profits but for the exclusion clause. It follows that the exclusion clause being there it does not include it. But it is not a sound argument. The exclusion clause is put in to make the meaning more clear, and probably on account of the argument I am next about to notice. It excludes expressly compensation for compulsory sale, which is not included in the value. Great reliance was placed on the rating cases. It is said that even before the 6 & 7 Will. 4 c. 96, s. 1, which expressly makes the rent which a tenant would give, subject to certain deductions, the criterion of the annual value for rating purposes, this had been the law. But there are no exclusive words in the rating statutes such as we find here. Moreover, the principle of those cases is to apportion the rate fairly among all occupiers, and if one is in occupation of premises whose value as a hereditament is greatly increased by its profit-earning capacities, it would be unfair to other ratepayers not to take that into account. The rateable value of a house in Bond-street must be greater than that of a precisely similar house in Islington, both being used as shops. This supposed analogy seems to me to be the basis of the whole argument. But, in my opinion, there is no analogy at all; first, by reason of the different nature of the two cases, but chiefly because of the exclusion clause, which was probably put into this statute for the very purpose of preventing any argument being raised upon this supposed analogy. Next it was said that the exclusion is only of past and future, not of present, profits. I confess that this argument surprised me. In ascertaining the value of a tramway no allowance is to be made for past or future profits of the undertaking. But it is argued that there may be an allowance for present profits. What are present profits? They are the profits made in the past year, month, week, or day. It is impossible to estimate them except by calculating past profits. No allowance for past or future profits includes of necessity no allowance for present profits. But, if an allowance were made for present profits, which must mean the profits which the undertaking has been making up to the time of sale, the whole value of the goodwill must be included. Goodwill is only the capacity of making future profits, and this can only be arrived at by knowing what it has made in the past. Counsel were pressed with the difficulty of giving any other intelligible meaning to past profits, and they suggested that it meant an expenditure upon the line out of past profits. But this would be compensated in estimating the then value of the structure, and therefore the words cannot be so satisfied. With respect to future profits, they suggested that that means a probable increase of profits in the future. But those are not the words. Counsel for the company admitted that the value of the goodwill of the undertaking was not to be paid. But why not? If their argument

is sound, that value, or, at any rate, a large part of it, would be payable. It is only not payable because the words of sect. 44 exclude it, and the exclusion words are those which refer to past or future profits. But the words are that there shall not be "any allowance" on this account. So that the only possible alternatives are to include the whole value of the goodwill or to exclude it altogether. Collins, J. was much pressed with the consideration that the thing to be sold was the undertaking, and that *prima facie* the price should be the value of the undertaking. I entirely agree. But the statute says that this is not the price, but something less, and, as I have pointed out, counsel agree that the value of the goodwill must be excluded from the price. Having given to the judgments of the learned judges in the court below, and the ingenious arguments addressed to us, all the consideration I can, my clear opinion is that no allowance for profits of the undertaking is to be included in the price to be paid; but that such price is to consist of the structural value of the tramway, lands, buildings, works, and suitable plant, and of that only; and that the company's mode of computing such value is entirely wrong, because it includes a large allowance for the profits of the undertaking which the statute expressly and carefully excludes.

SMITH, L.J.—The question raised is this: At what price are the appellants, the London County Council, empowered by statute to buy what they are compelling the respondent company to sell to them? Although this case arises under the London Streets Tramways Act 1870 (33 & 34 Vict. c. clxxi.), the point under consideration is the same as it would be if it arose under the General Tramway Act, passed in the same year, and this decision is therefore of moment to all the tramways companies in England, and there can be no doubt about the magnitude of the interests involved. The great dispute is this: Can the London County Council, when they are minded to step in and buy up the respondent company, do so upon payment merely of the then value of the structure of the tramway *in situ*, ascertained by taking what it would cost the county council to make it; or must the county council pay the then value of what the company have to sell, *i.e.*, the then value of their tramway in use, together with the rights, powers, and authorities of maintaining the same in the streets, of running cars thereon, and of earning tolls thereby, ascertained in the usual and accustomed way of finding out what the present value is, by estimating the rental which might be obtained, and then capitalising the rental? I need not here deal with the other matters the company have to sell, *viz.*, the lands, buildings, works, and plant they may have, suitable to and used by them for the purposes of their undertaking. The case has been well argued on each side, and it has given rise to a diversity of judicial opinion—four judges in Scotland having affirmed the construction placed upon the section by the county council; the Lord President and my brothers, Mathew and Collins, JJ., having upheld the contention of the company. Sect. 44 of the London Streets Tramways Act 1870, upon the true interpretation of which the decision of this case depends, after setting forth the three occasions in which the London County Council are empowered to become purchasers of a tramway otherwise than by agreement, proceeds

thus: [Reads it.] Considering the arguments which have been addressed to us, it becomes necessary to understand in the first place what, under the Act, is to be sold and bought; next, whether what is to be paid is to be for the whole or only for part of what is sold and bought; and, lastly, how the price which is to be paid is to be arrived at. I cannot doubt that what is to be sold and bought is not merely the tramway *in situ* as a structure, but the undertaking of the company as a going toll-earning concern, i.e., the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others, to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt. The words of the section are clear: "And thereupon the company shall sell," not their rails and sleepers, but "their undertaking," and "when such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the county council." By the interpretation section, sect. 3, the expression "the undertaking" shall mean the tramways and works, and undertaking by this Act authorised, or any part thereof. It seems to me that the undertaking comprises three distinct matters: First, the tramways *in situ* in the streets. By sect. 5 the company are authorised to enter upon, take, and use (not purchase) lands delineated in certain plans, and to lay down and maintain street tramways thereon with all proper rails, plates, works, and conveniences connected therewith. This constitutes the tramway. Secondly, the powers granted to the company of running cars with flange wheels therein to the exclusion of all others, and of taking the prescribed tolls and the other power, in the Act mentioned, in addition to what is included in No. 1. And, thirdly, all lands, buildings, works, materials and plant of the company which they may have purchased by agreement, if suitable to and used by them for the purposes of their undertaking. The Lands Clauses Consolidation Acts 1845, 1860, and 1869, which are incorporated in the London Streets Tramways Act 1870, except with respect to the purchase and taking of lands otherwise than by agreement, and with respect to the entry upon lands by the promoters of the undertaking, give the company power to purchase lands. It is these three things which the company have to sell under the words "their undertaking," and that this is what is to be sold by the company to the county council I do not doubt. I now come to consider the next question, which is this: Is the whole or only part of what is sold and bought, and, if so, what part, to be paid for by the county council; or, to state the point in detail, is only the tramway *in situ* to be paid for, together with the lands, buildings, works, materials, and plant, as mentioned in the section; or are the rights, powers, and authorities granted by the Act to the company, and which the county council undoubtedly obtain by their purchase, also to be paid for by them? It cannot, I think, be denied that ordinarily a purchaser pays for the whole of what he purchases, though a statute may enact that it shall be otherwise. I should say that, unless the statute be explicit upon the point, the strong presumption is that the whole of what is sold is to be paid for. I should say that the phrase "paying the then

value of the tramway" *prima facie* meant the then value of the tramway as a structure *in situ*, and more especially when it is coupled with the other named matters, lands, buildings, works, materials, and plant, which are also in like manner to be paid for. The words are not the company shall sell their undertaking to the county council upon the terms of paying the then value of the tramway, exclusive of any allowance for past or future profits of the undertaking. It is said, however, that the words "the tramway" as here used denote more, and that they are equivalent to the words "the undertaking." Mathew, J. thought that the interpretation section brought this about. I would point out, however, that there is no definition of the words "the tramway," but only of the words "the tramways." If the words "the tramway" in the section are to mean the undertaking, why add thereto the words, "and all lands, buildings, works, materials, and plant, if suitable and used by the company," which, as before shown, form one of the subject-matters of the undertaking, and would be included in the word "undertaking" above? It will be seen that, in addition to sect. 46, which gives power to the company in certain events to sell, if they so desire, their undertaking to willing purchasers, in which case the contracting parties can agree *inter se* as to what is to be sold and what paid for, there are three sections which enable the London County Council to become purchasers otherwise than by agreement, viz., sects. 42 and 43, and this now in hand, sect. 44. By sect. 42, when a tramway company have discontinued working for three months the Board of Trade may declare that the powers of the company shall be at an end, and therefore the powers shall cease, unless the same are purchased by the county council in the manner provided by sect. 44 of the Act, viz., upon the terms of paying the then value of the tramway. (I omit about the lands, buildings, &c.) This cannot mean upon paying the then value of the powers. It does not say so, and why should a company be paid for that which they have been the cause of coming to an end? By sect. 43, when a tramway company have become insolvent the Board of Trade may declare that the powers of the company shall be at an end after the expiration of six months from its order, and that they shall accordingly cease unless the same are purchased by the county council in the manner provided by sect. 44, i.e., upon paying the then value of the tramway. In my judgment what is to be paid for under each of these sections is that part of the undertaking represented by the structure of the tramway *in situ*, and not the powers which the county council then obtain. They pass to the county council upon discontinuance of working or upon insolvency of the company, upon payment by the county council of the then value of the tramway. Lastly, by sect. 44, after the expiration of twenty-one years from the passing of the Act, the county council can compel the company to sell their undertaking to them if the county council give the prescribed notice requiring such sale, and here as before the company are to sell upon the terms of being paid by the county council, not the then value of the undertaking, but the then value of the tramway, together with the then value of all buildings, works, materials, and plant then belonging to the company which are suitable to and used by the company for the

APP.] *Re ARBIT., LONDON COUNTY COUNCIL AND LONDON STREET TRAMWAYS CO.* [APP.]

purposes of their undertaking. These last are also to be purchased by the county council when they purchase under sects. 42 or 43. It seems to me that the words "the tramway" in each of these three sections mean the same thing, that is, the part of the undertaking which consists of tram lines, points and sidings, *in situ*, and not the whole undertaking as contended for by the company. It is here that I differ from my brothers Mathew and Collins, who read the words "the tramway" as comprehending the whole "undertaking" to be sold. My brother Collins points out that, if the word tramway is read as I read it, there was no necessity for the parenthesis, for the mere tramway as it exists *in situ* is incapable of earning profits, and that therefore profits had no place in the discussion. I feel the force of this observation; but, in my judgment, the parenthesis was necessary to prevent the controversy which would otherwise arise as to whether, inasmuch as the whole undertaking was to be sold and only the tramway was to be paid for, a claim for any allowance for profits, compulsory purchase, or any other consideration whatever, was to be made by the company. In the endeavour to prevent this the parenthesis was inserted. I cannot, for the reasons I have given above, read the word "tramway" in sect. 44 as embracing the whole undertaking. The lands, buildings, works, materials, and plant which the company may have purchased, and which were suitable to and used by the company for the purposes of their undertaking, though undoubtedly to be purchased by the county council, are not part of "the tramway," but an addition thereto. In my opinion the Act when examined clearly defines what is to be sold and what paid for, which is, that the then undertaking as a whole is to be sold, and only the tramway *in situ* is to be paid for, together with the lands, buildings, works, materials, and plant above mentioned; and that the *prima facie* presumption which otherwise would arise is rebutted by the express language of the statute. I now come to consider as to how the price to be paid for the structure of the tramway *in situ* is to be estimated. It was argued on behalf of the county council that, as the company had paid nothing in the first instance for their concession to make the tramway, it was but reasonable that they should sell what had been so obtained after twenty-one years' enjoyment of it to the county council (the twenty-one years being the limit of time for which they had obtained an indefeasible right of user subject to discontinuance of working and insolvency) at the price which the tramway had cost the company, as also the other things mentioned in the section, less depreciation by wear and tear in the meantime, if any. It may, however, on the side of the company be said that they paid a large sum of money in obtaining their Act, and that it was unreasonable to allow a purchaser to come in and purchase at a price less than the value of the thing purchased and appropriate the excess value to his own use. It seems to me fruitless, with these conflicting considerations, to speculate upon what may or may not have prompted the Legislature to pass the Act, for after all, it must come to this, what is the true reading of the section? There can be no doubt that, in any ordinary case where an undertaking such as the present is to be sold and paid for, its

present, that is, its then value, is in practice arrived at by capitalising its rental value. I should say that this is the true way of arriving at its present value. To ascertain rental value, the first thing the hypothetical tenant looks to is to ascertain what can be made out of the thing to be rented; what profits have been made in the past out of it, so as to estimate what profits are likely to be made in the future; in other words, what is its net annual value. He does the same whether the subject-matter be a public-house which has in addition a trade profit attached to it, or whether it be a grass field which has no such profit. It is upon these figures that he bases the rental he will give, and this rental, when capitalised, is the present value of the thing bought. Had there been no words of exclusion as in the parenthesis in this case, and had it been the whole of the undertaking which was not only to be sold but paid for, I should have said that capitalising the rental value of the undertaking was the correct mode of ascertaining its then value. But here, though the undertaking is to be sold only, the "then value of the tramway" is to be paid for. And it appears to me that the Legislature has expressly enacted, for the reasons above stated, that the hypothetical tenant, if he is resorted to as the means of ascertaining the rental value, shall not include in his estimate any allowance for either past or future profits of the undertaking. It was said, however, that he might include present profits, for they were not excluded. I cannot follow this reasoning. What are the so-called present profits? The profits earned in the past. They are the profits earned prior to the day upon which the supposed calculation takes place, and are nothing more or less than past profits, and those are excluded by the section. My brother Mathew felt the difficulty arising from the exclusion of past profits from present value in the section, and he surmounted it by saying that the words excluding any allowance for past profits could not alter the whole meaning of the section. But, with all submission, that begs the question as to what is the meaning of the section. Assume a case in which a tramway company had let its undertaking for 1000*l.* a year. In this case the 1000*l.* a year would be the profit of every sort which the company made. If the rental were capitalised to get present value, can it be said that no allowance for past profits had been included? Surely not. We were strongly pressed by Sir Richard Webster to hold that the principle laid down in rating cases applied, and he said, and with truth, that the surveyors were daily ascertaining the annual value of a hereditament irrespective of trade profits attaching thereto, as in cases of breweries, paper mills, railways, and such like, for it was upon the annual value of the hereditament, and not upon the trade profits, that the rate had to be taxed. This is so, but in the annual value of a hereditament for rating purposes, apart from trade profit, the tenant's profit is included, and it is here that the parenthesis in the section comes in, and expressly differentiates the present case from rating cases. There are no such words of exclusion in rating cases. The words as I read them in the statute are peremptory—"any allowance for past profits made out of the undertaking of whatever kind, as also future profits"—that means the anticipation of future profits—"shall be excluded in arriving at the present value

CT. OF APP.]

SMITH v. HANCOCK.

[CT. OF APP.]

of the tramway." It is not that only trade profits are to be excluded, but all profits, past or future, of the undertaking. What are tenant's profits of a tramway *in situ* incapable of being worked by a tenant? There are none, but the parenthesis had to be inserted because the undertaking was to be sold, as above pointed out. If this be so, the then value of the tramway must be what it cost to construct, less depreciation for wear and tear, for there is no other then value excepting that taken by Sir Frederick Bramwell, which I understood to be equivalent thereto. I must add that, in rating cases, the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96) has expressly enacted not that past and future profits are to be excluded, but that the estimate of the net annual value of the hereditament rated is to be that of the rent at which the same might reasonably be expected to be let from year to year, free of the deductions there named. I find no such enactment in the London Tramways Act of 1870, whereby to ascertain the then value of the tramway. To my mind, the real question is this: Are the words of exclusion in the section so strong when applied to the thing which is to be estimated, viz., a tramway *in situ*, as to exclude the ordinary way of ascertaining present value? For the reasons above I have arrived at the conclusion that they are, and that Sir F. Bramwell was right when he held that rental value involved an allowance for past or future profits within the meaning of the section, and that this mode of arriving at the present value of the tramway *in situ* was not permissible. It was not contended that, if the county council were right in their construction of the statute, the way the tramway *in situ* has been valued was erroneous, and no point has been made as to the way in which the lands, buildings, works, materials, and plant have been valued, nor do I know how the value has been ascertained. As to the case of the *Kirkleatham Local Board* (69 L. T. Rep. N. S. 661; (1893) A. C. 444), to the judgment of which, in this court, I was a party, I have nothing to say, excepting that it was a case upon a different Act of Parliament, and upon a different state of facts. And, in my opinion, it has little if any bearing upon the construction to be placed upon the London Streets Tramways Act 1870. If, however, that case is to be applied, then, in the view I take of sect. 44, it certainly does not militate against the judgment I have now arrived at. I think, for the reasons above, that this appeal should be allowed.

Appeal allowed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Ashurst, Morris, Crisp, and Co.*

March 19, April 9 and 23.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

SMITH v. HANCOCK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Restraint of trade—Contract—Breach—Agreement by vendor of business not to "carry on or be in anywise interested in" any similar business—Business carried on by wife of vendor trading separately.

The defendant, who had been carrying on the business of a grocer under the style of "T. P.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Hancock," sold his business to the plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. T. P. Hancock." The business was managed by the nephew, and the defendant's wife took some part in carrying it on, but the defendant took no part. The money necessary for carrying on the business was found by the wife out of her separate estate, and no money whatever was contributed by the defendant, nor did he share in the profits in any way. He, however, assisted his wife in obtaining the lease of the shop in her own name, and, as she was disabled by rheumatism from writing, he wrote for her a circular, inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own, and introduced the nephew to some provision merchants, and attended at the bank when his wife opened the banking account for the business in her own name.

Held (dissentients Kay, L.J.), that there had been no breach of the agreement by the defendant, inasmuch as he was neither "carrying on" nor "interested in" his wife's business within the meaning of the agreement.

Decision of Kekewich, J. (ante, p. 163) affirmed.

APPEAL by the plaintiff from a decision of Kekewich, J. (ante, p. 163).

*Warmington, Q.C. and A. D. Tyssen for the appellant.—The respondent has committed a breach of his agreement not to "carry on" the business of a grocer, for the carrying on of that business in the name of his wife was a mere device to evade the agreement. She was in fact the agent of the respondent, the business being his business, not hers, and was "carried on" by him within the meaning of the agreement. But even if the respondent did not carry on this business in the name of his wife, he has broken the agreement not to be "in anywise interested in" the business of a grocer. The words of the agreement are "in anywise interested." That is the broadest possible language. The expression "in anywise" cannot be disregarded. It would be doing violence to the language to say that "interested" is to be restricted to meaning interested by way of profit. The motive of the respondent and his wife in starting this business, and carrying it on under the name of "Mrs. T. P. Hancock," obviously was to appropriate as much as possible of the goodwill which the respondent sold to the appellant, and it is certain that without the respondent's assistance his wife could not have started this business. A husband, living with his wife, is necessarily interested in a business carried on by her; still more so where, as here, he has acted for her in reference to the business. See *Newling v. Dobell* (19 L. T. Rep. N. S. 406; 33 L. J. 111, Ch.), where Malins, V.C. said every journeyman or workman was "interested" in his master's business. It is immaterial that the defendant, acting as the agent of his wife, received no remuneration. He might, in law, have recovered from her on a quantum meruit for his services. The assistance he gave her in obtaining*

the lease, his preparation of the circular, the distribution of it by him when prepared, his introduction of the nephew to provision merchants, his attendance at the bank when the account was opened in his wife's name, were all "interested" acts within the meaning of the agreement.

Renshaw, Q.C. and *Brinton* for the respondent.—In this agreement there are simply the words "carry on or be interested in," being less extensive than the usual agreement in similar cases. There has been no breach of the agreement in the acts complained of by the appellant, and his action must therefore fail. The respondent may assist in the business carried on by his wife in any way that he can, so long as he has no money or pecuniary interest in the business. Unless he has a charge on the business, or on the profits of it, there is no breach of the agreement:

Bird v. Lake, 1 H. & M. 111, 338, 340.

It is clear, we submit, that the respondent has not done any act amounting to a "carrying on" of the business in any sense of those words:

Allen v. Taylor, 22 L. T. Rep. N. S. 651; 24 L. T. Rep. N. S. 249; 19 W. R. 35;

Lewis v. Graham, 20 Q. B. Div. 780;

Ex parte Whitehead; *Re Whitehead*, 52 L. T. Rep. N. S. 597; 14 Q. B. Div. 419;

Turner v. Evans, 17 Jur. 1073; 2 De G. M. & G. 740.

[*KAY, L.J.*—But is she carrying on business as her husband's agent, or *bona fide* on her own account?] Since the Married Women's Property Acts a wife can carry on business apart from her husband. The Acts of 1870 and 1882 both deal with that matter. [*KAY, L.J.*—Yes; but the question here is whether the carrying on of the business by the wife is not in breach of her husband's agreement.] Nor can it be said that the respondent has been "in anywise interested" in the business carried on by his wife within the meaning of the agreement, wide as those words are. "Interested" must mean pecuniarily and commercially interested, i.e., interested in the profits of the business:

George Hill and Co. v. Hill, 55 L. T. Rep. N. S. 769; 35 W. R. 137.

We submit that, in order that the respondent should be "interested," within the meaning of this agreement, he must have some interest in the returns or losses resulting from the business, i.e., an interest such that he would be liable if the business incurred debts; that an action in reference to it ought to be brought against him; that he could be adjudicated bankrupt in respect of the concerns of the business; and that, if judgment were recovered against him as to some matter outside the business, stock-in-trade of the business could have been taken in execution. [*KAY, L.J.*—You read "interested in" as meaning pecuniarily interested in. I cannot see why it should be confined to that. The respondent, it seems to me, is interested in the business carried on by his wife, just as much as if he had money in it, so far as mischief to the purchaser is concerned. The fact that he makes no pecuniary profit out of his wife's business is none the less detrimental to the person to whom he has sold his own business.] There is no scheme or design of the respondent to make money out of the business after his sale of it. There is no sham or fraudulent device. He does not carry on the

business himself, although he allows his wife to do so. Perhaps, morally, he ought to have stopped her, if he could have done so. [*LINDLEY, L.J.*—Is the old maxim that a husband and wife are one person gone altogether now?] Certainly, so far as this sort of case is concerned. It is true that the respondent may take a natural interest in his wife's enterprise, but that is not being "interested in" the business, within the meaning of the agreement. [*LINDLEY, L.J.*—This is an important case to conveyancers, as warning them to insist not only on a covenant restricting the vendor of a business, but his wife also.] Yes, since the alteration in the law relating to husband and wife it is very important that such a course should be adopted. They referred also to

Pearson v. Pearson, 51 L. T. Rep. N. S. 311; 27 Ch. Div. 145; overruling

Labouchere v. Dawson, 25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322.

Warmington, Q.C. replied.

Cur. adv. vult.

April 23.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal from an order of Kekewich, J., refusing an injunction to restrain the defendant from breaking an agreement, into which he entered with the plaintiff on the occasion of the sale to him of a business, formerly carried on by the defendant. The defendant formerly carried on business as a grocer, provision dealer, and baker, under the name of T. P. Hancock, in Kidsgrove, Staffordshire. His wife Agnes assisted him in his business, as did also a nephew of hers named John Kerr. In March 1886 the defendant sold this business to the plaintiff, and agreed "not to carry on, or be in anywise interested in, the business of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the old shop, for a period of ten years. This agreement, it will be observed, is personal to the defendant; it binds him and him only; it does not extend to anyone else, or make him answerable for the conduct of anyone but himself. In the next place, his obligation is confined to abstaining from two lines of conduct, viz.: (1) carrying on any of the businesses specified, and (2) being in anywise interested in any of such businesses. The agreement, like every other agreement, must be construed with reference to the subject-matter to which it relates, and so as to give effect to, and not to defeat, the object to attain which the agreement was entered into. This object is plain enough; it was to secure the plaintiff from the competition of the defendant. But, although this is the object, it is not in accordance with sound legal principle to give to the language of the agreement a wider interpretation than that language properly bears. The duty of the court is confined to enforcing the agreement entered into, and it is not permissible to extend it so as to make the defendant responsible either for the conduct of other people besides himself or for conduct which does not amount to carrying on or being in any way interested in one of the prohibited businesses. These principles are elementary, and their application to such cases as the present is well exemplified by the case of *Bird v. Lake* (1 H. & M. 111, 338). I pass on to

CT. OF APP.]

SMITH v. HANCOCK.

[CT. OF APP.]

consider what the defendant has done, and what others have done, for which it is sought to make him responsible. The defendant himself *bonâ fide* retired from business, and he has not himself made any attempt whatever to carry on business, nor does he carry on any business himself, nor has he attempted to acquire, nor has he in fact any interest whatever in, any business. The learned judge who saw the witnesses came to this conclusion, and I not only see no reason to differ from him, but I am satisfied that the evidence warrants the conclusion arrived at. What has been done is this: Some six or seven years after the sale of the business, the defendant's wife set to work to start her nephew John Kerr in business. She had some 200*l.* of her own. The evidence on this point satisfied the learned judge that she had separate estate to this amount, and again I agree in his conclusion. She took a grocer's shop near the plaintiff's. She painted up "Mrs. T. P. Hancock," and her nephew Kerr has carried on business there since with her help and under her name. She lives with her husband (the defendant) at another house, but she goes every now and then to the shop, and is generally there two days a week. The defendant certainly assisted her and Kerr to start this shop, although at first he objected to the scheme. But he helped his wife to get a lease of the shop; he introduced her to a local bank, where she opened an account in her own name; and he introduced Kerr to wholesale suppliers of grocery and other goods, and so induced them to give him credit. The defendant further assisted in the preparation of a circular, inviting old friends and customers to deal at the shop, and "Mrs. Hancock's mixture," which was some tea which he used to sell when he was in business, was prominently referred to in the circular. Further, he gave this circular to two or three old friends and customers. The defendant, however, has no pecuniary interest in the business; he is not liable for the debts contracted by his wife or by Kerr in carrying on the business; and the profits, if any, cannot be claimed by the defendant. All moneys received and paid in respect of the business pass through his wife's account at the bank, and on this account the defendant has no power to draw. The wife pays Kerr a salary, and, as I gather, a share of the profits. Now it cannot be denied that this proceeding is calculated to injure the plaintiff, and no one can be surprised at his being greatly annoyed by it. If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly. But I find it impossible to avoid the conclusion that the business is being carried on by the wife primarily for Kerr, and, perhaps, to some extent, for herself. But, there being at present little or no profit, she has not yet got any money out of the business for herself. This being the state of the case, I am unable to hold that the defendant has done, or is doing, or is threatening or intending to do, what he agreed not to do. The utmost that can be said is, that he has assisted his wife and Kerr to do what he agreed not to do himself. No honourable man would have done that,

and no honourable man would, if he could help it, allow his wife to do what she has done and is doing. But, as a matter of law, I cannot say that the defendant is breaking his agreement. In *Bird v. Laks* (1 H. & M. 111, 338) it was held that to help a man to carry on business by lending him money without security was not a breach of a covenant "not to carry on or be engaged in the business or any matter or thing whatsoever in anywise relating thereto." So here, to help Kerr to carry on business by introducing him to persons who would furnish him with goods on credit, and by further assisting him through Mrs. Hancock, cannot, without straining the words of the defendant's agreement, be held to be a breach of that agreement. A married woman with separate estate has a right to carry on business in her own name—i.e., in the name of her husband, with the prefix "Mrs.," and I am not aware that he can prevent her from so doing by any legal proceedings. Even if he can, he is under no legal obligation to do so, unless he has imposed such an obligation on himself by some contract. An agreement by a husband not to do a thing does not oblige him to prevent his wife from doing that same thing if she has a right to do it independently of him. Whether the defendant in this case could or could not prevent his wife from assisting her nephew Kerr I do not know. The defendant does not say that he has endeavoured to do so and has failed. But, supposing he could do so, he has not agreed to do so, nor to try to do so, and the court cannot itself impose any such obligation upon him. It is urged that, even if the defendant is not carrying on the business, he is in some way "interested" in it, that he is interesting himself in it, and that he can be restrained, and ought to be restrained, from so doing. As the defendant and his wife are living together, I have no doubt that he is interested in her, and perhaps also in her nephew Kerr. Further, if the wife gets any profit out of the business she may very likely make use of it in adding to her husband's comforts. But I cannot say that he is in any way "interested" in the business which she has started and is carrying on for Kerr. What interest has he in that business? Certainly no pecuniary interest. His only interest is that indirect interest which every man has in the happiness and welfare of his wife. But to have such an interest as this is no breach of the defendant's agreement. When a person sells a business and agrees not to carry on, or be in any way interested in, any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it. An injunction to restrain the defendant from carrying on, or being in any way interested in, the business would not be broken if the defendant were to repeat what he has done for Kerr, and is doing, by living with his wife without trying to stop what she is doing. I have reluctantly come to the conclusion that the plaintiff is not entitled to an injunction in this case, and his appeal must be dismissed, but, under the circumstances, not with costs. This case is one of general importance. Conveyancers will have to exercise their ingenuity in devising some method of stopping a wife with separate estate from carrying on a business in rivalry with a purchaser of a similar business from her husband. The agreement entered into in this case, to which

CT. OF APP.]

SMITH v. HANCOCK.

[CT. OF APP.]

the wife is not a party, does not cover such conduct, nor do the common forms at present in use. The old doctrine that the husband and wife are one person is inapplicable; they are not one with reference to her separate estate; his obligations are not hers, nor are hers his. The appeal must be dismissed, but, under the circumstances, without costs.

KAY, L.J. stated the facts of the case as to the sale of the business, read the agreement entered into by the defendant, and continued:—The object of this agreement was obviously to secure to the purchaser the goodwill free from interference by the vendor. For this purpose the vendor agreed not to carry on or be in anywise interested in a similar business. If he did he would attract some of the old customers, and draw them away from the purchaser. It seems to me clear that it is not confined to a pecuniary interest. If he carried on, or was in anywise interested in, a like business which drew away the old customers from the purchaser, or otherwise diminished his receipts, though he took no pecuniary benefit from that business, the injury to the purchaser would be the same. Then "carry on" does not mean "exclusively" carry on, or even "principally." If he became partner with other persons, even a dormant partner, or if he contributed capital to aid a like business, or became manager, I should think he would have broken this agreement. So any active assistance in the business, particularly any such as was intended and calculated to attract his former customers and to take them away from the purchaser, would, in my opinion, be a "carrying on" within the meaning of those words as used in this agreement. I am also of opinion that being "interested in" means something short of "carrying on," and when coupled with the words "in anywise" a very large meaning should be given to those words in furtherance of what seems to me the obvious intention. The defendant for some years observed this agreement. He sold his other shop, and gave up business altogether. However, in 1891 or the beginning of 1892, his wife, being desirous of helping her nephew Kerr, persuaded the defendant to assist her in setting up a business like that which he had sold. He says that he objected to do this, and resisted. But what he actually did was this: He paid to his wife a sum of 110*l.*, which he says she had given to him to invest, being the savings which he had allowed her to make out of housekeeping moneys which he gave to her weekly. With this money and 90*l.* which she had in cash the wife took a small shop in Market-street, within 200 yards from the shop in Heathcote-street which he had sold, and there commenced, and is carrying on with the aid of her nephew Kerr, a business identical with that which the defendant had sold. Kerr lives with the defendant. He receives a small weekly payment for his assistance, and a small share of the profits besides; after deducting 10*s.* a week for Kerr's board, the rest of the profits goes to the defendant's wife. The judge has found that this is the wife's separate business, and that the money employed in it is her separate property, and I assume that to be the case. The defendant has taken an active part in establishing this new business and in endeavouring to induce his former customers to support it. He drew out with his own hands a form of circular, which contained statements as follows: "New grocery

and provision establishment, Market-street, Kidsgrove. Mrs. T. P. Hancock has opened the above shop with a new and well-selected stock of groceries and provisions, and will be pleased to see all old and new friends. Mrs. T. P. H. intends selling at prices that cannot be beaten in or out of the Potteries." Then followed the prices of certain teas, and amongst them "Mrs. Hancock's well-known mixture." Then below came, "Note the address, Mrs. T. P. Hancock, Market-street, Kidsgrove (opposite Dickinson's, draper)." T. P. Hancock is the defendant's name. In that name his former business was carried on. The announcement that the new business is carried on in that name, with only the prefix "Mrs.," the reference to old friends, meaning customers in the former business, the mention of Mrs. Hancock's well-known mixture of tea, which refers to a tea sold by the defendant in his former business under that name, as she admits, show plainly that the object and intention of the defendant was to obtain for this business, which he assisted his wife to set up, some of the goodwill which he had sold to the defendant. After the new shop was opened the defendant personally distributed this circular to various persons. He admits that he did so to the extent of some twenty copies, and thus he rendered active assistance in carrying on the new business. Beside this, he took Kerr to Liverpool and Manchester, and introduced him there to four wholesale dealers who had supplied the defendant in his former business, and he induced them to supply the wife's business in the same way. He negotiated the lease of the new shop to Mrs. Hancock. He introduced her and Kerr to the lawyers who drew the lease. He went to a bank and there opened an account in his wife's name, to which the receipts of this business were paid. His wife and he are living together, and any profits she may receive he will have the benefit of while that continues. Suppose that he should in future repeat these and similar acts, could it be said that he was not "carrying on" or was not "in anywise interested in" this business? In my opinion it could not. I think that what he has done has been a breach of the agreement in both its branches. He has been assisting in carrying on this business, and it seems to me impossible to say that he is not "in anywise interested in" it. It is not necessary, but I do not think it would be improper, to construe the words "in anywise interested" as meaning shall not in anywise actively interest himself in the business so as to interfere with the goodwill which he has sold. What the defendant has done seems to me to be a deliberate attempt to defraud the plaintiff by getting back some of the goodwill which the defendant sold to him. It is a principle of English law that a vendor shall not, after the sale, derogate from his own grant. For example, if a man sells a house with windows in it looking over his adjoining land he cannot afterwards build upon that adjoining land so as to obscure such windows. *Palmer v. Fletcher* (1 Lev. 122), which is one of the leading authorities on that branch of the law, was decided in the King's Bench in 1662, 230 years ago. It was formally approved by Lord Holt in *Tenant v. Goldwin* (2 Ld. Raym. 1089, 1093), and is constantly cited at this day as undoubted law. If a man sells the goodwill of a business I have never been able to understand why the same principle should not apply. It is an anomaly by no

[CT. OF APP.]

SMITH v. HANCOCK.

[CT. OF APP.]

means creditable to the law that there is an exception to the rule in that case, and it is therefore necessary to obtain an express contract from the vendor not to carry on a like trade. But, when there is such a contract, I am inclined to construe it as much as can fairly be done in favour of the intention to prevent any derogation from the value of the thing sold. I think that an injunction ought to be granted against the defendant in the words of the agreement which I have read, to restrain him, his servants and agents, from carrying on or being in anywise interested in the business set up in the name of his wife, or any similar business during the ten years mentioned in the agreement, within five miles from the premises in Heathcote-street, and that the defendant should be ordered to pay the costs here and below.

SMITH, L.J.—Upon the 31st March 1886 the defendant sold to the plaintiff his business of grocer, provision dealer, and baker for the sum of 2000*l.*, and in consideration thereof agreed not to carry on or be in anywise interested in a like business within a distance of five miles from the old shop in Heathcote-street during a period of ten years. Seven years afterwards, viz., in the year 1893, the defendant's wife, who had separate property of her own, was desirous of aiding a nephew of hers named Kerr, and she thereupon determined to set up and start him in the business of grocer, provision dealer, and baker, within a short distance of the old shop in Heathcote-street. Upon the 25th March 1893 this business was opened by the wife, and thereupon the plaintiff issued a writ against the defendant, claiming an injunction to restrain him from carrying on the business of a grocer, provision dealer, and baker, contrary to the agreement of the 31st March 1886. My brother Kekewich, who tried this cause, arrived at the conclusion that the business then set up and carried on by the wife was a business set up and carried on by her trading as a *feme sole*, with her own separate property, in order to benefit her nephew, and that in so doing she in no way acted on behalf of or in the interest of the defendant, her husband; that the business was in reality that of the wife and not of the husband; and that the case made by the plaintiff that what the wife did was but a cloak and device, in order to enable her to do ostensibly on her own account, but as her husband's agent, what he could not, without breaking the covenant, was untenable and not the truth. That the object of the wife in opening the business for the nephew at the place in question was to obtain as much as she could of the goodwill of the old business for which her husband had received the 2000*l.* is to me apparent, the circular which was issued and the placing up of the name of Mrs. T. P. Hancock upon the *facia* of the shop, coupled with the other circumstances of the case, makes this obvious, and that her conduct is reprehensible is beyond dispute, as also that of her husband, for reasons I will hereafter state. It is true that this case may be opened in such a way as to lead to the inference that the whole thing was a sham concocted by the husband and wife in order to evade his covenant; and, indeed, Mr. Warmington so opened this appeal. But having heard Mr. Renshaw and Mr. Brinton on the defendant's behalf, and having re-read the evidence since the argument was closed, I have arrived at the conclusion that Kekewich, J. was right in the

decision which he arrived at when he held that it was the real business of the wife and not that of the husband, and that there was no attempted deception in the matter. Before the passing of the Married Women's Property Acts of 1870 and 1882 I do not doubt that a wife, setting up business in the way Mrs. Hancock has, would have done so as agent for her husband, for as long as coverture existed she could do so in no other capacity, and her acts would then constitute a breach of covenant by the husband, on the principle *qui facit per alium facit per se*. But this is not so now. The wife, although coverture exists, can nevertheless trade with her own separate property, apart from her husband and free from his control, as if she were a *feme sole*, as and when she pleases, and, if she does so, she is no more the agent for her husband than his father, uncle, or brother would be under like circumstances, nor can the husband restrain his wife from so acting. It is true that the proposition sounds novel, but, when looked into, the above is the real position of a wife in relation to her husband at the present time in the circumstances of this case. If, therefore, it is desired to restrain such an act of a wife, the covenant of the husband must hereafter be so framed as to meet the case, for it is no part of the duty of the court to place a forced construction upon the covenant, which it will not fairly bear, in order to put a stop to that of which it disapproves. When the agreement in this case was framed, the capacity of the wife to do what she has done was not contemplated by the parties, for, if so, the covenant would obviously have been different. Mr. Warmington, in an excellent argument, contended that the guiding rule was that we should construe a covenant like the present so as to carry out the object and intention of the parties, and in this I agree, if he limited his proposition, which he did not, by the words "so far as the language of the covenant will fairly allow, but no further." Now, the covenant is that the covenantor will not carry on, nor in anywise be interested in, a business of a character similar to that sold, within the prescribed limits of time and place, which, in my judgment, means that he will not carry on, by himself or his agent, such a business, nor will he in anywise have any interest, be it pecuniary or personal, in such a business. It is not a covenant that he will not take an interest, whether from feelings of affection or friendship or what not, in how another may carry on his or her business within the prescribed limits. The words are, "nor in anywise be interested in the business." To constitute a breach of the covenant it must be proved that the covenantor has some interest in the business itself which is being carried on, and not that he only takes, or has taken, an interest in the success of another carrying on his or her business. In my opinion, this is the true reading of the covenant. If this case had rested here, for the reasons above stated, I should hold that the fact that the defendant's wife was carrying on a business as a *feme sole*, with her separate property on her own behalf, within the prescribed limits, did not establish a breach of covenant by the defendant. The husband takes no part whatever in the management of the business, and has advanced no money in that behalf. But it was said, and with truth, and this is an important part of the case, that the defendant, before the business was started, did

CHAN. DIV.]

MINTER v. CARR.

[CHAN. DIV.]

not attempt to restrain his wife from carrying it on, but actually aided and abetted her in so doing by introducing her to his bankers, by going with her nephew to the wholesale dealers with whom the old firm dealt, and introducing him to them, and by taking part in the penmanship of the circular, which it appears was issued after the business was started, and in taking part in the issue. I agree that this is evidence which might well lead to the inference that the business was in reality his, and not his wife's, or partly his and partly hers, which would suffice to constitute a breach of covenant by the husband, for he would then have an interest in the business. But, when this inference is disproved, as, in my judgment, it is in this case, how do the acts of the husband constitute a breach of the agreement sued on? He has no interest whatever in the business itself, which is that of his wife, carried on by her for her own purposes, though he has taken an interest in her succeeding therein, which these acts of his show that he has done. If the husband had performed similar acts in like circumstances for a stranger, who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger, and so now the same result follows if he does the same acts for his wife. I agree that his conduct is such as to be highly disapproved of, but that does not constitute a breach of the agreement sued on. This agreement of the 31st March 1886 does not cover the present case, and I cannot, though I should like to do so, hold that the husband has broken his agreement. I agree with Kekewich, J., and, consequently, I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, Cronin, Orgill, and Cronin, agents for Llewellyn and Ackrill, Tunstall.

Solicitors for the respondent, Chester and Co., agents for E. A. Paine, Hanley.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 6, 7, and 16.

(Before ROMER, J.)

MINTER v. CARR. (a)

Mortgage—Consolidation—Several properties mortgaged by one mortgagor to different mortgagees—Equity of redemption in one of the properties assigned—Several mortgages subsequently united in one person—Equity of redemption of the one property afterwards vests in a person who is a puisne mortgagee of all the properties.

An owner of several properties mortgaged property A. to S., and other properties to different mortgagees, who, in respect of such properties, were the predecessors in title of the defendants. After this, but before these mortgages came into the hands of the same mortgagees, the mortgagor mortgaged property A. (subject to the mortgage to S.) to W., and this security (the mortgage to W.) was, on the 14th July 1890, transferred to P.,

who, on the 8th Oct. 1890, in exercise of his power of sale, sold and conveyed property A. to the plaintiff, subject only to the mortgage to S., which, in the meantime, after the mortgage to W., but before the commencement of this action, had become vested in the defendants, together with the mortgages on the other properties, made as above mentioned to the defendants' predecessors in title. At the time that the mortgage on property A. was transferred to P., he was already a puisne mortgagee of all the properties; and at the time P. sold property A. to the plaintiff the latter was also already a puisne mortgagee of all the properties. This action having been brought to redeem property A., the defendants claimed against the plaintiff to consolidate with their mortgage on A. their securities on the other properties.

Held, that the defendants' claim to consolidate could not be supported; that the case fell within the principle of Harter v. Colman (46 L. T. Rep. N. S. 154; 19 Ch. Div. 630), viz., that when two mortgages by the same mortgagor to different mortgagees on different estates become united for the first time in one person, after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of the equity of redemption, even though both the mortgages were created before the assignment; and that, as there would consequently have been no right of consolidation against W. if he had remained mortgagee of property A., there was prima facie no more right to consolidate against the plaintiff who had purchased all W.'s rights, than there would have been against W. himself; and also that P. had not lost his right to resist consolidation by the fact that he was also a puisne mortgagee, as it was clear there was no merger of his securities, and that he was entitled as transferee of W.'s mortgage to deal with it separately, and sell property A. to the plaintiff, subject to S.'s mortgage thereon; and that the plaintiff's rights as purchaser of property A. (subject to S.'s mortgage) were not merged with or lost by reason of his rights as puisne mortgagee, and he had therefore not thereby lost his right to resist consolidation, and was accordingly entitled to redeem property A. without redeeming the other properties.

By two separate indentures, respectively dated the 4th Feb. 1864, James Banks mortgaged the two leasehold houses, Nos. 1 and 2, Shakespeare-terrace, Folkestone, to Charles Sedgwick, to secure two several sums of 500*l.* with interest.

By an indenture, dated the 12th July 1864, the said James Banks mortgaged the same two houses to Walter Stunt (subject to the prior mortgages of the 4th Feb.), to secure 900*l.* and interest.

Ultimately, after divers mesne assignments, &c., by an indenture, dated the 14th July 1890, the mortgage of the 12th July 1864, and the balance of the money secured thereby, became vested in James Pledge, subject to the said prior mortgages of the 4th Feb. 1864.

By an indenture of the 8th Oct. 1890, James Pledge, in exercise of the power of sale contained in the mortgage of the 12th July 1864, conveyed the two houses to John Minter, the

(a) Reported by R. H. DRANE, Esq., Barrister-at-Law.

CHAN. DIV.]

MINTER v. CARR.

[CHAN. DIV.]

plaintiff, subject only to the two mortgages of the 4th Feb. 1864. Those two mortgages had (subsequently to the execution of the mortgage of the 12th July following) been assigned to Ralph Thomas Brockman, and the same mortgages (he having died on the 23rd March 1877) were now vested in Mary Ann Carr (widow), Lewis Borrett White, Alfred Drake Brockman, and Lewis James Drake Brockman, the defendants, as the surviving executors of his will.

The plaintiff's case was based chiefly on the above mortgages and facts, but the defendants stated a number of other mortgages and transactions on which they relied, and which were as follows:

By an indenture of the 11th May 1863, James Banks mortgaged the leasehold house, 34, Bouverie-square, Folkestone, to John Banks for 450*l.* and interest.

By two indentures, respectively dated the 29th Aug. 1863 and the 12th July 1864, James Banks mortgaged and further charged the leasehold house, 5, Shakespeare-terrace, Folkestone, to John Banks for an aggregate sum of 600*l.* and interest.

By two other indentures, dated respectively the 29th Aug. 1863 and the 12th July 1864, James Banks mortgaged and further charged the leasehold house, 6, Shakespeare-terrace, to John Banks to secure an aggregate sum of 600*l.* and interest.

By an indenture, dated the 18th Oct. 1865, James Banks mortgaged the leasehold house, Sandgate Villa, Penge, to William Hobday to secure 700*l.* and interest.

By an indenture, dated the 13th April 1866, James Banks mortgaged the leasehold houses "Hillside" and "Ravensbourne" to Herbert Sturmy, Daniel Haywood, and George Saunders to secure 1400*l.* and interest.

By an indenture, dated the 24th Nov. 1866, James Banks mortgaged the leasehold house, Shorncliffe Villa, Penge, to Henry Ramsey to secure 600*l.* and further advances not exceeding 100*l.* and interest.

By an indenture, dated the 15th Nov. 1866, James Banks mortgaged the leasehold house, "Underhill," Penge, to Henry Selmes to secure 700*l.* and interest.

By an indenture, dated the 27th Nov. 1866, James Banks mortgaged the said houses, Shorncliffe Villa, "Underhill," Sandgate Villa, "Hillside," and "Ravensbourne," to Ralph Thomas Brockman, subject to the prior mortgages above mentioned affecting the same respectively.

By an indenture, dated the 12th Oct. 1865, James Banks mortgaged a freehold house known as Pembury Villa, Folkestone, to Stephen Hobday to secure 600*l.* and interest.

By an indenture, dated the 20th Aug. 1868, James Banks mortgaged the whole of the leasehold houses and the freehold house above mentioned to the said Ralph Thomas Brockman and William George Southey Harrison to secure 1039*l.* 7*s.* 5*d.* and further advances, subject to the several above-mentioned prior mortgages affecting the same respectively.

All the prior mortgages of the 11th May 1863 (on 34, Bouverie-square), the 29th Aug. 1863, and the 12th July 1864 (on 5 and 6, Shakespeare-terrace), the 18th Oct. 1865 (on Sandgate Villa),

and the 13th April 1866 (on Hillside and Ravensbourne), were transferred to R. T. Brockman in 1871 and 1873, in addition to those of the 4th Feb. 1864, on 1 and 2, Shakespeare-terrace (already mentioned to have been transferred), and the same were all now vested in the defendants as his executors.

By an indenture, dated the 3rd Oct. 1884, James Banks mortgaged his equity of redemption in the whole of the before-mentioned properties to the plaintiff.

By an indenture of the 27th March 1885 James Banks mortgaged his equity of redemption in the whole of the same premises to James Pledge to secure 100*l.*

By an indenture, dated the 1st April 1885, W. G. S. Harrison (the said R. T. Brockman being then dead leaving the said W. G. S. Harrison surviving him) transferred the mortgage of the 20th Aug. 1868 and the premises therein comprised to James Pledge (except certain parts thereof which had been sold or surrendered) subject to the prior mortgages and further charges affecting the same respectively.

The defendants had recently entered into possession of 1 and 2, Shakespeare-terrace, and given notice to the tenants to pay their rents to the defendants, which they had done.

The plaintiff called upon the defendants to account for the rents they had received as mortgagees in possession of 1 and 2, Shakespeare-terrace, and gave them notice that he wished to redeem them by paying to the defendants the amount due upon those houses under the said mortgages of the 4th Feb. 1864.

The defendants refused to allow the plaintiff to redeem except upon payment of all sums due to them under all the above-mentioned mortgages and further charges which are now vested in the defendants, who claimed the right to consolidate the same as against the plaintiff.

The plaintiff accordingly brought this action claiming: 1. A declaration that the defendants were not entitled as against the plaintiff to consolidate with the mortgages of the 4th Feb. 1864 any other mortgages by James Banks which were executed to or became vested in the defendants' testator, Ralph Thomas Brockman, or the defendants subsequently to the 12th July 1864, and that the plaintiff was entitled to redeem the mortgages of the 4th Feb. 1864 without redeeming any such other mortgages. 2. An account of what was due to the defendants under the mortgages of the 4th Feb. 1864 for principal, interest, and costs on the footing aforesaid, and that such accounts might be taken against the defendants as mortgagees in possession. 3. Redemption of the hereditaments comprised in the mortgages of the 4th Feb. 1864 on payment of the amount so found due. 4. A receiver, if necessary, of the rents and profits of the hereditaments.

Bramwell Davis for the plaintiff.—This case is governed by the decision of *Fry, J.* in *Harter v. Colman* (46 L. T. Rep. N. S. 154; 19 Ch. Div. 630). That decision was that, when two mortgages made by the same mortgagor to different mortgagees on different estates become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the

assignee of the equity of redemption, even though both the mortgages were created before the assignment. In the same case the learned judge also disapproved of *Bevor v. Luck* (L. Rep. 4 Eq. 537). The defendants cannot consolidate against us anything acquired by them since we acquired our equity of redemption. [He was stopped.]

Neville, Q.C. and *Edwin Ward* for the defendants.—*Vint v. Padgett* (31 L. T. Rep. O. S. 21; 1 Giff. 446; on appeal, 32 L. T. Rep. O. S. 66; 2 De G. & J. 611), as explained by *Harter v. Colman* (*ubi sup.*), decides that, where the first mortgages of a variety of properties are vested in the same person, and all equities of redemption in one other person, if he comes to redeem, he must redeem all the properties. Test it by a simple case: A. mortgages Blackacre to C.; B. mortgages Whiteacre to D.; B. gives a second mortgage on Whiteacre to E. Then C. acquires D.'s mortgage, so that both the mortgages are in C. Then A. acquires the remaining equity in Whiteacre. Admit, for argument's sake, that E. can redeem Whiteacre alone because, at the time he took, there was no union of the mortgages in one person. C. can foreclose A. as to both properties; and A. must redeem C. as to both. Here Minter did what A. did; he acquired the equities of redemption behind Stunt. But, prior to that, all the equities were by puisne mortgage vested in Pledge, the plaintiff's predecessor in title, and all the mortgages in Brockman or his executors. That lets in *Vint v. Padgett* (*ubi sup.*). [*Bramwell Davis*.—The whole point is, that a fifth mortgagee takes a transfer of a second mortgage. Are his rights, as a second mortgagee, merged in his rights as a fifth mortgagee? In *Harter v. Colman* (*ubi sup.*) Fry, J. distinguished *Vint v. Padgett* (*ubi sup.*). The two decisions were not irreconcilable. *Tweedale v. Tweedale* (23 Beav. 341) goes the same way as *Vint v. Padgett*, which does not therefore stand alone. It has not been overruled. If Stunt had assigned to anyone else, it would not have altered the position of the parties, but, as he assigned to the owners of the equities of redemption in the other properties, that brings the case within *Vint v. Padgett* (*ubi sup.*).] *ROMER, J.*—Why, because I buy another man's rights, am I to lose his rights and my own as well? Leaving out Stunt for the moment, Minter cannot be in a better position than Banks, the mortgagor. The equity of consolidation arose upon the union of mortgages in 1873, at which time Minter had no interest in any of the properties, he having first come upon the scene in 1884. *Harter v. Colman* (*ubi sup.*) is quite distinct. There the owner of the equity of redemption never had two estates: he only had one equity of redemption, so that decision is to be confined to the facts of that case. In *Jennings v. Jordan* (45 L. T. Rep. N. S. 593, at p. 594, and App. Cas. 698, at p. 700), Lord Selborne, C., said: "This doctrine of consolidation is well established, and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits." [*Bramwell Davis* referred to *Coots on Mortgages* (5th ed.), p. 910, and to *Higgins v. Francis* (15 L. J. 329, Ch.). *ROMER, J.* referred to *Selby v. Pomfret* (4 L. T. Rep. N. S. 314; 3 De G. F. & J. 595.) In *Squire v. Pardoe* (W. N. 1890, p. 153), North, J. held that

there was a right to consolidate. They also referred to

Flint v. Howard, 68 L. T. Rep. N. S. 390; (1893) 2 Ch. 54; and

Thornycroft v. Crockett, 2 H. of L. Cas. 239.

Bramwell Davis in reply.—*Vint v. Padgett* (*ubi sup.*) is gone. In *Jennings v. Jordan* (*ubi sup.*) the House of Lords preferred *White v. Hillacre* (3 Y. & C. Ex. 597), which is in our favour, to *Bevor v. Luck* (*ubi sup.*). The assignee of an equity of redemption takes subject to all equities against the assignor, existing at the date of the assignment, but not to any arising subsequently, to which he is not a party. That is the settled law now. In *Baker v. Gray* (33 L. T. Rep. N. S. 721; 1 Ch. Div. 491) Hall, V.C. decided against the right of consolidation in that case, and explained *Vint v. Padgett* (*ubi sup.*) and *Tassell v. Smith* (2 De G. & J. 713). *Jennings v. Jordan*, before the Court of Appeal, was reported as *Mills v. Jennings* (42 L. T. Rep. N. S. 169; 13 Ch. Div. 639). *Tassell v. Smith* (*ubi sup.*) was referred to and overruled in *Jennings v. Jordan* (*ubi sup.*), and in the latter case, Selborne, C. and Lord Blackburn evidently approved of *White v. Hillacre* (*ubi sup.*), and consequently did not approve of *Vint v. Padgett* (*ubi sup.*) [*Neville, Q.C.*—Fry, J. thought they could be reconciled. *ROMER, J.*—It was enough for his purpose to distinguish *Vint v. Padgett* (*ubi sup.*)] The two cases cannot stand together. In *Bird v. Wenn* (54 L. T. Rep. N. S. 933; 33 Ch. Div. 215) Stirling, J. decided against consolidation, and referred to the decision of Fry, J., in *Harter v. Colman*, and dwelt upon the intention of the parties as a matter to be considered. Unless the defendants can show that Minter intended to waive his rights, they cannot consolidate against him. As to the question of merger, the court looks to the intention of the parties:

Adams v. Angell, 36 L. T. Rep. N. S. 334; 5 Ch. Div. 634.

Cur. adv. vult.

March 16.—*ROMER, J.*—The circumstances of this case, shortly stated, are these: One James Banks mortgages property A. (1 and 2, Shakespeare-terrace) to Charles Sedgwick, and other properties to different mortgagees, the predecessors in title of the defendants. After these mortgages are executed, but before they get into the hands of the same mortgagees, the mortgagor mortgages property A. (subject to the mortgage to Sedgwick), and other properties in which the defendants are not interested, to one Stunt, and this security on the 14th July 1890 is transferred to one James Pledge, who on the 8th Oct. 1890, in exercise of his power of sale, sells and conveys property A. to the plaintiff, subject to the mortgage to Sedgwick, but otherwise free from incumbrances. In the meantime after the mortgage to Stunt, and before the commencement of this action, Sedgwick's mortgage on property A. and the mortgages on the other properties to the defendants' predecessors in title mentioned above became vested in the defendants. Then this action is brought to redeem property A., and the defendants claim as against the plaintiff to consolidate with their mortgage on A. their securities on the other properties. This claim, in my opinion, cannot be supported. It was decided by Fry, J. in *Harter v. Colman* (*ubi sup.*)—and with this decision, if I may say so,

CHAN. DIV.]

PLEDGE v. CARR.

[CHAN. DIV.]

I entirely agree—that when two mortgages made by the same mortgagor to different mortgagees on different estates become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of that equity of redemption, even though both the mortgages were created before the assignment. Applying that to the present case, it is clear that the defendants could have had no right of consolidation against Stunt, if he had remained mortgagee of property A. But the plaintiff has purchased all Stunt's rights, and, *prima facie*, the defendants have no more right to consolidate against the plaintiff than they would have had against Stunt. In answer to this the defendants set up what appears to me a wholly untenable and inequitable contention. It appears that, before the 14th July 1890, Pledge and the plaintiff were respectively puisne mortgagees of all the properties the first mortgages on which are now united in the defendants, subject to those mortgages, and subject, as to property A., also to Stunt's mortgage. And it is suggested that, in some way or other, when on the 14th July 1890 Pledge obtained a transfer of Stunt's mortgage, his right as transferee to resist any claim of consolidation was lost or interfered with because he happened to be also such puisne mortgagee as I have mentioned. That suggestion I cannot follow. It is clear that there was no merger of Pledge's securities, and that he was quite entitled, as transferee of Stunt's mortgage, to deal with that security separately, and to sell, as he did, property A. to the plaintiff, subject to Sedgwick's mortgage. It is then suggested that, though this may be so, the plaintiff as purchaser of property A., subject only to Sedgwick's mortgage, has in some way lost his right to resist consolidation because of his other position as puisne mortgagee. That again I cannot follow. The plaintiff's rights as purchaser of property A. are not in any way merged with or lost by reason of his rights as puisne mortgagee. He is not coming in this action to assert any rights on his part as puisne mortgagee, or to redeem by virtue of his position as such puisne mortgagee. He is coming here simply to redeem Sedgwick's mortgage by virtue of his position as purchaser through Stunt's mortgage of property A. And this he is entitled to do, and not the less because he may have other rights which do not arise to be considered in this action. For these reasons I hold that the defendants' claim against the plaintiff fails, and that the plaintiff is entitled as owner of property A. to the usual judgment for redemption of Sedgwick's mortgage. So far as the costs of this action have been increased by the defendants' claim to consolidate, they must be paid by the defendants. The other costs will be dealt with in the usual way, treating the action as an ordinary one for redemption of property A., subject only to Sedgwick's mortgage now vested in the defendants.

Solicitors for the plaintiff, *A. R. and H. Steele*, for *G. W. Haines*, Folkestone.

Solicitors for the defendants, *Talbot and Tasker*.

March 7 and 16.

(Before ROMER, J.)

PLEDGE v. CARR. (a)

Mortgage—Consolidation—Several properties mortgaged by one mortgagor to different mortgagees—All the equities of redemption subsequently conveyed to one assignee—All the mortgages ultimately united by transfer in one person.

The owner of several properties mortgaged them to different mortgagees for distinct sums. The mortgagor afterwards, in 1868, mortgaged all the properties by one deed to one mortgagee, the plaintiff's predecessor in title, subject, as to the different properties affected, to the prior mortgages thereon, some of which at that time still remained vested in different mortgagees. In 1885 the mortgage of 1868 was transferred to the plaintiff. All the prior mortgages were ultimately transferred to, or became vested in, the defendants before the plaintiff brought this action for redemption of some of the properties included in the mortgage of 1868 without the rest. The defendants claimed to consolidate all the prior mortgages as against the plaintiff.

Held, that, if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, of one of his securities without the other, and that the right to consolidate was enforceable as a rule, not only against the original mortgagor, but against his assignee of the equity of redemption; and that, applying these principles to the present case, if the original mortgagor had come to redeem the defendants after all the mortgages had become vested in them, he could not have redeemed one of their securities without redeeming the others; and the plaintiff, being his assignee by one deed of all the properties, subject to the defendants' mortgages, was in no better position.

THIS action was brought by James Pledge against Mary Ann Carr (widow), Lewis Borrett White, Alfred Drake Brockman, and Lewis James Drake Brockman, for the redemption of the hereditaments comprised in certain mortgages, dated the 11th May and the 29th Aug. 1863, on payment of the amount to be found due under the same; and for a declaration that the defendants (who were executors) were not entitled as against the plaintiff to consolidate with the said mortgages any other mortgages by the same mortgagor executed to or vested in the defendants' testator, or the defendants, subsequently to the 20th Aug. 1863; and for other relief.

By an indenture of the 11th May 1863 James Banks mortgaged the leasehold house, 34, Bouverie-square, Folkestone, to John Banks, to secure 450*l.* and interest.

By two several indentures, both dated the 29th Aug. 1863, James Banks mortgaged the two leasehold messuages, Nos. 5 and 6, Shakespeare-terrace, Folkestone, to John Banks, to secure two several sums of 500*l.* and interest, which were subsequently increased to sums of 600*l.* each by indentures of further charge, respectively dated the 12th July 1864.

By an indenture, dated the 20th Aug. 1868, James Banks mortgaged (*inter alia*) the same

(a) Reported by R. H. DRANE, Esq., Barrister-at-Law.

three above-mentioned messages to Ralph Thomas Brockman and William George Southey Harrison, to secure 1039*l.* 17*s.* 5*d.* and further advances, subject to the prior mortgages and further charges already mentioned, the mortgage money of 1039*l.* 17*s.* 5*d.* being advanced out of moneys belonging to the said R. T. Brockman and W. G. S. Harrison, on a joint account both at law and in equity.

In the course of the years 1871 and 1873 the principal sums and hereditaments secured by and comprised in the indentures of mortgage of the 11th May and the 29th Aug. 1863 were assigned to Ralph Thomas Brockman. Brockman died on the 23rd March 1877, leaving W. G. S. Harrison surviving, and having appointed Mary Ann Carr, Ralph St. Leger Brockman, Lewis Borrett White, Alfred Drake Brockman, and Lewis James Drake Brockman (of whom R. St. L. Brockman died on the 19th Dec. 1884) executors of his will, which was duly proved by them all.

By an indenture of the 1st April 1885, W. G. S. Harrison transferred the principal moneys, interest, and hereditaments secured by and comprised in the mortgage of Aug. 1868, to the plaintiff, James Pledge, subject to the prior mortgages of the 11th May and the 29th Aug. 1863 and the further charges of 12th July 1864.

The mortgagor, James Banks, died in June 1869, having appointed his son Benjamin Banks and another executors of his will, which, however, was never proved, and no legal personal representatives of James Banks were ever constituted.

The plaintiff based his contention mainly upon the above-mentioned mortgages and position of affairs. The defendants, however, put forward and founded their case on the existence of a number of other additional mortgages and transactions by James Banks, of which the following is a list:

1. Mortgage (the 18th Oct. 1865) of the leasehold house Sandgate Villa, Penge, to William Hobday, to secure 700*l.* and interest.

2. Mortgage (the 13th April 1866) of the leasehold houses "Hillside," and "Ravensbourne" to Herbert Sturmy, Daniel Haywood, and George Saunders, to secure 1400*l.* and interest.

3. Two mortgages (the 4th Feb. 1864) of the two leasehold houses, Nos. 1 and 2, Shakespeare-terrace, Folkestone, to Charles Sedgwick, to secure 500*l.* each.

4. Mortgage (the 24th Nov. 1866) of the leasehold house, Shorncliffe Villa, Penge, to Henry Ramsay, to secure, 600*l.* and further advances not exceeding 100*l.* and interest.

5. Mortgage (the 15th Nov. 1866) of the leasehold house "Underhill," Penge, to Henry Selmes, to secure 700*l.* and interest.

6. Mortgage (the 27th Nov. 1866) of the said houses Shorncliffe Villa, "Underhill," Sandgate Villa, "Hillside," and "Ravensbourne," to the said Ralph Thomas Brockman, subject to the prior mortgages above mentioned affecting the same respectively.

7. Mortgage (the 12th Oct. 1865) of a freehold house, Pembury Villa, Folkestone, to Stephen Hobday, to secure 600*l.* and interest.

8. Mortgage (the 20th Aug. 1863, already mentioned so far as it affected No. 34, Bouverie-square and Nos. 5 and 6, Shakespeare-terrace, *inter alia*) of the whole of the above-mentioned leasehold houses and freehold house, to the said R. T. Brock-

man and W. G. S. Harrison, subject to the several above-mentioned prior mortgages affecting the same respectively.

The prior mortgages respectively numbered 1, 2, 3, were transferred to the said R. T. Brockman during the years 1871 to 1873, in addition to those on No. 34, Bouverie-square, and Nos. 5 and 6, Shakespeare-terrace (already mentioned to have been so transferred), and the same were all now vested in the defendants as his executors, and by an indenture of the 27th Dec. 1890 the mortgage numbered 7 was transferred to, and was now vested in, the defendants as such executors.

9. Mortgage (27th March 1885) of Nos. 5 and 6, Shakespeare-terrace, and of all the premises comprised in the mortgages above mentioned, to James Pledge (the plaintiff) to secure 100*l.* with further advances and interest, subject to the prior mortgages affecting the same premises respectively.

As already stated, the mortgage of the 20th Aug. 1868 included all the above-mentioned premises, which accordingly were all also included in the above-mentioned indenture of transfer of the 1st April 1885, whereby they severally were conveyed to the plaintiff subject to the prior mortgages affecting the same premises respectively.

The plaintiff having given the defendants notice that he wished to redeem the three houses affected by the mortgages of the 11th May and the 29th Aug. 1863 by paying the defendants the amount due upon those houses under those mortgages, the defendants refused to allow the plaintiff to redeem except upon payment of all sums due to them under the several above-mentioned mortgages and further charges now vested in the defendants, and they claimed the right to consolidate the same against the plaintiff.

The plaintiff accordingly brought this action, claiming:—1. A declaration that the defendants were not entitled as against the plaintiff to consolidate with the said mortgages of the 11th May and the 29th Aug. 1863 any other mortgages by the said James Banks executed to or vested in the defendants' testator, R. T. Brockman, or the defendants, subsequently to the 20th Aug. 1868, and that the plaintiff was entitled to redeem the said mortgages of the 11th May and the 29th Aug. 1863 without redeeming any of the other mortgages. 2. An account of what was due to the defendants under the mortgages of the 11th May and the 29th Aug. 1863 for principal, interest, and costs, on the footing of the declaration aforesaid, and that such accounts might be taken against the defendants as mortgagees in possession. 3. Redemption of the hereditaments comprised in the mortgages of the 11th May and the 29th Aug. 1863 on payment of the amount so found due. 4. A receiver, if necessary, of the rents and profits of the said hereditaments. 5. That the defendants might be ordered to pay the costs of the action. 6. That, if necessary, some person might be appointed to represent the estate of the deceased mortgagor James Banks.

Bramwell Davis for the plaintiff.—The plaintiff claims to redeem only Nos. 5 and 6 Shakespeare-terrace, and No. 34, Bouverie-square, on the ground that Mr. Harrison, his predecessor in title, was entitled to redeem them immediately after the date of the mortgage of Aug. 1868. The plaintiff

CHAN. DIV.]

JONES v. DANIEL.

[CHAN. DIV.]

is entitled to be in the same position as Harrison was in Aug. 1868. That is not altered by the subsequent union of the mortgages in one mortgagee.

Neville, Q.C. and *Edwin Ward* for the defendants.—This case is rather different from that of *Minter v. Carr* (*ante*, p. 583). There the equity of redemption in three out of the four properties subsequently vested in Minter, but that in the fourth was outstanding till he bought it from Pledge, and thereby, as we submit, brought the case within

Vint v. Padgett, 31 L. T. Rep. O. S. 21; 1 Giff. 446; on appeal, 32 L. T. Rep. O. S. 66; 2 De G. & J. 611.

Here all the mortgages were originally in different hands. Then the mortgagor assigned all the equities to Harrison, the predecessor in title of Pledge. All the mortgages except one were united in one mortgagee before the equities were transferred to Pledge, and that one was united with the rest before Pledge brought this action. He now comes to redeem after all the mortgages have been united in one set of mortgagees. That is

Vint v. Padgett (*ubi sup.*).

Cur. adv. vult.

March 16.—*ROMER, J.*—In this case I do not see my way to decide against the defendants' claim. Speaking for myself, I have never been able to appreciate the justice or equity of the principle of the consolidation of securities, and certainly I would not extend the cases in favour of consolidation one jot. But I cannot refuse to recognise the settled law on the subject, and this is what, in my opinion, I should be doing in the present case, if I decided adversely to the defendants. Let me first state shortly what the facts of this case are, so far as relevant to the point to be decided. A mortgagor, the owner of several properties, mortgages them to different mortgagees for distinct sums. I will call these mortgages the prior mortgages. The mortgagor then by deed, dated the 20th Aug. 1868, mortgages all these properties together to secure one sum (subject, as to the different properties affected, to the prior mortgages thereon) to the plaintiff's predecessors in title. On the 1st April 1885 the mortgage of the 20th Aug. 1868 is transferred to the plaintiff. Now, on the 20th Aug. 1868, several of the prior mortgages remained vested in different mortgagees; but, before the plaintiff brings this action against the defendants to redeem them, all the prior mortgages have been transferred to or become vested in them. And, under these circumstances the defendants say, and it appears to me rightly, that the plaintiff cannot redeem as against them some of the properties included in his mortgage of the 20th Aug. 1868, of which they are mortgagees, without redeeming all. I think that this contention of the defendants is supported both on settled principle and by authorities which, at the present day, the plaintiff cannot challenge and I cannot disregard. First, as to the principle: it is settled that, if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, of one of his securities without redeeming the other security. It is also settled that the right to consolidate is enforceable

not only against the original mortgagor himself, but also, as a rule, against his assignee of the equity of redemption. Applying these principles to the present case, if the original mortgagor himself had come to redeem the defendants after all the mortgages had become vested in them, he could not have redeemed one of their securities without redeeming the others. And the plaintiff being his assignee, by one deed, of all the properties subject to the defendants' mortgages, is in no better position. Then, as to the authorities: the precise case before me was decided in 1857 in *Tweeddale v. Tweeddale* (*ubi sup.*), and in 1858 in *Vint v. Padgett* (*ubi sup.*), and possibly it has been decided in other cases. And I cannot find any adverse authority, nor can I find in any reported case, any doubt thrown on these cases or on the principles on which they rest. The cases of *White v. Hillaore* (*ubi sup.*), *Jennings v. Jordan* (*ubi sup.*), and *Harter v. Colman* (*ubi sup.*), were cases where the assignee whose right of redemption was in question was the assignee of one property only, and were governed by different considerations. And in *Harter v. Colman* (46 L. T. Rep. N. S. at p. 157; 19 Ch. Div. at p. 635) Fry, J. distinguishes *Vint v. Padgett* (*ubi sup.*) on this ground, and points out the principle governing cases like *Vint v. Padgett*, and certainly he expresses no doubt as to the soundness of the decision in *Vint v. Padgett*, or of the principles on which it was decided. Of course the defendants' right will only extend to their mortgages on the properties of which the plaintiff remains the owner of the equity of redemption. For instance, it will not extend to the premises Nos. 1 and 2, Shakespeare-terrace, the subject of the action of *Minter v. Carr* (*ante*, p. 583). I ought perhaps to add that no objection has been taken as to the absence of any party, and that I have been asked to decide the question of the right of consolidation as between the plaintiff and defendants alone, and have accordingly done so.

Solicitors for the plaintiff, *A. R. and H. Steele*, for *J. Minter*, Folkestone.

Solicitors for the defendants, *Talbot and Tasker*.

Tuesday, April 3.

(Before *ROMER, J.*)

JONES v. DANIEL. (a)

Vendor and purchaser—Specific performance—Statute of Frauds—Conditional acceptance—Offer and acceptance contained in letters—Formal contract referred to in letters and tendered for signature.

The defendant having already made a verbal offer of 1450l. to the plaintiff for the property in question, wrote to him as follows on the 22nd April 1893: "I may say, in respect to this property, the offer I made you of 1450l. is my fullest." The plaintiff's solicitor wrote to the defendant on the 26th April: "Mr. — has considered your offer of 1450l. for his reversionary interest in this property. . . . He accepts it, and we inclose contract for your signature. On receipt of this, signed by you across the stamp, and deposit, we will send you copy signed by him."

(a) Reported by *R. H. DEANE, Esq., Barrister-at-Law.*

again on the 29th April: "Kindly let us know whether we shall send abstract of title to you, or to a solicitor for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract, and for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract. Will you please send it us?" The defendant replied on the 4th May declining to entertain the matter further, and returning the contract unsigned. The plaintiff then brought this action to enforce specific performance of the contract alleged to be contained in the correspondence. The defendant relied on the Statute of Frauds, and contended that the letters did not contain any concluded agreement.

Held, that, having regard to the fact that the document inclosed in the letter of the 26th April 1893 included several fresh terms, such as the payment of a deposit by the purchaser, a provision fixing the day for completion, and one limiting the title to be shown by the vendor, the fair interpretation to be put on that letter was, that it was intended to be an acceptance of the defendant's offer only so far as regarded the price offered by him for the property, but that, in order to constitute a binding contract, his assent was required to the terms contained in the inclosed document; and that it was not, and was not intended to be, an unconditional acceptance of the defendant's offer such as to constitute by itself a binding contract, with a mere reference to an inclosed document, simply intended to carry out the terms of such contract; and that the letter of the 29th April could not be fairly construed as a withdrawal of the terms of the document inclosed in the previous letter, and an unconditional acceptance of the defendant's offer, and that it did not purport in itself to form a contract, and certainly was not one; that there was therefore no concluded agreement, and the action accordingly failed.

Crossley v. Maycock (L. Rep. 18 Eq. 180) followed. *Gibbins v. North-Eastern Metropolitan Asylum District* (11 Beav. 1) distinguished.

THIS was an action to enforce specific performance of an alleged agreement to purchase the fee simple in certain house property, subject to the several leases respectively affecting the different houses. The facts were as follows:—

Mr. William Jones, the plaintiff, owned the fee simple of a piece of ground abutting on Ely-road, Llandaff, upon which eleven houses had been erected. Ten of the houses were subject to leases for terms of ninety-nine years from the 2nd Feb. 1885, and the eleventh was subject to a lease for a term of ninety-nine years from the 2nd Feb. 1888, the aggregate of the ground rents reserved amounting to 58l. The wife of the defendant was in possession of one of the houses, which was known as Kingswood, under an assignment of the lease.

About the 6th April 1893 Mr. George Mark Palmer Daniel, the defendant, at an interview with a member of the plaintiff's firm of solicitors, made a verbal offer to purchase the houses, subject to the leases, for 1450l.

On the 22nd April 1893 the defendant wrote to the plaintiff's solicitors (who were the plaintiff's agents for the sale of the houses):

I may say, in respect to this property, the offer I

made you of 1450l. is my fullest, and in the present unsatisfactory definition of the leases, and the imperfect drainage, and difficulties attendant thereon, it is more than its real value.

On the 26th April the plaintiff's solicitors wrote in reply:

Ely-road property. Mr. W. Jones has considered your offer of 1450l. for his reversionary interest in this property. . . . He accepts it, and we inclose contract for your signature. On receipt of this signed by you across the stamp, and deposit, we will send you copy signed by him.

On the 29th April the plaintiff's solicitors wrote to the defendant:

Ely-road property. W. Jones to you. Kindly let us know whether we shall send abstract of title to you, or to a solicitor for you. At the same time perhaps you will send us a deposit. In order to define time for delivery of abstract, and for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract. Will you please send it us?

On the 3rd May they wrote to the defendant again:

W. Jones to you. We have been expecting to hear from you in answer to our letters. Kindly let us know where we are to send the abstract of title.

On the 5th May they received a reply from the defendant, saying:

Your not replying to my offer for so long induced me to think that it was not acceptable, and I made other arrangements, therefore cannot entertain anything further on the matter. . . . I return form unsigned.

The form referred to was the contract inclosed by the plaintiff's solicitors in their letter of the 26th April to the defendant, and consisted of particulars and conditions of sale, with a memorandum subjoined, to be signed by the purchaser, agreeing to complete the purchase in accordance with "the within particulars and conditions of sale." The conditions included a condition that the purchaser should pay a deposit of 10l. per cent., and that the purchase should be completed on the 24th May then next. There was also a condition restricting the title to be shown by the vendor.

On the same 5th May the plaintiff's solicitors replied to the last letter of the defendant, expressing their surprise, stating that they had had the correspondence stamped, that it formed a binding contract, and that, if necessary, they should take steps to enforce it.

On the 18th May the plaintiff commenced this action for specific performance of the contract alleged to be constituted by the correspondence, and other relief.

The defendant relied on the Statute of Frauds.

Neville, Q.C. and *Challis* for the plaintiff.—The only important point is, whether there was a valid contract under the Statute of Frauds. The defendant's offer, made verbally and referred to in his letter of the 22nd April 1893, was accepted unconditionally in the letter of the 26th April. By the letter of the 29th April we waived our right to a formal contract; we withdrew, if we had ever put forward, the claim to a written contract embodying fresh terms. This is the converse of the usual case. Here it was the plaintiff, if anyone, and not the defendant, who stipulated for a formal contract. The defendant's offer was not clogged by any such condition. Our mere reference to the signing

CHAN. DIV.]

JONES v. DANIEL.

[CHAN. DIV.]

of a formal contract did not prevent our acceptance of his offer making a binding contract. If it did, we waived that stipulation by our letter of the 29th April. *Rossiter v. Miller* (39 L. T. Rep. N. S. 173; 3 App. Cas. 1124) is very like the present case. We made no insistence on the deposit or other fresh terms. Where an offer is accepted unconditionally there is a valid contract which is not invalidated by the mere inclosure with the letter of acceptance of a formal contract intended to be signed by the purchaser:

Gibbins v. North-Eastern Metropolitan Asylum District, 11 Beav. 1.

That case is very like the present one. In *Bonnell v. Jenkins* (38 L. T. Rep. N. S. 581; 8 Ch. Div. 70) it was held that two letters constituted a complete contract, notwithstanding the reference to a future contract.

Haldane, Q.C. and *David* for the defendant.—In *Rossiter v. Miller* (*ubi sup.*) Lord Cairns, L.C. in his judgment (39 L. T. Rep. N. S., at p. 175; 3 App. Cas., at p. 1132) pointed out that in that case the purchasers were informed by the conditions of sale of the essential terms of the formal contract they would be required to sign. That was not so here; several of the terms introduced into the formal contract sent to the defendant for signature being entirely fresh terms. [*Neville, Q.C.* referred to *Fry on Specific Performance*, 2nd ed., s. 490.] In the case of *Gibbins v. North-Eastern Metropolitan Asylum District* (*ubi sup.*), the ground of the decision was that the defendant did not choose to produce the formal contract, which was in his possession, and therefore it was assumed against him that the plaintiff's allegation that it was merely a formal document carrying out the terms of the contract which had been made by offer and acceptance was true. That view brings the case cited into line with the other authorities. Wherever the formal contract contemplated is to be anything more than merely ancillary to the real contract; wherever any new term not expressed or implied in the earlier contract might be introduced into the formal one, the first document will not by itself be binding: (*Fry on Specific Performance*, 2nd ed., s. 491.) The test, according to the authorities, is, Does the contract contemplate any other term? The present case is almost exactly like *Crossley v. Maycock* (L. Rep. 18 Eq. 180), but even stronger. In *Hussey v. Horne-Payne* (41 L. T. Rep. N. S. 1; 4 App. Cas. 311) it was held that the whole of a correspondence and what had passed between the parties must be looked at, and not merely a part which taken alone might seem to constitute a complete contract. And in that case Lord Selborne stated that he adhered to what he had said in *Jervis v. Berridge* (28 L. T. Rep. N. S., at p. 483; 8 Ch. App., at p. 360) that the Statute of Frauds "is a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." The remainder of his judgment is also applicable to this case.

Neville, Q.C. in reply.—The true view of the correspondence is, that it was intended to accept the defendant's offer. An offer remains open till it is either withdrawn or declined. There was no insistence on payment of a deposit, the words being, "perhaps you will pay a deposit." I

quite agree that the test is the intention of the parties.

Romer, J.—I think that the plaintiff's case fails. It is clear that here there was no contract between these parties apart from the letters; and if the letters do not show a concluded agreement, then there was none. Now, I look to these letters. I need only refer in the first instance to the letter of the 26th April 1893. The defendant had made an offer for the premises, and had stated the price he was willing to give. Then the letter of the 26th April 1893 states this: that the plaintiff who was the vendor, accepted the offer, "and we inclose contract for your signature. On receipt of this signed by you across the stamp, and deposit, we will send you copy signed by him." I turn to the inclosure in that letter, and I find it is a document which contains special terms which have never been referred to in the offer, and those terms include a payment of a deposit of 10 per cent. by the purchaser; a provision as to fixing the day for completion; and provision limiting the title to be shown by the vendor, and other important terms. Now what was the meaning of that letter? What would anybody fairly understand, when he received that letter, to be the meaning of it? Certainly I think he would understand it to mean this: "So far as the price is concerned for the property, we are agreed. I now inclose you terms which I require you to assent to. If you assent to them, and sign them, and pay the deposit, then there will be a binding contract, but not till then." I think that is what the letter really meant, and what I think it was intended to mean. It was not a mere acceptance *simpliciter* of the defendant's offer forming a contract, and a mere reference to an inclosed document as carrying out the contract so made. In my opinion, it would not have been fair as against the plaintiff to immediately have said on behalf of the defendant, if he had been willing so to say immediately he received that letter, that the plaintiff was bound by an absolute contract, without obtaining a deposit, and without any conditions whatever as to title or otherwise. To say that he could be bound by an absolute unconditional contract for sale to the defendant of the property for so much would not have been fair as against the plaintiff. I do not think that that was his intention. When I speak of him I of course speak of the solicitors, who were acting for him as representing him, and, of course, in making that observation in his favour it also shows that that letter cannot be treated as a simple acceptance of the defendant's offer. Then what happens after this? Nothing, practically. The defendant does nothing. He does not accept what I may call the counter offer of the plaintiff, and, as time goes by, the plaintiff's solicitors, apparently feeling a little anxious, wrote the letter of the 29th April 1893. Now, what was the meaning of that letter? I do not gather that that letter amounted to this: "I withdraw the terms I was insisting upon by my letter of the 26th April 1893, and I give you now to understand that I accept unconditionally, and without requiring any other terms on your part, your offer of 1450l." I do not think that that is a fair interpretation to be put upon it. He does not purport by the letter of the 29th April in itself to form a contract, or to formulate a contract. All he says in that letter is, "though the correspondence" (and by that I clearly understand the writer to

mean the prior correspondence), "though the correspondence is a sufficient contract"; and it is noticeable in that very letter the writers refer again to the deposit. Certainly, if a contract valid and binding had not been come to before the letter of the 29th April 1893, it was not made by that letter of the 29th April 1893. I would only say one word as to the cases which have been cited. I think the case that really comes nearest to the present is the case of *Crossley v. Maycock* (*ubi sup.*). The case of *Gibbins v. The Board of Management of the North-Eastern Metropolitan Asylum District* (*ubi sup.*), to which my attention has been called, is, in my opinion, distinguishable. In that case it was alleged in the Bill that an inclosure sent to the defendant was a mere formal document, merely carrying out the contract constituted by an offer and an acceptance. The defendant, in whose possession the document was, did not choose to produce it; and therefore it was assumed as against him that that allegation in the bill was correct. Consequently it was not a case where simultaneously with a letter purporting to accept an offer a document was sent required (by the person sending it) to be signed by the person to whom it was sent, containing additional and important terms. That case, therefore, is not an authority in the case before me, and, as I have said, I think the real binding authority is that of *Crossley v. Maycock* (*ubi sup.*), and I need make no further observations as to the other cases which have been referred to. The action has failed, in my opinion, and must be dismissed, and, of course, dismissed with costs.

Solicitors for the plaintiff, *Bell, Brodrick, and Gray*, agents for *Lewis and Jones, Merthyr Tydfil*.

Solicitors for the defendants, *Martin and Co.*, agents for *David and Evans, Cardiff*.

April 16 and 17.

(Before ROMER, J.)

ATTORNEY-GENERAL v. MAYOR OF CARDIFF. (a)

Municipal corporation — Resolution by — Ultra vires — Borough fund — Misapplication — Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 143 — Power under local Act to subscribe capital sum for site and building of a college — Sum given by way of interest on capital sum instead.

A municipal corporation were empowered by their local Act of Parliament to contribute towards the funds of a college to be situated in their borough any sum or sums not exceeding 10,000*l.*, and to appropriate the whole or any portion of such sum or sums to the acquisition of a site for the college, and, if a suitable site could be obtained for less than that amount, they were empowered to contribute the balance, or any part, towards the cost of erecting college buildings on the site. This was not done, but the college rented some existing buildings for the purposes of their institution. A sum of 400*l.*, intended to represent interest on the 10,000*l.*, was voted by the council in 1892 as additional mayor's salary for that year, and was paid out of the borough fund to the credit of the college, and another sum of 350*l.* (also intended to represent interest on the 10,000*l.*) was in 1893

recommended by the finance committee for payment to the college, the recommendation having been since confirmed by the corporation, but the money not having been yet paid over. A sum of 650*l.* was also voted by the council in 1893 as an increase of the mayor's salary, but intended to be spent in celebrating the marriage of H.R.H. the Duke of York, and actually spent chiefly in providing teas and commemorative medals for children attending schools within the borough. The plaintiffs said the payments practically came out of the rates, the borough fund being insufficient by itself for the purposes for which it was formed. The action was brought at the relation of certain burgesses and ratepayers of the borough against the mayor and corporation, for a declaration that such an application of money out of the borough fund was unlawful, ultra vires, and a breach of trust, and for an injunction restraining the defendants from so applying it.

Held, that the corporation was not entitled to make a colourable addition to the salary of the mayor in order that the addition might be applied in making payments indirectly which could not lawfully be made directly; that there was nothing in their local Act which authorised payment of interest on the 10,000*l.* before that sum was paid; that the sums paid as interest, not being payments "for the public benefit of the inhabitants and improvement of the borough" within the meaning of sect. 143 of the Municipal Corporations Act 1882, were not authorised by that section, which, moreover, where there was no surplus of the borough fund, could not authorise even payments which did come within its meaning; but that the corporation were entitled to make a reasonable addition to the mayor's salary, where there was an anticipation that, in consequence of some event of national importance, his expenditure as mayor in festivities and so forth might be increased; and that, accordingly, any resolution passed bona fide, increasing his salary in such a case, could not be impeached.

THIS action was brought against the mayor, aldermen, and burgesses of the county borough of Cardiff, and against Thomas Rees and William Edward Vaughan, the late mayors of the said borough for the years ending respectively on the 9th Nov. 1892 and the 9th Nov. 1893, at the relation of Edward Thomas, Frederick Lewis Short, John Jenkins, and William Smith Crossman, who (being respectively burgesses and ratepayers of the said borough) were joined as co-plaintiffs in the action with Her Majesty's Attorney-General, under the following circumstances:—

By the Cardiff Corporation Act 1884 (47 & 48 Vict. c. cxiii.), s. 32, the corporation were empowered to contribute towards the funds of the University College of South Wales and Monmouthshire any sum or sums not exceeding in the whole 10,000*l.*, and to appropriate the whole or any portion of such sum or sums to or towards the acquisition of a site for the college, and if a suitable and convenient site could be obtained for less than that amount, to contribute the balance or any part thereof towards the cost of erecting on such site suitable buildings and premises for the purposes of the said college. What happened,

(a) Reported by R. H. DEANE, Esq., Barrister-at-Law.

CHAN. DIV.]

ATTORNEY-GENERAL v. MAYOR OF CARDIFF.

[CHAN. DIV.]

however, was that, instead of the plan contemplated by that Act being carried out, the college rented some existing buildings for its purposes, and consequently the 10,000*l.* had not been applied in the way intended. Instead of that, a sum of 400*l.*, "being the amount of interest at 4 per cent. upon the sum of 10,000*l.*" had been voted by the council during the mayoralty of the late mayor, Mr. Rees, one of the defendants, as additional salary for the mayor during that year (ending Nov. 1892), and had been actually paid out of the borough fund to the credit of the college.

In addition to that a further sum of 350*l.* (also intended to represent interest on the 10,000*l.*) had during the mayoralty of Mr. Vaughan (another defendant) been recommended by the finance committee for payment to the college; and that had been confirmed by the corporation itself, but the money had not yet been actually paid over to the college.

Moreover, on the 19th June 1893, a sum of 650*l.* was voted at a meeting of the council as an addition to the "mayor's salary, being by way of remuneration for the current year," such addition being intended and well understood to be really "for the purpose of celebrating the marriage of his Royal Highness the Duke of York, K.G., with her Serene Highness the Princess Victoria May of Teck;" as indeed it was expressed to be in the words of the resolution as originally brought forward. The sum was in fact spent chiefly in providing teas and medals commemorative of the wedding for children attending schools within the borough.

The action claimed a declaration that the application in the manner and for the purposes aforesaid of any part of the borough fund was unlawful, and beyond the power of the defendants, and a breach of trust; and asked that the two ex-mayors joined as defendants might be ordered to replace the sums of 400*l.* and 650*l.*; and an injunction restraining the defendants from directly or indirectly applying any part of the borough fund for any purpose not authorised by law.

The plaintiffs in their statement of claim stated, and the defendants by their defence admitted, that the borough fund was insufficient for the purposes to which it was applicable under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), and that a borough rate had to be, and was, raised every year to supplement the borough fund, so as to make it sufficient for such purposes.

Sect. 143 of the said Act provides that:

If the borough fund is more than sufficient for the purposes to which it is applicable under this Act or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough.

Haldane, Q.C. and *O. L. Clare* for the plaintiffs.—The real object of this action is to obtain the opinion of the court as to whether these payments can be properly made out of the rates. That is what it comes to, because the borough fund is insufficient, unless supplemented by the rates, for the purposes for which it is properly applicable. The payment of interest on the 10,000*l.* is not warranted either by the corporation's local Act or by sect. 143 of the Municipal Corporations Act 1882. The decision in *Attorney-General v. Corporation of Blackburn* (57 L. T. Rep. N. S. 385) is

not applicable, at all events, to this part of the case. The corporation is not entitled to apply money arising from the rates to such purposes:

Attorney-General v. Mayor of Newcastle-upon-Tyne, 23 Q. B. Div. 492; 67 L. T. Rep. N. S. 728; (1892) A. C. 568.

The corporation have no power to give the mayor an increase of salary clogged with a condition, so as to make the condition binding. You cannot get out of the Act by doing indirectly what cannot be done directly.

Neville, Q.C. and *Woodfall* for the defendants.—A corporation has power to vote additional salary to a mayor to be spent on festivities on occasions of national rejoicing. The mayor can lay out the money in any way he thinks proper, or any committee he chooses to consult may think proper. You cannot fix on him any legal engagement to spend any particular sum in any particular way. The money given to the college was for the benefit of the inhabitants and improvement of the borough within the meaning of sect. 143 of the Municipal Corporations Act 1882. The existence of the college in that locality is the cause of some 20,000*l.* being expended in the town yearly.

Haldane, Q.C. in reply.—As to the 650*l.*, all we want is to prevent this system being pursued in the future. What we seek is merely an expression of opinion by the court, such as was given in *Attorney-General v. Mayor of Newcastle-upon-Tyne* (*ubi sup.*), even without an injunction. No doubt the corporation would act on such an expression of opinion.

ROMER, J.—Of course it is clear that the corporation are not entitled to make a colourable addition to the mayor's salary, merely that the addition may be applied in making payments which would not be justified if those payments were made directly by the corporation. With that preliminary observation, I will consider shortly the case brought before me. The first part of the case relates to the payment of 350*l.* and 400*l.* Now the corporation passed a resolution, in pursuance of the powers given to them by the Act of 1884, that the 10,000*l.* they were authorised to subscribe to the University College, and mentioned in sect. 32 of that Act, should be paid in a certain event which has not yet occurred. Then they passed certain resolutions purporting to authorise yearly payments on account of the interest on the 10,000*l.* in the meantime. The 350*l.* and the 400*l.* were two such interest payments, and the question is, were they authorised? The first question is, were they authorised by the special Act of the corporation of 1884? Now I can find nothing in sect. 32 of that Act, or in any other part of that Act, which authorises the corporation to pay interest on the 10,000*l.* before the 10,000*l.* is paid over, and therefore I must state that the payments, in my opinion, of interest on the 10,000*l.*, were not authorised under that Act. The next question is, were those payments of interest out of their general fund authorised under the corporation's general powers? It is said that they were authorised under sect. 143 of the general Act of 1882: but, in my opinion, putting aside the question as to a surplus (with regard to which I need say nothing in this case), I cannot see that payments of these sums by way of

interest were payments "for the public benefit of the inhabitants and improvement of the borough" within the meaning of those words as used in that section. No doubt in some way an advantage may be given to some of the inhabitants of a borough by having a flourishing concern like a university college in the midst of the borough; but I cannot see that subsidising a college in a town can be said to be for the public benefit of the inhabitants and improvement of the borough within the meaning of the words as used in sect. 143. And clearly, if there was no surplus, the payments by way of interest for such a purpose could not be made out of the borough fund generally. That, I think, is free from doubt. It follows that, in my opinion, the payments by way of interest were unauthorised. The next question concerns the addition of 650*l.* made to the mayor's salary, because in the year in which that addition was made it was anticipated that an expenditure would be made in celebrating the marriage of the Duke of York. Now, the corporation is undoubtedly entitled to make a reasonable addition to the mayor's salary if it be anticipated that in his year of office, by reason of the occurrence of some event of national importance, his expenditure as mayor in festivities and so forth may be increased; and any resolution, *bonâ fide* passed, increasing his salary in such a case, could not be impeached. The question is, was the resolution in the present instance, increasing the salary by the sum of 650*l.*, passed *bonâ fide*? I am bound to say that I have had considerable doubt on this matter by reason, amongst other things, of the appointment of the marriage committee, and the fact that the cheque for payment of the 650*l.* was dealt with separately from the rest of the mayor's salary, drawn to a particular account, and carried, I notice, to a separate bank account. But on the whole I will in this particular case give the corporation the benefit of the doubt; and therefore I shall not by this judgment decide anything adversely to them with regard to this particular sum of 650*l.* But I have no doubt that what I have said will be a guide to the corporation in any future payments of the kind which may have to be made. If payments are desired to be made which are not intended really as a simple increase to a mayor's salary, they should not, in my opinion, be made by way of additions to the mayor's salary; they ought to be made directly, so that they may be directly challenged, if wrong, and impeached. No additional fee should be made to the mayor's salary except it is intended to go absolutely merely for the purposes of the salary, that the mayor may deal with it in any way he thinks fit as part of his salary, and not otherwise. The parties in the present case have not asked that any sums which may have been paid on account of the interest to the University College should be repaid; and all I need do, therefore, is to take from the defendants, the corporation, an undertaking (which I understand they are willing to give) that they will not pay either the 350*l.*, nor any future payments to the University College by way of, or being in fact, interest on the 10,000*l.* As to costs, I think it is a case in which they may be properly paid out of the borough fund. The case has been fairly raised and very fairly argued, and it is a matter that will be of guidance to the corporation, and of assistance to them. There will be liberty, therefore, to

pay the costs, and retain them out of the borough fund.

Solicitor for the plaintiffs, *H. Percy Becher*, for *Simons and Sons*, Merthyr Tydvil.

Solicitors for the defendants, *Edwin Andrew and White*, for *J. L. Wheatley*, Town Clerk of Cardiff.

QUEEN'S BENCH DIVISION.

Friday, March 2.

(Before WILLS, J.)

DUNN v. THE DEVON AND EXETER CONSTITUTIONAL NEWSPAPER COMPANY LIMITED. (a)

Practice—Payment into court—Action for libel in newspaper—Payment in under statute—Damages awarded less than sum paid in—Who entitled to money in court—Effect of new rule (r. 22 of Order XXII.).

*Payment into court by the defendant under the 8 & 9 Vict. c. 75, in an action for a libel in a newspaper, is subject to the ordinary rules as to payment into court when there is no denial of liability, and, accordingly, where, in such an action, the defendant pleaded that there was no actual malice, no gross negligence, and that an apology had been inserted, and paid 50*l.* into court as amends, and the jury found this plea proved, and awarded the plaintiff one farthing damages, the plaintiff was held entitled to the 50*l.* in court, notwithstanding that the jury had awarded one farthing only.*

No change has been made in the practice as to payment out in such cases by the rule (r. 22 of Order XXII.), which forbids the amount paid into court to be communicated to the jury.

FURTHER CONSIDERATION by WILLS, J., in an action tried before him, with a jury, at the last Bristol Assizes, the question being as to the effect of the new rule, providing that, when payment is made into court, the amount so paid into court shall not be communicated to the jury.

The action was brought for an alleged libel published in the defendants' newspaper.

The defendants pleaded, under Lord Campbell's Libel Act, that a full apology had been inserted in their newspaper, that the libel was published without actual malice and without gross negligence, and they paid into court the sum of 50*l.* as amends, under sect. 2 of the Act 8 & 9 Vict. c. 75.

The jury found that there was no actual malice, no gross negligence, and that there was a sufficient apology, and they assessed the damages for the plaintiff at one farthing. No communication had been made to the jury, either of the fact that money had been paid into court by the defendants, or of the amount so paid in. The learned judge was of opinion that this amounted to a verdict for the defendants; it was then pointed out on behalf of the plaintiff that the payment of the 50*l.* into court was made under the statute, and not under the rules, and that therefore the plaintiff was entitled to have the 50*l.* paid out to him. The learned judge thereupon reserved the case for further consideration upon the question as to which of the parties was entitled to have the 50*l.* in court.

J. A. Foote (C. W. Mathews with him) for the plaintiff.—The question that arises here has not

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

[Q.B. Div.]

DUNN v. DEVON AND EXETER CONSTITUTIONAL NEWSPAPER CO.

[Q.B. Div.]

arisen before, and could not have arisen but for the new rule (r. 22 of Order XXII.). The provision as to payment into court in Lord Campbell's Act has now been repealed by 42 & 43 Vict. c. 59, s. 2, and 46 & 47 Vict. c. 49, s. 4, but before these Acts a similar provision was contained in sect. 2 of 8 & 9 Vict. c. 75, and under that section the payment into court was made compulsory with such pleas. The payment into court, therefore, in this action was not a payment in under the rules, but under the statute, so that this case is not governed by the rules, and the order as to payment into and out of court (Order XXII.) does not apply here. The payment into court in this case could have been made and might have been made apart from the rules altogether. If this were a payment in under the rules, the court would have jurisdiction to order payment out; but it is not so. In actions for libel the payment into court stood by itself up to these rules, and payment into court is made in the same form and words as if the rules had not been passed: (Bullen Leake, 3rd edition, 1868, p. 767.) I rely on the reasoning in *Lafone v. Smith* (4 H. & N. 158), as proving my case; I rely on the judgment, there as showing that when the defendant fails to prove his plea there is no admission, and he is entitled to have his money back. If he relies on, and proves, his plea, it is otherwise, and he would not get his money back. In *Jones v. Mackie* (17 L. T. Rep. N. S. 151; L. Rep. 3 Ex. 1), where, under similar circumstances, money was paid into court, the jury were directed to assess the damages, irrespective of the money paid into court, and without considering the payment as an admission of liability, and Channell, B. says that "this plea not being proved, no liability is admitted." These cases, although they do not decide the exact point raised, show that the only case where the defendant is entitled to have the money out of court is where he has failed in his plea. He also referred to *Chadwick v. Herapath* (3 C. B. 885); and Day's Common Law Procedure Acts.

Bucknill, Q.C. and *Duke* for the defendants.—The plaintiff's contention here must amount to this: that the 50*l.* paid into court becomes the money of the plaintiff at once and for ever, the moment it is paid in, and if he falls short of that he must fail altogether. [WILLS, J.—That is not so, because, if the jury had found that the apology was not sufficient, then the plea would have failed, and the offer of 50*l.* would have been of no avail.] Payment into court under Lord Campbell's Act was optional; now, under 8 & 9 Vict. c. 75, it is obligatory in such cases. The section says that all such payments into court shall be governed by the general rules existing under the old rules and practice, and the plaintiff might have done one of two things: he might have taken the money out and taxed his costs; or he might have gone on and taken his chance of getting more, or the risk of getting less. I cannot contend that this was a payment in under the Judicature Acts or rules, and I want to treat this case as if the Judicature Act were out of the question altogether. The case of *Jones v. Mackie* (*ubi sup.*) is wholly different from this case, as there the jury found that the apology was not sufficient, and the only question was as to the assessment of damages, and no question arose as to the payment out of the 5*l.* in

court. In *Harris v. Arnott and others* (24 L. Rep. (Ir.) 404) it was held that the plaintiff was not entitled to take the money out of court and proceed with the action for the purpose of recovering greater damages. That case is strongly in favour of our contention that, if the plaintiff goes on with the action and recovers less than is paid into court, he is not entitled to the sum in court. The jury here have never given any finding on the question whether the 50*l.* paid in was sufficient or not, and if the contention for the plaintiff is correct, he has recovered 50*l.* and one farthing, and not merely the farthing which the jury awarded. The plaintiff is entitled to have the farthing awarded by the jury and no more, and the defendants are entitled to have the 50*l.*, less the farthing, paid back to them.

WILLS, J.—I am quite clear as to this case. The 8 & 9 Vict. c. 75 makes payment into court in such a case as this subject to the ordinary rules as to payment into court, when there is no denial of liability. Since the passing of that Act, down to the present time, in actions of this kind I have never heard of any question being left to the jury except this, "Is the sum paid into court sufficient." I have never known the question put to the jury whether the sum paid into court is too large. It was well said by Mr. Quain, in his argument in the case of *Jones v. Mackie* (*ubi sup.*), that "the only issue on an ordinary plea of payment into court is of damages ultra." The jury have to say whether the amount paid in is enough or not. They cannot say that it is more than enough." Upon that issue, and that issue only, does the plaintiff succeed. Then it is said by Mr. Bucknill that the whole former practice on this point has been wrong ever since we have had any knowledge of the profession. That is a strong proposition to make, and I do not accede to it. Then it is said that the last new rule (rule 22 of Order XXII.) has made a change in the practice in this respect. Everybody knows the specific mischief that rule was intended to meet; it was intended to meet this, that juries almost always found for more than the sum paid in, in order to get the plaintiff his costs, thus in many cases doing an injustice to the defendant. The rule provides that no communication shall be made to the jury of the amount paid in, but it might have gone on to say that the plaintiff should recover no more than the jury had assessed in his favour; but it does not say so, and in my opinion the rule was not intended to do more than I have said. All that is meant by the rule is, that the question whether the sum paid in was sufficient or not should be answered in this way by the jury without knowledge of the amount paid in. I do not think that this rule was intended to revolutionise the practice of half a century or more in the way contended for on behalf of the defendants. I think, therefore, that the proper order to make is a declaration that this sum in court should belong to the plaintiff, but that it should remain in court as a security for any costs owing by him to the defendants; then, that the sum, or the balance of the sum, should be paid out to the plaintiff.

Solicitors for the plaintiff, *Templeton and Cox*, for *Dunn and Linford Brown*, Exeter.

Solicitors for the defendants, *Coode, Kingdon*, and *Cotton*, for *A. E. Ward*, Exeter.

Tuesday, March 20.

(Before CAVE and WRIGHT, JJ.)

REG. v. HIS HONOUR COMMISSIONER KERR AND HIVES. (a)

County Court—Practice—Judge's note—When judge is bound to take note—County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 120, 121.

A County Court judge is only bound to take a note when a question of law is raised and he is asked to take a note of that question of law; then it is his duty to take a note of the question of law raised and of the evidence in relation thereto, and of his decision thereon and of his decision of the action or matter.

If there be more questions of law than one, the request to take a note must be made in respect of each.

Per Cave, J: If the circumstances be such that there was no possibility of raising the point of law at the trial or of getting a note, then the appellant may show by affidavit what happened at the trial.

RULE calling on his Honour Mr. Commissioner Kerr, the judge of the City of London Court, and W. Hives, the plaintiff in the action of *Hives v. Moseley*, to show cause why the learned judge should not furnish to the defendant, free of cost, or at a cost not exceeding 2d. per folio, or other reasonable rate, a copy of the transcript of the shorthand notes taken at the trial of the action, and sign such copy as his note; or, if such notes were taken otherwise than in shorthand, why he should not furnish a copy thereof to the defendant.

The action of *Hives v. Moseley* was brought to recover damages from the defendant for injuries sustained by the plaintiff while walking along the street, and passing near a house, of which the defendant was owner, the injury being caused by a window sill of the house falling on the plaintiff.

The trial took place in the City of London Court, before Mr. Commissioner Kerr, without a jury, and lasted two days, the evidence being very voluminous.

The judge found for the plaintiff for 500*l.*, and the defendant, wishing to appeal, applied to the judge for a copy of his note.

A shorthand note of the whole proceedings in the case had been taken by the official shorthand-writer attached to the court, but the learned judge himself had taken no note. When applied to by the defendant for a transcript of the shorthand note for the purpose of appealing, the registrar of the court demanded 18*l.* by way of deposit to meet the expense of the transcript. The defendant refused to make this payment, and he then applied for a rule to compel the judge to deliver to him a copy of the transcript.

In the affidavit filed by the solicitor for the defendant, it was stated that the "judge was desired by the defendant's counsel to take the usual note of the proceedings." This request, if made, was not heard by the judge, and no note was taken by him.

In an affidavit, made by Mr. Commissioner Kerr, he stated:

No request whatever was made to me by either party to take a note of any question of law raised at the said trial or hearing, nor of the facts in relation thereto. I was not desired by the defendant's counsel to take the

usual or any note of the proceedings at the said trial. No request to take a note of the evidence was made to me. I have read through the transcript of the shorthand notes of the trial taken by the official shorthand-writer of the court, and I find therein no note of any such application having been made to me, and my recollection is entirely confirmed by such note.

Whenever a request is made to me under the 120th section of the County Courts Act 1888, I always take a note of the point or points of law which are raised and of the facts in relation thereto, and of my decision thereon with the reason therefor, and of my decision of the action or matter. A copy of such notes can be obtained by any party to the action on the same terms as those obtaining in any other County Court in England, and in accordance with sect. 121 of the said Act.

In every case which is tried in the City of London Court a shorthand note of the proceedings is taken by an official shorthand-writer appointed by the corporation of the City of London for that purpose. If any party to the action desires to obtain or use a transcript of the whole of such notes, he can obtain it. I always read such transcript and satisfy myself that such transcript is a correct note of the proceedings, and I then adopt and sign the same as my notes of the case. A transcript of any extract from or portion of such official shorthand notes referring to any particular part of the case may also be obtained, but it is not my practice to sign a portion or extract only. These transcripts of shorthand notes are entirely distinct from my own notes which I make myself as above stated whenever a request is made to me to take a note under the statute.

The result of the appointment of an official shorthand-writer by the corporation is, that in cases where I am requested to take a note in compliance with the Act of Parliament, it is open to the parties to obtain both a copy of my own note and also a transcript of the official shorthand note, or either of such notes at the parties' option, and in cases where I have not been requested to take a note, the parties are still at liberty to obtain a transcript of the official shorthand note signed by me in accordance with the above-mentioned practice.

In the case of *Hives v. Moseley*, as no request to take a note was made to me, I took no note of any question of law raised, nor of the facts in relation to any such question.

The official shorthand-writer of the court made an affidavit in which he stated that at no time on either of the days when the case was heard was any application made to the judge to take a note of any point of law or of any evidence in relation thereto; and the plaintiff's solicitor also stated in an affidavit, that no request to take a note was made to the judge.

The registrar of the court, in his affidavit, stated that notices were posted in the court to the effect that any suitor can have a shorthand note on giving a day's notice to the registrar, and on payment of the usual charges, that is, 1*l.* 1*s.* for the shorthand-writer and 8*d.* per folio for the transcript and 4*d.* per folio for a copy of the transcript; but that the charge of 1*l.* 1*s.* has never been enforced; and that in this case the sum of 18*l.* was asked by way of deposit to meet the expense of the transcript of the shorthand-writer's notes.

Sect. 120 of the County Courts Act 1888 provides:

At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter.

Q.B. Div.]

REG. v. HIS HONOUR COMMISSIONER KERR AND HIVES.

[Q.B. Div.]

Sect. 121 provides:

... he (the judge) shall, at the expense of any person or persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy . . . and the copy so signed shall be used and received at the hearing of such appeal.

Danckwerts, for Mr. Commissioner Kerr, showed cause against the rule.—Even assuming that there was any request here to take a note, the only request was a request by the defendant's counsel "to take the usual note of the proceedings." The case of *Morgan v. Rees* (44 L. T. Rep. N. S. 133; 6 Q. B. Div. 508) decides that such a request is not sufficient, and that the judge need pay no attention whatever to it. In this case it is abundantly clear that no request of any sort or kind ever reached the learned judge to take any note of any point of law, or of any evidence. Even supposing that the request to take the usual note had been made, and that it had reached the judge, was that a request to which the judge was bound to attend? I submit not, on the authority of the case I have cited, as well as upon the plain reading of the 120th section itself. There was a case lately before Mathew and Collins, J.J., on the 23rd Feb. 1894 (a), in which the official shorthand note, made in the City of London Court, was used by the court, and the judges, in allowing the appeal, expressed their approval of the provision made by the corporation, and granted the application made by the appellant for the cost paid to the City of London Court for the shorthand notes. The suitors in this court have, through the liberality of the corporation, a privilege which no other suitor in any court in this country enjoys, namely, of having a shorthand note supplied. In addition, they have the statutory right of having the short note of the judge, made in accordance with the Act, whenever the request to take a note is made. Moreover, judging by the grounds of appeal given in the notice of appeal, it is difficult to see that any question of law was raised at all. I submit, upon the merits, that the whole case has been moved under an absolute misapprehension of the real facts and of the practice of the court, and, having regard to what has happened in this case. I submit that the explanation offered is conclusive.

Moyses for the plaintiff.

Abel Thomas, Q.C. and *Benson*, for the defendant, in support of the rule.—The question of law here was a very short one, namely, whether, as there was a tenant in possession of the house, the landlord, under the circumstances, was liable for the injury suffered by the plaintiff. The evidence with regard to that might have been taken on half a sheet of paper, and the cost of the copies need not have been more than a shilling or two. Notwithstanding that, we have here the preposterous demand for 18*l.* to start with, and if we paid this 18*l.* we might be called on to pay something more, first, for the transcript, and then for the copy of it. The transcript was to cost 8*d.* per folio, and the copy 4*d.*, whereas the usual charges are simply 2*d.* a folio, stationers' charges of copying. We submit that that is all the defendant is bound to pay under the Act. [CAVE.

(a) Unreported.

J.—That is all he is bound to pay where he asks the judge to take a note, and the judge takes one. *WRIGHT, J.*—The counsel for the defendant made a remark as to taking a note which he thought was sufficiently audible and intelligible, but it failed to reach the learned commissioner; I do not understand Mr. Benson's recollection to be that he applied in the terms of the Act. *Benson.*—I did not; I asked for a note, as I was denying liability; the answer did not come from Mr. Commissioner Kerr, but from the registrar, who said that a shorthand note was being taken.] A shorthand note is necessarily very much longer than a note taken by the judge would be, and it is quite evident that, if County Court judges are entitled to saddle litigants with this heavy expense as a condition precedent to an appeal, very serious injustice will be done, especially where the appellant is a person of small means.

CAVE, J.—I am of opinion that this rule must be discharged. Sect. 120 of the Act of 1888 provides distinctly for the circumstances under which a judge is to be required to take a note. [His Lordship having read the section, proceeded:] The first step is, that there must be a question of law raised, and then, when the question of law has been raised, there must be a request by one party or the other, and it is only when there has been a question of law raised and a request that the judge is to make a note; and he is first to make a note of the question of law, then of the facts in evidence in relation thereto, then of his decision thereon (that is, on the question of law), and then, as a separate matter, he is to make a note of his decision of the action or matter; showing very distinctly that it is only with regard to a question of law that is raised that he can be asked to make a note at all. Now, in this case, the learned commissioner, who is supported by the shorthand-writer—if his affidavit required any support, which I do not think it does—states that he never was requested to make a note of any question of law, and that seems to me entirely consistent with the affidavit of the solicitor for the defendant, who says "that the judge was desired by the defendant's counsel to take the usual note of the proceedings." Now the Act does not authorise a party to make any request of that kind, and he is not at liberty to ask the judge to take a note of the proceedings. It may be that there are more questions of law than one, and if so, the party must make his request with regard to each of those questions of law if he wishes to appeal, and he must ask the judge to take a note of the evidence with regard to each of those questions, and of his decision on each question of law. It is perfectly clear that nothing of that kind was done here. The judge is not bound to take a note or the usual note, whatever that may mean. He is only bound to take a note when the question of law is raised and he is asked to take a note of that question of law, and then he shall take a note of the evidence relating to that—not of the whole of the evidence of the proceedings—and of his decision upon that point of law, and of his decision upon the whole matter. The learned commissioner has stated in his affidavit what is the course he pursues, and that course appears to be exactly in accordance with the requirements of the Act. In addition to that more is done in this court, because, by the

Q.B. Div.]

AUSTRALIAN NEWSPAPER COMPANY v. BENNETT.

[Priv. Co.]

liberality of the corporation, a shorthand-writer is attached to it, who takes a note of the whole proceedings in every case, and when, as may possibly happen, it is impossible to comply with the statute and raise a point of law beforehand, and ask the judge to take a note of it—because, as Lord Bramwell observes in *Morgan v. Rees* (*ubi sup.*), the point may sometimes be that there is no evidence to warrant the final decision arrived at—then comes in the advantage of the course pursued by the corporation, that there is this note which is available for the suitor in the absence of the note which, under the circumstances, he has not been able to request the judge to take. He is not, in my judgment, confined to the note so taken by the shorthand-writer. Where the judge does not take the note, either because he refuses to take the note, or because the question of law is such that it cannot be raised at a time when he can take the note, then by leave of the court—which in such cases I apprehend would never be refused—the appellant may show what his point of law was and what the evidence was thereon by any evidence that may be available for that purpose. He is not bound to take a copy of the shorthand notes, because that is not the note that is contemplated by the Act, and in the absence of that note he may proceed upon his own affidavit. When it is clear that there has been no possibility of getting the regular note taken by the judge, then he has the choice either to obtain a copy of the shorthand notes, or else to give an account upon affidavit of what happened at the trial, and how it came about that the point of law could not be raised in the ordinary way and the judge requested to take a note, and in one way or the other he would be able to bring the facts to the knowledge of the court. It appears to me perfectly clear that here there was never any question of law raised upon which the judge was requested to take a note in the way required by the statute, and it is questionable whether there was any question of law raised at all upon which the learned judge decided against the appellant. Upon these grounds, therefore, I am of opinion that this motion was misconceived, and that this rule ought to be discharged with costs.

WRIGHT, J.—I am of the same opinion. One object of the last County Courts Act was to diminish appeals, and discourage them, except in cases where there was proper matter of law for an appeal. It was found that things which had not struck people during the trial as points of law when they were sanguine of success, were regarded afterwards, in the light of failure, as important points of law, and appeals were brought upon them; and the statute provided that all intended points of law should be expressly raised at the trial and brought to the attention of the judge there.

CAVE, J.—It is very important that the public at large should know what is the practice which prevails in this court. We see, from the affidavit of the learned commissioner which has been read, what that practice is, and it appears to me to be the best possible course that can be adopted.

Rule discharged, with costs to the learned commissioner, but without costs to the other party, on the ground that there was no reason for his appearance.

Vol. LXX., N. 8., 1897.

Solicitor for Mr. Commissioner Kerr, C. C. Crawford.

Solicitors for the defendants, Riddell, Vaizey, and Smith.

Solicitor for the plaintiff, C. F. Appleton.

Judicial Committee of the Privy Council.

Monday, April 9.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell). Lords WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS.)

AUSTRALIAN NEWSPAPER COMPANY v. BENNETT. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Libel—Imputation on manager of newspaper—Wilful falsehood—"Ananias."

An imputation upon a newspaper is not necessarily a personal imputation upon everybody connected with it.

A newspaper, of which the respondent was manager and part proprietor, published in an evening edition an erroneous statement as to the winner of a race which had taken place the same day. A newspaper, of which the appellants were proprietors, in a paragraph commenting on the mistake, spoke of the respondent's paper as "the M. Street Evening Ananias."

Held (reversing the judgment of the court below), that this was not necessarily to be understood as an imputation of wilful deliberate falsehood upon the respondent as manager of the paper, and that a verdict of a jury in favour of the appellants in an action of libel brought against them should not be set aside as unreasonable.

THIS was an appeal from a judgment of a majority of the Supreme Court of New South Wales making absolute a rule nisi for a new trial in an action of libel brought by the respondent against the appellants, in which the jury had given a verdict for the defendants.

The facts appear fully from the judgment of their Lordships.

Odgers, Q.C. and A. Adams appeared for the appellants.

Cozens-Hardy, Q.C. and H. Fraser for the respondent.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell).—This appeal arises in an action brought by the plaintiff, who is the manager, conductor, and part proprietor of a newspaper known as the *Evening News*, printed and published in the city of Sydney, against the appellants, the Australian Newspaper Company Limited, for a libel alleged to have been published in a newspaper conducted by them, called the *Australian Star*. The action came on for trial before Stephen, J. and a jury of four persons, and the jury by a majority of their number found a verdict for the defendants. An application was made to the full court, on behalf of the plaintiff, for a new trial, and a rule nisi was granted, and on the argument of the rule it

(1) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

AUSTRALIAN NEWSPAPER COMPANY v. BENNETT.

[PRIV. CO.]

was made absolute by a majority of two to one of the learned judges who composed the court, Stephen, J., the learned judge who had tried the action, dissenting. It appears that in the special edition of the *Evening News*, published on the evening of the day on which a boat race took place between two oarsmen named Kemp and McLean, the *Evening News* published a statement that McLean had won the boat race, but in the details which followed this statement it appeared that the race had really been won by Kemp. It was alleged that in another edition, published earlier on the same evening, the statement that McLean had won the race was not followed by any such details. On the latter point the evidence was conflicting. The *Australian Star* thereupon published certain paragraphs with reference to this incident. The first of these paragraphs contains the passage upon which the judgment of the court below has proceeded. It is in the following terms: "According to the Market Street Evening Ananias, both Kemp and McLean won the boat race yesterday. Poor little silly noozy." Windeyer, J., who pronounced the judgment of the majority of the court, said: "Much of the matter complained of in the plaintiff's declaration, however low and vulgar in style it may have been considered by the jury, may have been regarded by them simply as badinage, imputing no dishonourable conduct to the plaintiff, and it is impossible for us to say that such a view might not be taken by reasonable men called upon to decide whether the article was or was not a libel. What the plaintiff, however, chiefly complains of is that portion of the writing declared upon contained in the words 'According to the Market Street Evening Ananias, both Kemp and McLean won the boat race yesterday.' So that the judgment of the court below has proceeded exclusively upon that part of the alleged libel. It does not, therefore, appear necessary for their Lordships to do more than deal with that portion of the alleged libel which alone induced the majority of the judges to come to the conclusion that there ought to be a new trial. The innuendo attached to the words just read, upon which the plaintiff chiefly placed reliance, is as follows: "That the matter which the plaintiff was in the habit of publishing or allowing to appear in the said *Evening News* was such, and his conduct and management of the said *Evening News* was such, that the said *Evening News*, by reason of the publication of such matter, and by reason of such conduct and management on his part, had become notorious for wilfully false and lying statements intended to deceive the public, and that the said newspaper of the plaintiff was wholly unfit to be sold to, or read, or trusted by the public." It is not disputed that, whilst it is for the court to determine whether the words used are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. It was therefore the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged. Windeyer, J. observed in the course of his judgment that he admitted that the court would only be justified in reversing the finding of the jury "if their decision upon that point is such as no jury could give as reasonable men." This is a correct statement of

the law. Their Lordships have not, any more than the court below had, to determine in the present case what is the conclusion at which they would have arrived, or what is the verdict they would have found. The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men. The judgment of the court below was founded on the use of the word "Ananias." Windeyer, J. has expressed the opinion that only one meaning could be attributed to that word, that everyone must understand it to impute wilful and deliberate falsehood, and that, therefore, the mere use of the word "Ananias," which necessarily involves such an imputation, could not reasonably be held to be innocent, or to be otherwise than intended to cast this imputation upon the plaintiff. Even admitting that the natural effect of the use of the word "Ananias" standing alone would be to convey the imputation suggested, the learned judge appears to their Lordships, with all respect, to have lost sight of the fact that people not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which, in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves. Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon character must be for the jury. In the present case it is impossible to consider the use of the word detached from all that accompanied it in the newspaper issued by the defendants. The language used must be looked at as a whole in considering whether the jury could reasonably come to the conclusion that the use of the word was not intended to convey, and that those reading the newspaper would not understand it as conveying, the serious imputation suggested. It is to be observed that the expression "Ananias" is used in relation to the newspaper, and not to the plaintiff individually. No doubt offensive language applied to a newspaper may cast a reflection, and be understood as casting a reflection, upon persons connected with the newspaper. But it clearly cannot be maintained that every imputation upon a newspaper is a personal imputation upon everybody connected with the newspaper. Whether it is an imputation which would attach to any individuals, and, if so, to whom, must depend in each case upon the language used and upon the circumstances. The suggestion contained in the innuendo in the present case, which has been adopted by the court below, is that the use of the word imputed to the plaintiff that he was, in his conduct of the newspaper, guilty of making a wilfully false statement. Now, the statement in question was an erroneous statement as to the winner of the boat race. There could be no motive suggested for wilfully making such a statement, knowing it to be false. To do so would only be to injure the credit and reputation of the newspaper. Would any one of the public, when a statement of this sort was commented upon, suppose that the suggestion made was that the falsehood had been

inserted on purpose? It seems difficult to understand how anyone could arrive at that conclusion. The paragraph, which has been already quoted, says: "According to the Market Street Evening Ananias, both Kemp and McLean won the boat race yesterday." That, of course, refers to the *Evening News* having stated an impossibility as having occurred. When two men were racing against one another, both could not have won the race. One of those statements must be false. That would be the interpretation of it, or at all events (which is all that need be said) it might be the interpretation of it by anyone who read it, and it is in connection with that statement that the word "Ananias" is used. The plaintiff was the part proprietor, manager, and conductor of the newspaper. He was not the editor. There was no evidence given to show that he would be supposed to be even responsible on any particular occasion for the literary or news contents of his newspaper. The only reference to him in the article complained of is the statement, "It will result in the defeat of several reporters and several dozen other employes, if we know Alfred aright." It is not disputed that by "Alfred" would be understood to be meant the plaintiff, the proprietor of the newspaper. So far, therefore, from suggesting that this statement was a wilfully false statement, either inserted or countenanced by the plaintiff, it was open to the jury to consider whether, read in connection with these words, the language used would not indicate that, whoever was responsible for the statement, no such responsibility rested upon the plaintiff, but that he would make those who were responsible for the blunder feel the result of it by the loss of their employment. The question therefore is whether, in all these circumstances, it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character, or even upon his conduct in relation to the newspaper. The jury have so found, and their Lordships are of opinion that it would be exceeding the legitimate function of the court, if the verdict were set aside and a new trial ordered, that the court would then in reality be taking upon itself the function which the law has committed to the jury, of looking at the alleged libellous matter as a whole, and determining whether it is published of and concerning the plaintiff, and whether it bears the innuendo which the plaintiff seeks to attach to it. For these reasons their Lordships are of opinion that the rule absolute should be set aside and the rule nisi discharged, and that the respondent should bear the costs of the rule absolute, and the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitor for the appellants, G. P. Slade.

Solicitors for the respondent, H. Kimber and Co.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, April 4.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

DAVIS v. THE CORPORATION OF LEICESTER. (a)
APPEAL FROM THE CHANCERY DIVISION.

Corporation—Sale of land—Building scheme—Restrictive covenant—Conditions of scheme not submitted to Treasury—Approval of sale by Treasury—Rights of purchasers—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 108, 109, and 136.

In March 1888 the corporation of L. put up certain land for sale by auction under conditions which provided that dwelling-houses only might be erected, and fixed a building line, and which, in the opinion of the court, constituted a building scheme such as in the case of a private vendor could have been enforced against the lots retained in his hands. None of the lots to which the special conditions applied were sold at the auction, but in June 1883 D. bought parts of two lots subject to the conditions, and the property was conveyed to him on the 20th Nov. 1888. The conveyances contained no covenants on the part of the corporation to observe the conditions in respect of lots retained by them. The sale and conveyances to D. were duly approved by the Treasury. The Treasury had also given a preliminary sanction to the sale, but had not seen the conditions. In April 1893 the corporation agreed with the trustees of a Presbyterian church, for the sale to them of two other lots for the purpose of erecting a church. The plans for the church were submitted to and approved by the corporation, and a conveyance was approved by the Local Government Board (now substituted for the Treasury) and executed. The trustees had begun to build their church beyond the building line shown on the conditions. D. brought this action against the corporation and the trustees to restrain such building, and now moved for an injunction. The Municipal Corporation Act 1882, s. 108, provides that, the council of a corporation shall not, unless authorised by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury. Sect. 109 provides that, with such approval the council may sell land on such terms and conditions as the Treasury approve, and sect. 236 provides for fixing on the Town-hall notice of any application for approval of a sale.

Held (by North, J.), that the prohibition of sect. 108 must be construed to extend to the sale or alienation of any interest in or right over corporate land; that the Treasury had never approved the conditions of sale under which D. bought, nor had any notice of an intention to apply for such approval been given to the burgesses, as required by sect. 236; that therefore the corporation could not bind the lots retained in their hands by the conditions, and the claim of D. must fail.

Held (by the Court of Appeal), that the Treasury had not, as required by sect. 109, approved of the

(a) Reported by J. R. BROOKE and W. C. BISS, Esqrs., Barristers-at-Law.

CT. OF APP.]

DAVIS v. THE CORPORATION OF LEICESTER.

[CT. OF APP.]

land being sold to D. upon terms which gave him rights over other plots of land belonging to the corporation, and therefore the other lots were not bound by the conditions, and D.'s action therefore failed.

IN the year 1887 the corporation of Leicester, being anxious to sell part of their town estate for building purposes, submitted to the Lords Commissioners of the Treasury a preliminary sale scheme, consisting only of a plan and a valuation made by a surveyor. This scheme contained no conditions with regard to buildings to be erected or to a building line. On the 30th Aug. 1887 the estate committee of the council of the corporation reported to the council that the preliminary sanction of the Treasury had been given, and requested authority to fix the reserve prices and make all necessary arrangements for the offering by public auction of such portions of the properties as they should consider desirable. This report was adopted by the council, and in pursuance thereof particulars and conditions of sale were prepared by the town clerk and approved by the estate improvement sub-committee. The report of this sub-committee was approved and adopted by the estate committee. The particulars and conditions were never submitted to the Treasury, nor, except as aforesaid, to the council.

The property was put up for sale by public auction on the 26th March 1888 subject to these particulars and conditions. The general conditions provided that all the lots were sold subject to the approval of the council for the borough and the Lords of the Treasury, and reserved power to rescind if such consent was not obtained.

One portion of the land so put up for sale was shown on a separate plan as practically one plot of land which was then unbuilt upon. The adjoining land was all shown on the plan as already occupied by residences, and did not then belong to the corporation. This portion of land was divided into fifteen lots, numbered consecutively from 18 to 32 inclusive, and was offered for sale subject to special conditions providing (condition 10) for the payment of 2s. a yard for the cost of forming and sewerage half the roads; (condition 11) for the observance of certain building lines laid down on the plan, beyond which nothing was to be erected except fence walls and bay windows approved by the estate committee of the corporation; (conditions 12 and 13) that the purchaser of each lot was to erect a dwelling-house or houses thereon within two years, and not to erect any other building except stables or domestic offices, the position and arrangement of each house and stable being subject to the approval of the estate committee, and he was also to erect within a year and maintain a dwarf wall and fence along his front boundaries, with pilasters and gates, according to a design approved by the estate committee.

Conditions 14, 15, 16 required that each house should be of the value of 600*l.* at least, that all houses and structures should be externally towards the roads of such form and design as should be approved by the estate committee, and should be of specified materials, and the woodwork thereof painted every three years.

Condition 18 also provided for the making of a common carriage-way as to lots 21 and 22 and 30 and 32, which the judge held would have been

unnecessary if it had not been intended that the proprietors of these sites, whoever they were, should be subject to a common obligation as to the roads.

Condition 35 provided that the purchaser of each of these lots should enter into proper covenants in his conveyance for the observance and performance of such of the conditions as applied to his lot.

None of the lots numbered 18 to 32 were sold at the auction, but some of the other lands were so sold.

On the day after the sale a report of the estate committee, stating the result of the sale and that the committee were prepared to receive offers for the lots remaining unsold, subject to the council's approval, was received and adopted by the council.

On the 30th May 1888 the plaintiff, after some previous correspondence, wrote to the town clerk that he was willing to buy lots 31 and 32 at the prices named by the estate committee, and would want the contracts made out to himself and Mr. Witham. To suit the convenience of the plaintiff, the committee divided the two lots into three, and on the 26th June they reported to the council that they had agreed, subject to the approval of the council and the Treasury, for the sale of two pieces of land to the plaintiff and Mr. Witham, subject to the conditions. The council approved the report, and directed the town clerk to prepare the necessary memorial to the Treasury for their consent to the sale.

On the 27th June the town clerk signed, on the part of the corporation, formal contracts with the plaintiff and Witham for the sale, subject to the conditions, of lots 31 and 32, divided as aforesaid.

Notices of the intention of the corporation to apply for the approval of the Treasury to the sale of these lots to the plaintiff were duly posted according to the Act, and on the 27th Aug. a memorial was presented to the Treasury for approval of the said sale. Their sanction was given on the 5th Sept., and on the 23rd Nov. the lots were conveyed to the plaintiff by two conveyances which had been approved on behalf of the Treasury and executed by two Lords thereof. The conveyances contained covenants by the plaintiff to erect buildings, &c., in the terms of the conditions, but no covenants by the corporation as to the lots retained, and no reference to the conditions.

The plaintiff had entered into and continued in possession of the lots so sold to him. In 1890 the plaintiff purchased lot 30, and the sale was carried out as above.

In March 1893 the trustees of St. Stephen's Presbyterian Church, entered into negotiations with the corporation for the purchase of lots 18 and 19 in the said particulars, with a view to the erection of a church and schools thereon. After some negotiation, the corporation required the trustees to obtain the consent of the owners of the houses adjoining the said lots, and forbade the erection of any schools in connection with the proposed church, and on the 13th May 1893 entered into a contract, subject to the approval of the Local Government Board. Notice of their intention to apply for such approval was duly given and acted on, and the approval was given on the 19th Sept. 1893.

In the same month of Sept. 1893 the council approved plans for the proposed church which

encroached on the building line shown by the conditions of 1888. The trustees afterwards began to build in accordance with these plans.

On the 16th Nov. 1893 the plaintiff commenced this action against the corporation and the trustees for an injunction to restrain the erection upon any of the said lots 18 to 32 of any building other than a dwelling-house, or any building transgressing the building line.

The provisions of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), on which the case principally depended, are as follows:

Sect. 108. (1) The council shall not, unless authorised by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury.

Sect. 109. The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve.

Sect. 236. (1) Where the council intend to apply to the Treasury for their approval of any sale, loan, or other financial arrangement under this Act, notice of the intention to make the application shall be fixed on the town-hall one month at least before the application, and a copy of the intended application shall during that month be kept in the town clerk's office, and be open to public inspection.

(2) If the Treasury either refuse their approval or grant it conditionally or under qualifications, notice of the correspondence between the Treasury and the council shall forthwith and during one month be fixed on the town-hall, and a copy of the correspondence shall during that month be kept in the town clerk's office, and be open to public inspection.

By the Local Government Act 1888 (51 & 52 Vict. c. 41) the powers conferred by these sections on the Treasury were transferred to the Local Government Board.

The case was heard by North, J. on the 15th Dec. 1893.

S. Hall, Q.C. and Dunham for the plaintiff.—There can be no doubt that if the vendor had been a private owner the plaintiff, as purchaser of his lots under these conditions, would have had a right to have the conditions enforced against all other purchasers and the vendor. The corporation are trying to get out of their contract on the ground that the Treasury never sanctioned the building scheme. But the Treasury sanctioned the conveyance, and their sanction must be taken to have been given to a conveyance according to the contract and subject to these conditions. Even if this were not so, the object of requiring the consent of the Treasury is only to prevent a corporation selling at an under value; their consent was not necessary to the imposition of these conditions, which no doubt increased the price obtained for the land. The deed of conveyance recites that the sale was approved by the Treasury, and the corporation are estopped from denying that it was approved as a whole—i.e., according to the contract. It is suggested that the plaintiff has himself deviated from the building scheme, and so lost his right to enforce it. But the corporation assented to the division of the lots as the plaintiff required, and to the small deviation from the building line which the plaintiff has made, and the court will not regard a small breach of that kind as a waiver of the plaintiff's rights:

Besant v. Wood, 40 L. T. Rep. N. S. 445; 12 Ch. Div. 605.

Swinfen Eady, Q.C. and Thompson for the corporation.—There were no purchasers at the auction in 1888, and therefore the corporation ceased to be bound by the scheme, even if they would have been bound to purchasers at that sale. The plaintiff's contention is that immediately on the contract being signed all the unsold land became bound. But there is no express contract to observe the conditions with regard to the unsold land, and the corporation had no power to bind their land by any such contract, express or implied, without the consent of the Treasury. [NORTH, J.—If the corporation agree with A. to sell him a piece of land with the consent of the Local Government Board, and at the same time agree not to build upon the adjoining land, does that second agreement require the consent of the Board?] Certainly; it amounts to an alienation of part of the corporation's rights in the land. In *Arnold v. The Corporation of Gravesend* (27 L. T. Rep. O. S. 97; 25 L. J. N. S. 530) Wood, V.C. (p. 98) treats precisely similar words in the Corporations Act 1835 as absolutely prohibiting all dealing with the land of any kind. But there is no implied contract; if there had been the purchaser had a right to have covenants by the corporation to observe the covenants inserted in the conveyance:

Re Birmingham and District Land Company and Allday, 67 L. T. Rep. N. S. 850; (1893) 1 Ch. 342.

The absence of the covenants shows that the corporation were not intended to be bound. In any case there was no contract under seal, and the doctrine of part performance does not apply in the case of a corporation:

Young v. The Corporation of Leamington, 49 L. T. Rep. N. S. 1; 8 App. Cas. 517.

In all these cases it is a question of fact to be deduced from all the circumstances whether the vendor is to be bound with respect to unsold land:

Re Birmingham and District Land Company and Allday (*ubi sup.*).

And it is much more difficult to make the deduction that the vendor is bound in the case of separate contracts made at different times than where all the land is sold at once:

Tucker v. Fowles, 67 L. T. Rep. N. S. 763; (1893) 1 Ch. 195.

Everitt, Q.C. and McSwinney for the trustees of the church.—The trustees had no notice whatever of any sale to the plaintiffs, or of the conditions under which it was made. It is the duty of the Treasury to see not only that the land is sold at a proper price, but under proper conditions: (Municipal Corporation Act 1882, ss. 109 and 236 (2)). The conditions under which the land is to be sold are an important element in determining a proper price. It is clear on the evidence that the conditions were never approved by the council. The sub-committee who approved them could not bind the corporation.

S. Hall, Q.C. in reply.—It is said the conditions were not consented to either by the council of the corporation or the Treasury. As to the council the minutes of the sub-committee were received and confirmed. As to the Treasury, the conveyance to which they did consent refers to the contract, and the plan on the conveyance shows

CT. OF APP.]

DAVIS v. THE CORPORATION OF LEICESTER.

[CT. OF APP.]

the building line. But their consent was not necessary. The words "sell, mortgage, or alienate" in sect. 108 of the Municipal Corporations Act 1882 must be taken in their natural sense. A covenant binding the corporation is not a sale.

Feb. 27.—NORTH, J.—The plaintiff, who has purchased land from the corporation of Leicester, seeks to restrain the corporation, and subsequent purchasers from them, from erecting a church upon land sold to the latter. In the first place, I shall treat the corporation as having all the powers of an individual owner, reserving for subsequent consideration what is the result of their being a municipal corporation. [His Lordship read the conditions stated above, and proceeded:] There is no doubt that the publication of these particulars and conditions was, to use Lord Macnaghten's language in *Spicer v. Martin* (60 L. T. Rep. N. S. 546; 14 App. Cas. 12), an invitation to the public to come in and buy portions of this estate upon the footing of the general building scheme put forward therein, intended to bind all the purchasers as likely to be for the benefit of all, and to enhance the values of their respective properties, and, consequently, to increase the price they would be willing to pay for their respective lots. The rights of the purchasers *inter se*, when such a scheme exists, to enforce the provisions thereof against one another, and the obligation attaching to the vendors to observe and perform the same, are now thoroughly settled and recognised. See *Renals v. Cowlishaw* (38 L. T. Rep. N. S. 503; 41 L. T. Rep. N. S. 116; 9 Ch. Div. 125; 11 Ch. Div. 866), *Nottingham Brick and Tile Company v. Butler* (54 L. T. Rep. N. S. 444; 15 Q. B. Div. 261; 16 Q. B. Div. 778), *Mackenzie v. Childers* (62 L. T. Rep. N. S. 98; 43 Ch. Div. 265), and *Spicer v. Martin* (*ubi sup.*). The particulars and conditions had been prepared by the town clerk and submitted by him to the estate improvement sub-committee of the corporation, and considered and approved by them; their report had been approved and adopted by the estate committee and duly recorded; and under sect. 22, sub-sect. 6, of the Municipal Corporations Act 1882, these committees must be deemed to have been duly constituted and to have had power to deal with the matters in question. The auction took place on the 26th March. None of the lots numbered from 18 to 32 were sold, but some of the other lands offered did find purchasers. On the following day a report of the estate committee, stating the result of the sale and that the committee were prepared to receive offers for the remaining lots unsold, and would report further to the council as occasion might require, was approved and adopted by the council. The town clerk, in his very fair and temperate affidavit, says that the particulars and conditions were never actually submitted to the council. But I think that immaterial under the circumstances above stated, and especially having regard to the conveyances to be mentioned hereafter. [His Lordship stated the facts as to the execution of the conveyances, and proceeded:] After the execution of these deeds it seems to me impossible to say, as the defendants argued, that the contracts entered into by the town clerk on behalf of the corporation were not approved by the council of the borough. The plaintiff swears that he made his purchase in the faith that

the conditions as to the building lines and otherwise would be observed on all the other lots, and I see no reason to doubt the truth of this statement. It was contended by the defendants that the forms of their conveyances showed that it was not the intention that the corporation and purchasers of the remaining land from them should be fettered by any building scheme, as, if this had been the intention, the corporation would have been required to enter into corresponding covenants, and could, according to the recent decision in *The Birmingham Land Company's case* (67 L. T. Rep. N. S. 850; (1893) 1 Ch. 342), have been compelled to do so. This argument is not well founded. So far as my experience goes, it was not before that decision the usual practice to make vendors under a building scheme enter into covenants with purchasers as to the user of unsold lots, though it probably will be more common in future. Sometimes vendors have inserted a condition that they will, until sale, hold unsold land subject to the conditions of the scheme, but very often even that is omitted. And the cases make it clear that the absence of such covenants is not fatal. As Hall, V.C. said in *Renals v. Cowlishaw* (*ubi sup.*), "The right exists, not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established." See *Spicer v. Martin* and the other cases which I have already referred to. The defendants also contended that the division of lots 31 and 32 into three portions, instead of two, was in itself a departure which had the effect of making the alleged scheme not binding; but to this again I do not assent. The effect of this might have been different if it had been to authorise something forbidden by the scheme; but this was not the case. The plaintiff was not restricted from dividing his lots, or as to the number of houses he might erect on each. If he had taken one conveyance to himself of the whole of lots 31 and 32, the corporation could not have complained if he had built three houses on them, and then sold the central house, as this would not have been at variance with any condition or covenant. I see no departure, or evidence of departure, from the scheme in what was done. In the year 1890 the plaintiff contracted to purchase lot 30 from the corporation, and the conveyance was completed in May 1891. This transaction was carried through by printed contract, resolutions, and conveyance, on exactly the same lines as the other, and it is not necessary to mention it further. I am satisfied that the corporation were still carrying on the same building scheme first put forward in 1888, and it is not suggested by the town clerk that there had been any change of scheme or purpose. The defendants also contend that the plaintiff has lost any rights he might otherwise have had by having himself violated the alleged building scheme, by erecting houses which project beyond the fixed building line. Even if such a transgression were proved as alleged, the encroachment would have been trivial. The corporation never made any complaint of it. What was done was done by arrangement with their own officers and according to plans passed by the corporation, and they cannot be heard to complain of it now. But I am not satisfied upon the evidence that the building line was violated by the plaintiff, or the substance of the scheme departed from to any

extent. In the month of March 1893 the trustees of St. Stephen's Presbyterian Church (of whom the defendants Macleod, Urquhart, and Crawford are the present representatives) entered into negotiations with the corporation for the purchase of lots 18 and 19, with a view to the erection of a church and schools thereon. On the 25th April the corporation approved and adopted a report of the estates committee, and directed that a memorial to the Local Government Board (which had by the Act of 51 & 52 Vict. c. 41, s. 72, been substituted for the Treasury) for their sanction to the proposed sale on the conditions stated in that report, should be sealed with their common seal. That report stated that, subject to the confirmation of the council, they had agreed to sell the land in question to the church trustees, subject to the building line being set back from the new street to a uniform depth of 25ft., and also stated that it had been arranged that, in addition to a dwelling-house or dwelling-houses as required by the special conditions of sale, a church or chapel with a hall thereto might be erected on the land, but that no day or Sunday schools were to be erected or held in any of the buildings. And on the 13th May formal contracts were signed by the town clerk and church trustees respectively in the usual printed form annexed to the particulars and conditions put forward in and used ever since 1888, with the addition thereto of words embodying the arrangement or variation as to the erection of a church referred to in the report of the estates committee. This variation was obviously a departure from the building scheme, under which no buildings but dwelling-houses, with domestic offices, could be erected on lots 18 and 19. The alteration in the building line was also a departure from the scheme, inasmuch as building was by the new contract authorised much nearer (in one part as much as 15ft. nearer) to the road than was permitted by the original plan and conditions. The defendant trustees have been let into possession, and have proceeded with the erection of their church, and in so doing have approached nearer the road than even the new building line permitted, and the plaintiff has commenced this action to restrain the defendants from building or permitting to remain upon the land the church now being erected thereon. The plaintiff's case rests to some extent upon the allegation that the church will be an eyesore or disfigurement, and an annoyance to the plaintiff; but I think, considering the distance between the plaintiff's land and the church, and the nature of the intervening land, that this complaint is an idle one. His counsel abandoned it, and relied upon the charge that the erection is a violation of the building scheme—so I think it clearly is. It was contended that the plaintiff had known so long of the intention to erect a church on this site that he could not be entitled at any rate to an interlocutory injunction. But be this as it may, he swears that he did not know until the 13th Nov. that the church was to encroach on the old building line, and his notice of motion was given on the 17th Nov. The church trustees alleged that they never knew till after the purchase that the plaintiff had purchased any part of this estate, or claimed any right to enforce the restrictive conditions. This may be quite true. But, though they might know nothing of the plaintiff individually, they do not, and obviously

could not, deny that they were aware of the existence of the building scheme, and must have known that some persons had purchased parts of the estate comprised in it, and, whether they knew it or not, they had not taken up their conveyance when this action was commenced against them. Under these circumstances I am of opinion that, if the vendors had been private individuals, and not a municipal corporation, the plaintiff would have been entitled to an injunction against the defendants. Does the fact that the vendors are a municipal corporation alter the case? The contracts by the plaintiff, which were signed by the town clerk, were expressly made subject to the consent of the council and of the Lords of the Treasury. I have already expressed my opinion that the corporation by their acts, and especially by the conveyances, confirmed what was done on their behalf, and having regard to the fact that the contract has been completely performed by the plaintiff, and to the doctrines as to the effect of performance upon a contract, not wholly in writing, expressed in the judgment in *Maddison v. Alderson* (49 L. T. Rep. N. S. 303; 8 App. Cas. 467), I see no difficulty in arriving at the conclusion that the corporation is bound, subject to the question as to their power to bind themselves, now to be considered. By sects. 108, 109 of the Municipal Corporations Act 1882, a municipal corporation cannot, unless authorised by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury, but may, with such approval, dispose of any corporate land by way of absolute sale, or by way of mortgage, charge, demise, lease, or otherwise in such manner and on such terms and conditions as the Treasury approve. The words "or otherwise" seem to me very important, and I understand the effect of these sections to be that a corporation cannot dispose of its land, or any right or interest therein at all without the sanction of the Treasury, unless by the authority of some Act of Parliament. A voluntary conveyance of land, for instance, would be forbidden by the Act. The mode of application for such approval is by memorial to the Lords of the Treasury; and sect. 236 of the same Act provides that, where the council intend to apply to the Treasury for their approval of any sale, notice of the intention to make the application is to be fixed on the town-hall, one month, at the least, before the application, and a copy of the intended application is, during the month, to be kept in the town clerk's office, and be open to public inspection. Lord Hatherley, in *Pallister v. The Corporation of Gravesend* (27 L. T. Rep. O. S. 282; 25 L. J. 776, Ch.), referring to provisions in the Municipal Corporations Act 1835 practically identical with the provisions of the 1882 Act, now under consideration, says: "The very requisition of the statute, as to the publication of the memorial, and the application to the Treasury show that the burgesses were to have the means of satisfying themselves as to the conduct of the council, and, if they thought proper, of contesting the intended raising of the money. All which things show that the Commissioners would not be supposed to go beyond the memorial submitted to them. Then the council, having acted upon this approval or a memorial previously submitted by them to the Treasury, cannot afterwards give to the mortgagee a further charge on all their property."

CT. OF APP.]

DAVIS v. THE CORPORATION OF LEICESTER.

[CT. OF APP.]

Previously to the passing of the Act of 1835 a corporation could dispose of its land much as it pleased. But their property having, by virtue of that Act, become trust property in their hands, and their powers of dealing with it being thus cut down, the next step is to see what was done in the present case. In 1887 a preliminary scheme for the sale of land of the corporation (including all the lots from 18 to 32, except lot 26), with a plan and valuation by Mr. Goodacre, was submitted to the Treasury at their request. The lands were referred to generally as "building land," but no conditions or terms were mentioned or referred to. To that preliminary sale scheme a general approval was given. The estate committee was then authorised by the council to determine upon the lots, fix the reserve prices, and make all necessary arrangements for offering the same for sale by public auction, and the particulars and conditions were then prepared by the town clerk, and approved as already mentioned. Early in July 1888 notices were fixed on the door of the town-hall of the intention of the council to apply to the Treasury for their approval of the sale and conveyance to the plaintiff and Mr. Witham of the portions of lots 31 and 32 agreed to be sold to them respectively, and stating that a copy of the proposed memorial would be open for a month for the inspection of any burgesses at the town clerk's office. This notice remained there till the 27th Aug., and on the 29th Aug. a memorial was presented to the Treasury, stating that the corporation had agreed to sell those lands to the plaintiff (describing them particularly and stating the price), that these pieces of land were included in the arrangements for the sale of other properties which had already received the approval of the Treasury, and were comprised in the lots UU and VV on the plan attached to the valuation of Mr. Goodacre, and that the prices agreed on were higher than those named in the valuation, and it prayed for the approval of such sale. A like memorial was presented at the same time as to the land purchased by Mr. Witham. On the 4th Sept. those memorials were answered by letter conveying the sanction of the board to the proposed sales, but that the formal sanction of the Lords of the Treasury would be obtained by two of them being made parties to the deeds, drafts of which must be sent to their solicitor for perusal. That was done, and the conveyances were duly completed accordingly. Precisely the same course was adopted on the subsequent sale to the plaintiff in 1890. The arrangements for sale referred to in the memorials were merely the submitting to the Treasury Mr. Goodacre's plan and valuation, of which the Treasury had expressed a general approval. This was all that had been done. The Treasury was never informed that the corporation had embarked upon any such building scheme as was put forward by them in 1888, and the burgesses never had any such notice of, or opportunity of objecting to, such a scheme as the statute requires. The Treasury never sanctioned the disposition by the corporation in favour of the plaintiff of any other lands than those actually conveyed to him, or any right or interest in such lands, and I think the defect one of substance. The Treasury had, and the Local Government Board now have, the duty of seeing that corporation land is not sold for less than its proper value. What might be adequate value for a building lot,

if sold without the benefit of conditions affecting other lands, might be much too small a price, if the sale were accompanied by a collateral contract that the adjoining land (of equal value for building, but otherwise of little value) was to be kept unbuilt upon. The Treasury when asked to sanction a sale of corporation land is not in a position to express approval when kept in ignorance of the fact that the conveyance not only disposes of the land sold, but also disposes of and confers rights over other lands of the corporation. The plaintiff is in this dilemma. The Treasury have given their approval to all that can be found within the four corners of the deeds of conveyance to the plaintiff, but nothing to be found in those conveyances gives him any right of action against the defendants. He claims larger rights outside the conveyances, but these rights depend upon a disposition of corporate property which has not been approved by the Treasury, and the absence of that approval is a fatal defect. The plaintiff's counsel contended that the corporation ought to have obtained the approval of the Treasury to their whole scheme, and ought not to be allowed to set up a defect arising from their own default and neglect. But I doubt whether this argument is sound. See *Mulliner v. The Midland Railway Company* (40 L. T. Rep. N. S. 121; 11 Ch. Div. 611). Even if it is, it will not avail the plaintiff, for the objection is equally fatal to his case if set up by the church trustees, who are not in default. Under these circumstances I must dismiss the motion, and, as against the church trustees, with costs. But, as I think that the plaintiff has great reason to complain of the conduct of the corporation, I dismiss the motion as against them without costs.

From this decision the plaintiff appealed.

S. Hall, Q.C. and Dunham, for the appellant, submitted similar arguments to those in the court below, and further referred to

London and South-Western Railway Company v. Gomm, 46 L. T. Rep. N. S. 449; 20 Ch. Div. 562;

Mackenzie v. Childers, 62 L. T. Rep. N. S. 99; 43 Ch. Div. 265;

Wilson v. The West Hartlepool Railway Company, 2 De G. J. & Sm. 475, 496;

Crook v. Corporation of Seaford, 25 L. T. Rep. N. S. 1; L. Rep. 6 Ch. App. 551.

Swinfen Eady, Q.C. and F. Thompson for the corporation, and *Everitt, Q.C. and McSweeney*, for the trustees of the church, were not called on.

LINDLEY, L.J.—I think that the objection which has been taken cannot be got over. The case is a peculiar one. In 1887 the corporation of Leicester were desirous of disposing of a portion of their property in accordance with a certain building scheme; and in 1888 some lots were put up for sale by auction in accordance with certain conditions of sale which have been referred to. The plaintiff did not buy at that auction, but he afterwards entered into a private contract for the purchase of three lots—30, 31, and 32—and those contracts referred to the conditions of sale, and the conveyances of those lots were afterwards made, and made in the form which, if not usual, at all events is so common as to be almost a matter of course; that is to say, the purchaser entered into a covenant that he would do certain things on the lots purchased by him and conveyed

to him; but there was not in the conveyance any similar covenant by the vendors that they would abstain from doing particular things upon other property which they still retained in their possession, nor was there in that conveyance any covenant or stipulation that the corporation should be, as it were, trustees for the benefit of the plaintiff of any covenant entered into by purchasers of other lots with them. So far as this conveyance is concerned it does not contain any covenant by the vendors except the ordinary covenant of title. Now, notwithstanding that, it is asserted, and I think it is correctly asserted, that the terms and conditions upon which this property was bought do entitle the purchasers to the benefit of those restrictive stipulations which were introduced for the benefit of everybody who was buying according to the terms and conditions which were printed and circulated at the time of the sale by auction; in other words, that the purchaser of each lot purchased upon the terms that he should be entitled to the benefit of those restrictive stipulations. Without having heard the other side I am disposed to follow the judgment of North, J. on that point. Then comes the question and difficulty which is peculiar to this case. The vendor here was not an ordinary person *sui juris*; it is a corporation bound in dealing with its property by the provisions contained in the Municipal Corporations Act of 1832, which is a consolidation with one or two amendments of the previous Municipal Corporations Act of 1835 and subsequent Acts amending it. In order to understand the restrictions imposed by those Acts upon municipal corporations in dealing with their own property, we must look back and see what great alterations were made in 1835. Prior to 1835, as the case of the *Corporation of Colchester v. Louten* (1 V. & B. 226) shows, a municipal corporation could sell and dispose of its property. In that case the Attorney-General argued that the corporation property was trust property, and that the corporation were fettered in their disposal of it. Lord Eldon decided the contrary. The great change introduced in 1835 was to make the property of municipal corporations trust property, and that was done, so far as real estate was concerned, by throwing the rents and profits into what is called the "borough fund," and the borough fund, including the rents and profits of the corporation, could only be dealt with under the Act of 1835 in a certain specific manner enumerated in that Act. That altered the whole aspect of the property of municipal corporations. That has been continued from 1835 down to the present time, and in the Act of 1882, sect. 139, we find the old provision in the Act of 1835 respecting the borough fund reproduced. That is the section that prevents municipal corporations from doing what they like with their own property. The material sections of the Act of 1882 that we have to consider now are sects. 108 and 109. Those two sections must be construed with reference to the alterations made in 1835 to which I have alluded, the alterations, I mean, which transformed the property of municipal corporations into trust property. Sect. 108 is a negative one, and provides: (1) The council shall not, unless authorised by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury. (2) The council shall not, unless authorised by Act of Parlia-

ment, lease or agree to lease, any corporate land without the approval of the Treasury." Then come certain exceptions which are not material to this case. The next section (109) is an enabling section, but an enabling section which contains in it a negative stipulation. It provides: "The council may, with the approval of the Treasury, dispose of any corporate land either by way of absolute sale or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve." Now, reading that in connection with the clause relating to the borough fund, what does it mean? It means, that although this property of the corporation is no longer, as it was, their own property, so that they can do what they like with it, although it is converted into trust property, and the corporation is fettered in the disposal of it, they may, with the consent of the Treasury, do certain things. That means, as I understand it, that you cannot do those things without the consent of the Treasury, otherwise sect. 109 would become reducible to a dead letter. Now, what have the corporation done here? They have obtained the consent of the Treasury to the conveyance of certain of these lots, and in particular to the conveyance of the various lots purchased by the plaintiff in this case. But what they have not done, whether by oversight or otherwise I do not know, is this, they have not obtained the consent of the Treasury to the disposition of any lots of land upon the terms that the owner of that lot shall have rights negative or affirmative over the other land of the corporation. That has never been done. That raises a very great difficulty, and, to my mind, an insuperable difficulty. We are asked, in the face of that omission, be it intentional or not, to infer some obligation on the part of the corporation to fetter themselves in the disposal of land not sold to the plaintiff; in other words, we are asked to say that, although the Treasury have never been consulted on the subject, the land sold to the plaintiff has been disposed of upon such terms and conditions as entitle him to say that the corporation is under an obligation to him to preserve other property in a particular shape, and not to sell it except subject to certain specified conditions. I think we have no business to infer such an obligation at all. It is not to be found in the conveyance, as I have already pointed out. There is no covenant to that effect. It is to be found, if it is to be found at all, upon the consideration of the building scheme; but in face of this clause, to which I have referred, I do not think it would be right or proper judicially to draw the inference we are asked to draw in this case, that is to say, that the plaintiff has acquired rights over other property not conveyed to him, the Treasury not having assented to it; and to impose upon the other property those restrictions and fetters which the plaintiff seeks to put upon it. I think that is a fatal blot in this particular case, and that the view of North, J. on this particular point is as well founded as his view in favour of the plaintiff on the other points. I am of opinion that this appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The plaintiff Davis contends that he is entitled to the benefit of certain restrictive covenants affecting land other than that which he bought, the restrictive covenants appearing in the conditions

CT. OF APP.]

DAVIS v. THE CORPORATION OF LEICESTER.

[CT. OF APP.]

of sale under which he purchased. The particular condition (12) relating to the lots which he bought provides that the purchaser of each lot shall erect thereon a dwelling-house or houses within two years after he has entered into possession, and shall not erect any other building thereon than such house or houses and domestic offices required for the same, the position and arrangement of any coach-house or stable to be nevertheless subject to the approval of the estate committee. Now what has happened is this: Years after Davis bought, quite within a recent period, certain trustees of a chapel proposed to erect upon one of the lots, about 300 yards from the lots which the plaintiff bought, a certain chapel and a school-house, and it is that of which Davis complains. He says under the force of these restrictive conditions he is entitled to prevent that chapel and school being built. Now, I will assume that he is entitled to the injunction which he claims, subject to the provisions of the Municipal Corporations Act 1882, and particularly to those two sections which have been referred to by my brother Lindley, I mean sects. 108 and 109. After careful consideration, it appears to me that these two sections ought to be read together, and that the true meaning of the two sections read together is this: that the council are not, unless authorised by Act of Parliament, to sell any corporate land without the approval of the Treasury in any circumstances. That is sect. 108. But sect. 109 goes on and, I think, means this: but with the approval of the Treasury they may dispose of any corporate lands in any manner, on any terms, and on any conditions, provided the terms and conditions are approved of by the Treasury. It appears to me that is the proper reading of those two sections, and it must be remembered that the object that the Legislature had in view in enacting as it has, was to prevent any corrupt or imprudent or improvident dealings with the corporate property. If that is the true reading of sect. 109, which is the important section in this case, let us see what has happened here. The sale of these lots which the plaintiff has purchased has, beyond all question, been approved of by the Treasury. The conveyance has been submitted to them, and in point of fact they are parties to that conveyance. But in that conveyance no restrictive covenants of any sort or kind appear which affect these particular lots upon which the chapel is proposed to be erected. There is no notice of any restrictive covenants. In point of fact, as I understand, the building scheme has never been brought to the notice of the Treasury. There is nothing in the conveyance; there is nothing, in point of fact, in anything which came before the Treasury to give them notice or warning of any of the restrictive covenants which are relied upon by the plaintiff Davis in this case. That being so, the conclusion at which I arrive is this: that it is impossible to say in these circumstances, in the words of sect. 109, that these conditions—because they cannot be called anything but conditions—have been approved of by the Treasury. I think, therefore, the conclusion to which North, J. arrived was the right one.

KAY, L.J.—I only desire to add a few words out of respect to the very ingenious argument which has been addressed to us by Mr. Hall and Mr. Dunham. It is important to observe that the nature of this action is an action for specific per-

formance of an alleged agreement which is not expressed, but is to be implied. The writ is indorsed for an injunction to restrain the defendants from departing from the terms of that alleged implied agreement, and, of course, that is only one mode of obtaining specific performance of that agreement in a court of equity. Now, what is the agreement? The plaintiff is a person who has bought certain lots of land sold by the corporation of Leicester under what he says is a building scheme. The lots were all put up for sale by auction at one time. They were not then disposed of, but afterwards he bought certain of them, lots 30, 31, and 32, by private contract, but upon the terms stated in the conditions of sale, which include this particular agreement on which he now relies. The agreement was expressed in the conditions of sale as an agreement which was to be entered into by each purchaser, as to his particular lot, to abide by the scheme of building which was shown by those conditions and the plan annexed to them, and, speaking generally and roughly, the condition was a condition that no houses should be built upon any of the lots except dwelling-houses, and those dwelling-houses were to be built within the building line which was shown upon the plan. Now, he alleges that, since this purchase, some of the defendants, the co-defendants being the corporation, have bought from the corporation other lots, upon the terms that they may, the corporation assenting to it, depart from that building scheme, and erect instead of dwelling-houses a chapel and a school, and, moreover, erect them beyond the building line which was shown on that plan. Now, the plaintiff took a conveyance of part of his purchase in Nov. 1888 and he bought another lot in Dec. 1890, and obtained a conveyance of it. In his conveyance there is no contract whatever by the corporation that the rest of the land shall be dealt with according to the building scheme. He has no direct contract with the corporation to that effect at all, except that which may be implied from the conditions contained in the original building scheme, which, as I have said, were conditions that each purchaser should contract with the vendor to observe that building scheme. But I do not doubt for a moment that the learned judge was quite right in saying that, if this had been a transaction between individuals, the effect would have been to bring this case within the well-known decisions which are referred to in the House of Lords in *Spicer v. Martin* (60 L. T. Rep. N. S. 546; 14 App. Cas. 12), and that there would have been an implied contract, not only between him and the vendor, but between other purchasers from the vendor and him, that the building scheme should be adhered to by the vendor and by such other purchasers, and accordingly this action would have been quite right if the parties had been in the position of ordinary individuals who have power to deal with their own property. But the difficulty in this case arises from the fact that the vendor here was a corporation, and therefore came within and is bound by the provisions of the Municipal Corporations Act 1882. The sections which especially apply to this particular case are sects. 108 and 109. Now, clause 108 is, as has been well urged, a prohibitory clause. It provides that a municipal corporation shall not sell, mortgage, or alienate any corporate land without the approval of the

Treasury. That is a negative clause entirely. It takes away from them the power which originally corporations had at common law of dealing with land belonging to them. But, then, sect. 109 is differently worded, and I agree it is worded in an enabling form. It follows immediately and provides that, "The council may, with the approval of the Treasury, dispose of any corporate land, either by way of absolute sale or by way of exchange, mortgage, charge, demise, lease, or otherwise in such manner and on such terms and conditions as the Treasury approve." Now, reading those two sections together, what is the meaning of them? The first takes away all right of disposition from the corporation. The second says, except with the approval of the Treasury, and it defines what is meant by the approval of the Treasury. They are not merely to approve of the corporation selling the land, but they are to approve of each particular sale when it comes to be made; they are to approve the price, they are to approve, to take the very terms of the section, the terms and conditions on which that sale is made, and I think it is inevitable that the meaning must be this: "You shall not sell any land whatever except with the approval of the Treasury, and that approval shall be the approval of the particular sale and of the terms and conditions on which each particular sale is made." The two sections are perfectly reconcilable, and the function of sect. 109 is to define what sort of approval is intended by the simple word "approval" in sect. 108. Then in that case what we have got is this: the building scheme has never been before the Treasury in any kind of way. They never knew of it. The conveyance to the plaintiff does not mention the building scheme; it mentions none of those conditions and restrictions on which the plaintiff now founds this action. The Treasury did see the conveyance. It was submitted to them, and two Lords of the Treasury are parties to the deed, and they approved of that conveyance. Mr. Hall urged with very great ingenuity a proposition in which I entirely fail to agree. He said that the conveyance, although it does not refer to the building scheme, and although it does not contain any contract by the vendors as to their dealings with the other land, still does refer to a contract under which the plaintiff bought, and that must have given the Treasury notice that there was a preceding contract, and therefore they had constructive notice of the terms of this contract. But what then? I never yet heard that the doctrine of constructive notice had been pushed so far as to say that when a body in the position of the Treasury in this case had such constructive notice they must be taken to have approved of that of which they had constructive notice. I should have thought that the doctrine which has always been observed in cases of election, waiver, and the like, namely, that, in order to fix a person with election or with waiver of a right, it must be made out that he had full notice of all the facts and of his rights, would apply *à fortiori* to a case of this kind. Before you can possibly fix the Treasury with approval of this building scheme you must at least show that the Treasury had not merely constructive notice, if they had such notice, but that they had the fullest possible knowledge of the building scheme and deliberately and intentionally signified their approval of it.

Nothing of the kind is shown in this case. I do not even think they had constructive notice of it, as there is only a reference in the conveyance to the contract, and they are not bound to look any further than the conveyance. The conveyance was only submitted to them to see whether they approved of that particular sale of which the conveyance expressed the terms, and they did approve of that sale, and none of those terms which it is now sought to enforce were contained in that conveyance at all. Therefore, I think that argument entirely fails, and does not impress my mind at all. Then Mr. Dunham, with very great ingenuity, if I may be allowed to say so, said that there was no disposition of these lands, the use of which was restricted by the building scheme as regards the plaintiff, I mean the lands which he did not buy, including the lands which the defendants, the trustees, have since bought, that there is no disposition of them, and therefore sect. 109 does not apply to the case. But I do not read sect. 109 in that way at all. There was a disposition to the plaintiff of the land which the plaintiff bought, and he says that the terms and conditions of that disposition were that the corporation and other purchasers from them should be restricted in their dealings with the rest of the land. His whole case is, that these were terms and conditions attached to the disposition of his land. That seems to me to be the very thing which was intended and meant to be prevented by sect. 109. If those terms and conditions are to be made binding on the corporation, they can only be made so by being brought clearly to the knowledge of the Treasury and receiving the approval of the Treasury. Therefore the case is reduced to this: that the plaintiff is now seeking to bind the corporation, and the other defendants who have purchased other lands from the corporation, by an implied agreement from the building scheme, which he says was a term and condition of the disposition of the land to him which he bought, which alleged implied agreement and which terms and conditions have never been submitted to the Treasury at all, and, of course, have not been approved by them. The answer is, that such a thing would be *ultra vires* the corporation altogether, because, as I read sect. 109, such terms and conditions attached to the sale of the particular lands which the plaintiff bought could not be made valid and binding upon the corporation without the approval of the Treasury. There was a very easy mode by which the plaintiff could have provided against this if he had chosen. No doubt it was first of all the duty of the corporation to obtain the approval of the Treasury; but the thing was in the plaintiff's own power, because, if he had had the terms and conditions expressed in his deed, then they would have been brought to the attention of the Treasury and the difficulty would not have arisen. From the way in which the case is put it seems to me that this is an attempt to obtain specific performance of an implied agreement, implied from the existence of a building scheme, which implied agreement was one of the terms and conditions upon which the plaintiff says he bought, and those terms and conditions have not been approved by the Treasury. They were *ultra vires* the corporation which he seeks to bind by them, and neither the corporation nor the subsequent purchasers from the corporation can be treated as so bound. I think, there-

[CT. OF APP.]

Re HEAD; HEAD v. HEAD (No. 2).

[CT. OF APP.]

fore, this appeal fails, and the decision of the learned judge should be affirmed.

Solicitors: *Morse and Simpson*, agents for *Parsons, Wykes, and Davis*, Leicester; *Field, Roscoe, and Co.*, agents for *John Storey*, Town Clerk, Leicester.; *Surr, Gribble, and Co.*, agents for *R. and G. Toller and Sons*, Leicester.

Thursday, April 5.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re HEAD; HEAD v. HEAD (No. 2). (a)

APPEAL FROM THE CHANCERY DIVISION.

Partnership—Bankers—Current account—Death of one partner—Transfer of part of balance to deposit account—Liability of estate of deceased partner—Novation.

A. and B. were in partnership as bankers, and C. had a current account with them. A. died, and C., knowing of his death, went to the bank and intimated his intention to draw 500*l.*, but at the suggestion of B. he decided to leave it on deposit, with interest at 3½ per cent., and subject to twenty-one days' notice of withdrawal. A deposit receipt was given to C., but he did not draw a cheque for the amount, which was merely transferred from his current account to the deposit account. The bank afterwards stopped payment, and B. became bankrupt.

Held, that there was a new contract, and therefore the liability of A. was discharged as to the 500*l.*, and C. was not entitled to prove against his estate in respect of that sum.

Decision of Chitty, J. affirmed.

THIS was an appeal from the decision of Chitty, J.

G. Head and his son, G. S. Head, were partners in a bank at East Grinstead.

On the 10th Dec. 1890 G. Head died, and G. S. Head continued to carry on the business alone. A. Tester was a customer of the bank, and at the time of the death of the father had a balance to his credit of 501*l.* 11*s.* 6*d.* Between that date and the 24th Dec. 1890 he drew out 22*l.* 8*s.*, and paid in different sums amounting to 122*l.* 10*s.*

On the 24th Dec., having full knowledge of G. Head's death, Tester went to the bank, and told G. S. Head that he wished to draw 500*l.* from his account in order to invest it. G. S. Head advised him not to do so, and told him that if he would place it on deposit he would pay him interest at 3½ per cent.

Tester agreed to this, and G. S. Head then gave him a deposit receipt for 500*l.* in the following form:

East Grinstead Bank. Deposit receipt. 24th Dec. 1890. Received of Mr. A. Tester the sum of 500*l.*—For G. and G. S. HEAD, G. S. HEAD. This deposit receipt bears interest at 3½ per cent. per annum if left undisturbed for six months. It is repayable only after twenty-one days' notice.

Tester did not draw a cheque for the amount, but on the same day 500*l.* was transferred from his current account to a deposit account.

On the 24th Feb. 1890 the bank stopped payment, and G. S. Head was subsequently adjudged bankrupt.

Between the date of G. Head's death and the stoppage of the bank Tester drew out of his current account sums amounting to more than 501*l.* 11*s.* 6*d.*, and also paid in various sums. At the date of the stoppage of the bank he had overdrawn his current account to the extent of 31*l.* 0*s.* 10*d.*, but the 500*l.* was still on deposit.

The estate of G. Head was being administered by the court, and Tester claimed a right to prove against it, as being that of a deceased partner, for 479*l.* 3*s.* 6*d.*, being the balance of his current account at the date of the death of G. Head, less the sum of 22*l.* 8*s.* drawn out between that date and the 24th Dec. 1890.

Chitty, J. held that the placing of the 500*l.* on deposit at interest, at the surviving partner's request, constituted a novation, and that the case was distinguishable from *Re Head; Head v. Head* (69 L. T. Rep. N. S. 753; (1893) 3 Ch. 426).

From this decision Tester appealed.

Swinfen Eady, Q.C. and *Eve* for the appellant.—In *Re Head* (*ubi sup.*) it was held that the fact that after G. Head's death a fresh deposit receipt was given to a customer who had drawn out a part of a sum on deposit at the death of G. Head, was not sufficient evidence of novation. There is no difference in principle between that case and the present one. Here the original debt was not paid off. There was no payment, the money being merely transferred in the bank books from the current account to the deposit account. The circumstances are not sufficient to discharge the estate of the deceased partner:

Harris v. Farwell, 15. Beav. 31;

Heath v. Percival, 1 Peere Wms. 682.

[KAY, L.J. referred to *Bilborough v. Holmes*, 35 L. T. Rep. N. S. 759; 5 Ch. Div. 255.]

R. F. Norton and Ernest Hatton, for the personal representatives, were not called on.

LINDLEY, L.J.—I do not think there is any doubt about this case. G. and G. S. Head carried on business as bankers. G. Head died, and G. S. Head carried on the business alone. A customer, the appellant, being aware of G. Head's death, went to the surviving partner, and said he should draw 500*l.* from the balance of his current account in order to invest it. The banker suggested that he should not do that, but should place it on deposit, and the customer consented. The sum of 500*l.* was then written off his current account. It is said that G. Head's estate is not discharged, because the customer was never paid the money; but I am of opinion that he was paid. It seems to me that the case is the same as if the customer had drawn a cheque for the amount and put the money in again on a deposit account, the money being paid out and re-lent on a totally different contract from that which existed in regard to the current account. It is not like the cases which have been cited. When the money was placed on deposit the course of dealing with it was changed. I think it would be unfair to charge the estate of the deceased partner with this amount. In my opinion, Chitty, J. was right, and the appeal must be dismissed.

LOPES and KAY, L.JJ. concurred.

Solicitors: *Hasties*, agents for *Hasties, Little, and Hughes*, East Grinstead; *Clarke and Calkin*.

CT. OF APP.]

Re THE SECURITIES INSURANCE COMPANY LIMITED.

[CT. OF APP.]

Wednesday, May 2.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re THE SECURITIES INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

*Company—Scheme of arrangement sanctioned—Right of appeal by creditor not appearing on petition.**Where an order has been made sanctioning a scheme of arrangement under the Joint Stock Companies Arrangement Act 1870 (33 & 34 Vict. c. 104), a creditor who has not appeared on the petition cannot appeal from such order without leave.*

THIS was an appeal by a creditor from an order made by Wright, J. (sitting as an additional judge of the Chancery Division), on the 17th Feb. last, sanctioning a scheme of arrangement under the Joint Stock Companies Arrangement Act 1870.

Farwell, Q.C. and *G. Lawrence* for the appellant.

Swinfen Eady, Q.C. and *Eve* for the respondent.—There is a preliminary objection to this appeal. The appellant is not entitled to appeal, as he has not obtained leave to do so. He is not on the record, and was not a party in the court below. Both before and since the Judicature Acts a person who is not a party must obtain leave to appeal:

Re Markham; Markham v. Markham, 16 Ch. Div. 1; *Parmiter v. Parmiter*, 2 De G. F. & J. 526;

Watson v. Cave, 44 L. T. Rep. N. S. 40; 17 Ch. Div. 19;

Seton on Decrees, 5th edit., p. 726.

Farwell, Q.C.—The reason the appellant did not appear in the court below was that he considered that there was a binding agreement by the liquidator under which his debt would be paid, but that agreement is now disputed. The appellant has a right to appeal without leave. Besides, the official liquidator and the parties to the application in the court below, any creditor or contributory of the company may appeal without leave obtained for the purpose:

Buckley on the Companies Acts, 6th edit., p. 314;

Palmer's Winding-up Forms and Practice, 2nd edit., p. 529;

Re Cape Breton Company, 45 L. T. Rep. N. S. 395; 19 Ch. Div. 77;

Re Agriculturists' Cattle Insurance Company; Bush's case, 24 L. T. Rep. N. S. 1; 6 Ch. App. 246.

In *Re Anglo-Californian Gold Mining Company* (1 Dr. & Sm. 628, 630; 5 L. T. Rep. N. S. 739), *Kindersley, V.C.* said: "The second objection is that the present petitioners were no parties to the order. No doubt they were not parties as being petitioners or respondents when the order was made. But they are parties to it in this sense, that it is an order which, as long as it stands, affects the present petitioners and all the other persons who were shareholders in the company, and the petitioners must have a right to make an application to discharge or vary it." There is no section of the statute nor any rule or order which prescribes that leave shall be given. A winding-up petition differs from everything else, because

it is served on all parties by virtue of the advertisements which are issued under the statutory orders. It is not necessary to make all the persons affected by the petition parties, by reason of the statutory provision for the advertisements; but still they are none the less parties. In this case the appellant was made a party, not by service, but by the statutory equivalent to service, the advertisements. The appellant is a party affected, and in that sense is a party injured by the proceeding, and therefore must have the ordinary right to appeal. [*LOPES, L.J.* referred to *Re The Etna Insurance Company; Ex parte The National Provincial Bank of England, Ir. Rep. 7 Eq. 362.*]

LINDLEY, L.J.—I think this preliminary objection must prevail. A petition was presented by the liquidator of a company for the sanction of the court to an arrangement under the Joint Stock Companies Arrangement Act 1870. A gentleman who might have attended and appeared in court upon that petition did not do so. It seems a little doubtful whether he was present at the meeting which was convened before the petition came before the court. If he was present he did not, as I understand, raise any objection. Now, without having been present upon the hearing of the petition, he appeals, without leave, against the judge's order sanctioning this scheme of arrangement. He is not out of time, as he served his notice of appeal within three weeks after the date of the order, and the question is, whether he has any right to appeal without leave. Upon looking at the matter closely I am of opinion that he is not entitled to appeal without leave. The Joint Stock Companies Arrangement Act 1870 refers to and incorporates the Companies Act 1862, sect. 124 of which runs thus: "Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this Act may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction, subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made." Now, what was the practice of the Chancery Division before 1862, and what has it been since? I understand the practice is perfectly well settled, that a person who is a party can appeal (of course within the proper time) without leave, and that a person who, without being a party, is either bound by the order, or aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to get leave. If he can make out even a *prima facie* case why he should have leave he would get it, but without leave he is not entitled to appeal. In this particular class of cases it appears to me that that practice ought not to be lightly departed from, because it would be in the highest degree inconvenient that, after a judge had sanctioned a petition for a scheme of arrangement, persons who did not take the trouble to attend to what was going on should without leave flood the Court of Appeal with notices of appeal. It would be an invitation which a great many people would be very glad to accept, and we are not disposed to extend the invitation to them. I think the practice is well settled. I

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

CT. OF APP.]

Re CRONMIRE; *Ex parte* CRONMIRE.

[CT. OF APP.]

have not a doubt about it under the old Chancery practice, and even in the winding-up of companies I do not recollect a case of an appeal by a person who was aggrieved, without leave, unless he had made himself a party in some way or the other. I am of opinion that the objection must prevail.

LOPES, L.J.—I am of the same opinion. I am not familiar with the old Chancery practice; but the practice, as stated by Lindley L.J., seems to me to be the right one, and certainly seems to me to be a just one.

KAY, L.J.—I am of the same opinion, and I do not think I can usefully add much to what Lindley, L.J. has said. I think that sect. 124 of the Companies Act 1862 shows that the practice to be observed in winding-up cases must be the same as the practice of the same court in cases of appeal in matters other than in a winding-up, and I think it was the invariable practice of the Court of Chancery where a person was not an active party on the record to treat him as not entitled to appeal against an order made in the particular case, although he was aggrieved by it, without getting leave; but if he is aggrieved by it, it would be very easy for him to obtain leave. I do not think there is any hardship in applying that very convenient rule to a case like this. Here there has been a scheme presented, I suppose, at meetings of creditors and contributories, and approved by and sanctioned by the judge. This person, who now wants to appeal, had the opportunity of being present at those meetings. He was there, we are told, either in person or by proxy, and he did not oppose the scheme. He had the power of being present when the judge sanctioned the scheme and of opposing the application for his sanction. He was not present, and did not oppose it. In fact, he has not by any proceeding whatever made himself a party to this application in the winding-up, and he now appeals without leave. I confess, I think it would be an extremely inconvenient thing to sanction an appeal by a person so circumstanced without first obtaining the leave of the court. As the appellant has not got leave, and it does not seem to me he is in a position to obtain it, I think that this preliminary objection is successful, and the appeal must be dismissed with costs.

Solicitors: *Slaughter and May; Gush, Phillips, Walters, and Williams.*

Friday, April 6.

(Before Lord ESHEK, M.R., SMITH and DAVEY, L.JJ.)

Re CRONMIRE; *Ex parte* CRONMIRE. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Public examination of debtor—Order by registrar to furnish accounts of a business—Denial by debtor that business his—Jurisdiction to make the order—Effect of order—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 17—Bankruptcy Rules 1886, r. 338.

A receiving order was made against the debtor in 1885. A public sitting for his examination was held in 1886, and, having been adjourned, was resumed in March 1894. The debtor was ques-

tioned as to a business which it was alleged he carried on as "W. Freeman." The debtor denied that the business was his, but the registrar, upon the facts elicited, made an order that the debtor should furnish accounts of that business, stating in the order that he was of opinion that the business belonged to the debtor.

Held (dismissing the appeal), that the registrar had jurisdiction to make the order, and that the debtor, if an application was made to the court to take action against him for failure to comply therewith, might contest the question as to the ownership of the business.

THIS was an appeal by the bankrupt from an order of Mr. Registrar Giffard directing the bankrupt to file certain accounts.

A receiving order was made against the bankrupt in 1885, and his public examination was held in 1886. The public examination was then adjourned *sine die*, and was resumed on the 8th March 1894.

The bankrupt was questioned as to the business of an outside stockbroker which was apparently being carried on by him under the style of "W. Freeman." The bankrupt denied that this business belonged to him, and said that it belonged to his wife, and that he acted as her clerk or manager.

Many questions were put to the debtor in connection with this matter, and ultimately the registrar made an order as follows:

"This being the day appointed for the adjourned public examination of the above-named bankrupt, and the said bankrupt having submitted himself for such examination, now upon hearing . . . and the official receiver having examined the bankrupt and then applying, and the court being of opinion from such examination that the bankrupt had traded as 'W. Freeman,' it is ordered that the said public examination be further adjourned till the 5th April 1894. And it is further ordered that the said bankrupt do attend on the said 5th April 1894 for the purpose of being examined as to his conduct, dealings, and property. And it is further ordered that the said bankrupt do on or before the 22nd March 1894 file an account of his dealings as 'W. Freeman.'"

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52), provides:

Sect. 17. (1.) Where the court makes a receiving order it shall hold a public sitting, on a day to be appointed by the court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

(3.) The court may adjourn the examination from time to time.

(7.) The court may put such questions to the debtor as it may think expedient.

(8.) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him.

The Bankruptcy Rules 1886, provide:

Rule 338. The debtor shall, on the request of the official receiver, furnish him with trading and profit and loss accounts, and a cash and goods account for such period not exceeding two years prior to the date of the receiving order as the official receiver shall specify. Provided that the debtor shall, if ordered by the court so to do, furnish such accounts as the court may order for any longer period. If the debtor fails to comply with the requirements of this rule the official receiver shall report such failure to the court, and the court

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

shall take such action on such report as the court shall think just.

The bankrupt appealed.

Herbert Reed, Q.C. and F. Cooper Willis for the appellant.—The registrar had no jurisdiction to make this order because he had no power to decide any question as to the ownership of this business. When it was denied by the appellant that this business belonged to him, the registrar could not decide that question. He has decided that question by ordering the bankrupt to file accounts of that business, and that decision appears upon the face of the order. Such a question can only be decided by having the matter brought before the court by motion, when all parties interested will be before the court. When a question arises as to whether particular property belongs to the bankrupt's estate or to another person, the registrar cannot entertain that question, but the trustee must proceed in the ordinary way to establish his right to the property. If the registrar can make an order of this kind the bankrupt is in effect precluded from afterwards disputing the matter; if he does not file the accounts he may be dealt with under the provision at the end of rule 338, and cannot reopen the question whether the business is his. Even if he can again dispute this question when the matter is brought before the court under rule 338, he is placed in an unfair position by this order, because the onus of proof will be thrown upon him instead of being on the trustee, as it would be in the usual mode of proceeding.

Muir Mackenzie for the respondent, the official receiver.—As against the bankrupt the registrar had power to say that the business belonged to the bankrupt, and to order him to file these accounts. This order has no effect as against the bankrupt's wife; it is not an adjudication as to the ownership of the business, but only an order upon the bankrupt to give certain accounts. If the bankrupt does not give those accounts proceedings will have to be taken before the judge, and the whole question as to the title to this business can be fought out. By sect. 104 of the Bankruptcy Act 1883, all orders in bankruptcy can be reviewed, varied, or rescinded by the court which has made them; and, therefore, the court can review this order. The registrar has power to order the bankrupt to file accounts, and for that purpose must often have to adjudicate to some extent upon questions of fact. Accounts are ordered for the purpose of giving information to the court upon which it may or may not act, in the same way as information is obtained by the questions asked at the public examination.

F. Cooper Willis in reply.—The judge has no jurisdiction to review, vary, or rescind an order made by the registrar:

Re Maugham, 59 L. T. Rep. N. S. 253; 21 Q. B. Div. 21.

Rule 338 only gives power to order accounts of transactions before the date of the receiving order.

Lord Esher, M.R.—In this case the debtor had been adjudicated a bankrupt, and, after a long interval, a public sitting, under sect. 17 of the Bankruptcy Act 1883, was held for the examination of the bankrupt, and the bankrupt attended to be examined as to his conduct, dealings, and

property. That is called the public examination of the debtor. This public examination is held before an officer of the court for the sole purpose of the debtor being examined; that is all. Nothing is to be then determined or concluded for or against the debtor. There is only a collecting from the debtor of evidence upon which the court may subsequently act; the examination is merely a mode of obtaining evidence from the debtor. The registrar is to conduct this examination; but he has no power to call witnesses himself; he has only to sit and conduct the examination and take the answers of the debtor, and decide whether the questions are proper questions or not. The registrar has to regulate the examination, and as far as possible enforce the obligation of the debtor to answer all proper questions. For the purpose of collecting evidence for the court, the debtor has to answer questions as to his own "conduct, dealings, and property." In this case, therefore, he was bound to answer questions as to his dealings, and the registrar had to see that the questions related to the debtor's dealings and not to the dealings of other persons. For that purpose the registrar would have to determine whether the questions were as to the dealings of the debtor. The registrar cannot, however, decide any question as a final determination of that question. He cannot finally determine whether questions are proper or not; the position is the same as upon a commission to take evidence, where the commissioner has to decide as to the propriety of questions, but his determination is not conclusive. So in cases of this kind, where the registrar, for the purpose of collecting evidence at the public examination, determines for that purpose and for that time whether the business in question is that of the debtor, he only does so for that purpose and for that time, and does not, by so doing, determine that question for any other purpose or time. When the matter comes before the court for the court to act upon the evidence, the court can say that the registrar was mistaken. That is not an appeal from his decision, but only that the court does not act upon his temporary decision, which was not a final decision. That this is so is clear from the provisions of rule 338, which provides that "the debtor shall, on the request of the official receiver, furnish him with trading and profit and loss accounts, and a cash and goods account, for such period not exceeding two years prior to the date of the receiving order, as the official receiver shall specify. Provided that the debtor shall, if ordered by the court so to do, furnish such accounts as the court may order, for any longer period. If the debtor fails to comply with the requirements of this rule, the official receiver shall report such failure to the court, and the court shall take such action on such report as the court shall think just." If, then, the debtor fails to comply with that rule, the official receiver reports to the court, and the court makes such order as it thinks just. It is suggested in this case that, if the debtor fails to furnish the accounts of this business, the court must commit him for contempt, and cannot inquire whether the business was his or not. But rule 338 says that the "court shall take such action as the court shall think just." The court, therefore, has the widest possible powers upon such an application; the inquiry before the court is not an appeal from the order to furnish accounts, but is another stage of the

CT. OF APP.]

KENT v. WARD.

[CT. OF APP.]

proceedings, when the court has the greatest powers. All the objections, therefore, to this order fail. It is said that this order compels the debtor to furnish accounts of a business which is not his own, and that the court will not have power, when the debtor is reported for failure to comply with the order, to consider whether the business is his or not, and that the debtor must get the accounts even of a business which belongs to another person. That is saying that the Legislature has directed a man to do something which he cannot do, and which is absurd. If a man is ordered to give accounts of a business which belongs to another, he will reply that he cannot do so, and does not do so. It is not intended that he should do so. It is said that the court must commit him, if he has not furnished the accounts, because the registrar ordered him to do so. The court, however, is "to take such action as the court shall think just." I have no doubt but that the right course for the debtor to take, if he still persists that the business is not his, is to say that he cannot and will not give the accounts. When he has done so, if the court believes his statement, the court will do that which is just, and will not commit him. The objections which have been raised are only the ingenious objections of astute counsel, and raise difficulties which cannot really arise. If this business is not the debtor's he will be properly treated by the court. This supposed adjudication of the registrar is only a temporary ruling for the purposes of the moment in relation to the questions and answers at the public examination, and for no other purpose. This appeal fails, and must be dismissed.

SMITH, L.J.—In this case a receiving order was made against the appellant in 1885, and there was a sitting for the public examination of the debtor. The public examination was adjourned indefinitely. Recently the debtor was found to be living in good style, and the public examination was proceeded with. It transpired that the debtor was apparently carrying on business as an outside stockbroker, but he said that the business belonged to his wife, and that he was only her clerk. The registrar having heard the evidence of the debtor upon this matter, thought that he ought to find out about the assets of that business. So far the registrar was right. It has been admitted on behalf of the appellant that, if he had admitted at the public examination that the business was his, this order to furnish accounts would have been properly made. It is argued, however, that because the debtor has denied that the business is his, this order could not be made in spite of the other evidence elicited from the debtor. If I thought that this order would preclude the bankrupt for ever from re-opening the question as to this business, I should consider the matter differently. But, as the Master of the Rolls has pointed out, this ruling by the registrar during the inquiry that there was a *prima facie* case that this business was the debtor's, and that accounts of it must therefore be furnished, will not bind the debtor afterwards. I can see what are the difficulties of the debtor. He must make up his mind whether the business is his or not. If he says that it is not, and refuses to give the accounts, he may have to go to prison. If the business is not his, and the accounts are not furnished, the judge in bankruptcy will, under

rule 338, make such order as is just. This order of the registrar creates no estoppel against the debtor, and if the business is shown not to be his, such order as is just will be made, and no case for a committal will be shown. This appeal, therefore, fails, and must be dismissed.

DAVEY, L.J.—The way in which this case strikes me is this: In the course of the examination of the debtor, it appeared to the registrar that a further examination was required by accounts furnished by the debtor, and the registrar therefore ordered the debtor to furnish certain accounts. I think that this order was part of the examination in bankruptcy. That being so, there was no final adjudication even as between the debtor and the official receiver. It has been rightly admitted on behalf of the respondent that, if the debtor refuses to give these accounts, he can show, when the matter comes before the court, that the business was not in fact his. If that be so, all the objections of the appellant vanish. Our decision is based upon the assumption that, when the matter comes before the court, upon non-compliance by the debtor with this order, it will be open to the debtor to contest the question whether he ought to give these accounts or not. I think that this appeal must be dismissed.

LORD ESHER, M.R.—There is another case which will illustrate this. When a judge at the trial rules as to a particular question, he must often determine a question of fact for that purpose. Subsequent evidence may show that that determination of fact was not correct. In such a case the ruling was right at the time when it was made, but that does not preclude that question of fact from being left to the jury to decide.

Appeal dismissed.

Solicitor for the appellant, *James Davis*.

Solicitor for the respondent, *Solicitor to the Board of Trade*.

April 9 and 10.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

KENT v. WARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Solicitor and client—Costs—Taxation—Disbursements in respect of business done while uncertificated—Attorneys and Solicitors Act 1874 (37 & 38 Vict. c. 68), s. 12.

The Attorneys and Solicitors Act 1874 provides, by sect. 12, that "no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any suit or matter by any person or persons whomsoever."

A solicitor, during a time when he was not duly qualified, because he had not taken out a certificate, delivered briefs to counsel, and the trial took place during that period, and refreshers became payable. After he had taken out his certificate he paid fees in respect of those briefs and refreshers. He sued his client to recover the amount due upon his bill of costs, which included those fees,

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

CT. OF APP.]

KENT v. WARD.

[CT. OF APP.]

and judgment was given for the amount appearing to be due upon the bill, the bill to be taxed.

Held (reversing the judgment of the Queen's Bench Division), that these fees were "disbursements on account of or in relation to an act or proceeding done or taken," while the solicitor was not duly qualified, and that they ought to have been struck out of the bill on taxation.

THIS was an appeal by the defendant Ward from the decision of the Divisional Court (Mathew and Cave, JJ.) dismissing the defendant's appeal from chambers.

The plaintiff had acted as solicitor for the defendant in an action which had been brought against the defendant, and brought this action to recover the amount alleged to be due to him from the defendant upon his bill of costs.

The writ in this action was indorsed for the sum of 278*l.* for costs, and credit was given for 142*l.* paid by the defendant, the amount alleged to be due being 136*l.*

One of the defences pleaded was, that the solicitor had not got a certificate.

At the trial before Mathew, J., it appeared that 12*l.* had already been taxed off the bill, and the learned judge gave judgment for the plaintiff for 124*l.*, the bill to be taxed.

Upon taxation it appeared that the plaintiff had not renewed his certificate in the year 1893 until the 31st Dec.

Solicitors' certificates are granted annually, and expire on the 12th Nov. in each year; if taken out before the 12th Dec. they take effect as if they had been taken out on the 12th Nov., but if they are taken out after the 12th Dec. they take effect from the date on which they are taken out.

The Attorneys and Solicitors Act 1874 (37 & 38 Vict. c. 68) provides:

Sect. 12 No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any suit or matter by any person or persons whomsoever.

For the purposes of this section, a person shall be deemed to be duly qualified to act as an attorney or solicitor if he shall have in force at the time at which he acts as an attorney or solicitor a duly stamped certificate, authorising him so to do.

Four items in the plaintiff's bill of costs were for fees paid to counsel in Feb. 1894. These fees were paid in respect of briefs delivered during the period between Nov. 12 and Dec. 31, 1893, when the plaintiff had not got a certificate; two of the fees were fees marked on the briefs, and two were for refreshers in respect of the trial which took place during the above period.

The defendant's objections to these items were overruled, and the Divisional Court (Mathew and Cave, JJ.) dismissed the defendant's appeal upon the ground that the plaintiff had money of the defendant's, which had been paid to him on account, which he might appropriate to these items.

The defendant appealed.

Marshall, Q.C. and *George Wallace* for the appellant.—These fees to counsel ought to have been struck out of the bill upon taxation, because the briefs were delivered, and the trial took place, during the period when the solicitor had not got

a certificate. The fact that the fees were paid after the solicitor had taken out his certificate does not make any difference, for these fees were "costs, fees, rewards, or disbursements on account of or in relation to an act or proceeding done or taken" while the solicitor was not duly qualified, within the meaning of sect. 12 of the Attorneys and Solicitors Act 1874 (37 & 38 Vict. c. 68). The "act or proceeding done or taken" on account of or in relation to which these fees were paid was the delivery of the briefs. It is clear from the affidavits of the solicitor himself that he had no money of the appellant's in hand out of which he did or could pay these fees.

Muir Mackenzie for the respondent.—This is not a taxation under the Solicitors Acts at all, and the provisions of the Act of 1874, sect. 12, do not apply. The defendant submitted to judgment upon the bill of costs, and there was only an ordinary taking of accounts between the parties. This objection could not then be taken:

Re Jones, 21 L. T. Rep. N. S. 482; L. Rep. 9 Eq. 63.

If the solicitor has been paid by the client in respect of any costs or disbursements for work done while the solicitor had not got a certificate, the client cannot get that money back upon taxation:

Fullalove v. Carter, 6 L. T. Rep. N. S. 653; 12 C. B. N. S. 246.

That was a decision under the Solicitors Act 1843, but as between solicitor and client the provisions of that Act and of sect. 12 of the Act of 1874 are the same. The solicitor had a right to allocate to these items part of the money which he received from his client on account, and thus to treat them as paid:

Arnold v. Mayor of Poole, 4 M. & G. 860, 897.

These disbursements were made at a time when the solicitor had taken out his certificate, and therefore the provisions of sect. 12 of the Act of 1874 do not apply.

Marshall, Q.C. was not heard in reply.

LORD ESHER, M.R.—I think that the meaning of the judgment of Mathew, J. at the trial is quite clear. It meant this, that, if the bill of costs stood, the plaintiff was entitled to judgment for 124*l.*; that there was, however, a dispute in respect of some of the disbursements, whether the plaintiff could recover them; that question was to be decided by the master; if there were any disbursements which the plaintiff could not recover, then the amount of the judgment was to be reduced *pro tanto*. That was the meaning of the judgment for a certain amount, the bill of costs "to be taxed." The bill of costs was to be taxed as if the taxation was taking place before any action. This bill of costs, therefore, upon which the plaintiff was suing as a solicitor for work done, and for disbursements made as a solicitor, was sent to the master to be taxed as a solicitor's bill. As to the disbursements charged in the solicitor's bill, what is the legal effect of disbursements? If the solicitor has no particular authority from his client to make disbursements, what authority has he? Disbursements are money paid on behalf of the client. If the solicitor has no express authority, yet he can recover for disbursements, because the law implies from his character as a solicitor that he has

[CT. OF APP.]

KENT v. WAED.

[CT. OF APP.]

authority to make them for his client. If he makes disbursements when he is not a solicitor, and has no express authority, there is no such implied authority. He cannot then recover the disbursements as a solicitor, or in any other capacity, because he had no authority, express or implied, to make them. What then is the position of this solicitor as to certain claims which are in dispute? He delivered briefs as a solicitor when, though he was a solicitor, he had not got a certificate. A solicitor has one month's grace within which to take out his certificate, but this solicitor did not take out his certificate within that month, but afterwards. His certificate, therefore, took effect from its date. He was, therefore, an uncertificated solicitor until he took out his certificate. Could he, during that time, act as a solicitor? I think not, and that he could not make anyone liable to him as a solicitor; he would be liable to a penalty for acting as a solicitor. In this case, then, acts were done by the solicitor during the period when he was uncertificated; he delivered briefs, and the time for refreshers becoming payable occurred during that period. Therefore, if he was a certificated solicitor when the disbursements were made, yet they were disbursements "on account of or in relation to" an act done by him while he was not duly qualified, within the meaning of sect. 12 of the Solicitors Act 1874. It is clear then that he cannot recover those disbursements, and in this action he has sued as a solicitor to recover them. It is argued on his behalf that, even if he could not recover these disbursements in an action, yet money has been paid to him by the client on account generally, and that he has a right to allocate that money to any items of his claim which he chooses, and that he has done so in respect of these disbursements. If it were true that money was paid to him generally on account, I am of opinion that he cannot allocate any part of that money to items which he could not recover from his client. I doubt whether the rule about appropriating payments applies at all to such a case. Therefore, even if money was paid to him on account generally, he cannot appropriate any part of it to these items. But even if money was paid to him on account generally, he has not, in fact, appropriated any part of it to these items. That is only now suggested. It seems to me, therefore, clear that this appeal must succeed, and these items be disallowed, and the amount of the judgment for the plaintiff be reduced accordingly. The appeal must be allowed.

SMITH, L.J.—This is an action by a solicitor upon a bill of costs to recover a sum due to him as a solicitor. The action was tried before Mathew, J., and he gave judgment for the plaintiff for 124*l.*, the bill of costs to be taxed. That was the ordinary course. The bill of costs went to taxation, and 39*l.* was taxed off. The defendant asked that a further amount of 16*l.* should be taxed off, because the solicitor was uncertificated during a certain period. That is the sole question upon this appeal. The Divisional Court decided that the solicitor was entitled to retain these four items, and we have to decide whether they were right. The Solicitors Act 1874 provides, by sect. 12, that "no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person

who acts as a solicitor without being duly qualified so to act, shall be recoverable in any suit or matter by any person or persons whomsoever," and that a person is duly qualified if he has a certificate: What are the facts of this case? During a certain period this solicitor had no certificate. The four items in dispute were fees paid to counsel, two of them being refreshers; the briefs were delivered, and refreshers marked, or at any rate payable, during that period. The payment of these fees was not made until after the solicitor had got his certificate. The question is whether these fees were "disbursements on account of or in relation to an act done" while the solicitor was not qualified. I am clearly of opinion that they were. In respect of these acts done when the solicitor had not a certificate, it is said that he, having received money on account generally, was entitled to allocate a part of it to these items. It is not necessary to decide whether he could do so or not, for he never in fact did so. I think, therefore, that the decision of the Divisional Court was wrong, and that the appeal must be allowed.

DAVEY, L.J.—The circumstances of this case are as follows: A solicitor sues to recover the amount of a bill of costs. That bill contains four items which are now in dispute. The solicitor is, therefore, seeking to recover those four items in the action. Upon the writ he gives credit for 142*l.*, and a further 12*l.* is deducted at the trial. At the trial judgment is given for the solicitor for 124*l.* subject to taxation. That is, there is judgment for the whole amount of the bill, including these four items, after deducting the above amounts. What is the meaning of that judgment? In my opinion it is a judgment for the amount of the claim, subject to reduction by the disallowance on taxation of all such items in the bill of costs as are not properly recoverable in the action. Upon the taxation the whole bill of costs is brought in by the solicitor and submitted to the master for taxation; it contains the four items now disputed; if those four items are not properly recoverable in the action the master ought to have struck them out. Were those items properly recoverable against the defendant in this action? Sect. 12 of the Solicitors Act 1874 has been already referred to, and I will not read it again. I am of opinion that the "act or proceeding on account of or in relation to which" these fees were paid was the delivery of the briefs or instructions to appear. I think that refreshers become due, as counsel's fees, upon the delivery of the briefs subject to the happening of the events upon which refreshers do become payable, that is, the lasting of the trial beyond a certain time; or they become payable when the trial does so last. In any case, here the act or proceeding took place while this solicitor had no certificate, and therefore he cannot recover the disbursements, whenever the payments were actually made, in respect of those acts or proceedings. The other point raised by the respondent is, that payments were made to him on account generally, and I will assume that that was so. The solicitor then says that he will allocate a part of these payments to these disputed items. It is unnecessary to decide whether he can do so. I am inclined to agree with the Master of the Rolls that a solicitor cannot allocate payments on account to items which are not recoverable from

his client. Here any such claim must fail because of the form of the claim in the action and of the judgment, and because the bill which had to be taxed under the judgment contains these items; and also because the evidence shows that the solicitor never did so allocate any of the money paid on account, and never meant to do so. I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for the appellant, *H. S. Bridge.*

Solicitor for the respondent, *Rossiter.*

Saturday, April 14.

(Before Lord ESHER, M.R., LINDLEY, LOPES, KAY, SMITH, and DAVEY, L.JJ.)

Re HOLLOWAY; Ex parte PALLISTER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION
Practice—Originating summons—Summons for an order upon a solicitor to deliver up papers.

A summons for an order upon a solicitor to deliver up papers to his client, not taken out in any pending proceeding, is not an "originating summons."

THIS was an appeal by W. Holloway from an order of the Divisional Court (Mathew and Cave, JJ.) refusing to set aside an order for delivery up of papers by the appellant to his client the respondent.

The appellant, Holloway, was retained as solicitor for the respondent, Pallister, in an action of *Bymill v. Pallister.*

Pallister having changed his solicitor, took out a summons in the following terms:

In the High Court of Justice, Queen's Bench Division, —In the matter of W. Holloway, one of the solicitors of the Supreme Court.—Let all parties concerned attend the master in chambers at the Central Office of the Royal Courts of Justice, on Wednesday the 31st January, on the hearing of an application on the part of John Pallister that the above-named William Holloway do within four days after service of the order to be made hereon, deliver up on oath . . . all deeds, papers, and writings whatsoever in his custody or power belonging to the applicant.—Dated 27th day of Jan. 1884.—To William Holloway.

This summons was taken out under the Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 37, which provides that,

It shall be lawful for the said respective courts and judges, in the same cases as they are respectively authorised to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such courts or judges respectively, where any such business had been transacted in the court in which such order was made.

Holloway objected that this summons was an "originating summons," and that he ought to have eight days within which to appear.

The Rules of the Supreme Court 1883 provide:

Order LXXI., r. 1.—"Originating summons" means a

summons by which proceedings are commenced without writ.

Order LIV., r. 4b (Nov. 1893).—An originating summons shall be in the form No. 1, A, B, C, or D, Appendix K, with such variations as circumstances may require. It shall be prepared by the applicant or his solicitor, and shall be sealed in the Central Office . . . and when so sealed shall be deemed to be issued. The person obtaining the summons shall leave at the Central Office . . . a copy thereof, which shall be filed and stamped in the manner required by law.

Rule 4c. The parties served with an originating summons shall, before they are heard, enter appearances in the Central Office . . . and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited by the summons for appearance he shall not, unless the court or a judge shall otherwise order, be entitled to any further time for any purpose than if he had appeared according to the summons.

Rule 4d. The day and hour for attendance under an originating summons shall, after appearance, be fixed by notice, sealed with the seal of the Central Office in the case of a summons issued in the Queen's Bench Division. . . . The notice shall be served on the defendant or respondent by delivering a copy thereof at the address for service named in the memorandum of appearance of such defendant or respondent not less than four clear days before the return day.

Rule 4e. Every summons, not being an originating summons, shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered. Provided that in case of summonses for time only, the summons may be served on the day previous to the return thereof.

According to the form in the appendix an appearance is to be entered within eight days.

Order LIVa. (Nov. 1893), r. 1.—In any division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

The master made an order upon the solicitor to deliver up the papers, which was affirmed by Grantham, J. at chambers, and by the Divisional Court (Mathew and Cave, JJ.).

Holloway appealed.

H. Newson for the appellant.—This summons is not taken out in the action of *Bymill v. Pallister*, but is a summons which commences the proceedings against the solicitor under sect. 37 of the Solicitors Act 1843. It is therefore an "originating summons," and has not been properly issued; under an originating summons the respondent has eight days within which to appear, but this summons gave only two clear days' notice. In Order LXXI., r. 1, an originating summons is defined thus: "Originating summons means a summons by which proceedings are commenced without writ." The Judicature Act 1873, in sect. 100 defines "action" to "mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court." In 1883 the originating summons was first introduced into the rules, and by the Rules of Nov. 1893 it is made clear that an originating summons can be taken out in the Queen's Bench Division. All civil proceedings, therefore, are now commenced by writ of summons or by originating

[CT. OF APP.]

Re HOLLOWAY; Ex parte PALLISTER.

[CT. OF APP.]

summons, and all civil proceedings must be commenced in one of those two ways:

Re Fawsitt; Galland v. Burton, 53 L. T. Rep. N. S. 271; L. Rep. 30 Ch. Div. 231;

Re Vardon's Trusts, 55 L. J. 259, Ch.

In a case of this kind, the client can commence an action against the solicitor by writ of summons, or commence proceedings by an originating summons. [DAVEY, L.J. referred to rule 7 of the Central Office Practice Rules.] This summons cannot be amended so as to make it an originating summons, or so as to make it a summons in a pending proceeding:

Anlabay v. Prætorius, 58 L. T. Rep. N. S. 671; 20 Q. B. Div. 764.

[DAVEY, L.J. referred to the order as to Supreme Court Fees 1884, where in the schedule No. 7 this appears: "On sealing or issuing an originating summons under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the order to be made thereon, 10s."]

E. Tindal Atkinson, Q.C. and W. Howland Jackson for the respondent.—This summons is in the ordinary form which has always been adopted and used for applications under sect. 37 of the Solicitors Act 1843. All applications for the purpose of compelling a solicitor to do that which he ought to do as a solicitor have always been made in this form, whether the application is made under the Act, or asks the court to exercise its ordinary and inherent jurisdiction over its officers: (see the notes to sect. 37 of the Solicitors Act 1843 in Chitty's Statutes.) Proceedings commenced by originating summons are the same as an action commenced by writ of summons. This kind of proceeding is not an action, or in the nature of an action, and an originating summons is not the proper way of applying for an order upon a solicitor. [They were stopped by the Court.]

H. Newson replied.

Lord ESHER, M.R.—It is, no doubt, possible to find discrepancies in these orders and rules, and it is impossible that it should be otherwise. Difficulties do arise in these rules, owing to the infirmity of language and expression. I think, however, that there is no doubt as to the intention of the rules in this case. The definition of an "originating summons" may not, perhaps, be a very happy one. It is as follows: "Originating summons" means a summons by which proceedings are commenced without writ." Perhaps it would have been better to say that an "originating summons" is that mode of commencing an action which is allowed instead of a writ of summons. That was what was meant. When we look at what was the former practice, that is clear. When the expression "originating summons" was used as applicable to proceedings at common law, it was then a well-known thing in the Chancery Division, as a shorter and less expensive mode of commencing proceedings. It was a procedure invented for the purpose of coming cheaply and quickly before the court when the point to be decided was a short one. After that procedure had been used in Chancery for many years, and when the judges were trying to shorten and simplify the procedure of all the courts, they desired to introduce this procedure by "originating sum-

mons," which had worked well in Chancery, into the Queen's Bench Division. That was the intention of these rules, and I think that the subject-matter of these rules shows that the meaning of "originating summons" is a summons by which an action is commenced when it is not commenced by a writ of summons. This summons, therefore, is not an "originating summons" at all, and none of the rules applicable to an "originating summons" are applicable to this case. The summons under the Solicitors Act 1843 remains the same as it always was before, and is not affected by these rules. I am of opinion, therefore, that this appeal must be dismissed.

LINDLEY, L.J.—I have no doubt that this is not an "originating summons," and that no one would ever think that it was, were it not for the language of Order LXXI., r. 1, which defines an "originating summons." The argument of the appellant is founded upon the theory that every summons is an "originating summons" which commences proceedings. The expression "originating summons" started after the Chancery Jurisdiction Act 1852 (15 & 16 Vict. c. 86), s. 45, when for a "bill" there was substituted in some cases a shorter form of proceeding; in certain easy cases a suit was commenced by a summons originating in chambers. That was the origin of the expression. What is an "originating summons?" It was a method of commencing a suit in Chancery by a summons in chambers instead of by "bill." Under the Judicature Acts there are two classes of writs for commencing proceedings—ordinary writs of summons, and these originating things in chambers. That is the real meaning of the expression "originating summons." The Orders and Rules of 1875 did not, generally speaking, apply to the Chancery Division, but the Rules of 1883 did so. In the latter rules we find the "originating summons" introduced and defined. What, then, is the meaning of "originating summons?" It does not mean every summons which originates proceedings, but a summons, instead of a writ of summons, to institute a suit or action. In 1883 and afterwards the cases in which proceedings commenced by that mode of procedure increased, as appears from Order LV. Down to Nov. 1883 no one called a summons to tax, or a summons calling on a solicitor to deliver up papers, an "originating summons," except in the one instance in the Order as to Supreme Court Fees 1884, and I cannot understand how that got there. In 1893 rules were made to extend that Chancery procedure to the Queen's Bench Division, where the "originating summons" was then unknown. That was Order LIVa., and the matter is quite clear when that is read before Order LIV., rr. 4a, b, c, and d, for it shows why the latter rules sometimes expressly mention the Queen's Bench Division. What, then, is the meaning of an "originating summons?" It is precisely the same as before, and has not been altered by the Rules of 1883 and 1893. The argument that this is an "originating summons" is founded entirely upon the unfortunate obscurity of the definition in Order LXXI., r. 1. The appeal fails, and must be dismissed.

LOPES, L.J.—I agree.

KAY, L.J.—Summons come under three heads: (1) a summons taken out in pending

proceedings, which is not an "originating summons"; (2) a summons taken out to originate a matter, instead of a bill in Chancery or a writ of summons, which is properly an "originating summons"; (3) a third class of summons to which this summons belongs. This summons was taken out to obtain an order upon a solicitor to deliver up papers belonging to his client. It is a summons which originates the proceedings against the solicitor. This proceeding is under the general jurisdiction of the Queen's Bench Division, under statutes, or its inherent jurisdiction, against a solicitor, to compel him to deliver up papers. Is this class of summons, which is not taken out in a pending action or proceeding, and does not commence an action when it is taken out, because this proceeding is not an action, an "originating summons"? I have come to the conclusion that, in these rules, an "originating summons" does not mean a summons of this kind, but means only an originating summons of the same kind as formerly. The appeal must be dismissed.

SMITH, L.J.—The argument of the appellant is, that every summons which is not taken out in an action is an "originating summons" within the meaning of these rules. It is clear that that argument is not a good one. The argument is founded upon the definition of "originating summons" given in Order LXXI., r. 1. I read that definition thus: an "originating summons" means a summons by which proceedings are commenced without a writ, which otherwise would have to be commenced by writ.

DAVEY, L.J.—I agree, and for the same reasons.

Appeal dismissed.

Solicitor for the appellant, in person.

Solicitors for the respondent, *Leesmith and Munby*.

Friday, April 20.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

COULSON v. DISBOROUGH. (a)

APPLICATION FOR A NEW TRIAL.

Practice—Trial—Witness called by judge—Right of cross-examination—Discretion of judge.

If the judge at a trial calls as a witness a person who has not been called by either side, counsel have no right to cross-examine such witness; but if such witness gives any evidence which affects either party, the judge will generally, in the exercise of his discretion, give leave to cross-examine upon such evidence, but not to cross-examine at large.

THIS was an application by the plaintiff for judgment or for a new trial on appeal from the verdict and judgment at the trial before Bruce, J. and a jury in Middlesex.

The plaintiff sued the defendant to recover damages for false imprisonment and malicious prosecution.

The action was tried before Bruce, J. and a jury. At the close of the defendant's case the jury expressed a wish that the defendant's son, who had not been called as a witness by either

party, should give some evidence. Thereupon the learned judge called the defendant's son as a witness, and he was asked certain questions. Counsel for the plaintiff desired to cross-examine this witness, but was not permitted to do so. The answers given by this witness were not material to any issue in the case.

The jury having answered certain questions left to them by the judge, the judge entered a verdict and judgment for the defendant.

The plaintiff applied for a new trial upon the ground, among others, that her counsel ought to have been permitted to cross-examine the witness called by the judge.

Warburton and Sydney Knox for the appellant.

Candy, Q.C. and Calvert for the respondent.

LORD ESHER, M.R.—I am of opinion that we ought not to interfere with this verdict. It has been argued that the trial of this case miscarried because the learned judge did something which had never been done before, and was so wrong in doing so that the trial was unsatisfactory. What did the learned judge do? The case as against the defendant had nothing whatever to do with the question whether the plaintiff was innocent or guilty of the crime with which she had been charged. It was not alleged in this case that she was guilty, and she had not got to prove her innocence. It had been said that the defendant's son might have been called as a witness upon that question; but the only question at issue was as to what was in the defendant's mind. That was the only question upon the case as to false imprisonment; so also on the case as to malicious prosecution. Unless the son could have been got to say that he had told the defendant that he, and not the plaintiff, had taken the money, he had no material evidence to give. This is not the first time that this course has been taken by the judge at the trial when a particular witness has not been called by either side, and the judge or the jury has thought that he could help to elucidate the truth. It has been done frequently when the witness is present and the judge thinks that he will help to bring out the truth. When the judge does call a witness in such a case he examines him himself, and does not allow counsel on either side to examine him in chief. Counsel on either side has no right to cross-examine such a witness without the leave of the judge. If the witness so called by the judge says anything material to the issue which tells against either party, the judge will, as a rule, allow counsel to cross-examine him, but that is a matter for the discretion of the judge. In such case, however, the judge will only allow cross-examination upon the answer which has been given, but will never allow a general cross-examination of a fishing character. The learned judge, therefore, was not wrong, but was right in not allowing cross-examination of this witness, because the answers which he gave were quite immaterial to the issue.

SMITH, L.J.—At the end of the case the son of the defendant was called as a witness by the learned judge, the jury having said that they would like to hear what he had to say. It has been urged that there was a miscarriage of justice because the judge called that witness. It seems to me that, the guilt or innocence of the plaintiff not being in issue, his evidence was quite immaterial, and he need not have been called at all.

CT. OF APP.] THURSBY AND ANOTHER v. CHURCHWARDENS, &C., OF BRIERCLIFFE. [CT. OF APP.]

When a witness is so called, he is the witness of the judge and not of either party; he is called for the purpose of eliciting the truth. It is obvious that, in such a case, there can be no cross-examination as of right by counsel. The question here is, whether there was a miscarriage of justice because counsel was not allowed to cross-examine. There was no miscarriage, because what the witness said was quite immaterial to any issue in the case. The judge, therefore, was quite right not to allow cross-examination by counsel.

DAVEY, L.J.—It is said that there was a miscarriage of justice chiefly upon the ground that the learned judge called a witness and asked him certain questions, but would not allow counsel to cross-examine him. When the judge calls a witness, there can be no cross-examination as of right. If the witness who is so called gives evidence which is material to the issue and affects either party, the judge, in the exercise of his discretion, will and ought to give leave to counsel to cross-examine. Here the questions which were asked of this witness were quite immaterial to the case, and could not affect any issue. That being so, the judge was right, in the exercise of his discretion, not to allow a general cross-examination for the purpose of enabling the plaintiff to elicit something against the defendant which he had been unable to prove before. I think, therefore, that there was no miscarriage of justice which could make us hold that there ought to be a new trial.

Appeal dismissed.

Solicitor for the appellant, *W. H. Armstrong.*
Solicitor for the respondent, *G. R. Harrison.*

March 19 and April 9.

(Before LOPES and DAVEY, L.JJ.)

THURSBY AND ANOTHER (apps.) v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF BRIERCLIFFE WITH EXTWISTLE IN THE COUNTY OF LANCASTER (resps.) (a)

Local government—Lighting and watching rate—Coal mines—Property other than land rateable to the relief of the poor—Poor Relief Act 1601, (43 Eliz. c. 2), s. 1—Lighting and Watching Act 1833 (3 & 4 Will. 4, c. 90), s. 33.

Coal mines are property (other than land) rateable to the relief of the poor under the Poor Relief Act 1601, and are therefore liable to pay the higher rate imposed on such property by the Lighting and Watching Act 1833.

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Collins, JJ.) upon a special case stated for the opinion of the court by the parties to an appeal to the Court of Quarter Sessions for the county of Lancaster, under 12 & 13 Vict. c. 45, s. 11.

1. On the 19th March 1892 the ratepayers of a portion of the township of Briercliffe with Extwistle in the county of Lancaster (such portion being hereinafter called the respondents' township) duly adopted the provisions of the Lighting and Watching Act 1833 (3 & 4 Will. 4, c. 90, hereinafter called the Act of 1833) with respect to lighting, and on or about the 6th Feb.

1893 the respondents made a rate of 2d. in the pound for the purposes of the Act of 1833 on the owners and occupiers of property in the respondents' township.

2. The appellants are colliery proprietors occupying and working mines of coal in the respondents' township, and as such are rateable to the relief of the poor in the said township. In the valuation list in force in the said township, the net rateable value of the appellants' mines in the said township is 2100*l.* By the rate now appealed against the appellants were assessed and rated in respect of their said mines as follows:

No.—438. Name of occupier—Executors of J. Hargreaves. Name of owner—Self. Description of property rated—Coal mines. Name or situation of property—Briercliffe. Rateable value, 2100*l.* Rate in the pound: A. At 2d. in the pound on property other than land—17*l.* 10*s.* B. At $\frac{1}{2}$ d. on land.

3. As appears by the said rate the appellants are rated on the higher scale at which under the provisions of sect. 33 of the Act of 1833 the owners and occupiers of houses, buildings, and property other than land were rated in the respondents' township.

4. The appellants said rated premises consist entirely of underground coal mines 500 feet at least below the surface, and having no shaft or opening to the surface within the respondents' township. The coal gotten in the respondents' township is taken by underground ways or passages into the adjoining township and borough of Burnley where it is brought to the surface.

5. All the pit shafts or openings to the surface, and all houses, buildings, and erections and property of a like nature used in connection with the getting of the coal gotten in the respondents' township are situated in the township and borough of Burnley where they are assessed and rated to the poor, sanitary, lighting, and other rates. The appellants have no houses or buildings or property of a like nature in, or in connection with, the said mines in respondents' township. Their property in that township consists wholly of underground workings and ways, which are not and cannot be lighted in any way by the lighting of the said township.

6. If the court shall be of opinion that the said coal mines are liable to be rated on the higher rate chargeable by the Act of 1833 the appeal is to be dismissed with costs, including the costs of and incidental to this case, and the said rate is to be confirmed. If the court shall be of a contrary opinion the appeal is to be allowed with costs, including the costs of and incidental to this case, and the said rate, as far as regards the appellants' said coal mines, is to be reduced to the sum of 5*l.* 16*s.* 8*d.*, being two-thirds of a penny in the pound upon the said rateable value of 2100*l.*

By the Lighting and Watching Act 1833 (3 & 4 Will. 4, c. 90) it is provided by sect. 33:

The overseers aforesaid shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish; provided always, that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act.

(a) Reported by T. R. BRIDGWATER and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

OT. OF APP.] THURSBY AND ANOTHER v. CHURCHWARDENS, &C., OF BRIERCLIFFE. [OT. OF APP.]

Feb. 16, 1894.—*Poland, Q.C. (William Graham with him)* for the appellants.—The appellants ought not to have been rated at the higher rate. The appellants' coal mines ought to be treated as "land" within the meaning of sect. 33 of the Lighting and Watching of Parishes Act 1833 (3 & 4 Will. 4, c. 90), and not as coming within the words "houses, buildings, and property other than land." Coal mines could not possibly be said to come within the words "houses, buildings, and property other than land," because nothing could less resemble houses and buildings than underground coal workings, and no property is less likely to be benefited by a lighting rate than underground coal mines, and which were not, as found in the present case, even in the respondents' township. Three cases have been decided, which are very much in favour of the appellants' contention. It was held, in the case of *Reg. v. Southwark and Vauxhall Water Company* (28 L. T. Rep. O. S. 123; 6 E. & B. 1008), that a water company occupying pipes under the surface of the soil were rateable at the lower rate as occupiers of land. Lord Campbell, C.J., in that case, says, on page 1013: "The owners and occupiers of 'houses, buildings, and property (other than land) shall be rated to every lighting rate thrice as high as 'owners and occupiers of land.' 'Property' here evidently meant property of the same sort as houses and buildings." That passage supports our first test. In the same case *Erle, J.* says on page 1015: "Land generally includes all real property, but here it is used in the sense of land other than houses, buildings, and such property as, being used for habitation, is most benefited by lighting." That supports our second test. In the case of *The Company of Proprietors of the Neath Canal Navigation* (apps.) v. *Overseers, &c., of the Parish of Neath* (resps.) (24 L. T. Rep. N. S. 871; L. Rep. 6 Q. B. 707) it was held that a canal and towing-path, bridges, and a dry dock lined with masonry used for repairing the canal boats, ought to be rated as land. In *Reg. v. Midland Railway Company* (10 Q. B. 389) a line of railway was held to be land within the meaning of the section, and was therefore rateable on the lower scale.

Castle, Q.C. (William Mackenzie with him) for the respondents.—The Act for the Relief of the Poor 1601 (43 Eliz. c. 2), sect. 1, imposes the poor rate first on "lands," and then on several other classes of property, namely, "houses, tithes impropriate, appropriation of tithes, coal mines, or saleable underwoods." The special mention of these latter classes of property shows that they are not "lands" within the meaning of that statute of Elizabeth, for, if it were otherwise, the words would be superfluous. If this be so, it follows that coal mines are "property (other than land) rateable to the relief of the poor" within the meaning of sect. 33 of the Lighting and Watching of Parishes Act 1833, and therefore rateable at the higher rate. The House of Lords decided, in the case of *Morgan and others v. Crawshay* (24 L. T. Rep. N. S. 889; 5 H. L. Cas. 304) that all mines except coal mines were exempt from poor rate, because, in the statute of Elizabeth, coal mines are alone mentioned, which shows conclusively the coal mines are rateable to the relief of the poor, not as "lands," but because they are specially mentioned as "coal mines." This is equivalent to saying that they are "property (other than land) rateable for the relief of the poor," as pro-

vided in the Lighting and Watching of Parishes Act 1833. If all other mines are not "land" a coal mine is not.

Poland, Q.C. (William Graham with him) in reply.

MATHEW, J.—We are dealing in this case for the first time with the question whether a coal mine is rateable, as is contended by the respondents, under the Lighting and Watching Acts. The cases that have been brought to our attention are cases of property other than coal mines, such property as canals, which property in some respects is analogous to a coal mine and railways, and so may be said to be in some respects analogous. But those authorities, it appears to me, do not afford us a guide in this case, because under the terms of the section in question we are compelled to have recourse to the earlier enactments upon this subject. Now, under the Act of Elizabeth it is quite clear that coal mines are not land, that coal mines are assessed separately from land, and remain rateable to the poor from the time that that Act passed down to the present time. In that state of things this first Lighting and Watching Act was passed in the 11 Geo. 4 & 1 Will. 4. That will be found at chapter 27, and the important section for us to consider in that statute is sect. 25, and that runs in this way: "The overseers aforesaid shall, for the purpose of collecting, raising, and levying such rate, proceed in the same manner and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish." Now it is quite clear that under that portion of the section coal mines would be assessable and a rate would be leviable upon them. The section goes on: "Provided that the owners or occupiers of land situate in any parish adopting the provisions of this Act shall be assessed in the proportion of one-fourth of the rate so authorised to be demanded by the said inspectors, and the owners or occupiers of houses, buildings, and other property rateable to the relief of the poor shall be assessed in the proportion of the remaining three-fourths of the said rate." Under that section it appears to me perfectly clear that coal mines, being assessable under the Act of Elizabeth as something different from land, would have had to pay the larger portion of the rate pointed out by that section. Now that section is repealed by the Lighting and Watching Act (3 & 4 Will. 4, c. 90), and in that Act you will find another section identical almost with an unfortunate variation which gives rise to the difficulty. It is almost identical with the sections in the earlier Act, and it runs in this way, "That the overseers aforesaid shall for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish. Provided always, that owners and occupiers of houses, buildings, and property (other than land)"—"other than land" is thrown in, in a parenthesis, but the section runs on and describes what property is meant to be dealt with—property "rateable to the relief of the poor in any such parish shall be rated at and pay" at thrice as large a proportion as mere land. Now, it is only from the position in which that parenthesis is found

CT. OF APP.] THURSBY AND ANOTHER v. CHURCHWARDENS, &C., OF BRIERCLIFFE. [CT. OF APP.]

that it appears to me any difficulty whatever is created. If the section ran, omitting the parenthesis; "That owners of houses, buildings, and property rateable to the relief of the poor in any such parish shall be rated at" thrice as much, there would be no question as to what the meaning of the section was. It appears to me it ought to be interpreted in that way. In the cases which the courts have dealt with the question was between the description of "land" and "houses, buildings, and property." The judges appear to have thought that the particular cases fell rather within the description of "land" than "houses, buildings, and property." But they were not dealing with a coal mine, and the attention of the courts does not appear to have been called to the earlier enactment on this subject repealed in the terms that I have just mentioned. For these reasons it appears to me that our judgment in this case ought to be for the respondent.

COLLINS, J.—I am of the same opinion. When it is once admitted that coal mines do not come within the designation "land" in the statute of Elizabeth, it seems to me that it follows that, under the provisions of the Lighting Act, they are subject to the higher rate. Now, it is quite clear, as was so clearly put by Mr. Castle, that the statute of Elizabeth embraced other subject-matters than land. It embraced tithes, coal mines, and saleable underwood, and in the case of coal mines, by specifically designating coal mines as a separate subject-matter of rating, it took it out of the generic term "land," and, inasmuch as it did take it out of it, the courts in other cases have held that all mines were excluded from the designation "land" in the statute of Elizabeth. That being so, we find that up to the time when the Lighting Act of 3 & 4 Will. 4 was passed, the area of rateability for this class of purpose was the same as in the statute of Elizabeth. But the previous statute of Geo. 4 in terms stated that property other than land—in other words, that all property rateable under the statute of Elizabeth—was to be rateable for this purpose. Then came this statute, which has created the difficulty; and the words are: "Provided that owners and occupiers of houses, buildings, and property other than land rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated." It is obvious, therefore, that, if you can point to something rateable under the statute of Elizabeth which is not a house and which is not land, it is subject to the higher taxation. Is a coal mine a house? It is not contended that it is. Is it land? The statute of Elizabeth, as interpreted by the subsequent decisions, decides that it is not. Then what is it? It is "other property," and being "other property" it is rateable at the higher rate. Now that it seems to me would be so clear as to be almost unarguable, but for the decisions which have been called to our attention. I may say, before I come to these decisions, that, as pointed out by Mr. Castle, it does not merely stand upon the comparison of the statute of Elizabeth and the Lighting Act which I have dealt with, for we also have intervening the Act of 1851, which distinctly assumes that tithes, being property other than land were rateable at the higher rate under the Lighting Act, and, recognising that that was inequitable, puts them

for the purpose of rating upon the same footing as land. It does not constitute land, but it directs that they shall be rated in the same proportion as land. In my judgment, had the matter stood there without the decisions, the case would have been absolutely clear. But then come some decisions in which the question was in one case a canal, in another a railway, and in another a dock accessory to a warehouse. The question was, what category those subject-matters fell under? Did they fall under the designation "land" or under the designation "houses"? Now, it was obvious there that, unless those were houses, unless the two categories of "houses" and "land" were taken as being mutually exclusive of each other, and unless it was clear that if they were not houses they must be land, they were clearly capable of coming under the description "land." They were not, like a coal mine, something that by the statute of Elizabeth could not be embraced under the designation "land." Therefore the only question the court really had to consider there was whether something capable of being designated by "land" was in fact described under the designation "house," or was to be taken as being described under the designation "land," and that being the point to which they had to address their minds, there being no question of anything outside the two dealing with something only which might be land, and which it was contended possibly might be a house, they decided in that particular case it was land. Therefore, though there are some dicta which do suggest that "other property" there must be taken to be property *ejusdem generis* as "house," those decisions do not appear to me to embarrass us at all, and those dicta, like every other dicta, must be read *secundum subjectam materiam*, and being so read, do not seem to me at all to affect the question which was not before the court, and which it was not necessary for them to consider. Therefore I am of opinion that this appeal must be dismissed.

Appeal dismissed.

The appellants appealed.

Balfour Browne, Q.C. and W. Graham for the appellants.—"Property other than land" means something *ejusdem generis* with houses and buildings, and therefore does not include coal mines:

R. v. Southwark and Vauxhall Water Company, 6 E. & B. 1008;

Neath Canal Navigation Company v. Overseers of Neath, 24 L. T. Rep. N. S. 871; *nom. R. v. Overseers of Neath*, L. Rep. 6 Q. B. 707;

Midland Railway Company v. Churchwardens of Great Wigston, 32 L. T. Rep. N. S. 753; *nom. R. v. Midland Railway Company*, L. Rep. 10 Q. B. 389.

In those three cases water-pipes, a canal and a railway, were held each to be land. These coal mines can by no possibility derive any benefit from the lighting of the township.

Castle, Q.C. and W. Mackenzie for the respondents.—Docks have been held *ejusdem generis* with houses, and therefore liable to the higher rate:

Peto v. Overseers of West Ham, 2 E. & E. 144.

When the nature of a property is uncertain, then the rule as to *ejusdem generis* may be used; but here it is submitted that there is no uncertainty. The terms of the Poor Relief Act 1601 show that

CT. OF APP.] THURSBY AND ANOTHER v. CHURCHWARDENS, &C., OF BRIERCLIFFE. [CT. OF APP.]

coal mines are not "land" within that Act. Coal mines are not rateable under that Act as "land" but in consequence of a special provision as to coal mines:

Morgan v. Crawshaw, 24 L. T. Rep. N. S. 889; L. Rep. 5 E. & I. 304.

Tithes were "property other than land," and were rateable as such: (see 14 & 15 Vict. c. 50.)

Balfour Browne replied.—The Act of Elizabeth does not say that coal mines are not land, but even if they are not for the purposes of that Act, it does not follow that they are not for the purposes of the Lighting and Watching Act. The classification in the two Acts is different.

Cur. adv. vult.

April 8, 1894.—The following written judgments were delivered:—

LOPES, L.J.—This is a special case raising an important question, viz., whether the appellants' coal mines are liable to be rated at the higher rate chargeable by sect. 33 of 3 & 4 Will. 4, c. 90 (Lighting and Watching Act 1833). The Divisional Court have held that the appellants are liable to be rated at the higher rate as "owners and occupiers of houses, buildings, and property, other than land." The reasoning of the learned judges in the court below appears to be that, because coal mines are specially mentioned in the 43 Eliz., c. 2, s. 1, in addition to lands, therefore they cannot be regarded as "land" under the Lighting and Watching Act, but must be included in the general words "property (other than land) rateable to the relief of the poor," which follow the words "houses, buildings," and are therefore subject to the higher rate. The early part of sect. 33 is mere procedure, and affords no assistance in determining what property is subject to the higher and what to the lower rate. Then comes these words of the proviso: "Provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." Who are to pay the higher rate? Why, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor under the statute of Elizabeth, which is not described therein as land, but as tithes, coal mines, and saleable underwoods, which are placed in the same category with houses and lands, and together form the five subject-matters to which the poor rate attaches under that statute. The statute 14 & 15 Vict. c. 50 affords a very strong argument that this is the proper construction to be placed on the word "property" in this section. That statute assumes distinctly that tithes, being property other than land, were rateable under the Lighting and Watching Act at the higher rate, and recognising this injustice, the Legislature places them on the same footing as land. If the Legislature regarded tithes as coming within the word property, and rateable under the Lighting and Watching Act on the higher scale, how can coal mines, which are under the statute of Elizabeth in the same predicament as tithes, be relieved? They are both specifically mentioned and are both specifically rateable under that Act,

and coal mines are not, like tithes, within the relief afforded by 14 & 15 Vict. c. 50. It is to be observed that the language of the old Lighting and Watching Act, 11 Geo. 4 & 1 Will. 4, c. 27, sect. 25, is different from that of sect. 33 of the Act we are now considering. The words there are "owners or occupiers of houses, buildings, and other property rateable to the relief of the poor." The words "other than land" are omitted. The language of this Act would clearly make coal mines rateable at the higher scale. Mathew, J. places some reliance upon this, but I do not think much reliance is to be placed on the language of a repealed statute when we have to construe the language of a statute by which it is repealed. We have been much pressed by certain decisions which have placed a construction upon the words in question, and especially the case of *Reg. v. Overseers of Neath* (*ubi sup.*), where it was held that "property" meant things *ejusdem generis* with houses and buildings, and did not include a canal and towing-path, and also by *Reg. v. Midland Railway Company* (*ubi sup.*), where it was held that a line of railway was land within the meaning of the section, and was therefore only rateable at the lower rate. Blackburn, J. says in the latter case: "I cannot come to the conclusion that in considering sect. 33 of the Lighting and Watching Act we can say that in the words 'houses, buildings, and property other than land,' and 'land,' the antithesis is between land in its natural state, or in an agricultural state, and land in which any money has been invested for commercial purposes. I think the distinction is between land, which is the general word, and land which has been built upon. Such property is either a house or building, or something which for any reason is not a building—a house or things *ejusdem generis*; and I think neither a railway nor a canal could be considered as a building in that sense." I feel the force of this reasoning; but the court in the first case was dealing with a canal, and in the second case with a railway, subject-matters not specifically dealt with by the statute of Elizabeth, and only rateable as land in the ordinary acceptation of that description. For the purposes of the decision of those cases it was only necessary to hold that the railway and canal were not houses or buildings, but land. The court was not embarrassed with something which was treated by the statute of Elizabeth as rateable independently of being land, and which came within the description of being property specifically mentioned as being rateable to the relief of the poor. All they had to decide was whether something which was capable of being designated as land and was not distinguished from land in the statute of Elizabeth, was to be regarded as land or as a house or building. These decisions for some time created grave doubts in my mind, but I have come to the conclusion that if the judges in those cases had been called upon to decide whether a coal mine, which is specifically mentioned in the statute of Elizabeth, and made rateable as a coal mine, independently of its being land, came within the words "property (other than land) rateable to the relief of the poor," they would have decided that question in the affirmative. A coal mine is not a house, it is not a building, it is not regarded as land or made rateable as land under the statute of Elizabeth; but it is property rateable to the relief

CHAN. DIV.]

Re LUMLEY; HOOD-BARRS v. CATHCART.

[CHAN. DIV.]

of the poor under that statute, and, therefore, in my judgment, to be rated on the higher scale. I am of opinion that the appeal fails, and the judgment of the court below must be affirmed.

DAVEY, L.J.—I do not disagree with the judgment of the Lord Justice, which has just been read, concurring with the judgments of the learned judges in the Divisional Court. Apart from any decision on the statute, I should say that the words in question included all property of every description rateable under the Act of Elizabeth or any subsequent Act, and that it is a reasonable construction of the words "other than land" to construe them with reference to the Rating Acts, and to hold that what is intended to be excepted is property rateable as land. Coal mines being expressly mentioned, are separately rated, and not rated as land, although, like saleable underwoods they are, in fact, land. But I cannot help seeing that, although the decisions in the Queen's Bench cases which have been referred to do not touch this case, yet we are in fact differing from the construction of the proviso adopted and laid down with some variation by judges of so great eminence as Lord Campbell, Erle, J., and Lord Blackburn. Nor do I think that the effect of that observation is altogether got rid of by saying that they might have come to the same conclusion on the cases before them without adopting that construction. And I feel some hesitation in differing from those judges. As, however, my learned brother agrees with the Divisional Court, my hesitation will have no effect, and it is of the less importance because my experience in such cases as this is not, of course, to be compared with that of the judges in the court below and my learned brother.

Appeal dismissed.

Solicitors for the appellants, *Littledale and Lefroy*, for *Artindale and Southern*, Burnley.

Solicitors for the respondents, *Warriner and Kinch*, for *T. Nowell*, Burnley.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, April 27.

(Before NORTH, J.)

Re LUMLEY; HOOD-BARRS v. CATHCART. (a)

Married woman—Restraint on anticipation—Sequestration—Arrears of income—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), ss. 1 (2), 19.

By an order made by North, J. on the 15th Jan. 1894, as varied by the Court of Appeal, leave was given to H. to issue a writ of sequestration against C., a married woman, limited to her separate estate not subject to any restraint on anticipation, to enforce payment of 115l., the amount of costs of proceedings taken by her, which she had been ordered to pay by three previous orders. C. was entitled, under her marriage settlement, to a life interest in real estate for her separate use, without power of anticipation, settled upon her directly, without the intervention of a trustee. A writ of seques-

tration, limited as above, was issued on the 8th Feb. The money was not paid. On the 29th March H. moved for an injunction restraining C. from receiving the rents due on the 25th, and for an order that her agent, who had already received a portion of those rents, should pay the moneys he had received to the sequestrator, or, in the alternative, for leave to issue a fresh writ of sequestration.

Held, that H. was only entitled to have the costs paid out of such separate estate of C. as was at the date of the order for payment free from restraint on anticipation, not out of that which might have become free from such restraint at the time of the issue or the enforcing of a writ of sequestration. The sequestrators were therefore not entitled to the rents which had become due on the 25th March, nor was H. entitled to a fresh order for sequestration.

Both motions were dismissed with costs.

PREVIOUSLY to the 15th Jan. 1894 three several orders had been made for the taxation and payment, by Mrs. Cathcart, a married woman, to Messrs. Lumley, or Hood-Barrs, their assignee, of the costs of certain proceedings taken by her, without a next friend.

On the 15th Jan. an order was made by North, J., that Mrs. Cathcart should pay the amount of these taxed costs, 115l. 2s., to Hood-Barrs, within four days, and that, in default of such payment, Hood-Barrs should be at liberty to issue a writ of sequestration against the separate estate of Mrs. Cathcart, such sequestration to be limited to the separate property of the said Mrs. Cathcart not subject to any restraint on anticipation, unless by reason of sect. 19 of the Married Women's Property Act 1882 the property should be liable to sequestration notwithstanding such restraint.

On appeal it was held that the court had no power to make an order for sequestration on an uncertain future event (96 L. T. 584), and the order was varied by striking out the order to pay, and leaving a simple order for leave to issue sequestration.

On the 8th Feb. 1894 a writ of sequestration was issued limited as above.

Mrs. Cathcart was, under her marriage settlement, entitled for her life to the rents and profits of real estate amounting to more than 4000l. a year for her separate use, without power of anticipation. This interest was vested in her directly, without the intervention of a trustee.

On the 29th March 1894 the vacation judge made an order on an *ex parte* application by Hood-Barrs, restraining Mrs. Cathcart from receiving the rents which became due on the 25th March until after the first motion day in the Easter sittings. A portion of the rents had been received by Lewis, Mrs. Cathcart's agent, before the date of this order.

Hood-Barrs now moved that this injunction might be continued, or, in the alternative, for leave to issue a fresh writ of sequestration.

There was a second motion by Hood-Barrs and the sequestrators that Lewis might be ordered to pay to the sequestrators the rents in his hands.

Swinfen Eady, Q.C. and *Ribton* for the first motion.—The sequestration entitles the sequestrators to receive all property which, at the time

(a) Reported by J. R. BROOKS, Esq., Barrister-at-Law.

it is taken, belongs to a married woman for her separate use free from restraint on anticipation:

Cox v. Bennett, 64 L. T. Rep. N. S. 380; (1891) 1 Ch. 617.

Lindley, L.J.'s judgment in that case lays down the rule in the widest terms: "If you can find at any time arrears that can be attached, you may attach those arrears of the separate estate, although, of course, you cannot attach the future income which she is restrained from anticipating." The order to pay binds the separate estate of a married woman to the same extent as her own contract does, and her contract will bind separate estate acquired after its date, even though she had no separate estate at the date of the contract:

Re Ann; Wilson v. Ann, 70 L. T. Rep. N. S. 273; (1894) 1 Ch. 549.

Mrs. Cathcart in person.

Bartley Dennis for the second motion.—As soon as the rents become in arrear the restraint on anticipation ceases. The sequestrators could not take them before they were due, nor prevent Mrs. Cathcart from receiving them the day they were due; but the moment they have become in arrear they are liable to be taken under an execution for a previous judgment, and in the same way may be taken under a sequestration.

Hyde v. Hyde, 59 L. T. Rep. N. S. 529; 13 P. Div. 166.

Oswald, Q.C. and *St. John Clerke*, for Lewis, were not called upon.

NORTH, J.—I will deal with the second motion first. In my opinion the sequestrators are not entitled to receive the rents which accrued due on the 25th March. Orders had been made that Mrs. Cathcart should pay certain costs, and on the 15th Jan. 1894 an order was made giving leave "to issue a writ of sequestration against the separate estate of the said Mary Cathcart not subject to any restriction against anticipation, unless by reason of sect. 19 of the Married Women's Property Act 1882 the property should be liable to sequestration notwithstanding such restriction." It is not suggested that this property comes within sect. 19, and therefore the latter words may be left out of consideration. There is only power to issue the writ against the separate estate which is not subject to any restraint upon anticipation, and this limit is also expressed in the writ itself. The writ was issued, and at the date of its issue, the only property of Mrs. Cathcart with which we are concerned was real estate to the income of which she is entitled for her life only, subject to a restraint on anticipation. In my opinion there was no power at that time under the order to issue sequestration against that property at all. The writ could not take effect against that property, because it was expressly excepted from the scope of the order, and necessarily also from the scope of the writ which was issued under it. On the 25th March the rents became payable, and within two days from that date some rents were received partly by Mrs. Cathcart and partly by her agent Mr. Lewis. The sequestrators say that the rents so received ought to be handed over to them. Why? I cannot see any reason to justify the sequestrators in claiming them. The rents are those with respect to which Mrs. Cathcart was

restrained from anticipation, and property subject to such a restriction was expressly excepted from the operation of the order. It is contended that, when the 25th of March arrived and the money was received by Mrs. Cathcart or her agent, it was no longer subject to any restriction against anticipation in her hands, and that an execution then issued against her would have entitled the creditor issuing execution to take the money as part of her separate property not subject to any restraint on anticipation. I have no doubt that would be so; but it does not follow that the effect of a writ issued while the property was still subject to a restraint against anticipation would be the same. It is said, whether there is a judgment for costs or a contract it is exactly the same. If this be so, and this argument is sound with respect to a judgment, it must be equally sound with respect to a contract, and it would come to this, that a lady who is restrained from anticipation and who cannot contract herself out of the right to receive her income, might enter into a contract by which she would confer a right on some one else to take the money when the time for payment has come, although she is expressly prevented by law from entering into any such contract, because she is restrained from anticipation. The argument has been carried to this absurd extent, that the lady cannot be prevented from going to the bank to receive her dividends on consols on the morning of the day on which they become due, and during all that day she may do as she likes with them, but that, if she does not receive them on the first day, then on the following day those dividends are in arrear, and can be taken by the sequestrators. A distinction has been drawn between rents or dividends which are due but are not in arrear, and rents and dividends which are overdue and in arrear. In my opinion there is no such distinction. When the books speak of the right to the income of married women which is said to be "in arrear," in my opinion a distinction is being drawn between income to which a married woman is entitled, but which she is not yet entitled to receive, and which she cannot anticipate, and income which she is entitled to receive at once. When the time has passed at which the income becomes due, it is included in what is called "income in arrear" within the meaning of the phrase as used in the cases which have been cited. I know of no principle or authority for the proposition that on the 24th March rents are not yet due and cannot be anticipated by a married woman who is restrained from anticipation, and that on the 25th March the rents are due and can be received by her, but will not be bound by a previous assignment, and it is not until after that time that they can be received by her assignee. I know of no such distinction. It seems to me that either the time for payment has not come (in which case a woman who is restrained from anticipation cannot deal with the rents); or the day has arrived for payment (in which case they are no longer capable of being anticipated), and they are then in arrear within the meaning of that phrase, as it is used in the cases. The result is, that there are rents or revenue with respect to which Mrs. Cathcart was restrained from anticipation, and in my opinion she had no power to do anything which, after the period of payment had arrived, would

CHAN. DIV.]

Re ROLFE; TYSON v. JOHNSON.

[CHAN. DIV.]

have the effect of fettering herself in respect to that income. As Cotton, L.J. said in the passage which has just been read, in the case of *Hyde v. Hyde* (59 L. T. Rep. N. S. 531; 13 P. Div. 173): "With regard to future income, it would, in my opinion, be wrong to hold that the sequestrator can enforce payment of it to him, because, when a married woman, who has a separate estate, which is the mere creature of a court of equity, is restrained from anticipation, the court, in fact, secures the property to her, and as she cannot do any act to anticipate the income, or to give it to another person by anticipation, it would, in my opinion, be wrong for the court to say that, because she has committed a contempt, the court will not only authorise the sequestrator to receive the income already due to her, but will take advantage of her act to make an order for the sequestrator to receive the future income; that would be causing a married woman to do indirectly what she cannot do directly." Now, in *Re Glanville* (54 L. T. Rep. N. S. 411; 31 Ch. Div. 532), the courts held that the commencement of the action was the time to look at, and that no income which did not accrue due till after that date could be attached. In *Cox v. Bennett* (*ubi sup.*) the court took a different view. It held there that, if the property with respect to which it was said that the order for sequestration applied was not in arrear until the date when the order was made, but was then in arrear, that would do. The present is an attempt to go further, and say that, if the money which it is sought to make liable is in arrear, not when the order is made, or when the writ issued, but when it is sought to put the writ into execution, that will do. In my opinion that will not do. There is no authority for it. The case I cited is against it, both as regards principle, and as regards the application of the principle to the particular cases. In my opinion, therefore, the sequestrators had no power to recover payment of the rents that only became due on the 25th March. Under the circumstances, Mrs. Cathcart was entitled to receive them, or to employ an agent to do so, and the sequestrators are not entitled to require the agent to pay those moneys over to them, because their power merely applies to the property which was not, at the time when the order for payment was made, subject to any restraint on anticipation. The second motion, therefore, must be dismissed with costs. The same reasoning applies to the first motion, so far as it seeks to restrain Mrs. Cathcart from receiving the rents, but that motion asks, in the alternative, for leave to issue a fresh writ of sequestration. [His Lordship expressed an opinion that this leave ought to be given, but on the following morning (28th April) he delivered the following further judgment:] I have considered this matter again since yesterday, and I do not see that the applicant ought to have leave to issue a fresh writ of sequestration; for this reason, that I do not see what good he would get by it. The writ is to work out the orders for payment, and those orders only apply to rents and income which were in arrear at their date. The existing sequestration is quite ample enough to cover that, and a further sequestration would do no good. The case is not, as I thought yesterday, like a case in which you have execution in one county, and, there being no return, you issue a fresh execution in another

county. The sequestration already issued covers everything which the applicant has a right to catch. It is as large as any writ could be, and the issue of a fresh sequestration would not add anything to the power of the sequestrators. If the date of the writ of sequestration were that at which it has to be considered what can be taken under it, then, no doubt, the case would be different. But it is not so, and I must dismiss the first motion also with costs. I see the cases of *Re Dixon* (57 L. T. Rep. N. S. 94; 35 Ch. Div. 4), *Stogdon v. Lee* (64 L. T. Rep. N. S. 494; (1891) 1 Q. B. 661), and *Pelton Brothers v. Harrison* (65 L. T. Rep. N. S. 514; (1891) 2 Q. B. 422), are strong authorities in favour of the view I have taken.

Solicitors: Hood-Barrs and Co.; H. B. Elton.

Tuesday, May 1.

(Before NORTH. J.)

Re ROLFE; TYSON v. JOHNSON. (a)

Practice — Administration — Action — Persons served with notice of judgment—Notice of hearing on further consideration—Order XVI., rr. 40, 41, 42; Order XXXVI., r. 21.

As a general rule persons served with notice of a judgment or order under Order XVI., r. 40, who have not entered an appearance, need not be served with notice of the hearing on further consideration.

In an action by one beneficiary against the trustees of a will, the usual judgment was given for administration and execution of the trusts of the will. This judgment was served upon the other beneficiaries under Order XVI., r. 40. None of them entered an appearance.

Held, that it was not necessary to serve them by filing or otherwise with notice of the hearing on further consideration, the order asked for not requiring them to pay money or otherwise affecting them personally.

THIS was an action for the administration of the estate of Robert Rolfe, who died some years before its commencement. The plaintiff was one of the persons beneficially interested in the residue of the testator's estate; the only defendants were the executors of the last surviving trustee, who in that capacity were the present trustees of the will.

On the 12th June 1893 the usual administration order was made directing full accounts and inquiries.

Notice of this order was served under Order XVI., r. 40, upon all the persons other than the plaintiff beneficially interested, and a memorandum of such service was duly entered in the Central Office according to rule 42, but none of the persons so served entered an appearance or attended any of the proceedings in chambers.

The chief clerk's certificate, which was dated the 5th March 1894, certified, among other things, that there was a balance due from the surviving trustee's estate of 336l., and that the defendants, his executors, had admitted assets; that the only outstanding estate was a mortgage which had been appropriated for the payment of two legacies, the other legacies and debts having been paid.

(a) Reported by J. R. BROOKS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re NEW TERRAS TIN MINING COMPANY LIMITED.

[CHAN. DIV.]

He also certified that all the persons beneficially interested under the will had been duly served with the order, but had not entered any appearance, as appeared by certificates from the Central Office.

The case now came on for further consideration. The order asked for provided for the payment into court of the balance found due, the taxation, payment of costs, and for directions as to realising the mortgage.

Bramwell Davis for the plaintiffs.—A question has been raised whether notice of the hearing upon further consideration ought to have been served upon the persons who were served with the notice of judgment but did not enter an appearance. Order XXXVI., r. 21, requires that notice should be served on the parties to the action. The question is, whether these persons are parties. The service of notice of judgment is governed by Order XVI., r. 40, which makes the judgment binding on them, and rule 41 of the same order directs that they should enter an appearance like other parties instead of obtaining leave to attend the proceedings as under the old practice. In a recent case before your Lordship, the registrar (Mr. Lavie) stated that the practice was to serve such persons. On the other hand, in *Seton's Judgments and Orders*, vol. 1, p. 316 (5th edition), it is stated that all parties, including persons who may have entered an appearance under Order XVI., r. 41, must be served, apparently excluding those who have not entered an appearance. In *Rees v. George* (15 Ch. Div. 490) Chitty, J. required service, but in that case the order was for payment of money by the persons who had been served with notice of judgment. If your Lordship thinks service necessary, the case must stand for a week to allow of notice being filed in the Central Office.

Byland, for the defendants, did not raise any objection on this point.

NORTH, J.—I think I can hear the case. I do not think it is essential that beneficiaries who have been served with notice of the judgment should be served with notice of the hearing on further consideration. Order XVI., r. 41, provides that it shall not be necessary for any person served with notice of any judgment to obtain an order for liberty to attend the proceedings, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office, in the same manner and subject to the same provisions as a defendant entering an appearance. Then rule 42 provides that a memorandum of the service upon any person of notice of the judgment or order in any action under rule 40 shall be entered in the Central Office upon due proof of such service. That has been done, as appears from the chief clerk's certificate, and there is no provision requiring anything else to be done. The passage quoted from *Seton*, under the heading "Further consideration—Service—Appearance by persons not parties," only states that those who have appeared must be served. No doubt cases may well arise in which, as in *Rees v. George* (*ubi sup.*), the court will not make orders on further consideration without requiring service on persons who are personally affected by the order. But that is a different matter altogether, and a question for the discretion of the court. In the absence of such special reason for the exercise of

its discretion, I see no ground for requiring service by filing or otherwise.

The case was then heard, and the order made as prayed, except that the costs were not ordered to be paid, but only to be taxed, with liberty to apply for their payment, and generally, when the balance found due had been paid into court.

Solicitors: *Alexander Pope; Belfrage and Co.*

Wednesday, Feb. 28.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re NEW TERRAS TIN MINING COMPANY LIMITED. (a)

Company—Winding-up—Voluntary liquidation—Stannaries Court—Jurisdiction—Companies (Winding-up) Act 1890, ss. 1 (sub-sects. 1, 4), 3, 32.

A company formed for working mines "in Cornwall and elsewhere in England" was in voluntary liquidation. The company had originally been engaged in working a mine in Cornwall, but it did not appear from the evidence that it had at any time been engaged in working a mine out of Cornwall.

Held, that the court having jurisdiction to entertain applications in the winding-up was the Stannaries Court, until it was shown that the company was actually working mines beyond the limits of the Stannaries.

MOTION.

This was an application in the voluntary winding-up of the New Terras Tin Mining Company Limited by a contributory, under sects. 134 and 141 of the Companies Act 1862, that the liquidator should be removed, and that another should be appointed in his place.

The company was registered in 1882.

The memorandum of association stated its objects to be

To purchase or otherwise acquire and work mines, minerals, and mining rights, lands, and hereditaments in the county of Cornwall or elsewhere in England.

The registered office of the company was in London.

The company had formerly been engaged in working a mine in Cornwall, but was not now engaged in working any mine either in Cornwall or elsewhere.

It did not appear from the evidence whether the company had ever worked a mine not in Cornwall.

In Jan. 1894 an application in the winding-up had been made by another contributory in the Stannaries Court with reference to other matters, and an order thereon had been made by consent.

Oswald, Q.C. and *Bramwell Davis* for the motion.

Micklem, for the liquidator, took the preliminary objection that the motion ought to have been made to the Stannaries Court. By sect. 81 of the Companies Act 1862 the "court" was defined to mean the High Court of Chancery, and provision was thereby made for the case of a company carrying on business within the Stannaries. That section was, however, repealed by sect. 33 of the

(a) Reported by W. IVIMBY COOK, Esq., Barrister-at-Law.

CHAN. DIV.]

Re GENERAL PHOSPHATE CORPORATION LIMITED.

[CHAN. DIV.]

Companies (Winding-up) Act 1890, and the definition contained in the Stannaries Act 1887 was adopted. Sect. 1, sub-sect. (4) of the Act of 1890 provides that "where a company is formed for working mines within the Stannaries, and is not shown to be actually working mines beyond the limits of the Stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into a contract for such working or undertaking, a petition to wind-up the company or to continue the winding-up of the company under the supervision of the court shall be presented to the Stannaries Court, whatever may be the amount of the capital of the company and wherever the registered office of the company is situate." This sub-section does not apply to a voluntary liquidation, but it appears from the sub-section taken in connection with sub-sect. (2) of sect. 32 of the Act that the court having jurisdiction in the case of a voluntary winding-up of a company engaged in working mines within the limits of the Stannaries is the Stannaries Court. This court has therefore no jurisdiction to entertain the present application, unless it be under the power given by sect. 3, sub-sect. (1), to retain proceedings in the court in which they have been commenced: (*Re Watson and Sons Limited*, 65 L. T. Rep. N. S. 170; (1891) 2 Ch. 55.) [WILLIAMS, J.—In that case all that Chitty, J. meant was that in general the Companies (Winding-up) Act of 1890 had no application to voluntary liquidations. He did not intend to lay down that it only applied to voluntary liquidations where they were expressly mentioned. There are also sections in the Act which must apply by implication. In four-fifths of the sections there is a limitation to compulsory winding-up. In *Re Stock and Share Auction and Banking Company Limited* (*ante*, p. 235; (1894) 1 Ch. 736) I went much further than that, and held that sect. 15 applied to a voluntary winding-up.] In the present liquidation an application has already been made to the Stannaries Court for the appointment of another liquidator. I ask your Lordship therefore to follow the course adopted by Stirling, J. in *Re Buller and Basset Tin and Copper Company Limited* (35 Sols. Jour. 260), and to transfer the matter to the Stannaries Court.

Oswald, Q.C. and Bramwell Davis for the applicant.—The memorandum of association states that the company was formed to work mines "in Cornwall and elsewhere in England." By that we submit is meant that the company was to work mines in England. The words "in Cornwall or elsewhere" were unnecessarily inserted, and are mere surplusage. [WILLIAMS, J.—The fact that the memorandum gives power to work elsewhere is not sufficient to take the company out of the jurisdiction of the Stannaries Court.] As there is no evidence showing that the company is engaged in working mines in Cornwall, this court has jurisdiction to make the order asked:

Re Silver Valley Mines, 45 L. T. Rep. N. S. 104; 18 Ch. Div. 472.

[WILLIAMS, J.—Lord Romilly, M.R. had decided in *Re East Botallack Consolidated Mining Company* (11 L. T. Rep. N. S. 408; 34 Beav. 82) that "engaged in working" meant "formed to work." The Court of Appeal overruled that in *Re Silver Valley Mines* (*ubi sup.*), and held that the com-

pany must actually be engaged in working. The Act of 1890 enacted as law in sect. 1, sub-sect. (4) what Lord Romilly had decided in the case before him. Therefore *prima facie* it is sufficient to give jurisdiction to the Stannaries Court that a company has been formed to work mines within the limits, and is not actually working beyond the limits of the Stannaries. To oust that jurisdiction it must be shown that the company is working elsewhere.] In *Re North Molton Mining Company* (W. N. 1886, p. 78), Kay, J. made an order removing a liquidator and appointing another in his place in the case of a company which had had a mine within the jurisdiction of the Stannaries Court but which had been sold in the voluntary liquidation. *Re Buller and Basset Tin and Copper Company Limited* (*ubi sup.*) does not apply, as in that case there do not appear, as here, to have been the words "or elsewhere." Further, the liquidation here being voluntary, the court has no jurisdiction to retain or transfer the matter under sect. 3, sub-sect. (1) of the Act of 1890.

WILLIAMS, J.—I am of opinion that, under the circumstances of this case, the jurisdiction is *prima facie* in the Stannaries Court. I think this company was formed for the purpose of working mines within the limits of the Stannaries, although not exclusively within those limits. Having regard to the terms of the Act of 1890, I think that, the moment that appears, the jurisdiction is in the Stannaries Court until it appears that the company has been working mines beyond the limits of the Stannaries. I will give the plaintiffs an opportunity of showing that this company has been working mines beyond such limits, but in the meantime I decline to exercise my power of retaining the case here, having regard to the fact that the matter has been under consideration in the Stannaries Court, and an order by consent has been made there.

The plaintiffs thereupon agreed to an order transferring the motion and proceedings thereon to the Court of the Vice-Warden of the Stannaries to be heard by him, and reserving all costs to be dealt with by him.

Solicitors: Lewis W. Gregory; J. A. Maxwell.

Wednesday, April 25.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re GENERAL PHOSPHATE CORPORATION LIMITED.

Re NORTHERN TRANSVAAL GOLD MINING COMPANY LIMITED.

Re DELHI STEAMSHIP COMPANY LIMITED. (a)
Company—Winding-up—Public examination—Report of official receiver—Statement in report that fraud has been committed—Companies (Winding-up) Act 1890, s. 8.

In order to obtain an order for public examination under sect. 8 of the Companies (Winding-up) Act 1890, the official receiver should, in his further report under sub-sect. (2), state matters of information and belief, and should pledge himself that such matters in his opinion constitute a *prima facie* case of fraud by some person—not defining which person—in the promotion

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

or formation of the company or in relation to the company since the formation thereof. Whether or not the expression of such opinion is a condition precedent to the making of such an order, it is convenient in practice that the opinion of the official receiver should be so expressed.

THESE were applications in chambers, by the official receiver in person, under sect. 8 of the Companies (Winding-up) Act 1890, for orders for the public examination of persons connected with the above-named companies. That section provides:

Sub-sect. (1). Where the court has made an order for winding-up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court—(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and (b) if the company has failed, as to the causes of the failure; and (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

Sub-sect. (2). The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud had been committed by any person in the promotion or formation of the company, or by any director or other officer of the company, in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court.

April 25.—The following written judgment was now delivered in court by WILLIAMS, J.:—The question I have to decide, before I can make the order for examination asked for in these cases, is whether or not the statement in terms by the official receiver in his report of his opinion that “a fraud has been committed” by some person of the class mentioned in sub-sect. 3 of sect. 8 of the Companies (Winding-up) Act 1890, in the promotion or formation of the company, or in relation to the company since the formation thereof, is a condition precedent to the jurisdiction to make the order for examination, and what constitutes the expression of such an opinion? This question has been before the Court of Appeal, and was argued by counsel in the case of *Re Trust and Investment Corporation of South Africa* (67 L. T. Rep. N. S. 777; (1892) 3 Ch. 332). The report of the official receiver in that case did not state in terms the opinion of the official receiver that fraud had been committed, but the court nevertheless ordered a public examination. The judgment of the court, however, was only given on an *ex parte* appeal, and was in terms only directed to the question whether the order for examination could be made on an *ex parte* application, and whether the report need indicate fraud on the part of the person ordered to be examined. Since, and in consequence of this decision, I have always thought it right to make orders if the report of the official receiver disclosed a *prima facie* case of fraud, even though the report did not express in terms the opinion that fraud had been committed, and I have treated the report and application of the official receiver as a sufficient indication of the opinion of the official receiver. It seems, however, from observations of members of the Court of Appeal in the recent case of *Re New Zealand Loan and Mercantile Agency Company Limited* (10 Times L. Rep. 379), that the court, with-

out expressly departing from the decision in *Re Trust and Investment Corporation of South Africa* (*ubi sup.*), and without saying that an expression in terms of an opinion by the official receiver that fraud has been committed, was a condition of the jurisdiction of the court to order a public examination, indicated a view that it was desirable that the official receiver should express in terms the opinion referred to in sub-sect. 2 of sect. 8. I, therefore, have now to consider how far I ought to require the expression in terms of such an opinion, and what the nature of the opinion thus to be expressed is. Now the object of the examination is manifestly to ascertain whether such fraud has been committed. It is obvious, therefore, that one should not so read the section as to make the conclusion in fact that such a fraud has been committed a condition precedent to the order for examination. The utmost that the section can mean is that the official receiver should state that, on the information before him, uncontradicted and unexplained, he is of opinion that a *prima facie* case is made of fraud having been committed, and that he believes such information to be true. To give, however, the words “state his opinion that a fraud has been committed,” this meaning is no small departure from the literal meaning of the words, for to state an opinion that there is a *prima facie* case that a fraud has been committed is manifestly not the same thing as to express an opinion that fraud has been committed. Some light is thrown on the meaning of the words by previous legislation, for the opinion of the official receiver embodied in his report seems to be made evidence by rule 333 of the Bankruptcy Rules of 1886, and the object of the Legislature generally would seem to be to enable the official receiver to bring before the court matters as to which he has no personal knowledge, and can only be speaking from information and belief. Thus, by the 16th section of the Debtors Act 1869, it is enacted that, “Where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.” Now, in this section it is impossible to suppose that it was intended that more should be required of the trustee (whose duties in this respect are now performed also by the official receiver), as the condition of an order to prosecute, than is required of a creditor making a representation to the court. It is plain that in either case the facts must be stated, because the court is only to order the prosecution if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, a matter of which the court cannot judge unless the facts upon which the application is based are before it. Why, then, does the section require that the trustee or official receiver should report that in his opinion a bankrupt has been guilty of an offence under the Debtors Act? It seems to be because the official receiver is entitled to bring before the court matters based

Q.B. Div.]

NEAL (app.) v. DEVENISH (resp.).

[Q.B. Div.]

on information and belief, in which case it is only reasonable that the expression of his belief in a *prima facie* case of fraud should be made a condition of his obtaining an order for public examination. It seems to me that sect. 8 of the Companies (Winding-up) Act 1890 in the same way intends that the official receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person—not defining which person—falling within the description of persons mentioned in sub-sect. 2 of that section. I do not say that the expression of this opinion is a condition precedent, but I do say that it is convenient in practice that the opinion of the official receiver should be so expressed. The opinion so to be expressed, in my judgment, however, as I have already said, is merely an opinion of the official receiver that the facts of which he has knowledge, or information which he believes to be true, and which he sets forth in his report, constitute a *prima facie* case that fraud has been committed in the promotion or formation of the company, or in relation to the company since the formation thereof. Unless, therefore, the official receiver is prepared to make this or an equivalent statement, I do not think that I ought to make an order. If he is willing to add this statement to each report I shall then make the order in each case for the public examination; but in the case of the Phosphate Company it will, in the first instance, be limited to two of the persons named in the report.

The Official Receiver in person.

QUEEN'S BENCH DIVISION.

Friday, Feb. 23.

(Before MATHEW and CAVE, JJ.)

NEAL (app.) v. DEVENISH (resp.). (a)

Adulteration of food—Milk—Particulars of offence—Summons—Insufficiency of particulars—Jurisdiction of justices—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food and Drugs Amendment Act 1879 (42 & 43 Vict. c. 30), s. 10.

Sect. 10 of the Sale of Food and Drugs Amendment Act 1879 (42 & 43 Vict. c. 30) provides that "in all prosecutions under the principal Act . . . particulars of the offence or offences against the said Act of which the seller is accused . . . shall be stated on the summons."

Held, that the omission of such particulars from the summons does not deprive the justices of jurisdiction, but merely entitles the defendant to an adjournment of the hearing of the case, in the event of the justices being satisfied that he is prejudiced by such omission.

The case of Barnes (app.) v. Rider (resp.) (68 L. T. Rep. N. S. 447; 62 L. J. 25, M. C.; 56 J. P. 709) disapproved; Reg. v. Wakefield (54 J. P. 148) followed.

THIS was a case stated by five of Her Majesty's justices of the peace in and for the borough of Dorchester, in the county of Dorset, under the statutes 20 & 21 Vict. c. 43, and the Acts amending the same, for the purpose of obtaining the opinion

of the High Court on questions of law which arose before them, as hereinafter stated.

At a petty sessions, holden at the Guildhall in Dorchester, in and for the borough of Dorchester, on the 1st Jan. 1894, an information was preferred by Walter Devenish (herein called the respondent) against William Neal (herein called the appellant) under sect 6 of the Food and Drugs Act 1875, charging that "the said W. Neal (the appellant) on the 11th Dec. 1893, at the parish of St. Peter in the said borough, did unlawfully sell, to the prejudice of the said W. Devenish, the purchaser (the respondent), a certain article of food, to wit, milk, which was adulterated and was not of the nature, substance, and quality demanded by the purchaser, contrary to sect. 6 of the Food and Drugs Act 1875.

1. The appellant was, on the 23rd Dec., served with a summons under the Food and Drugs Act at the instance of the respondent, of which, so far as it is material to this case, the following is a copy:

For that you (the appellant), on the 11th Dec. 1893, at the parish of St. Peter, in the borough aforesaid, did unlawfully sell, to the prejudice of the said Walter Devenish, the purchaser (the respondent), a certain article of food, to wit, milk, which was adulterated, and was not of the nature, substance, and quality demanded by the purchaser, contrary to sect. 6 of the Food and Drugs Act 1875.

2. The appellant appeared to the said summons, and on the case being called on, he, by his solicitor, at once objected that particulars of the offence against the aforesaid Acts, of which he, the appellant, was accused, were not stated in the summons, in compliance with 42 & 43 Vict. c. 30, s. 10, and that such defect in the summons was fatal to it.

The justices, being of opinion (a) that the summons in the present case was to be distinguished from the one in the case of *Barnes (app.) v. Rider (resp.)* (68 L. T. Rep. N. S. 447; 62 L. J. 25, M. C.; 56 J. P. 709), in that it disclosed by the words "which was adulterated" that the defect in the milk was adulteration, and not abstraction of fat, &c., (b) that under all the circumstances they, the justices, were the persons to decide on the sufficiency of the particulars, (c) that the particulars were sufficient, and the appellant was in no way misled, they disallowed the objection, and promised to state a case if the appellant were convicted and one applied for.

The justices proceeded to hear the case; witness for the respondent and the appellant were heard, and the appellant convicted and ordered to pay the sum of 1l. fine and 1l. 0s. 6d. costs, and against this conviction the appellant appealed.

The questions of law for the opinion of the court upon the facts were:—

1. There being some particulars, are the magistrates the persons to decide whether such particulars are sufficient or not?

2. Are the particulars set forth in the summons sufficient or not?

3. Was the irregularity (if any) in the summons cured by the appearance of the defendant?

The court is now asked to decide whether the conviction shall stand or be quashed.

Sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) enacts as follows:

No person shall sell, to the prejudice of the pur-

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

NEAL (app.) v. DEVENISH (resp.).

[Q.B. Div.]

chaser, any article of food, or any drug, which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds, &c.

Sect. 10 of the Sale of Food and Drugs Amendment Act 1879 (42 & 43 Vict. c. 30) enacts as follows:

In all prosecutions under the principal Act, and notwithstanding the provisions of sect. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food and drug, for the sale of which, in contravention to the terms of the principal Act, the seller is rendered liable to prosecution; and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the persons summoned.

Hohler on behalf of the appellant.—Sect. 10 of the Sale of Food and Drugs Amendment Act 1879 provides imperatively that the offence of which the seller is accused shall be stated on the summons. If this has not been done the summons is a bad summons. In the case of *Barnes* (app.) v. *Rider* (resp.) (68 L. T. Rep. N. S. 447; 62 L. J. 25, M. C.; 56 J. P. 709), which is a case directly in point in the present appellant's favour, the appellant there was charged upon a summons which did not further state any particulars of the offence, except that he sold milk not of the nature, substance, and quality demanded by the purchaser. The appellant in that case objected that the summons did not state the defect complained of—whether the addition of water or the abstraction of fat. The magistrate in that case overruled the objection, and convicted the appellant of adulterating the milk by the addition of water. On appeal to the Divisional Court the objection to the summons was fatal, and the court quashed the conviction in that case.

No counsel appeared on behalf of the respondent.

MATHEW, J.—The conviction of the justices in this case must be upheld. It is said on behalf of the appellant that the justices had no jurisdiction to hear this case, because the summons taken out against the appellant failed to disclose sufficient particulars of the offence charged. I do not agree with this contention. I am of opinion that the justices were right in holding that this summons, in fact, gave sufficient particulars. It called the appellant's attention to the section of the Act under which he was charged, and to the fact that the nature of the charge was one of adulteration, and that is quite enough. But supposing the particulars were insufficient, the fact that they were so would not take away the jurisdiction of the justices. The proper course for a defendant, if he really has been prejudiced by want of information as to the nature of the charge, is to ask for an adjournment of the case. The case to which we have been referred—*Barnes* (app.) v. *Rider* (resp.) (*ubi sup.*)—as supporting the appellant's contention, seems to me to be entirely opposed to the earlier case of *Reg. v. Wakefield* (54 J. P. 148).

Vol. LXX., N. 8., 1898.

CAVE, J.—I am of the same opinion. But for the case cited, *Barnes* (app.) v. *Rider* (resp.) (*ubi sup.*), the present case would have been unarguable. Sect. 10 of the Sale of Food and Drugs Amendment Act 1879 no doubt requires that the summons shall contain particulars of the offence of which the seller is accused, but that requirement must be interpreted by the light of the general rule laid down in *Jervis' Act* relating to summonses, namely, that no objection shall be taken to any summons for any alleged defect therein in the summons in substance or in form, but that, if the defendant appears to have been misled thereby, the justices may adjourn the hearing of the case to some future day. If the summons does not give the defendant sufficient particulars to enable him to prepare his defence, his remedy is to apply to the justices for an adjournment, and the justices will grant it if they think the circumstances of the case demand it. The sufficiency of such particulars, however, is a matter entirely for the justices, and not one on which they ought to state a case for the court. This is clearly laid down in the case of *Reg. v. Wakefield* (*ubi sup.*). The defendant in that case was convicted of selling milk not of the nature, substance, and quality demanded by the purchaser; but the summons gave no particulars as to how the milk was adulterated. The defendant did not ask for an adjournment, but contended that a statement of the particulars of the offence charged was a condition precedent to the jurisdiction of the justices, which was the same point as that taken in this present case. A rule having been obtained, calling on the justices to state a case, the court there held that the omission of particulars did not go to the jurisdiction, and that the question whether sufficient particulars had been given was one for the justices to decide, and they discharged the rule. The decision expresses my view in this case. In the case of *Barnes* (app.) v. *Rider* (resp.) the court allowed an appeal on the ground of the insufficiency of the particulars, and intimated that the magistrates ought to have dismissed the summons. Perhaps the summons should state the ground of complaint against the milk, whether it be the adulteration of the milk with water or the abstraction of fat; but to hold that it is essential that it should do so is to lose sight of the only object of particulars, which is to give the defendant notice of the nature of the charge. So long as the defendant has sufficient notice, it cannot matter whether he gets it from the summons or elsewhere. I do not agree with the decision in *Barnes* (app.) v. *Rider* (resp.) (*ubi sup.*), for that case is in direct contradiction to *Reg. v. Wakefield* (*ubi sup.*), and opposed to the practice under *Jervis' Act*. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Andrews, Son, and Huxtable*, Dorchester.

H. OF L.]

HEDLEY v. PINKNEY AND SONS STEAMSHIP COMPANY LIMITED.

[H. OF L.]

House of Lords.*July 31, Aug. 1, 1893, and March 8, 1894.*(Before the LORD CHANCELLOR (Herschell),
Lords WATSON and MACNAGHTEN.)HEDLEY v. PINKNEY AND SONS STEAMSHIP
COMPANY LIMITED. (a)ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.*Ship—Master and seamen—Common employment
— Negligence — Unseaworthiness — Merchant
Shipping Act 1876 (39 & 40 Vict. c. 80) s. 5.**The captain and crew employed by a shipowner in
the navigation of a ship are fellow-servants
engaged in a common employment, and therefore
the owner is not liable for negligence of the captain
which causes injury or death to one of the crew.**A ship which is properly equipped for encountering
the ordinary perils of the sea is not unseaworthy
within sect. 5 of the Merchant Shipping Act 1876
(39 & 40 Vict. c. 80) because the captain negli-
gently omits to make use of part of her equip-
ment.**A ship was constructed with an opening in her bul-
warks which could be readily closed by fixing a
movable railing and stanchions. The ship sailed
with the railing unfixed, and a storm came on,
and one of the crew fell through and was
drowned.**Held (affirming the judgment of the court below),
that the owners were not liable for a breach of
the obligation to keep the ship seaworthy during
the voyage created by sect. 5 of the Merchant
Shipping Act 1876.**Steel v. State Line Steamship Company (37 L. T.
Rep. N. S. 333; 3 App. Cas. 72) approved.**This was an appeal in formâ pauperis from a
judgment of the Court of Appeal (Lord Esher,
M.R., Lopes, and Kay, L.J.J.), reported in 66 L. T.
Rep. N. S. 71, and (1892) 1 Q. B. 58; who had set
aside a verdict for the appellant, the plaintiff,
below, and had entered judgment for the respon-
dents.**The action was brought under Lord Campbell's
Act by the widow and administratrix of a seaman
who was lost at sea against the shipowners in
whose employment he was at the time of his
death.**The case was tried before Grantham, J. and a
special jury at the Durham Assizes, when the
jury gave a verdict for the plaintiff with 175*l.*
damages.**The facts appear in the reports in the court
below and in the judgment of the Lord Chancellor.**Raikes, Q.C. for the appellant, argued that
between the master and crew of a ship the
doctrine of "common employment" did not apply.
See *Ramsay v. Quinn* (8 Ir. Rep. C. L. 322), in
which *Wilson v. Merry* (19 L. T. Rep. N. S. 30;
L. Rep. 1 H. L. Sc. 326), was distinguished. The
disciplinary powers of the captain put him in a
different position. See also *Murphy v. Smith* (19
C. B. N. S. 361). Further there was a breach of
the obligation created by sect. 5 of the Merchant
Shipping Act 1876 (39 & 40 Vict. c. 80) to keep
the ship in a seaworthy condition during the
voyage. Whilst the railing was unfixed, the ship
was not seaworthy. The only decision on the*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*section appears to be a Scotch case reported in
the Shipping Gazette of 1890, and not elsewhere.**Finlay, Q.C. and Lennard (C. Dodd, Q.C. with
them), who appeared for the respondents, were
only called upon on the question of unseaworthi-
ness. The intention of the section was that the
ship should start on the voyage with all necessary
equipment, not to deal with subsequent negligence
of the master in making use of it. This ship was
"seaworthy" in the ordinary sense of the word.**Raikes, Q.C. in reply.**At the conclusion of the arguments their Lord-
ships took time to consider their judgment.**March 8, 1894.—Their Lordships gave judg-
ment as follows:—**The LORD CHANCELLOR (Herschell).—My
Lords: This action was brought against the respon-
dents, who are the owners of the screw steamer
Prodano, by the plaintiff, the widow and adminis-
tratrix of a seaman who was drowned whilst
serving on board that vessel. The deceased was
one of a crew of six hands engaged to take the
vessel from London to Cardiff. The bulwarks of
the vessel generally were four feet to four feet
six inches in height, but opposite to the hatchways
the permanent bulwarks were only two feet to two
feet six inches high, there being stanchions and
rails to put into these apertures so as to make the
bulwarks of the same height throughout when the
hatchways were not in use. The vessel left
London on the 8th March 1891. At that time
these stanchions and rails had not been fixed, but
they were on board, and might during fine
weather have been fixed at any time within about
twenty minutes. The next day after leaving
London the vessel met with bad weather in the
English Channel, and began to roll heavily. The
deceased, whilst engaged in endeavouring to secure
a tarpaulin over one of the hatches, lost his hold
and footing, owing to a violent lurch of the vessel,
and fell overboard through an opening in the bul-
warks across which the rails had not been fixed.
It was not possible to fix the stanchions and rails
after the storm began, but there would have been
no difficulty in doing so prior to that time. The
action was founded upon the alleged negligence
of the master of the vessel in not seeing that the
stanchions and rails were fixed in their places
before the bad weather came on, and also upon
an alleged breach of duty by the master to use all
reasonable means to keep the vessel "in a sea-
worthy condition for the voyage during the same."
The jury returned a verdict for the plaintiff for
175*l.*, for which sum judgment was entered by
Grantham, J. before whom the case was tried.
The Court of Appeal set aside this judgment, and
entered judgment for the defendants, upon the
ground that there was no evidence to go to the
jury of liability on their part. It cannot be
doubted that there was evidence of negligence on
the part of the master of the vessel, but it is
equally free from doubt that if he is to be regarded
as the servant of the owner engaged in a common
employment with the seaman who lost his life,
liability does not, in the existing state of the law,
attach to the respondents. It was argued that
the master of a vessel, although in some respects
the servant of the shipowner, possesses in relation
to the crew powers and duties independent of him,
and that the law which exempts a master from*

H. OF L.]

HEDLEY & PINKNEY AND SONS STEAMSHIP COMPANY LIMITED.

[H. OF L.]

liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case. The only authority cited for this proposition was a case of *Ramsay v. Quinn*, in the Court of Common Pleas in Ireland (8 Ir. Rep. O. L. 322). But in view of the judgment of this House in *Wilson v. Merry* (19 L. T. Rep. N. S. 30; L. Rep. 1 H. L. Sc. 326), which was recently considered in the case of *Johnson v. Lindsay* (65 L. T. Rep. N. S. 97; (1891) A. C. 371), I do not think it possible to give effect to the contention of the appellant. The question arising on the appellant's claim under sect. 5 of the Merchant Shipping Act 1876, is one of greater difficulty. That section imports into every contract of service between the owner of a ship and the seamen thereof an implied obligation upon the owner of the ship "that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same." The question is, was there evidence that this obligation had not been fulfilled? It is asserted on the part of the appellant that there was, on the ground that the apertures which should have been closed, by fixing the stanchions and rails, were left unclosed; that the vessel was consequently, at the time of the accident, unseaworthy; and that the master, having failed to see that the stanchions and rails were fixed, had not used all reasonable means to keep "her seaworthy for the voyage during the same." The case mainly turns, in my opinion, on the construction to be put upon the words "seaworthy for the voyage" in the connection in which they are found. The word "seaworthy" is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter. Parke, B., in the case of *Dixon v. Sadler* (5 M. & W. 405), defined the seaworthiness of a vessel thus: "that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage." Other definitions which have been given do not, I think, substantially differ from this, and I think when so well-known a word is used in the statute of 1876 it must have its well established meaning attached to it. The question is, then, was the vessel unseaworthy in this sense at the time of the accident? It must be admitted that there was more danger to those engaged on board than if the movable bulwark had been in its place; but did this render the vessel unseaworthy? In the case of *Steel v. The State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 App. Cas. 72), which came before your Lordships' House, the question arose whether a vessel which started on her voyage with an insufficiently fastened porthole, through which the sea burst, damaging the cargo, was in a seaworthy condition at the commencement of her voyage. Lord Blackburn expressed the opinion that, if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could

not be said to be unfit to encounter the perils of the voyage: that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship. I entirely concur in this view. It is quite clear that, if this view be correct, the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. Under circumstances such as these I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words "to keep her in a seaworthy condition for the voyage during the same" point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature. The failure properly to secure many parts of the ship which are in ordinary practice open from time to time would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that, because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy. In truth, the point is only of importance because of the limitation which the law at present imposes upon the liability of an employer for accidents due to the negligence of his servants; but for this limitation I do not think it would have occurred to anyone to maintain that there had been, in the present case, a breach of the implied obligation created by sect. 5 of the Merchant Shipping Act 1876. For these reasons, I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed.

LORD WATSON.—My Lords: In this appeal I have come to the same conclusion on all points with the Lord Chancellor. I have only to add that I fully concur in all the reasons which have been assigned for his judgment by my noble and learned friend.

LORD MACNAGHTEN.—My Lords: I also concur
Order appealed from affirmed, and appeal dismissed.

Solicitor for the appellant, *S. Pilley*, for *James Storey*, Sunderland.

Solicitors for the respondents, *Downing, Holman, and Co.*, for *Pinkney and Bolam*, Sunderland.

[CT. OF APP.] WEARDALE IRON AND COAL CO. v. HODSON; A. HODSON, Claimant. [CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 14.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

THE WEARDALE IRON AND COAL COMPANY v. HODSON; A. HODSON, Claimant. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of sale—Validity—Construction—Ambiguity—Installments—Rate of interest—Covenant to produce receipts for rent, rates, and taxes—Bills of Sale Act 1882 (45 & 46 Vict. c. 43), s. 7, and form in schedule.

A bill of sale given by way of security for the repayment of 150*l.* contained covenants by the grantor that he would pay the principal sum by yearly payments of 30*l.* "until the whole of the principal and interest is fully paid;" and that he would pay "interest on the said sum of 150*l.*" quarterly at a certain rate; and also a covenant to produce upon demand in writing the last receipts for his rent, rates, and taxes, followed by a proviso that the mortgaged chattels should not be liable to seizure for any cause other than those specified in sect. 7 of the Bills of Sale Act 1882, and a further proviso that, if the mortgaged chattels should be seized "in consequence of any breach of any of the covenants herein contained," the grantee should be at liberty to remove and sell the same. The Queen's Bench Division held the bill of sale void for ambiguity.

Held, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the true construction of the covenant for the payment of interest was that interest should only be paid on so much of the principal sum as might from time to time remain unpaid.

Held also, that the second proviso read with the covenant to produce the last receipts for rent, rates, and taxes, and with the first proviso, was not inconsistent with sect. 7 of the Act.

THIS was an appeal from a judgment of the Q. B. Division (Charles and Wright, JJ.) affirming a decision of the judge of the Lambeth County Court for the plaintiff in an interpleader issue.

By a bill of sale, dated the 20th May 1892, Caleb Hodson assigned certain chattels to his son Albert Hodson by way of security for the repayment of "150*l.* and interest thereon at the rate of 4 per cent. per annum."

The bill also contained the following covenants:

And the said Caleb Hodson doth further agree and declare that he will duly pay to the said A. Hodson the principal sum aforesaid by equal yearly payments of 30*l.* on the 20th May 1893, and on the 20th May in each succeeding year, until the whole of the principal and interest is fully paid. And will also pay to the said A. Hodson interest on the said sum of 150*l.* at the rate of 4*l.* per cent. per annum, such interest being payable by quarterly payments on the 20th Aug., the 20th Nov., the 20th Feb., and the 20th May in each year, the first of such instalments being due and payable on the 20th Aug. 1892 . . . and will also during the continuance of this security duly and regularly pay the rents, rates, and taxes payable by him in respect of the said dwelling-house . . . and produce to the said A. Hodson upon

demand in writing the last receipts for such rents, rates, and taxes. Provided always, that the said chattels and things hereby assigned shall not be liable to seizure or to be taken possession of by the said A. E. Hodson for any cause other than those specified in sect. 7 of the Bills of Sale Act 1882, that is to say: [All the causes of seizure in the section are then set out in full, including . . . (4) If the said Caleb Hodson shall not without reasonable excuse upon demand in writing by the said A. E. Hodson produce to him his last receipts for rent, rates, and taxes . . .] . . . Provided further, that if the said chattels and things hereby assigned shall be seized or taken possession of by the said A. E. Hodson in consequence of the breach of any of the covenants herein contained, the said A. E. Hodson shall be at liberty to remove or sell the same, or any part thereof, by public auction or private contract at the expiration of five clear days from the day of such seizure or taking possession.

The learned County Court judge held that the bill was not in accordance with the form in the schedule to the Bills of Sale Act 1882, the interest payable under it being upon the whole sum of 150*l.*, and not upon so much of it as should then be due. He therefore set aside the bill as void.

The defendant appealed.

Edmondson for the appellant.—There is nothing misleading in this bill of sale; its provisions are not like those in *Davis v. Burton* (48 L. T. Rep. N. S. 433; 11 Q. B. Div. 537). [He was stopped by the Court.]

Frank Gover for the respondents.—The bill of sale contravenes the provisions of the Act of 1882, its legal effect being different from the form in the Act. There is an express covenant by the grantor to pay interest not upon the sum for the time being outstanding, but upon the whole original sum of 150*l.* The interest therefore is not rateable as required by the statute (*Davis v. Burton*, 48 L. T. Rep. N. S. 433; 11 Q. B. Div. 537); and it is arguing in a circle to say that the parties intended to pay interest only upon the balance outstanding in each year, and therefore their deed must be read so as to carry out that meaning: (see per Lord Halsbury in *Leader v. Duffy*, 59 L. T. Rep. N. S. 9; 13 App. Cas. 301.) In any case the meaning must be expressed with clearness and simplicity: (see *Melville v. Stringer*, 50 L. T. Rep. N. S. 774; 13 Q. B. Div. 392.) Secondly, this bill by its last proviso gives an implied power of seizure for causes other than those specified in sect. 7 of the Act, and it is not cured by incorporating that section. The section gives a power to seize for breach of a qualified covenant to produce receipts, viz., on default without reasonable excuse; but this bill contains an absolute covenant to produce such receipts, and an implied power to seize upon breach of any covenant in the bill. At best, therefore, the bill is a puzzle, and therefore void. He cited

Ex parte Official Receiver; Re Morritt, 56 L. T. Rep. N. S. 42; 18 Q. B. Div. 222;

Ex parte Stanford; Re Barber, 54 L. T. Rep. N. S. 894; 17 Q. B. Div. at p. 270;

Furber v. Cobb, 56 L. T. Rep. N. S. 689; 18 Q. B. D. 494.

Edmondson in reply.—The reasonable construction of the bill is plain, and no ordinary mind could understand it to mean anything but that interest is to be payable only on the principal sum for the time being due. Secondly, there is no power of seizure given in excess of that allowed by sect. 7. The declaration must be read with

(a) Reported by G. H. GRANT and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

CT. OF APP.] WEARDALE IRON AND COAL CO. v. HODSON; A. HODSON, Claimant. [CT. OF APP.]

the proviso. The declaration is, that the grantor must produce receipts for rent, rates, and taxes. The proviso is, that there shall be no power to seize, except such as is conferred by sect. 7. There is nothing misleading or puzzling in that.

CHARLES, J.—This is not an easy case to decide, but I have come to the conclusion that the judge was right. Two points have been made against the bill. In the first place, it is said that the covenant for payment of the principal and interest is not in accordance with the form prescribed by the Act, because the grantee, it is suggested, covenants to pay interest on the full sum of 150*l.* until the whole debt is discharged. Now, I own I do not think that is the true legal construction of the words, but that they are consistent with the meaning that the interest is to be rateable. But, on the other hand, there is undoubtedly an ambiguity on the face of the bill, and I cannot deny that the words look as if they might have the meaning which has been suggested. The judge has held the bill void on account of that ambiguity, and though at one period I thought differently, I am now satisfied that he was right. A second point, however, is raised before us upon which the judge gave no opinion, but which I think it right that we should decide. That is, that there is a proviso in the bill that, if the chattels assigned are seized by the grantee "in consequence of the breach of any of the covenants herein contained," the grantee may sell them, and so on. Now, it is said that these words imply a covenant on the part of the grantor that his property may be seized for breach of any covenant contained in the bill. Among the covenants in the bill is one to produce receipts for rent, rates, and taxes, upon demand in writing, and it therefore appears as if on failure to do so, with or without good excuse, the goods might be seized by the grantee. But then there is a previous proviso in the bill, that the goods shall not be liable to seizure for any cause other than those specified in sect. 7 of the Bills of Sale Act 1882, which causes are then set out in full in the bill. One of such causes is failure to produce the receipts without reasonable excuse. So that here are the two provisos, and it certainly does look as if the second conferred a power to seize for breach of any covenant in the bill without limitation, and so for a cause other than those specified by sect. 7 of the Act. That being so, the observations of Lord Esher in *Furber v. Cobb* appear to apply to this case. There are double clauses inserted in the bill, and even if they should mean the same thing, they are, in my opinion, liable to mislead. I think therefore that this bill is invalid, and the appeal must be dismissed.

WRIGHT, J.—As to the first point I agree with my brother Charles. On the second point I think the case is covered by the observations of Lord Halsbury in *Leader v. Duffy*.

The claimant appealed.

Herbert Reed, Q.C. and Edmondson for the claimant.—The covenant for payment of interest does not mean that the grantor is to go on paying interest on 150*l.* after part of that sum has been paid off, and no one could think that it could have that meaning. Interest means payment in respect of a sum which is actually owing:

Haslewood v. The Consolidated Credit Company Limited, 63 L. T. Rep. N. S. 71; 25 Q. B. Div. 555.

Davis v. Burton (48 L. T. Rep. N. S. 433; 11 Q. B. Div. 537) was decided before *Goldstrom v. Tallerman* (55 L. T. Rep. N. S. 866; 18 Q. B. Div. 1), and before *Haslewood's case* (*ubi sup.*). As to the last proviso, it gives no power to seize except for statutory causes, because it must be read not only with the covenant to produce receipts, but also with the proviso including seizure except for statutory causes:

Watkins v. Evans, 56 L. T. Rep. N. S. 177; 18 Q. B. Div. 386.

The covenant for production of the last receipts for rent, rates, and taxes is a good one, and necessary for the maintenance of the security:

Hammond v. Hocking, 50 L. T. Rep. N. S. 267; 12 Q. B. Div. 291;

Furber v. Cobb, 56 L. T. Rep. N. S. 689; 18 Q. B. Div. 494.

The latter case has recently been approved in this court:

Seed v. Bradley, ante, p. 214; (1894) 1 Q. B. 319.

A covenant may be a good and valid covenant, though the grantee cannot seize the goods in respect of a breach of it:

Turner v. Culpan, 58 L. T. Rep. N. S. 340.

The validity of the bill cannot depend on the intelligence of the borrower. The construction of a covenant depends on the words, not on the ignorance of the parties:

Simmons v. Woodward, 66 L. T. Rep. N. S. 534; (1892) A. C. 100.

It is therefore submitted that this bill is good.

Jelf, Q.C. and Frank Gover for the plaintiffs.—The duration of the payments of instalments of the principal sum is ambiguous; the covenant may mean that if the last instalment of interest is not paid on its due date, then until it is paid the grantor is to go on paying instalments of 30*l.* a year. As to the covenant for payment of interest, it means that interest is to be paid quarterly on a fixed sum of 150*l.*, not on so much as is from time to time left unpaid, and the grantor is to pay interest on 150*l.* until the whole of the principal sum with interest is paid off. The result is that the grantee can get more than 4 per cent. for his loan. Possibly the parties to the bill never intended such a construction, but there is no reason why they should not make such a bargain if they wished, and in such a case the words of this covenant are suitable words to carry out that bargain. The low rate of interest in the bill shows that the lender meant to be paid 4 per cent. on 150*l.* so long as any money was owing on the bill. The last proviso gives the grantee a power of seizure for a cause not permitted by sect. 7 of the Act of 1882, because he can seize merely for non-production of the grantor's last receipts for rent, rates, or taxes. There was no such power to seize in the cases of *Turner v. Culpan* (*ubi sup.*), *Furber v. Cobb* (*ubi sup.*), or *Seed v. Bradley* (*ubi sup.*). The incorporation of sect. 7 in the bill does not correct that state of things. The power to sell given by the last proviso implies a previous power to seize:

Re Morrill; Ex parte The Official Receiver, 56 L. T. Rep. N. S. 42; 18 Q. B. Div. 222;

Ex parte Stanford; Re Barber, 54 L. T. Rep. N. S. 894; 17 Q. B. Div. 259;

Hetherington v. Groome, 51 L. T. Rep. N. S. 412; 13 Q. B. Div. 789.

LORD ESHER, M.R.—Two principal arguments are relied on to show that this bill is void under

OT. OF APP.] WEARDALE IRON AND COAL CO. v. HODSON; A. HODSON, Claimant. [OT. OF APP.]

the Bills of Sale Act 1882, but, after all, it seems to me that the case really depends on the true construction of the covenant in this document for payment of interest. The true mode in which the court should deal with such a point is, first, to construe a bill of sale according to the ordinary canons of construction, just as if no Act of Parliament had ever been passed. Then, when the bill had been so construed, it must be compared with the statutory form, to see whether it is or is not in accordance with that form. If the court should come to the conclusion that the bill, as previously construed, is not in accordance with the form, then the bill is void; but if the court should be of opinion, upon comparing the two things, that the bill upon its true construction is not contrary to the form, then the bill is a good one. Now, dealing with this document according to the ordinary canons of construction, we find that it is a contract for the lending and borrowing of money on security. Then the phraseology of the contract must not be given any technical or exquisitely grammatical meaning, but the meaning which ordinary men of business would give to the language used. In this bill the loan is 150*l.*, and it is made on the terms that interest shall be paid thereon at the rate of 4 per cent. per annum. Any man of business would say that the meaning of that is, that so long as the money is due and unpaid the borrower must pay 4 per cent. interest upon it. Then the document goes on to provide that the borrower agrees to duly pay to the lender the principal sum aforesaid, by equal yearly payments of 30*l.* until the whole of the principal and interest is fully paid. As by the terms of this contract 30*l.* of the principal is to be paid off each year, the meaning of the agreement is that the loan of 150*l.* is to be for five years, and the lender binds himself to receive repayment in instalments of 30*l.* In my opinion, payment of interest is understood by ordinary men of business to be a payment in respect of a loan, so long as the loan is not paid off. After the first instalment is paid the loan in this case is no longer 150*l.*, but it is 120*l.*, and, interest being only payable for money lent, it will then be payable only upon 120*l.*, and so on, as the other instalments are paid. Then comes the agreement for payment of interest on 150*l.*, at 4 per cent. per annum, by quarterly payments. Now, if you construe this document with strict grammatical accuracy, this agreement means that the borrower is to go on paying interest on 150*l.*, though part of the loan has been previously paid off. That is the strict grammatical meaning, but it is not the construction which men of business would put on the document. No man of business would think it necessary to put in a clause providing that the borrower should not be bound to pay interest on money which he had repaid; such a clause would be quite unnecessary. If that is the business meaning of this document, then it is the true meaning, and I am therefore of opinion that upon the true construction of this bill of sale interest is only payable upon the money lent, and not upon money paid back. The argument that has been addressed to us on this point on behalf of the execution creditors is equally applicable to the form in the schedule to the Bills of Sale Act 1882. The provision as to interest in the form must not be construed with strict grammatical accuracy; it is a business form, and the meaning of it is the same as the provision for pay-

ment of interest contained in the bill now before us. Upon this point, therefore, the bill is not contrary to the form in the Act. Then as to the proviso in the bill for the sale of the goods seized; the whole question again depends on the true construction of the document, and again we must first construe it as though the Act of Parliament did not exist. The borrower covenants to pay rent, rates, and taxes, and to produce upon demand in writing the last receipts for such rent, rates, and taxes. Those are general words, but if there are two covenants in one document relating to the same matter, they must not be read separately, but both together, in order to find out the true construction of the first. In this case, after the general words comes a proviso that the goods shall not be liable to seizure except for the causes specified in sect 7 of the Act of 1882, sub-sect. 4 of which gives as a cause if the grantor shall not "without reasonable excuse, upon demand in writing," produce his last receipts for rent, rates, and taxes. That is not inconsistent with the general words of the covenant. It relates to the same subject-matter, and the two things must be read together. The first agreement must not be read without the restrictive words of the second, and the effect of the two is that the borrower covenants to produce his last receipts for rent, rates and taxes upon demand in writing, unless he has some reasonable excuse. Such a covenant is not contrary to the form of bill in the schedule in the Act. It is then said that the covenant in the last proviso is contrary to the form, and that it implies a power of seizure for the breach of any one covenant in the bill, such as a breach of the covenant to produce the last receipts for rent, rates, and taxes upon demand. I think that the covenant should be read as applicable only if the chattels shall be seized upon the grounds agreed upon by the parties under the preceding covenants, and that it does not enlarge the lender's power of seizure, but only refers to his power of sale after he has seized under the previous covenants. Upon these grounds I think that the bill is good, and that this appeal must therefore be allowed.

LOPES, L.J.—I am of the same opinion. In the first place, the bill should be read as if no Bills of Sale Act had been passed, and as if it was an ordinary assignment of chattels by way of mortgage. The chattels are here assigned to secure the repayment of 150*l.* with interest at 4 per cent. payable quarterly. Then there are covenants by the grantor to insure the premises against fire, to pay rent, rates, and taxes, and to produce upon demand the last receipts for rent, rates, and taxes. Then follows a proviso that the grantee shall not seize the goods for any cause other than those specified in sect. 7 of the Bills of Sale Act 1882, one of which is a refusal by the grantor, "without reasonable excuse," to produce his last receipts for rent, rates, and taxes upon demand in writing. Then at the end is a general proviso that if the chattels assigned are seized by the grantee, he may sell by public auction or private contract at the expiration of five days from the seizure. That being the effect of the bill considered without reference to the Act of Parliament, how does it sin against the form in the Act? The first objection raised by which it is sought to show that the bill is not in accordance with the form is, that the last proviso authorises a seizure and sale

CT. OF APP.] WEARDALE IRON AND COAL CO. v. HODSON; A. HODSON, Claimant. [CT. OF APP.]

by the grantee for the breach of any covenant in the bill, and that there is in the bill an absolute covenant by the grantor, without any qualification, to produce his last receipts for rent, rates, and taxes, such a covenant not being one that is authorised by the Act. I do not agree that that is the true meaning of the bill, the covenant for production of the receipts is really one to produce unless there is a reasonable excuse. That, I think, is the construction which any ordinary reasonable person, taking the covenant and the first proviso together, would put upon the bill. Giving this bill its true legal effect, I see nothing in this covenant contrary to the statutory form, and therefore, following the decision of this court in *Ex parte Stanford*; *Re Barber* (*ubi sup.*), the bill so far seems to me to be a good one. But it was further argued that no ordinary borrower would understand this document without legal assistance. That objection has been disposed of in *Haslewood v. The Consolidated Credit Company Limited* (*ubi sup.*). Cotton, L.J. there said this: "In my opinion there is no doubt as to what is the true meaning of this clause, and although the argument is pressed upon us that, if there is any necessity for legal advice as to what is the true construction of it, that must make the bill of sale bad, yet that argument, I think, is got rid of by the case to which I have referred, of *Goldstrom v. Tallerman* (*ubi sup.*)." That shows that the true meaning of the bill is to be looked at, and disposes of that objection. The next objection was, that the limit for the payment of the instalments is uncertain. But it seems to me perfectly clear that the borrower is to repay only the sum of 150*l.*, and no more. Then it was objected that a mere covenant by the grantor to produce upon demand in writing his last receipts for rent, rates, and taxes is not necessary for the maintenance of the security. I think that argument is disposed of by *Furber v. Cobb* (*ubi sup.*), and I would refer especially to the opinion of Sir James Hannen. It was then further contended that the covenant for payment of interest is not clearly expressed. It was said that the words are quite consistent with construing the covenant to bind the grantor to pay interest quarterly on 150*l.* so long as any part of the loan remained unpaid, without taking into consideration the fact of the previous payments of instalments as they fell due. I think there is nothing in that argument. In *Haslewood v. The Consolidated Credit Company* (*ubi sup.*) Lindley, J. uses these words: "Everybody must bring to a bill of sale a knowledge of the ordinary principles of borrowing and lending. If I borrow 50*l.*, and promise to repay it with interest at 5 per cent. or 60 per cent. or at any other rate, the interest accrues and is payable only in respect of so much of it as is not paid. You pay interest in respect of principal money which you still retain—not upon that part of it which you have already paid to the lender. There is no common sense in a suggestion to the contrary; and to put a construction upon an instrument of loan which will impose upon the borrower an obligation to pay interest on money which has been already repaid is, to say the least, to put upon such a document an unreasonable construction—unless, of course, you are driven to it by terms, which, if they did exist, would show a most oppressive and unusual bargain. But it is not the reasonable construction of a document, even if it is ambiguous

—which I do not think it is." I am aware that the words in the present case are not exactly the same as in *Haslewood's* case, but the construction which has been urged upon us by the counsel on behalf of the execution creditor does not seem to me to be the reasonable construction from a business point of view. I confess that at first I had some doubt about it, because the rate of interest agreed upon is only 4 per cent., and that is certainly a small rate to find in a bill of sale. However, in this case the borrower and lender were father and son, and that relationship accounts for the smallness of the rate of interest. It was also argued that the provision for the payment of interest is contrary to the form; but the argument put forward was equally good against the form itself, and seems to me to be hypercritical. I agree that this bill is a good one, and that the appeal must be allowed.

DAVEY, L.J.—I entirely agree. The case seems to me to be a very plain one, and I am not disposed to yield to subtle arguments on the construction of the bill, nor am I inclined to say that the bill is void on any ground upon which it is not made void by the Act of Parliament. I entirely agree that the deed is first to be construed, apart from any Act of Parliament, in just the same way as any other deed would be construed, and then, when it has been construed, the question arises whether or not it is in accordance with the form prescribed in the Act, and, if it is in accordance with the form, I think it should not be held void because it may be capable of bearing some other construction. We were invited to construe this deed according to some standard of an unlettered person. What that standard may be I do not understand; but, speaking for myself, I am unable to use any other power than that which I have, for the purpose of finding out the meaning of this document. I entirely agree with what Cotton, L.J. said in *Haslewood v. The Consolidated Credit Company* (*ubi sup.*): "The main point pressed upon us was, that a bill of sale ought to be clearly expressed, and that, if it differs in any way from the form given in the schedule to the Bills of Sale Act, it ought to be in such terms that no lawyer or no educated person—no 'instructed person,' I think, were the words used—need to be consulted in order to ascertain what is the true effect of the document. I would deal with that point if it were necessary to do so; but I think that the decision of the Court of Appeal in *Goldstrom v. Tallerman* (55 L. T. Rep. N. S. 866; 18 Q. B. Div. 1) entirely gets rid of the necessity of doing so." Turning now to the points that have been argued in this case, I am of opinion that the covenant by the grantor to produce to the grantee upon demand in writing his last receipts for his rent, rates, and taxes, is one which the parties to the bill might very properly agree upon for the maintenance of the security, that is to say, for the keeping of the security alive and in full force, and the covenant seems to me a very good one for that purpose. That covenant therefore does not, in my opinion, invalidate the bill. Then there was an argument upon a very refined point, which seems to have depended upon reading a proviso in the bill apart from the preceding covenants. It seems to me that a proviso does not stand alone; it must be read with the preceding covenant, which covenant itself has a proviso.

CT. OF APP.]

HARRIS v. BEAUCHAMP BROTHERS.

[CT. OF APP.]

If I find in a bill an actual proviso against seizure by the grantee, except in accordance with the provisions of the Act, I will not imply in another proviso of the same covenant a new right of seizure in flat contradiction to the express words of the preceding proviso. The next argument was based on the covenant for the payment of the principal sum by instalments. It was said that that covenant might mean that the payment of instalments of 30*l.* should go on long after the number of instalments necessary to make up the 150*l.* had been paid. When a man has agreed to pay 150*l.* by yearly instalments of 30*l.*, I cannot conceive how it is arguable that under his agreement he is to pay more than 150*l.*, and the addition of the words "until the whole of the principal and interest is fully paid" do not seem to me to be inconsistent with that view. Then as to the covenant for the payment of interest, I entirely agree with the passage that has been read from the judgment of Lindley, L.J. in *Haslewood v. The Consolidated Credit Company* (*ubi sup.*), and in my opinion "interest" means interest on such money as may from time to time be due, and, when a debt has been paid, payment of interest on the debt comes to an end without any special agreement to that effect. Therefore, under this bill of sale, interest is only payable upon such amount of the principal debt of 150*l.* as from time to time may remain unpaid. No one could think that this covenant means that the borrower is to go on paying interest upon money which he does not owe. As Lopes, L.J. has pointed out, the argument addressed to us might be brought against the words in the scheduled form just as well as against this particular bill which we are dealing with now. I agree that this bill is a good one, and that the appeal must be allowed.

Appeal allowed.

Solicitor for the plaintiffs, C. W. Dommett.
Solicitors for the claimant, James and James.

Feb. 5 and March 8.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

HARRIS v. BEAUCHAMP BROTHERS. (a)

Practice—Execution—Receiver—Judicature Act
1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 8.

The Judicature Act 1873, s. 25, sub-sect. 8, has not given to the court power to appoint a receiver in a case in which the Court of Chancery formerly was unable to do so.

THIS was an appeal from a judgment of the Queen's Bench Division (Lord Coleridge, C.J. and Collins, J.), affirming an order of Wright, J. at chambers for the appointment of a receiver of the interest of one of the defendants, an infant, in the partnership of the defendants.

The action was brought by the plaintiff against the firm of Beauchamp Brothers to recover a debt of 189*l.* 5*s.* 1*d.*

The firm consisted of two partners, brothers, one of whom, Gilbert Beauchamp, was an infant.

On the 2nd Aug. 1893 the plaintiff obtained judgment against the firm for his debt, with 11*l.* 5*s.* 4*d.* costs, and this judgment, which was

confirmed in the Court of Appeal (69 L. T. Rep. N. S. 373; (1893) 2 Q. B. 534), provided that execution should not issue "against the separate property of Gilbert Walter Beauchamp (infant) or against his share (if any) in the partnership profits."

Previous to this, on the 18th July 1893, a great part of the firm's assets were destroyed by fire, and they consequently on the 26th July issued a circular to their creditors, in which they announced the dissolution of their firm, and proposed to vest in a trustee for payment of their creditors the moneys which might be obtained under their fire insurance policies in the arbitration which was to take place.

On the 10th Aug. the elder brother, it was stated, assigned all his interest in the firm's assets to his infant brother.

On the 24th Aug. Wright, J., at chambers, made an order appointing a receiver of the policies, book-debts of the firm, and moneys in any bank to the credit of the firm, or of G. W. Beauchamp the infant partner, being moneys received on account of the firm or the proceeds of the sale of any of the firm's effects, and it was ordered that out of the moneys received the judgment debt, amounting with costs to 200*l.* 10*s.* 5*d.*, be paid, and the balance paid into court.

On the 7th Sept., upon an application of another creditor of the firm for the delivery up of the defendants' books to the receiver, Wright, J. made a note on his order of the 24th Aug. to the effect that he had appointed the receiver, not so much by way of execution as to preserve the funds for the court to give effect to its judgment.

On the 9th Dec. the Queen's Bench Division (Lord Coleridge, C.J. and Collins, J.) affirmed the order of Wright, J.

The defendant G. W. Beauchamp appealed.

Sir Henry James, Q.C. and Herbert Reed, Q.C. for G. W. Beauchamp.—The judge at chambers had no power under the Judicature Act to appoint a receiver in this case. The result of numerous cases on the appointment of receivers is, that a receiver cannot be appointed for causes for which a receivership would not have been granted before the Judicature Act:

The North London Railway Company v. The Great Northern Railway Company, 48 L. T. Rep. N. S. 695; 11 Q. B. Div. 30;

Manchester and Liverpool District Banking Company v. Parkinson, 22 Q. B. Div. 173;

Holmes v. Millage, 68 L. T. Rep. N. S. 205; (1893) 1 Q. B. 551.

A receiver would not be granted (1) when there was no subject-matter against which execution could go, nor (2) when an ordinary common law execution could be carried out. It would be granted only when there were goods against which a *fi. fa.* could be issued, but where there was some impediment in the way of the execution. In the present case the assets consist of book-debts which are capable of attachment in the usual way; the claim against the insurance company under the fire policies; and other assets which can be seized under a *fi. fa.* This order indirectly causes execution to be issued against the firm's property, which is contrary to the order of the Court of Appeal of the 2nd Aug.

Channell, Q.C. and Wedderburn for the plaintiff.—The order was rightly made. The cases

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

[CT. OF APP.]

HARRIS v. BEAUCHAMP BROTHERS.

[CT. OF APP.]

cited do not lay down the general proposition that in no case can a receiver be appointed in circumstances where, before the Judicature Act, an order could not have been made. In the present case there are special circumstances why it is "just and convenient" that this order should be made. Every possible impediment and difficulty has been thrown in the plaintiff's way. There is a difficulty in attaching the book-debts. They are nearly all under 5*l.*, and according to the practice at chambers garnishee orders are refused for such small debts on account of the expense, because such small debts would be swallowed up by the costs. A receiver will be able to collect these debts at a comparatively small cost, and unless he is appointed the plaintiff will not be able to get at these debts. The money claimed under the policies is not at present attachable:

Randall v. Lithgow, 50 L. T. Rep. N. S. 587; 12 Q. B. Div. 525.

When the award under the arbitration is made, the money will be attachable, and then the receiving order comes into force. Till then it is of no effect.

Herbert Reed, Q.C. replied.

Cur. adv. vult.

March 8.—*DAVEY*, L.J. delivered the following written judgment of the court (Lord Esher, M.R., Lopes and Davey, L.J.J.).—This is an appeal from an order of the Divisional Court refusing an application to set aside an order dated the 24th Aug. 1893, and made by Wright, J., appointing a receiver over certain property of the defendants. The order in question was made by way of what is called equitable execution to enforce a judgment obtained in the action, and dated the 2nd Aug. 1893, against the defendants, for 189*l.* 5*s.* 1*d.* debt and 11*l.* 5*s.* 4*d.* costs. The defendants are a firm of Beauchamp Brothers, and it is stated that one of the firm, Gilbert Walter Beauchamp, is an infant. The judgment, as confirmed in this court (69 L. T. Rep. N. S. 373; (1893) 2 Q. B. 534), is in a peculiar form. It provided that execution should not be issued against the separate property of G. W. Beauchamp (infant) or against his share (if any) in the partnership profits. It is said that the word "profits" is a mistake, and it should be read as "assets." In our opinion it is immaterial for the present purpose which is the correct word, as the meaning is perfectly plain that execution may be levied on whatever constitutes the capital stock or property of the firm or partnership, and it is only the partnership property which is reached by the order under appeal. It further appears that the business premises and certain stock of the firm have been burnt, and they have a claim for a large sum on fire policies, the exact amount of which has not yet been adjusted. By the order of the 24th Aug. a receiver has been appointed of (1) the policies, meaning, apparently, the money receivable under the policies; (2) book-debts of the firm; (3) moneys in any bank to the credit of the firm or of G. W. Beauchamp, the infant partner, being moneys received on account of the firm or the proceeds of the sale of any of the firm's effects. And it is directed that, out of the moneys received, the judgment debt, amounting with costs to 200*l.* 10*s.* 5*d.*, be paid and the balance paid into court. It was stated at the bar that the order has since been explained and varied

by Wright, J. in a manner to which we will presently advert. We have carefully considered the affidavits upon which this order was made, and we think it is difficult to find in them any sufficient grounds to support the order, and we gather from the judgment of the court below, delivered by Collins, J., that the court affirmed the order with some hesitation. It is supported as an equitable execution of the judgment. That leads to the question, what is meant by equitable execution, and under what circumstances ought it to be granted? The learned counsel for the plaintiffs boldly argued that, if you have got a subject-matter which might be made available for satisfaction of the judgment debt, you may have a receiver if it is a better mode of getting at it than the usual mode. In our opinion that is wrong. Various modes are provided by common law and statute for enabling a judgment creditor to obtain payment of his debt, and the rules of court contain elaborate provisions for giving effect to such modes of enforcing a judgment. Order XLII., r. 3, provides that "a judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof." And rule 28 provides that, "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever." But neither of these rules, while they preserve all existing modes of enforcing judgments, purports to provide any new mode of so doing. And, in our opinion, if any more convenient process is to be established it ought to be done by the Legislature and not by the court. We are therefore thrown back on the inquiry, what was the jurisdiction in this matter of the Court of Chancery (which is now vested in every branch of the High Court), and in what cases was it exercised? The jurisdiction is thus described in Lord Redesdale's work on Equity Pleading, at pages 148 and 149: "Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction, and therefore a bill may be brought to obtain the execution or the benefit of an *elegit* or a *fieri facias* when defeated by a prior title, either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases where courts of equity formerly lent their aid the Legislature has by express statute provided for the relief of creditors in the courts of common law, and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case, to procure relief in equity the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title." It will be observed that the jurisdiction was exercised only on a bill filed by the judgment creditor or a petition in an existing suit, and was part of the jurisdiction exercised by the court to remove impediments from the path of a party pursuing his legal remedy; e.g., by injunction to restrain a defendant in ejectment from setting up an outstanding term. It should be added that, in a suit by a judgment creditor to impeach an assignment or conveyance as fraudulent upon creditors, the court

[CT. OF APP.]

HARRIS v. BEAUCHAMP BROTHERS.

[CT. OF APP.]

would of course in a proper case grant a receiver to preserve the property until the hearing, but in such case the order would be ancillary to the principal relief asked. The most common case was where the interest of the debtor in real estate was an equity of redemption which could not be reached by *elegit*, in which case the court appointed a receiver, as was elaborately explained by Sir George Jessel, M.R. in the *Anglo-Italian Bank v. Davies* (39 L. T. Rep. N. S. 244; 9 Ch. Div. 275). Instances of the exercise of a similar jurisdiction in regard to personal estate are to be found in *Robinson v. Wood* (5 Beav. 388) and *Watts v. Jeffereyes* (3 Mac. & G. 422), where the debt sought to be attached was payable by the accountant-general of the court, and could not therefore be reached by the ordinary process; and see *Westhead v. Riley* (49 L. T. Rep. N. S. 776; 25 Ch. Div. 413). Very soon after the passing of the Judicature Act it was settled that, as all branches of the court had jurisdiction, it was not necessary to commence a separate proceeding, but the equitable remedy could be given in the action in which the judgment had been recovered: (*Salt v. Cooper*, 43 L. T. Rep. N. S. 682; 16 Ch. Div. 544.) But that case affords no warrant for saying that the equitable jurisdiction now possessed by all branches of the High Court, and exercisable in the action, differed from or exceeded the old equitable jurisdiction. Some laxity, however, appears to have prevailed, and receivership orders would seem to have been made on the ground of greater convenience, and in many cases *ex parte* only. In some cases such orders would seem to have been made where the proper proceeding was by application for a charging order, under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1. In *Lucas v. Harris* (55 L. T. Rep. N. S. 658; 18 Q. B. Div. 127) the practice of granting such orders *ex parte* was disapproved in this court. We should be sorry to limit by construction the beneficial jurisdiction of the court to grant an injunction or make an order for a receiver where it is "just or convenient" to do so; but we conceive that those well-known words do not confer an arbitrary or unregulated discretion on the court, and do not authorise the court to invent new modes of enforcing judgments in substitution for the ordinary modes: (see per Jessel, M.R., in *Aslatt v. The Corporation of Southampton*, 43 L. T. Rep. N. S. 464, at p. 466; 16 Ch. Div. 143, at p. 148). In the case of *Re Shepherd*; *Atkins v. Shepherd* (62 L. T. Rep. N. S. 337; 43 Ch. Div. 131) the true nature and proper application of what is loosely called equitable execution was defined by this court. Cotton, L.J., in that case says: "Confusion of ideas has arisen from the use of the term 'equitable execution.' The expression tends to error. It has often been used by judges, and occurs in some orders as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law." And in the same case Fry, L.J., says: "The idea that a receivership order is a form of execution is, in my opinion, erroneous. A receiver was appointed by the Court of Chancery in aid of a judgment at law, when the plaintiff showed

that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and therefore it was not execution. Moreover, the appointment of a receiver was an act requiring the exercise of judicial power on the part of the court; the circumstances to which I have referred had to be proved before the court would make the order. All these considerations tend to show that the appointment of a receiver was not execution, but was equitable relief granted under circumstances which made it right that legal difficulties should be removed out of the creditor's way. It has often been spoken of by judges as 'equitable execution,' but I am afraid that this concise expression has led to the erroneous idea that the appointment of a receiver is a form of execution which can be obtained without showing to the court the existence of the circumstances creating the equity on which alone the jurisdiction arises." See also the judgment of Lindley, L.J. in *Holmes v. Millage* (68 L. T. Rep. N. S. 205; (1893) 1 Q. B. 551). The case of *The Manchester and Liverpool District Banking Company v. Parkinson* (22 Q. B. Div. 173) was referred to in the court below as showing that the order might be made under special circumstances. It would be rash and unwise to attempt to define the special circumstances which would justify the making of an order such as that which we have before us. But, for reasons which will appear from what we have already said, we think they must be such circumstances as would have enabled the Court of Chancery before the Judicature Act to have interfered by way of injunction or receiver at the suit of the judgment creditor. Now, what are the special circumstances relied on in the present case? They are (1) the obstruction of the defendants, (2) the form of the judgment, (3) threats to make away with the property; and it was suggested at the bar that the defendants had made an assignment or conveyance for the purpose of defeating the judgment. With regard to obstruction, the only statement in the affidavit is that the defendants have exercised their right of appealing against the judgment, and it was stated at the bar that they have successfully resisted a receivership order in bankruptcy. This is not of course any real ground with regard to the form of the judgment, which confines the plaintiffs to the assets of the firm. We are unable to see how it places any legal impediment in the way of the plaintiffs taking those assets in execution, though of course questions may arise whether the goods or debts seized or attached are liable to seizure or attachment. Such questions may arise, and do arise, in other cases, and the law provides a means for their speedy settlement. The only evidence of a threat to make away with the property is a statement said to have been made at a meeting of creditors by Mr. Harper, the defendant's solicitor, which is denied on oath by Mr. Harper, and we think there is no sufficient evidence of any such intention on which the court could act. We are, however, far from saying that, if a case were established to the satisfaction of the court that the defendants

threatened and intended fraudulently (we use the word advisedly) and for the purpose of delaying and defeating the creditor to make away with the property, it would not justify the interference of the court. With regard to the alleged assignment, the only evidence before the learned judge was a circular issued by the defendants, in which they announce the dissolution of their firm, and that they propose to vest or have vested the policy moneys in a trustee for payment of their creditors. This may or may not be fraudulent against the plaintiffs, and liable to be set aside in a proper proceeding in which issue can be taken on its validity in the presence of the proper parties; but it does not, in our opinion, justify the appointment of a receiver in these terms, or in this action, or at this stage. There is no evidence before the court of the execution, contents, or effect of the alleged assignment, and there is no proceeding to impeach it or test its validity. This can only be done either in a separate action, in which no doubt the court could appoint a receiver till the trial to preserve the property *in statu quo*, or by means of an interpleader issue. One vice of this order is, that in the absence of parties interested, and without any definite issue or evidence before it, the court has prejudged the question (if there be one) by ordering its receiver to take possession of the property, and apply it in satisfaction of the judgment debt. We do not forget that it was stated at the bar that the learned judge, when the matter came before him again in September, explained his previous order in a note, and directed the money to be paid into court. The note was to the effect that he appointed the receiver not so much by way of execution as to preserve the assets for the court to give effect to the rights of the parties interested. We are of opinion that the learned judge had no jurisdiction to make such an order. This is not equitable execution, but administration which the court had no jurisdiction to make, at any rate in this action. It was in fact an irregular substitute for a receiving order in bankruptcy. We are therefore of opinion that the order of the 24th Aug. 1893 was made improvidently, and on insufficient grounds, and ought to be discharged.

Appeal allowed.

Solicitors for the plaintiff, *Godfrey and Webb*.

Solicitors for the defendant, *G. W. Beauchamp, Harper and Battcock*.

Feb. 19, 20, and March 8.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

Re THE PULBOROUGH SCHOOL BOARD ELECTION; *BOURKE AND OTHERS* (petitioners) v. *NUTT* (resp.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bankruptcy — Disqualification of bankrupt — School board election—Adjudication of bankruptcy before the passing of disqualifying Act — Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 32.

Sect. 32 of the Bankruptcy Act 1883 does not apply to an adjudication of bankruptcy previous to the passing of the Act.

(a, Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Judgment of the Queen's Bench Division (ante, p. 25) reversed.

THIS was an appeal from a judgment of the Queen's Bench Division (Lawrance and Wright, JJ.) upon a special case stated under sect. 93, sub-sect. 7, of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50).

The special case is set out in the report of the case in the Queen's Bench Division, ante, p. 25; the question being whether the respondent, who in 1893 was a bankrupt under the Bankruptcy Act 1869, was thereby disqualified from being elected a member of a school board under sect. 32 of the Bankruptcy Act 1883, which provides that "where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for" (*inter alia*) being elected a member of a school board.

The Queen's Bench Division held that the respondent was disqualified.

The respondent appealed.

Feb. 19 and 20.—*Dickens*, Q.C. and *Day* for the respondent. — The respondent having become bankrupt under the Bankruptcy Act of 1869, proceedings in his bankruptcy continue to be carried on under that Act, and are not affected by the general provisions of the Bankruptcy Act 1883: (see sect. 169 of that Act.) Under the Education Act 1870 (33 & 34 Vict. c. 75) a bankrupt was declared capable of election to a school board, so that before the Act of 1883 the respondent had a clear right to stand for a school board election:

Reg. v. Turmine, 39 L. T. Rep. N. S. 255; 4 Q. B. Div. 79.

It is therefore submitted that, unless sect. 32 of the Act of 1883 is perfectly clear, the court ought not to make it retrospective and construe it so as to alter the position of the respondent from what it was before the Act was passed. The Legislature did not intend by the Bankruptcy Act 1883 to alter for the worse the position of a debtor previous to the passing of the Act:

Re Raison, 63 L. T. Rep. N. S. 709; 60 L. J. 206, Q. B.

If the respondent is held to be disqualified by sect. 32, he will be in a worse position than a bankrupt under the Act of 1883, because, since the procedure in his bankruptcy is governed by the Act of 1869, he will not be able to take advantage of the provisions of sub-sect. 2 of sect. 32 as to getting rid of the disqualification. They referred to

Re Pratt; *Ex parte Pratt*, 50 L. T. Rep. N. S. 294; 12 Q. B. Div. 334.

Channell, Q.C. and *G. J. Talbot* for the petitioners.—Sect. 32 is not retrospective, and it is a fallacy to treat it as such. To use the words of Lord Denman, C.J. in *Reg. v. The Inhabitants of St. Mary, Whitechapel* (12 Q. B. 120), "the statute is in its direct operation prospective . . . and it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." The section deals with the qualifications of candidates at future elections to school boards. Its main object is the public benefit, viz., that candidates should be properly qualified persons, and it ought

[CT. OF APP.]

Re THE PULBOROUGH SCHOOL BOARD ELECTION.

[CT. OF APP.]

not to be treated as though its main object was to impose disabilities on bankrupts:

Reg. v. Vine, 31 L. T. Rep. N. S. 842; L. Rep. 10 Q. B. 195.

It is argued that, under the Education Act 1870, every subject of the Queen acquired a status of eligibility for election to a school board, and that sect. 32 ought not to be construed as taking away that status. That is a forced construction of the Education Act, which contained no provision as to qualification for election. In considering whether an Act of Parliament is retrospective a right enjoyed by all the Queen's subjects cannot be held to be a vested right, which ought to be preserved if possible.

Day replied.

Cur. adv. vult.

March 8.—Lord ESHER, M.R.—In this case the respondent was elected as a member of the Pulborough School Board, and the petitioners have presented a petition asking the court to say that he was disqualified from being elected. The Divisional Court held that he was disqualified. The circumstances are few and simple. The respondent Nutt was adjudged a bankrupt before the passing of the Bankruptcy Act 1883; under what circumstances we do not know, but he is still an undischarged bankrupt. It is urged on his behalf that, under these circumstances, sect. 32 of the Bankruptcy Act 1883 does not apply to him. It is argued that there is nothing in the Act to show unmistakably that it is retrospective; that the disqualification imposed by sect. 32 is penal, and that therefore, according to the ordinary rules of construction, the section ought not to be construed to have a retrospective effect if such a construction can be avoided. In my opinion sect. 32 is not penal within the meaning of the proposition that penal enactments ought not, if possible, to be construed as retrospective. I also think that the section is not retrospective, and, in my opinion, the judgment of the Divisional Court was right. Now, the language of the section is, "Where a debtor is adjudged bankrupt he shall be disqualified for . . . being elected to or holding or exercising the office of member of a school board." Whether or not that enactment is retrospective depends on the words at the beginning of the section. The section does not say where a debtor "has been" or "shall be" adjudged bankrupt, either of which forms would be clear; but it uses an expression between the two, i.e., where a debtor "is" adjudged bankrupt. What is the canon of construction to be applied to those words? In the first place, I think the section is not "penal" within the meaning of that word as used in the rule against the construction of enactments as retrospective. I cannot think that the Legislature intended these disqualifications to be punishments upon a man for becoming bankrupt, because at the end of sect. 32 there are provisions for the removal of the disqualification if the bankrupt obtains from the court his discharge "with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part." To say that the Legislature intended by this section to punish a man of whom that could be proved would be to attribute to it gross injustice. To me it seems impossible to say that these disqualifications are imposed by way of punishment, and therefore, in my opinion, they are

intended to be solely for the protection of the public. In *Reg. v. Vine* (*ubi sup.*) we have a strong authority that a disqualification created under these circumstances cannot be penal within the meaning of the rule I have referred to. I think that that is the effect of the judgment of Cockburn, C.J.; but it was more clearly put by Mellor, J., who says: "It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character." The question in that case was, whether a person convicted of felony was disqualified from being licensed to keep a public-house. The case was a stronger one than the present, but it lays down a canon of construction that, if an enactment creates disqualifications, not by way of punishment, but only for the public good, it is not to be considered penal within the rule against construing an Act to be retrospective. A rule was also strongly and clearly laid down in *Re Pratt; Ex parte Pratt* (*ubi sup.*), which is a decision on the Bankruptcy Act 1883, though not upon sect. 32. The question turned on the meaning of sects. 4 and 5. Sect. 4 provides that "a debtor commits an act of bankruptcy" in certain cases; and sect. 5 runs, "if a debtor commits an act of bankruptcy." Both these sections of the statute are in the present tense, not the past or future, and the court held that sect. 4 was not retrospective with regard to an act of bankruptcy committed before the passing of the statute, but that it applied to the state of things existing at the date of the passing of the statute, and therefore a petition could be presented after the Act had passed, provided that at some previous time an act of bankruptcy had been committed, whether under the Act of 1883 or any previous Act. The present tense used in sects. 4 and 5 referred to the date of the petition, not to the dates of things happening before the passing of the Act. Bowen, L.J. says of the Act: "I think it is framed on the idea that a bankruptcy code is being constructed, and when the present tense is used, it is used, not in relation to time, but as the present tense of logic." And Fry, L.J. says: "I entirely agree with Bowen, L.J. as to the meaning of the present tense in this section; it is used, I think, to express a hypothesis, without regard to time, just as in stating the proposition, if A. is B., then B. is C. It is equivalent to saying, 'If at the time when the petition is presented the debtor shall have committed an act of bankruptcy.'" The court there said that the present tense used in sects. 4 and 5 refers to the time when the court has to act, and does not refer to the time when that upon which the court acts came into existence. Applying those words to the present case it seems to me that the words of sect. 32, "where a debtor is adjudged bankrupt," are to be construed as applying to the time when he is elected to or is acting in any of the positions mentioned in the section; that is to say, at the time when it is sought to show that he is disqualified. If he were elected before 1883, but acted after that year, the petition against him would be against his acting in his office, and the time when he was elected would be immaterial. If that is the true construction of the section it is not retrospective. It is prospective, because it refers to a time after the passing of the Act. As I have already said, it

CT. OF APP.]

Re THE PULBOROUGH SCHOOL BOARD ELECTION.

[CT. OF APP.]

seems to me impossible to say, after looking at the provision at the end of the section, that the Legislature intended to impose disqualification as a punishment on a bankrupt; and, if that is so, the rule of construction against construing penal statutes as retrospective would not be applicable here. Therefore, both on the authority of this court and on the ordinary rules of construction, I am of opinion that this section is not retrospective. To hold otherwise would, as it seems to me, cause a manifest injustice. There might be a case when a man, adjudicated bankrupt before 1883, under such circumstances that his discharge has been indefinitely postponed on the ground of misconduct, might, under the construction which has been put (though I myself am very doubtful about it) on the Education Act 1871, be re-elected and then be no longer disqualified. It seems to me extraordinary, but at present we are not asked to overrule that case. And then there might be another man, an undischarged bankrupt under the Act of 1883, in this position that, when his bankruptcy is inquired into, he will be entitled to a certificate on the ground that it was caused by misfortune without any misconduct on his part. This man must retire from being a member of the school board, though the other man may remain. And further, the fraudulent undischarged bankrupt may be the petitioner to oust the innocent undischarged bankrupt. I cannot believe that we ought to construe the statute, if there is any doubt in the matter, in such a way as to cause such a result. Therefore I agree with the judgment of the Divisional Court, and, in my opinion, this appeal ought to be dismissed.

LOPES, L.J. delivered the following written judgment:—The facts, so far as material, are as follows: On the 19th March 1893 the respondent had been adjudged a bankrupt under the Bankruptcy Act 1869. At a school board election, which took place on the 19th April 1893, the respondent was a candidate for election, and was declared to be duly elected. At the time of his said election, he had not obtained his discharge, nor had his bankruptcy been annulled. He was an undischarged bankrupt. On the 9th May 1893 a petition was presented to the High Court alleging that the respondent at the time of his election was disqualified on the ground that he was an undischarged bankrupt. The question is whether, in the circumstances, the respondent, under sect. 32 of the Bankruptcy Act 1883, is disqualified for being elected a member of the school board. The answer to this question depends upon whether sect. 32 is retrospective in its operation, or prospective only, and sect. 32 says that where "a debtor is adjudged bankrupt" he shall, subject to the provisions of the Act, be disqualified for almost every kind of office and appointment, these being specified, and amongst them for "being elected a member of a school board." It has been contended that the words "is adjudged bankrupt" are to be read "has been adjudged bankrupt either before or after the passing of this Act." I cannot so read those words. Independently of other considerations, with which I will presently deal, and regarding them only from a grammatical standpoint, I should read them, "is adjudged bankrupt under this Act." The sentence would then be, where a debtor "is adjudged bankrupt under this Act he shall, subject to the

provisions of this Act, be disqualified." This reading seems more consonant with sense than "where a debtor has been adjudged bankrupt under this Act, or any previous Act, he shall, subject to the provisions of this Act, be disqualified." The former reading gives to "is" its ordinary and natural meaning; the latter distorts it. The Bankruptcy Act 1883 was an Act to amend and consolidate the law of bankruptcy, and created disqualifications and disabilities which had not before attached to bankruptcy. It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect. In *Midland Railway Company v. Pys* (10 C. B. N. S. 179, at p. 191) Erle, C.J., says: "Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law, and wherever it is possible to put upon an Act of Parliament a construction not retrospective, the courts will always adopt that construction." The position of the respondent previously to the Bankruptcy Act 1883, under the School Board Act (33 & 34 Vict. c. 75), was that, on his being adjudged a bankrupt under the Bankruptcy Act 1869, his seat on the board would be vacated, but he would be re-eligible for election at any succeeding triennial election of members of the board: (*Reg. v. Turmine (ubi sup.)*). This case was not sought to be impugned at the bar. Under sect. 32 of the Bankruptcy Act 1883, the respondent on being adjudged a bankrupt is disqualified from being elected a member of the school board until the adjudication of bankruptcy against him is annulled or he obtains from the court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part. A new disability, therefore, is imposed upon him, and disabilities are imposed on other persons which had no existence before the Bankruptcy Act of 1883. Having regard to the scope of the Act, and the rule of construction applicable to statutes, I am confirmed in my view as to the true reading of the words in sect. 32 "is adjudged bankrupt." It was urged that the words "where a debtor is adjudged bankrupt" are equivalent to the words "where a debtor is an adjudged bankrupt;" but, if the Legislature so meant, why did they not use that form? And this observation is the more cogent, because, in the preceding section

[CT. OF APP.]

Re THE PULBOROUGH SCHOOL BOARD ELECTION.

[CT. OF APP.]

—viz., sect. 31—the expression “undischarged bankrupt” is used. Again, sect. 169 is most material, and points in the same direction. It provides that any proceedings under the Bankruptcy Act 1869 are to continue, and all its provisions are to apply thereto as if the Act of 1883 had not passed. The appellant’s bankruptcy is a pending proceeding, for he has not obtained his discharge, and he would have to apply for his discharge under the Bankruptcy Act of 1869. The Legislature, in my opinion, intended that bankruptcies under the Act of 1869 were to be subject to the incident of a bankruptcy under that Act, and were not to be affected by the Act of 1883. The repeal of the Bankruptcy Act of 1869 is not to affect “anything done or suffered before the commencement of this Act under any enactment repealed by this Act” (Bankruptcy Act 1883, s. 169, sub-sect. 2 (a)). This would appear to retain the old disqualification, which, as I have observed, was different and less severe than that imposed by sect. 32. In sects. 33 and 34 the same words “is adjudged bankrupt” are used, and it cannot be contended that to those words, as used in those sections, a retrospective operation can be attached. It seems to me highly improbable that the Legislature, when passing a new Bankruptcy Act creating great changes in the law and attaching wider and graver disabilities to bankruptcy, would impose new and penal consequences on bankruptcies already existing. Wright, J., in his judgment, seems to have relied on the language of the Bankruptcy Disqualification Act 1871, which is repealed by the Act of 1883, but re-enacted in this sect. 32. The words are, “Every peer who becomes a bankrupt shall be disqualified;” and sect. 9 says, that the Act shall apply to “any person who before or after the passing of this Act becomes bankrupt, and subsequently succeeds to a peerage, whose bankruptcy has not determined at the time of his so succeeding . . . or any person who has become bankrupt before the time of the passing of this Act, and whose bankruptcy has not determined.” The learned judge thinks it inconceivable that the Legislature could have intended a different construction to be placed on sect. 32 without expressly saying so. In my opinion, the omission in the Act of 1883 of any interpretation clause, or any words giving a retrospective effect to the disability, is most significant, and is strong evidence to prove that no retrospective effect was intended. The court below were also much influenced, in my judgment, by the case of *Reg. v. Vine* (*ubi sup.*). It is always dangerous to interpret one Act of Parliament by another, and the more especially is this the case where the words used and the subject-matter dealt with are different. The words under consideration in this case were, “every person convicted of felony.” It is difficult to distinguish those words from the words in question; but there was nothing in the Act of Parliament which had then to be construed to qualify or interpret their effect as there is in this case. Nothing, I mean, like sect. 169, indicating that the incidents of an old bankruptcy under the Act of 1869 were to continue, or like sects. 33 and 34, where similar words are used in circumstances where a retrospective effect cannot be attributed to them. Apart, however, from these points of difference, I do not hesitate to say I prefer the reasoning of Lush, J., who differed from the other members of the court. I cannot

accept that case as governing the case now before us. *Ex parte Pratt*; *Re Pratt* (*ubi sup.*), which was cited, is also distinguishable. The construction adopted did not impose any new liability or disability; it only gave effect to that which would have happened if the Act of 1883 had not been passed, viz., cases in which an act of bankruptcy had been committed under the Act of 1869, but no proceedings had been taken under that Act. It was a convenient construction to adopt, and does not militate with the view I take of sect. 32 of the Bankruptcy Act 1883, or the principles I apply to its construction. I think, therefore, that the decision of the court below should be reversed.

DAVEY, L.J. delivered the following written judgment:—I am of opinion that the appeal in this case ought to succeed. It was not contended on the part of the petitioners that any disability or disqualification was imposed on the respondent by the Elementary Education Act 1870, or that *Reg. v. Turmine* (*ubi sup.*) was wrongly decided. The question therefore seems to me to turn on the proper construction to be put on the words “where a man is adjudged bankrupt” at the commencement of sect. 32 of the Bankruptcy Act 1883. Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt; and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning “where a man is an adjudged bankrupt.” The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. I think the words “is adjudged” are the verb, whereas in the paraphrase suggested the word “adjudicated” would be an adjective. The one form of sentence points to an event to happen, whereas the form suggested predicates a certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one. Now, is there any context to be found in the Act itself which should control what I hold to be the *prima facie* meaning of the words? I think not. By sect. 169 all existing disqualifications are preserved, and, although I do not think that the eligibility to a school board was a privilege or right preserved by that section, I think the language of the section shows an intention to leave existing bankrupts as they were, and negatives any necessity for implying any new disqualification. If I turn to sects. 33 and 34 in the same group of sections, where the same words are used, I find that they are necessarily prospective only, and they afford me no assistance in construing the words in sect. 32 otherwise than in their ordinary grammatical sense. Does the subject-matter of the section supply any reason for so doing? In my opinion the argument is the other way. This Act is not a School Board Act, but a Bankruptcy Act for the primary purpose of defining the liabilities and consequences of bankruptcy, and although the section in question is no doubt dictated by regard to the public interest, it does impose disabilities and consequences of a serious character on persons adjudged bankrupt, and is

in that sense and to that extent a penal enactment. It is a well-known principle in the construction of statutes that, where the words admit of two constructions, you are not to construe them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the Act. If I thought this language more ambiguous than I confess I do, I think this principle should be applied, and the words, being at best ambiguous, ought not to be construed so as to impose upon the existing bankrupts disabilities which they were not at that time under. If the Legislature had meant such a result, it would have been exceedingly easy, instead of using this ambiguous form of words, to say so—as was in fact done in the Act of 1871, referred to by Wright, J. With regard to the cases which have been referred to, in *Reg. v. Vine* (*ubi sup.*), the words construed were grammatically and substantially different: "Every person convicted of felony." The observations I have made on the suggested paraphrase in the present case apply to the words in that case. In *Ex parte Pratt* (*ubi sup.*) the court had to construe other sections of the Bankruptcy Act expressed in different language and with a different context, and there were very strong reasons of policy and convenience for adopting the construction placed on the Act by the court. I do not think it is any authority in the present case. For these reasons I agree with the Lord Justice that the judgment of the court below should be reversed.

Appeal allowed.

Solicitors for the petitioner, *Parish and Hickson*, for R. A. Blagden, Littlehampton.

Solicitors for the respondent, *Palmer and Bull*, for Mant and Mant, Storrington.

Friday, March 9.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

Re BEALL; *Ex parte* BEALL. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Private examination of witnesses by official receiver—Evidence—Filing—Proceedings of the court—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 27—Bankruptcy Rules 1886, r. 12.

A debtor has no right to be present at an examination of witnesses taken before the court under sect. 27 of the Bankruptcy Act 1883.

Such an examination is a proceeding of the court, and the evidence then taken should be filed.

THIS was an appeal from a refusal by Mr. Registrar Giffard of an application by the bankrupt that the notes of the evidence taken at an examination under sect. 27 of the Bankruptcy Act 1883 might be taken off the file of proceedings in the bankruptcy.

By sect. 27 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), the court may, on application of the official receiver, at any time after a receiving order has been made against a debtor, summon before it any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property, and may examine any such person on oath.

In the present case an examination had been

held under this section, at which the bankrupt had asked permission to attend and cross-examine, but had been refused.

Upon the evidence which he then obtained the official receiver founded his report, and upon the report the registrar refused to grant the bankrupt his discharge.

After the discharge had been refused, the notes of evidence taken at the examination were filed.

The bankrupt was a solicitor.

The registrar having refused an application that the notes of evidence should be taken off the file, the bankrupt now appealed.

Rule 12 of the Bankruptcy Rules 1886 is as follows:

All proceedings of the court shall remain of record in the court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the court, or by special direction of the judge or registrar, but they may at all reasonable times be inspected by the trustee, the debtor, and any creditor who has proved, or any person on behalf of the trustee, the debtor, or any such creditor.

Herbert Reed, Q.C. and Macaskie for the appellant.—First, as the bankrupt had no opportunity of cross-examining the witnesses, it is contrary to natural justice that this evidence should be filed so that it can be inspected to the disadvantage of the bankrupt. Secondly, an examination under sect. 27 is not a "proceeding" within rule 12, and need not necessarily be filed. The notes of examination ought not to be filed until the court is satisfied that no harm can be done by their publication. The documents are the private property of the official receiver, and ought not to be made public:

Learoyd v. The Halifax Joint Stock Banking Company, 68 L. T. Rep. N. S. 158; (1893) 1 Ch. 686.

The bankrupt is a solicitor, and probably the Law Society will use these depositions, if filed, to his disadvantage. If they are not taken off the file, at least they ought to be sealed up. They referred to the two following cases as to examinations under sect. 115 of the Companies Act 1862:

Re Grey's Brewery Company, 50 L. T. Rep. N. S. 14; 25 Ch. Div. 400; and

Re Norwich Equitable Fire Insurance Company, 51 L. T. Rep. N. S. 404; 27 Ch. Div. 515.

Muir Mackenzie, for the official receiver, was not called upon.

Lord ESHER, M.R.—The first matter that was complained of in this case was, that at the examination of witnesses that took place in this bankruptcy under sect. 27 of the Bankruptcy Act 1883, the debtor was not allowed to be present and to cross-examine them either as to the accuracy of their statements or as to character. Then the second point in the argument here was, that it was contrary to natural justice that depositions taken in that way should be put on the file. As to the first point, in every case cited the decision has been to the effect that the debtor has no right to be present at an examination of witnesses held under sect. 27. As to the second point, it should be remembered that what takes place under sect. 27 is not an adjudication. It is the collection of information, for the purpose of its being brought before the court which has to consider whether or not the bankrupt should be discharged under the provisions of sect. 28 and following sections. This collection of information

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

[CT. OF APP.]

Re BEALL; Ex parte BEALL.

[CT. OF APP.]

is in one sense a judicial proceeding, because it is a step taken in the course of a judicial proceeding, but it is in no sense a judicial decision. Now it seems to me that every step taken in a bankruptcy case to enable the court to come to a final determination ought to be filed. It is impossible to maintain that examinations taken under sect. 27 for the purpose of enabling the official receiver to make his report, are not proceedings in the bankruptcy, and I am therefore of opinion that these depositions ought to be filed. Now it was argued that for certain reasons it might be a disadvantage to the debtor that these depositions should remain on the file, so that anyone might inspect them. To my mind it is to his advantage that they should remain on the file, and for this reason: the report made by the official receiver is *prima facie* evidence against the bankrupt, and since it is founded on the depositions, he can, by exercising his right of looking at the documents filed, prepare himself to contradict the evidence given by the witnesses in the depositions at the hearing of his application for discharge. But whether it be an advantage or a disadvantage to the debtor, it is, in my opinion, a fundamental rule in bankruptcy proceedings, that everything done in the bankruptcy shall be put on the file, so that the court, when it has to give a final determination, can find out how and on what grounds everything in the bankruptcy has been done. The depositions in the present case having been therefore properly filed, one application made to us now is, that they should be ordered to be taken off the file. Alternatively it is asked that they should be sealed up. I do not think that such depositions as these should be ordered to be sealed up, except upon very strong grounds, which at all events ought to be set out in an affidavit. There is no such affidavit in this case; there is nothing but a suspicion, stated to exist by counsel, that the Law Society is going to look at the file. But supposing that the Law Society does look at it, what then? The society cannot make use of the depositions against a solicitor whose conduct is to be inquired into. The witnesses themselves must be called, and the solicitor accused must have an opportunity of testing what they say. That again is not a final adjudication by the Law Society. The society only obtains information for the purpose of making a report, to be used in an application to the court to strike a solicitor off the rolls. But in this case we have nothing to do with the Law Society. We are now sitting as a Court of Appeal against proceedings in bankruptcy, and we cannot interfere in a matter which is not before us. I think that this appeal should be dismissed.

LOPES, L.J.—I agree that this application cannot be granted. It has been put in various ways, but substantially it is an application that these documents containing the evidence of certain witnesses should be taken off the file. It was said that it was very unjust to the debtor that the evidence of these witnesses should be taken behind his back. At first I thought there was something in that argument. But when the object is considered for which the evidence is taken, and what is the result of it, I think there is nothing unjust in the matter. In point of fact, the examination is taken by the official receiver simply for the purpose of instructing his mind

and for the purpose of enabling him to make a report. When an application for discharge is made, then the debtor has the fullest opportunity, if he thinks fit, to impeach the evidence of those witnesses. Speaking for myself I should almost think that if he wished he might call those witnesses, and might perhaps be allowed to cross-examine them, inasmuch as they would be in the nature of hostile witnesses, and then he might extract from them something which would go to impeach their testimony. Therefore, considering the object of these examinations, I do not think that the debtor has been treated unjustly. Moreover, there is ample authority, in the cases that have been cited, to show that the debtor has no right to be present at an examination of witnesses under sect. 27. Then another objection was brought before us, that these documents—I hardly know what to call them—containing the evidence of these witnesses are not such proceedings as ought to be filed. The point seems to me to be absolutely unarguable. The evidence was taken for the purpose of the bankruptcy in order to discover what was the conduct of the bankrupt, and how far the court would be justified in refusing his discharge, and for the purposes of making a report. It cannot be said that such proceedings ought not to be filed. In the present case the documents were not filed before the application for discharge was made. I cannot help thinking that they ought to have been filed before that, in order that the bankrupt might have had an opportunity of considering them. That matter, however, is now past and gone. We are now asked to take these documents off the file. I do not know of any authority that would justify our so doing; but even if we had the power, I am clearly of opinion that it would not be right to make such an order in the present case. It is suggested that the Incorporated Law Society will make use of these documents for the purpose of an inquiry by them into the conduct of the debtor, who is a solicitor. But I think there is no ground for any apprehension on that point. The documents are not evidence of any sort or kind against the debtor. If the Law Society should wish to use any evidence that these witnesses can give, the witnesses must be called in the presence of the solicitor, who will then have an opportunity of cross-examining them, and in his cross-examination he will be much assisted by having previously seen what is contained in these documents. On these grounds I am of opinion that this appeal should be dismissed.

DAVEY, L.J.—If this were a proceeding upon the application for a discharge to have the depositions on which the official receiver's report was presumably founded placed upon the file in order that the bankrupt might see them, I should think it was worthy of great consideration. But we are not considering that question. That is past and gone. No such application was made, and the application for discharge has been disposed of. The documents have now been placed on the file. I have no doubt they were properly placed on the file. What are they? They are depositions taken by the court at the instance of the official receiver by a shorthand-writer who is sworn and becomes thereby the agent of the court. They are in fact depositions taken by the court itself for the purpose of proceedings in bankruptcy. Why they are not to be placed on the file like any other pro-

CHAN. DIV.] *Re CENTRAL SUGAR FACTORIES OF BRAZIL LIM.; FLACK'S CASE.* [CHAN. DIV.]

ceedings in bankruptcy I am at a loss to understand. But, being on the file, I can see no ground whatever for taking them off. They are there for the inspection of the debtor and any other person who is entitled to inspect them under rule 12. Although they are taken by the official receiver for the purpose of enabling him to make his report, they may be made use of, so far as they can properly be made use of, by any person who is entitled to inspect them. Therefore, on these grounds, no authority having been cited in which any court has taken any such proceedings off the file, and no reason, so far as I have heard, having been suggested for taking them off the file, I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the bankrupt, *Beall and Co.*

Solicitors for the official receiver, *Solicitor to the Board of Trade.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Dec. 8, 1893.

(Before NORTH, J.)

Re CENTRAL SUGAR FACTORIES OF BRAZIL LIMITED; FLACK'S CASE. (a)

Winding-up—Property abroad—Foreign judgment—Embargo on property abroad by English creditor.

After an English company, carrying on business and with property situated in Brazil, had been ordered by the English court to be wound-up, an English creditor who had not proved in the winding-up obtained judgment against the company for the amount of his debt in the Brazilian courts, and laid an embargo on the property of the company situated in Brazil, thereby preventing the carrying out of an agreement sanctioned by the English court for the sale of the assets of the company.

On the motion of the liquidator of the company the creditor was ordered to remove the embargo on the company's property in Brazil, on having a sufficient part of the purchase money set apart to answer any claim he might establish in the English courts against the company.

Re Oriental Inland Steam Company; Ex parte Scinde Railway Company (31 L. T. Rep. N. S. 5; L. Rep. 9 Ch. App. 557) followed.

THIS was a motion by the liquidator of the Central Sugar Factories of Brazil Limited, a company in liquidation, against Daniel Ludgate Flack, a creditor of the company, for an order that he should remove an embargo which he had placed upon certain property in Brazil belonging to the company.

The company was incorporated in 1881 with the object of carrying on the business of sugar manufacturers and refiners, and all businesses in connection therewith. The nominal capital of the company was 600,000*l.* divided into 23,635 preference and 6375 ordinary shares of 20*l.* each.

In Jan. 1884 the company borrowed a sum of 100,000*l.*, secured by the issue of first mortgage debentures, constituting a first charge on the property and assets of the company, and subsequently a further sum of 69,880*l.* secured by the issue of second mortgage debentures.

On the 10th Dec. 1886 the company was ordered by the English court to be wound-up, and Allan Lambert was appointed official liquidator. The greater part of the company's assets were situated in Brazil, and consisted of four sugar factories, together with tramways and machinery. The debts of the company to planters and others in Brazil amounted to about 170,000*l.* The amount due to debenture-holders was 163,040*l.* exclusive of interest.

Shortly after the winding-up order the respondent D. L. Flack sent in to the liquidator a claim for 1735*l.* 5*s.* 2*d.* for bills of exchange accepted by the company payable in London in respect of coal supplied to the company, and certain other expenses.

In Jan. 1891 C. F. Hargreaves entered into a provisional agreement, which was sanctioned by the court in the following February, for the purchase of the assets of the company in Brazil for 50,000*l.*, and in addition to discharge the company's liabilities to creditors in Brazil to an amount not exceeding 100,000*l.* He, however, failed to pay more than 12,000*l.* of the 50,000*l.*; and in July 1893 Messrs. Davidson, Unwin, and Co., on behalf of a client, offered to purchase the interest of the company under the agreement with Hargreaves for 36,000*l.*, and this offer was accepted and sanctioned by the court on the 9th Aug. 1893.

In August and Oct. 1891 correspondence took place between D. L. Flack and the liquidator. D. L. Flack did not prove for his debt in England, and the liquidator had not inserted Flack's name in the list of creditors of the company, but had in a letter to D. L. Flack, admitted that he was a creditor of the company for 1622*l.* 12*s.* 3*d.* for coals supplied by him, and for 75*l.* 8*s.* for loss and expenses, in order to assist him to obtain payment in Brazil.

D. L. Flack subsequently obtained judgment against the company in the Court of Final Appeal, in Brazil, and placed an embargo or attachment upon the property of the company in Brazil. It was found impossible to carry out the agreement with Messrs. Davidson, Unwin, and Co., unless the embargo or attachment were removed.

The liquidator therefore moved that D. L. Flack might be ordered to remove the embargo without prejudice to any right he might have against the 36,000*l.* payable under the agreement with Messrs. Davidson, Unwin, and Co., when carried out.

Swinfen Eady, Q.C. and *Eve* for the motion.—After a company has in this country been ordered to be wound-up the court will restrain a creditor from proceeding against the assets of the company so as to obtain an unfair advantage over the other creditors, the assets being trust property to be distributed equally among the company's creditors. They referred to

Re Oriental Inland Steam Company Limited; Ex parte The Scinde Railway Company, 31 L. T. Rep. N. S. 5; L. Rep. 9 Ch. App. 557.

A creditor of a company which is being wound-up, cannot, by obtaining an embargo, obtain priority over other creditors:

Re The South-Eastern of Portugal Railway Company Limited, 21 L. T. Rep. N. S. 220.

The liquidator is prepared to set apart out of the

CHAN. DIV.] *Re BIRMINGHAM VINEGAR BREWERY COMPANY'S TRADE MARK.* [CHAN. DIV.]

purchase money a sufficient sum to answer any claim by Flack in respect of the judgment he has obtained in Brazil.

S. Hall, Q.C. and J. G. Wood for the respondent.—Mr. Flack ought not to be restrained from enforcing in Brazil a judgment obtained there against the property of the company situated there. The case of *Re Oriental Inland Steam Company (ubi sup.)* differs from the present, because there the creditor who tried to enforce his judgment obtained in India against the company's property there also came in and proved the debt under the winding-up in England; but Flack has not come in and proved under the winding-up here. His claim has priority according to the law of Brazil, where there is practically a winding-up of the company, and it would be unfair to deprive him of the same rights as other Brazilian creditors have because he happens to be residing in this country.

Swinfen Eady, Q.C. in reply.—The contract with Flack for the supply of coal to the company in Brazil was made in England.

NOETH, J.—I must grant the injunction asked for. I do so upon the authority of *Re Oriental Inland Steam Company (ubi sup.)*, where the matter was put in this way, that the assets of the company are held upon a trust, as it were, for the persons entitled to them; and the court treated the position of the claimant in that case upon the footing that one *cestui que trust* had got possession of trust property after the property had been subjected to the trust. That being so, the *cestui que trust* must bring it in for distribution with the other property of the trust. That is the principle applied there. I accede to that principle, and it seems to me to apply here. Whether the creditor, Mr. Flack, submitted to the jurisdiction or not, seems to me to be immaterial. The court restrains creditors from proceeding against the property of a company which is being wound-up regardless of whether they consent or not, or whether they are bound by proof or not. It stops all proceedings against the assets of the company; and those are the assets which we have to deal with in this case. Then there is this to be said: There is evidence that a sale can be made for 36,000*l.*, which will go off if this creditor is allowed to set up against the property the judgment he has obtained in Brazil. To complete the sale the property must be conveyed free from this judgment, and it is a case in which I ought to prevent him from depriving the whole of the persons interested in the assets of the company of a good asset by insisting upon this right of his own. I think, therefore, I am bound to order him to withdraw his claim, taking care to preserve for him such security as he has by the effect of the judgment. I think that will be accomplished by directing that the official liquidator shall out of the proceeds of the sale pay in a way which may be agreed upon the sum of 3000*l.*—the amount suggested—to answer the claim by Mr. Flack in respect of the judgment which he has obtained in Brazil. The amount is not in dispute; but the question as to the right to recover it out of the assets of the company according to English law will remain to be decided, recognising the fact that he has by the Brazilian law obtained a judgment (the details of which I have not exactly before me on the present evidence) against the

property of the company. He has succeeded in maintaining it in the Court of Appeal, and finally in the ultimate Court of Appeal of Brazil. The official liquidator should undertake to proceed forthwith to have it decided what claim by Mr. Flack is to be allowed against the 3000*l.* The onus of having the matter determined is, I think, upon the official liquidator, who is the moving party, and such extra costs as fall upon the first mover should be borne by him. I reserve the costs of this motion until the claim is disposed of.

Solicitors: *Ashurst, Morris, Crisp, and Co.; Ince, Colt, and Ince.*

Thursday, March 20.

(Before KEKEWICH, J.)

Re BIRMINGHAM VINEGAR BREWERY COMPANY'S TRADE MARK. (a)

Trade mark—Registration—Label—Essential particular—Disclaimer—Patents, Designs, and Trade Marks Acts 1883 to 1888.

Motion on behalf of a company that the Comptroller-General might be directed to proceed with an application by the company for the registration of a trade mark, consisting of a red label with two shields in each top corner, and a shield with a representation of St. George and the Dragon in the centre at the top, also a large white H. & Co. on the red ground, and words descriptive of the article, then the name of the company, "successors to Holbrook & Co." The Comptroller refused the application to register, "because you decline to state the device to be essential particular of the mark, and to disclaim any right to the exclusive use of the added matter except the name of your company."

Held, that a label of this complex character could not be considered an "essential particular" within sect. 64, sub-sect. 1 (c) of the Patents, Designs, and Trade Marks Act 1883; that the applicants ought to disclaim Holbrook and Co.

Motion dismissed with costs.

THIS was a motion on behalf of the Birmingham Vinegar Brewery Company Limited, that the Comptroller-General of Patents, Designs, and Trade Marks might be directed to proceed with an application by the said company for the registration of a trade mark, No. 172,834. The trade mark consisted of a red label with two shields in each top corner, and a shield with a representation of St. George and the Dragon in the centre at the top. Then there was a large white H. & Co. upon the red ground, and there was written across the label: "Worcestershire sauce, from the recipe of a nobleman in the county, for roast meats, steaks, cutlets, chops, fish, &c." (giving a description of the use of the sauce), and the words, "Sole manufacturers, Birmingham Vinegar Brewery Company Limited, successors to Holbrook & Co."

On the 8th Sept. 1893 the Comptroller wrote to the applicants, stating that, in exercise of his discretionary power, "the said application to register is refused, because you decline to state the device to be essential particular of the mark, and to disclaim any right to the exclusive use of the added matter except the name of your company." The applicants contended that the

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

essential particular was the label taken as a whole; secondly, that they ought not to be asked to disclaim Holbrook and Co., because it was the applicants' own name.

By sect. 64, sub-sect. 1, of the Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), it is provided that:

For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars: (c) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

Waggett for the company.—I submit, first, that the label taken as a whole is an essential particular, it is a "distinctive label" within the words of sect. 64, sub-sect. 1 (c); secondly, we ought not to be asked to disclaim Holbrook and Co., because that is our own name. I am ready to disclaim all the words except Birmingham Vinegar Brewery Company Limited, and Holbrook and Co. As to the first point, sect. 10 of the Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50) and sect. 64 of the Act of 1883; Sebastian on Trade Marks, 3rd edit., p. 363. The essential particular is the label as a whole. [KEKEWICH, J.—How is the essential particular the whole?] It is a "distinctive label." As to words common to the trade, sect. 74 of the Act of 1883. As to the mark as a whole:

Smokeless Powder Company's Trade Mark, 66 L. T. Rep. N. S. 407; 9 Rep. Pat. Cas. 109; (1892) 1 Ch. 590;

Hudson's Trade Mark, 55 L. T. Rep. N. S. 228; 3 Rep. Pat. Cas. 155; 32 Ch. Div. 311;

Pinto v. Badham, 8 Rep. Pat. Cas. 181.

By registration the applicants obtain no exclusive right to matters that are themselves common:

Hanson's Trade Mark, 57 L. T. Rep. N. S. 859; 5 Rep. Pat. Cas. 130; 37 Ch. Div. 112.

Sect. 10, sub-sect. 3, of the Patents, Designs, and Trade Marks Act 1888. A person under this section need not disclaim his own name. Holbrook and Co. is our own name, the name of the company in this branch of business:

Re J. and J. Colman's Trade Mark, 11 Rep. Pat. Cas. 129;

Rosenthal v. Reynolds, 67 L. T. Rep. N. S. 162; 9 Rep. Pat. Cas. 189; (1892) 2 Ch. 301.

The effect of the disclaimer of Holbrook and Co. would be to lead people to think they could use the name of Holbrook and Co. [KEKEWICH, J.—I do not understand the first objection of the Comptroller, "because you decline to state the device to be essential particular of the mark."] He means the shield with St. George and the Dragon.

Rotherham, for the Comptroller, was not called on.

KEKEWICH, J.—To my mind the Comptroller has exercised his discretion wisely and well. I have before me a label—certainly it is a label—of a very complex character, something more complex than is usual with labels that are registered under the Act, and the contention of the applicants is that the whole of that label is an "essential particular." Now, I must turn to the Act. The Act of 1883 says in sect. 64: "For the purpose of this Act a trade mark must consist of or contain at least one of the following essential particulars." It follows from that that Mr.

Waggett is so far right that the whole label may be the "essential particular" within the meaning of the Act, and ought to be registered in that way. That is a possible conclusion. The Act seems distinctly to contemplate a label or a device, mark, brand, heading, or ticket, which is by itself, and without more, an "essential particular." That is to say, consists of an "essential particular" or "particulars" in the plural. It contemplates that, as well as its containing essential particulars in addition to what is not essential. But then I must turn to this label to see whether this is a label of that kind. If this is a label of that kind, it is difficult to know what label is not an "essential particular" as a whole. Any tradesman might frame any advertisement of his goods, with or without a big letter, and with a small one, and some device, and say, "There is a description of my goods; there is my name; there is the place where I carry on business, and there are some advertising peculiarities of my goods, all put together, and between them they make a label which is an "essential particular." It is impossible, as far as I can see, to limit either the length, or the size, or the contents of a label of that kind. I cannot think that is the meaning of the Act. It is not difficult to conceive, and I have no doubt a very short reference to the *Trade Marks Journal* would show one, an essential particular in one label; in fact, I think I have one under my hand in the case that was cited in *Hudson's Trade Mark*, at p. 136 of 3 Rep. Pat. Cas. There is there an engraving of an arm and hand holding a common instrument. That, therefore, if registered without more, would be a device, being in itself an essential particular. There is no reason why it should not be registered; but, if you come to anything more than that, you must see whether the label contains the essential particulars which are mentioned in the statute, namely, "name of an individual or firm printed, impressed, or woven in some particular or distinctive manner"—that is not here. Then "a written signature, or copy of a written signature of the individual or firm applying for registration thereof as a trade mark." A written signature very possibly may be of some individual, but not, according to my view, the individual or firm applying for registration. Then "A distinctive device, brand, mark, heading, label, or ticket"—where is the distinction? I do not see it here, unless the distinction is the words of description and advertisement, which do not seem to me to fall within that language. There is no invented word or invented words, and there are no words, as far as I can see, having no reference to the character, size, or colour of the goods, and not being a geographical name. To my mind there are none of the essential particulars here in detail, and yet it is argued that altogether the combination of many particulars which are not essential make the whole label into an essential particular. I am told that the point is new. I am not surprised at it. I think it would be opening the door to the registration of labels which up to this time have been kept off the register, and in my point of view had better be kept off the register, if I were to support the application for registration of this particular label. Then it is said that at any rate they ought to be allowed to register "Holbrook and Co.," or rather not to disclaim "Holbrook

CHAM. DIV.]

Re KIDD; KIDD v. KIDD.

[CHAM. DIV.]

and Co.," because "Holbrook and Co." is the name of the applicants. That is allowable. *Colman's* case (11 Rep. Pat. Cas. 129), before Stirling, J., is decisive on that point as showing that the trade name may be allowed—not only the real personal name of the applicants, but the trade name. As, for instance, if a man carries on business as J. and J. Colman he may register his goods either as "*Colman's Mustard*" or the "*Mustard of J. and J. Colman*"—something which is distinctive of his name. But here in this case Holbrook and Co. do not carry on business. Holbrook and Co. are not the applicants. The applicants are the Birmingham Vinegar Brewery Company Limited, who have purchased, or, as it is put here, succeeded to the business of Holbrook and Co.; they desire to be registered by their own name, and also with the addition of "Successors to Holbrook and Co." Why not register in any other way—as formerly carrying on business in some other place in the way that tradesmen, naturally knowing the value of advertising, desire to advertise themselves and their goods? I see no magic in the succession to Holbrook and Co. any more than there is in any other particular connections with this business. Then Mr. Waggett says, with great force, "If we disclaim Holbrook and Co. we put ourselves in a fix, because it might then be held we are not entitled to the exclusive use of Holbrook and Co., although we say we are, and that any other persons affixing the title of Holbrook and Co. to their goods would be committing a fraud upon us." That is very likely. But the mischief arises from their seeking to register Holbrook and Co. as part of their trade mark. If they leave that alone, and do not bring it into their trade mark, they will get out of the difficulty. They have put themselves into it, and must get out of it as best they can. On these grounds it seems to me the application fails. There is a further point raised by the Comptroller about the registration of "*St. George and the Dragon*" as an essential particular. It is unnecessary to consider that. I gather from the way in which he put it that he would be prepared to receive *St. George and the Dragon*, and the figure which I cannot decipher through the white mark which rests upon it—I understand he would have been prepared to receive that as an essential particular. That may be. It may be a *St. George and the Dragon* so distinct from any other *St. George and the Dragon* that was ever painted, and may be a device worthy of registration; but I do not propose to deal with that. I think the other ground is quite sufficient. The application must be dismissed with costs.

Solicitors: *Cooper, Thorogood, and Tabor*;
Solicitors to the Board of Trade.

March 28, 1893, and April 14, 1894.

(Before KEKEWICH, J.)

Re KIDD; KIDD v. KIDD. (a)

Executors—Administration—Business—Indemnity—Creditors.

Executors and trustees, in pursuance of a power contained in a will, carried on the business of a licensed victualler after the death of the

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

testator, and incurred debts to trade creditors. An action was commenced for the administration of the estate of the testator. The trade creditors took out a summons in the action asking for an order declaring that they were entitled to the trustees' right of indemnity against the estate so as to get payment out of the estate. The trustees had made default in rendering proper accounts, but not in payment of money. There was a sufficient fund in court to pay all the debts. Held, that, in order to deprive the trustees of their indemnity, there must be a default in payment of money, and not merely a default in the rendering of accounts, and as in this case there was no default in payment of money, the creditors were entitled to prove against the estate through the right of the trustees to indemnity, and there would be a declaration to that effect.

By his will, made the 5th Jan. 1883, P. W. Kidd appointed his wife Margaret Ann Kidd, and his brother Edward Kidd, executors of his will, and he gave them all his real and personal estate in trust for sale and conversion, and directed them, after payment of his debts, to invest the residue for the benefit of his wife and children, and he directed them, if they should think fit, to carry on his business, and in so doing to use such part of his estate as they might think desirable.

On the 4th Feb. 1883 P. W. Kidd died, having up to the time of his death carried on the business of a publican at the *Masons' Arms* inn, Sunderland.

The executors proved the will on the 14th June 1883, and paid the testator's debts, and continued to carry on the business. On the 19th July 1890 the testator's children took out an originating summons for the administration of his estate, and a receiver was appointed and accounts and inquiries were directed at chambers.

By his certificate dated the 15th July 1892, and duly filed, the chief clerk found that the sum of 2827l. 18s. 6d. was due to Robertson, Sanderson, and Co., and other firms with whom the executors had dealt in carrying on the business, and he found that the executors were unable to furnish proper accounts of their management of the estate or of the business.

On the 12th Dec. 1892, Robertson, Sanderson, and Co., having previously obtained leave to attend the proceedings, took out a summons asking to have the amount due to themselves and the other creditors of the business charged upon the testator's estate, and raised by sale or mortgage of the *Masons' Arms* inn and stock-in-trade.

The summons was adjourned into court, and was heard on Tuesday, the 28th March 1893.

Warmington, Q.C. and *E. S. Ford* for applicants.—The creditors are entitled, so as to obtain payment of their debts, to avail themselves of the indemnity for debts against the estate which executors have, who are authorised to carry on a business, and use the estate for that purpose:

Re Johnson; *Shearman v. Robinson*, 43 L. T. Rep. N. S. 372; 15 Ch. Div. 548;

Fraser v. Murdoch, 6 App. Cas. 855;

Dowse v. Gorton, 64 L. T. Rep. N. S. 809; (1891) App. Cas. 190.

Renshaw, Q.C. and *Ashton Cross*, for the executors, supported the applicants.

[CHAN. DIV.]

Re THE CLERGY ORPHAN CORPORATION.

[CHAN. DIV.]

Johnston Edwards for the children of the testator.—It appears from the cases cited that, if the executors make default, they lose their right of indemnity. Here the executors have failed to furnish proper accounts.

KEKEWICH, J.—The question before me arises as follows: The testator has empowered his executors to carry on his business, and to make use of his estate for that purpose. The business has been carried on by the executors, and debts have been incurred. The creditors now seek to recover their debts out of the estate. Their right to do so depends upon the right of the executors to be indemnified against the estate in respect of these debts. It is said that the executors have forfeited their indemnity by reason of their failure to account, and cases have been cited as favouring that view. But I do not think that mere failure to account is a default within the meaning of these cases. What they contemplate is indebtedness to the estate on the part of the executors—the case of an executor who is in debt to the estate, a default in the matter of money. What they decide is that executors who are indebted to the estate forfeit their indemnity to the extent of their indebtedness. Apart from these cases I certainly know of no authority for saying that these executors have lost their right to be indemnified. My conclusion, therefore, is that the creditors are entitled to prove against the estate for the amount of their debt. But at present there is no money available for paying their debts, and as the administration proceedings are not before me, I cannot now determine how the money ought to be raised. I therefore declare that the executors are entitled to be paid out of the estate, and direct the registrar to make a minute of this declaration, but not to draw up the order until the action comes before me on further consideration.

On Saturday, the 14th April 1894, the further consideration of the administration summons, and the adjourned summons by the creditors, came on together for hearing. It appeared that the public-house in which the business was carried on had been sold, and realised an amount sufficient to pay all debts, including those due to the trade creditors.

KEKEWICH, J. made one order on the summons and the further consideration, such order to contain a declaration that the trade creditors were entitled to be paid the amounts due to them respectively.

Solicitors: *Hindson, Miller, and Vernon; Johnston, Weatherall, and Sturt*, for *Brewis, Sunderland; J. E. and H. Scott*.

April 13, 20, and 21.

(Before KEKEWICH, J.)

Re THE CLERGY ORPHAN CORPORATION. (a)
Charity—Railway—Compulsory sale of lands—Voluntary subscriptions and donations—Endowment—Consent of Charity Commissioners—Costs—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 69—Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), ss. 10, 62, and 66—Charitable Trusts Act 1855 (18 & 19 Vict. c. 124), s. 29.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Land belonging to a charity had been taken by a railway company under the power conferred by a section of their special Act whereby the purchase money was fixed at 40,000l. The Charity Commissioners having intervened, the sum of 5000l., part of the purchase money, had been paid into court. The land had been originally bought by the charity out of moneys produced by the sale of consols, which were derived from voluntary contributions, and were available for the general purposes of the charity, and could be dealt with as income. The charity had power under their Act of Incorporation to purchase land, but there was no provision empowering them to sell or let the land so purchased, but a power of sale was conferred by the section of the special Act of the railway company above referred to. This was a petition presented by the charity for payment of the 5000l. to them as being absolutely entitled thereto.

Held, that, if once a fund consisted of voluntary contributions, it retained that character notwithstanding any changes of investment, and being available for the general purposes of the charity, was taken out of the Charitable Trusts Act 1853 by force of the exception contained in sect. 62 of the Act; and that the consent of the Charity Commissioners was not required.

PETITION for payment out of court of a sum of 5000l. paid under sect. 69 of the Lands Clauses Consolidation Act 1845 to the credit of "*Ex parte the Manchester, Sheffield, and Lincolnshire Railway Company*, in the matter of the Manchester, Sheffield, and Lincolnshire Railway (extension to London) Act 1893, in respect of land at St. John's Wood, Middlesex, belonging to the corporation known as the Clergy Orphan Corporation in fee simple without power of sale."

The facts sufficiently appear in the head-note and judgment.

Warmington, Q.C. and Dibdin for the petitioners.—The consent of the Charity Commissioners is not required; the case is governed by *Governors for Relief of Poor Widows, &c., of Clergymen v. Sutton* (27 Beav. 651), a decision of Lord Romilly, sects. 62 and 66 of the Charitable Trusts Act 1853. It will be said that such consent is necessary under the 29th section of the Charitable Trusts Act 1855, but that section is not noticed by Lord Romilly. The case in 27 Beav. has been followed by many judges, but has not yet come before the Court of Appeal:

Royal Society of London and Thompson, 44 L. T. Rep. N. S. 274; 17 Ch. Div. 407;

Finnis to Forbes (No. 2), 48 L. T. Rep. N. S. 814; 24 Ch. Div. 291;

Ex parte the Committee of the Western Synagogue, &c., 28 Sol. J. 435;

Re Corporation of the Sons of the Clergy and Skinner, 67 L. T. Rep. N. S. 751; (1893) 1 Ch. 178;

Re St. John-street Wesleyan Methodist Chapel, Chester, 69 L. T. Rep. N. S. 105; (1893) 2 Ch. 618;

Re Faversham Charity, 10 W. R. 291;

Re William of Kyngeston Charity, 30 W. R. 78;

Re Spurstowe's Charity, 30 L. T. Rep. N. S. 355; 18 Eq. 279.

Sir John Rigby, Q.C. (S.-G.) and Vaughan Hawkins for the Charity Commissioners.—The charity are not entitled to payment out as of right, the court has a discretion. Trustees for

CHAN. DIV.]

Re THE CLERGY ORPHAN CORPORATION.

[CHAN. DIV.]

sale of settled land taken by a railway company have been held not entitled as of right to payment out of the purchase moneys in court:

Re Smith; Ex parte London and North-Western Railway Company and Midland Railway Company, 60 L. T. Rep. N. S. 77; 40 Ch. Div. 386.

The charity have no power to get rid of the land except with the consent of the Charity Commissioners (sect. 29 of the Charitable Trusts Act 1855). To come within the exceptions in sect. 62 of the Charitable Trusts Act 1853, the donation must be in the nature of income in aid of voluntary subscriptions. This land was bought for the purpose of a school, "a particular and specific purpose." The authorities are not binding on your Lordship; the circumstances of this case are quiet different from those cited. [KEKEWICH, J.—Stirling, J. in *Re St. John-street Wesleyan Methodist Chapel, Chester*, said he was not at liberty to set aside an authority which had been followed for thirty years.] There are two classes of donations, first, those which may be applied as income; secondly, those which are devoted to some particular and specific purpose. Here there is a permanent endowment, land purchased, which the charity has no power to sell. In *The Attorney-General v. Mayor, &c., of Newark-upon-Trent* (1 Hare, 395, at p. 401) it appears that Lord Eldon was of opinion that not even an Act of Parliament could enable a charity to sell the trust property. In all the cases cited the property was a temporary property. Here the land could not be sold, and therefore could not be converted into income. In the cases cited there was an express power to sell, here there is none:

Mayor, &c., of Colchester v. Lowten, 1 Ves. & B. 226;

Governors of St. Thomas's Hospital v. Charing Cross Railway Company, 1 Jo. & H. 400.

The court has jurisdiction to order trustees to deal with trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants or under disabilities:

Brooke v. Lord Mostyn, 10 L. T. Rep. N. S. 392; 2 De G. J. & Sm. 373, per Turner, L.J., at p. 415.

S. A. Sampson for the railway company.—Under the special Act of Parliament the charity are authorised to sell, and the railway company are authorised to buy the land. At p. 19 of *Dart on Vendors and Purchasers*, vol. 1 (6th edit.), "There is no positive law that property belonging to a charity shall be absolutely inalienable, but the onus is thrown on the alienee and those claiming under him of showing that the sale was beneficial to the charity."

Vaughan Hawkins in reply.—The special Railway Act embodies the Lands Clauses Consolidation Act 1845, and the charity are only entitled to sell for the purposes of the railway, and the money remains land. [KEKEWICH, J.—Is not this a statutory contract for sale under the special Act in which the parties are rendered competent to complete?] The Railway Act authorises a sale, but the purchase money should be in the same position as the land.

Warmington, Q.C. in reply.—I submit that we have a statutory power to sell the land. Then the land having been bought with money derived from voluntary subscriptions, we are entitled to have the purchase money paid to us to use for

general purposes. About 1857 the fund in question was invested in consols, and it is admitted that we could have dealt with them as we liked; by investing the consols in land the character of the fund has not been altered.

KEKEWICH, J.—Obviously this petition raises some questions of considerable interest, importance, and difficulty, deserving full consideration. Now, how does this money come into court? It is paid in by the Manchester, Sheffield, and Lincolnshire Railway Company under their Act of 1893, which contains one clause (51), on which there has been some argument, and which certainly deserves consideration. The Act, being a Railway Act, necessarily and by express language incorporates the Lands Clauses Consolidation Act 1845; but it also has special provisions with respect to this corporation and the lands of the corporation, and one has to look at the section to see what the enactment is on those points. It appears that an agreement had been entered into with a body styled "The Marylebone Cricket Club," whereby the railway company were to provide some lands for that body in substitution for certain lands which were taken by the railway company, or injuriously affected. That the railway company would, of course, be utterly unable to do except by agreement with outside parties, who might or might not agree, and therefore it seemed right to the Legislature to sanction this arrangement, and to enable the railway company to purchase lands of this corporation with a view, not of using them for their undertaking in the ordinary sense, or for the ordinary purposes of the undertaking, or selling as superfluous lands which were not required for the undertaking, but to convey certain parts of the land to the Marylebone Cricket Club. That seems to me to be the key of the clause. The railway company could not properly have purchased these lands from the corporation for the express purpose of conveying them to the Marylebone Cricket Club, and any attempt to convey them to the Marylebone Cricket Club, according to the law settled in *Carington v. The Wycombe Railway Company* (18 L. T. Rep. N. S. 96; 3 Ch. App. 377) before Lord Cairns, would immediately have been an admission by the railway company that they were superfluous lands, and being superfluous lands they would be liable to the provisions of the Lands Clauses Consolidation Act respecting superfluous lands, so that the arrangement would be altogether defeated. So we find this provision that the corporation shall sell and the company shall purchase certain lands of the corporation for 40,000l. That I do not understand in any way to mean that the corporation is placed in any other position than it would otherwise have occupied as an owner of property required by the company, except to this extent, that they cannot question the right of the company to take the land; they are bound to regard it as required for the purposes of the Act, or, more strictly speaking, they are not entitled to say that what is not required for the purposes of the undertaking falls under the superfluous lands provisions of the Lands Clauses Consolidation Act. Also the sum, having been fixed by arrangement between the parties, is adopted by the Legislature, so that there is no occasion to go under the 9th section, or, in default of agreement, under the other sections, to have the amount fixed by arbitration or a jury; the sum is ascer-

CHAN. DIV.]

Re THE CLERGY ORPHAN CORPORATION.

[CHAN. DIV.]

tained once for all, and sanctioned by Parliament. Reading it in that way, which seems to me the legitimate way of reading a statutory enactment, that is to say, reading it as enabling, so far as enabling is necessary, and not reading it as giving powers which are unnecessary, because they are there without the particular provision—reading it in that way, it seems to me that one may regard the case just as if the railway company had required this land for the purpose of this undertaking, had given the usual notice to treat, and, either by agreement, with the assistance of two able practical surveyors, or by reference to a jury or arbitration, the price had been fixed. The money, therefore, is paid into court strictly under the Lands Clauses Consolidation Act. It could not be paid in in any other way, and the company were perfectly at liberty, notwithstanding this clause, to say, “We are not content with your title.” Under the present practice it is necessary on the face of the account to show why the money is paid into court, and the railway company paying it in to the account of this corporation without power of sale, must not be understood to mean that necessarily there is no power of sale, but only that they are advised that there is sufficient doubt about there being a power of sale that they desire the protection of the court on the terms which the Act puts them under of paying the costs of taking the money out. I put that in the forefront because I think it is necessary to understand how the money came into court. Now here it is, and it is liable to be dealt with under the 69th section of the Lands Clauses Act. Unless it can be paid to the persons absolutely entitled, or applied in other ways, it must remain in court. The dividends will possibly be payable to persons entitled to the income, but the money must remain as capital liable to be invested in land until some investment has been found for it. The real question is: Is it now to be paid to the corporation as persons absolutely entitled? The argument, apart from the Charitable Trusts Act, to which I will come immediately, is that they are not persons absolutely entitled, because, as was pointed out by the Lords Justices, in the case in 40 Ch. Div., or at any rate by two of them strongly, and almost by the third, the persons absolutely entitled are not those who might merely give a receipt for it, but those who are entitled to receive it and use it for their own purposes, without being accountable to anyone else. “Absolutely” is as plain for that purpose as “beneficially.” Bowen, L.J. puts it in the plainest way. He says: “I fail to understand how trustees can be said to become absolutely entitled.” I am not sure that the Lord Justice meant to dwell upon the word “become” as saying that the title accrued subsequent to the payment into court. I think that what he was accentuating was the point that the trustees, who did not own the money themselves, even though they had a power of sale, and though they had the largest possible power of application, were not absolutely entitled because they could not put it into their own pockets and spend it as they liked. Now who are the petitioners in this case? The corporation, not the trustees for the corporation. It may be that the corporation direct it to be paid to the trustees in order that it may be received by somebody, but they are not persons who are the agents of the

corporation, clothed with any trust, but the corporation themselves; and if it is corporation money with which the corporation may deal as they please, then the authorities about the trustees not being absolutely entitled are inapplicable, because the corporation in that sense is absolutely entitled. I put it in that way because it seems to me that, after all, and notwithstanding the many interesting questions which have been argued by the way, the real point to be decided is whether this case falls within the Charitable Trust Act 1853; in other words, whether it falls within the exemptions of the 62nd section of that Act. I find it unnecessary to deal with the large question of the power of a corporation to sell and give a receipt for charity lands. That is a question upon which there is much authority, and which may and does deserve very anxious consideration and comparison of different cases. Different views at any rate, if not contradictory views, have been put forward by different judges of great weight, and the reasons given are, I will not say not convincing in the particular cases where the reasons are given, but in some cases certainly they fail to convey conviction as regards any general law on the subject. The case which I have before me of *The Attorney-General v. The Corporation of Newark* is cited as an authority for the general proposition that a charity cannot sell any lands belonging to the charity. The reasoning goes to show that that disability only attaches where the land is charity land, as in that case, which is very shortly reported and no doubt very shortly dealt with of the *Faversham Charity*, before Wood, V.C. The objection there on behalf of the railway company was that it was charity land, and that therefore the consent of the Charity Commissioners was requisite. If it is not charity land, and the consent of the Charity Commissioners is not requisite, then the point made there and the point for which that is an authority falls to the ground. Therefore, for the present purpose, without discussing the larger question, I really have only to consider whether this is charity land in that sense or not, that is to say, whether it is land under the control of the Charity Commissioners. The 62nd section, and all the authorities, I think without exception—certainly several of them—which have dealt with the section, point to this: that if once the property of a charity is taken out of the Act of 1853, then the property so taken out—whether it is the whole of the charity property or any particular part of it—is thenceforward outside the Act until by some devotion of that property to a specific trust it is, by that devotion, brought within it. And the 62nd section shows that that devotion is not to be affected by a donation or bequest in aid of any fund “so set apart or appropriated,” and so forth—I will not read the words at any length, but really by no act of the charity itself. What would happen if there was a new declaration of trust in any particular case I do not pause to consider; but, once find a fund constituted by voluntary subscription so that the fund is not within the jurisdiction of the Charity Commissioners under that Act, then the fact of its having been invested in land it seems to me is no more to be regarded than the fact that it has been invested in anything else. It remains in all its changes still a fund contributed by voluntary subscriptions taken out of the Act by the force of the exempting clause. That

CHAN. DIV.]

Re THE CLERGY ORPHAN CORPORATION.

[CHAN. DIV.]

I understand to be the meaning of the section, and certainly that view is supported by many authorities, including the main one, before Lord Romilly. Now, is this particular property within those exceptions? It is not argued, of course, that the charity itself is necessarily within the exemptions because the charity has some specific trusts, as is frequently the case. I suppose there is not a large charitable institution, say not a large hospital, in London, which has not some money belonging to it devoted by the donor to some specific trust, from which, of course, it cannot be diverted properly, notwithstanding the urgent general needs of the hospital. But you may have those specific trusts—any number of them—and yet, according to the section and the decisions, any fund which is not devoted to the specific trust is to be regarded as the aggregate of the charitable contributions which have formed it, and comes outside the Act. Mr. Vaughan Hawkins's argument is that directly you have appropriated a particular fund to a particular purpose in this way you put it aside, and say that it shall be used, not for any special object as distinguished from the other objects, but as land is for the maintenance of a school or anything of that kind, and that it must be thenceforward appropriated to a specific trust within the meaning of Lord Romilly's judgment. In the first place, the Act of Parliament is against that view, and, besides that, it seems to me to be a confusion between "specific" and "general." I think Lord Romilly meant by "specific" something which is not general, something which is particular and only a part of the whole, not that which is the whole. If you have property devoted to the whole objects of the charity, though used for the time conveniently for some particular part, that is not a specific devotion to that appropriation so that there is a trust attached to it for a particular purpose. It is not specific—it remains general. On the accounts and on the evidence it is clear beyond doubt that this particular fund with which we are now dealing arises from the sale of land which itself was purchased by voluntary contributions. This charity has its specific parts; there are funds devoted to specific purposes; but this fund in court is not concerned with them at all. It is part of the general fund which through the munificence of donors has been heaped up, and is now available for the general purposes of the charity arising strictly from voluntary contributions. It has been converted in this way for the moment into money. The corporation come here and say, "Pay it to us. We come here because we are absolutely entitled. We propose to deal with it as part of our corporate property for our general purposes, and no one has a right to inquire into it." I do not see how anybody has a right to inquire into it unless it is put under the jurisdiction of the Charity Commissioners by the Act of 1853. I have already said I do not intend to deal with that otherwise than by doing as Stirling, J. did in the case reported in (1893) 2 Ch. 618: I will not say blindly following, but following without inquiry the decision Lord Romilly arrived at in the other case. I desire to adopt what Stirling, J. says on p. 634 of that report. I have very little doubt that I should have done that if I had not had Stirling, J.'s decision before me, and if I had only had Lord Romilly's decision, which

was certainly not questioned, and one may say approved, in the case of *The Royal Society v. Thompson*. Upon those grounds I think the money must be paid to the petitioner. Now, as regards costs, the railway company must pay the costs of payment out. That is under the 80th section. Whether it is a question of adverse litigation or not is another point.

Sampson for the railway company.—I do not object to the petitioners' costs, but I object to the Charity Commissioners' costs. They have raised an adverse claim; they have raised a claim for the purpose of getting—I think your Lordship's expression was—a passport to the Court of Appeal in order to overrule a decision in 27 Beav. The Solicitor-General boldly said, "We have never had an opportunity before of questioning Lord Romilly's decision." This is not the construction of a will. This is adverse litigation between two parties. Your Lordship has decided that the Charity Commissioners have nothing to do with the title, and if people come here and argue that they have to do with the title, that is not clearing our title, or helping us in any way. They raised the whole of this question by objecting before the committee and saying, "We have a right to object under this special section" (sect. 51). It is not the first time they have raised this question against this particular corporation. I submit that we should not be called upon to pay the costs of the Charity Commissioners:

Re English, 11 Jur. N. S. 434.

KEKEWICH, J.—I do not think this is adverse litigation. The Charity Commissioners come here not claiming the fund themselves, but raising, as they are bound to raise, the question whether they are the trustees of it in one sense, and entitled to have a voice in the management of it. I put it aside as adverse litigation. But what strikes me as the true view is this: According to my decision the railway company might, if they had chosen to run the risk, have paid this money to the corporation and got a good conveyance and a good discharge, and the title would have been unassailable hereafter. If my decision is sound, that result seems to follow. They were advised, and I have no doubt properly, that it was a matter of considerable doubt, and deserving of judicial decision, and that they might not get a title without the decision of the court. How does that differ from the case where the trustees of a will or a settlement may or may not, on the true construction of the document, have a power of sale, and the money is paid into court, and then paid out to the tenant in fee—he may be equitable or legal tenant in fee? There is no adverse litigation in the case, but the railway company get a good title, which they could not do out of court at all, and could not do, except for the Lands Clauses Consolidation Act, without an action for specific performance or a vendor and purchaser's summons. The object of the Act is to enable railway companies to get a complete title, leaving the court to determine to whom the money is to be paid. The Legislature has said that in return for that they shall pay the costs of taking the money out. Where there is adverse litigation there is a fair provision that the railway company shall not pay the costs of the adverse litigants; but where there is no adverse litigation I think they are

bound to pay the costs. I think they must pay the Charity Commissioners' costs here.

Solicitors: Dawes and Sons; Clabon; Cunliffe and Davenport.

March 1 and May 8.

(Before KEKEWICH, J.)

Re NEWEN; NEWEN v. BARNES. (a)

Practice—Tenant for life—Leaseholds—Possession—Title deeds—Summons—Mortgagee—Trustee—Reversioner.

Originating summons issued by two ladies, tenants for life of certain leaseholds and railway stock, asking for possession and delivery up to them by the defendants, the trustees, of the muniments of title. The plaintiffs had mortgaged their life interest.

Held, that the application could be made by originating summons; if one trustee is a beneficiary, he should transfer his duty, and the other trustee should be separately represented; a reversioner is not a necessary party, but is entitled to appear at his own expense; a mortgagee ought to be made a party, and is entitled to his costs;

Held, that the applicants ought to be put into possession upon giving undertakings to protect the trustees, and paying their costs; that the applicants were not entitled to have the muniments of title handed over to them; that the refusal to give the powers under the Settled Estates Act 1877 in Re Peake's Settled Estates (69 L. T. Rep. N. S. 281; (1893) 3 Ch. 430) to two ladies must not be construed generally, but only with reference to that particular case; that no trustee having a fiduciary power to appoint trustees can exercise that power by appointing himself alone, or with any other person.

By his will, George Newen appointed his wife Maria Newen, Joseph Davey, and Charles Claridge Druce trustees and executors, and gave his leasehold houses in Hyde Park-terrace and Kensington Gore to his trustees upon trust after the death of his wife, to pay the ground rent and observe the covenants and conditions contained in the leases, and to set aside a sum out of the income to meet any costs or expenses incurred with regard to the leaseholds, and to divide the surplus into three shares, one share for his niece Mary Newen, who died in his lifetime, and another share to his niece Lydia Newen, and the third to his niece Eliza Maria Newen, to their separate use; and if either of the nieces died in testator's lifetime, her share was to go to the survivors. Then there was a gift over in the event of all his nieces dying without leaving children living at their deaths. The testator gave another leasehold property upon similar trusts for his nieces, with a similar gift over. The will contained powers of sale and demise. Testator gave his Great Western Railway 5 per Cent. Stock to his niece Mary Newen, and if she should die in the lifetime of the testator (which event happened), then to the plaintiffs; and he gave the residue of his property to his wife absolutely.

Power was given to the executors or administrators of the last surviving trustee, by any writing under their hands and seals, to appoint "any other proper person or persons," also power was

given to appoint a receiver and manager of the leaseholds at a salary or commission.

John Davey died in the lifetime of the testator, and the testator having died, the will was proved on the 24th April 1876 by Maria Newen and Charles Claridge Druce. C. C. Druce died in the lifetime of Maria Newen. By her will Maria Newen gave the residue of her property to the plaintiffs and their children, having appointed C. C. Druce her executor, and directed him to set apart a large sum to meet any costs and expenses in respect of the leaseholds.

Maria Newen having died, administration with the will annexed of Maria Newen was granted to Lydia Newen and Eliza Maria Newen, the plaintiffs, and in June 1887 they appointed Eliza Maria Newen, Henry Ernest Barnes, and John Bowly trustees of the will of George Newen.

The property consisted of the leasehold houses, and 4700l. of G. W. Railway stock.

On the 29th Sept. 1891 the plaintiffs mortgaged their life interest, and the mortgage was afterwards assigned to E. L. Douglas.

This was an originating summons taken out by Lydia Newen and Eliza Maria Newen against Henry Ernest Barnes and John Bowly, and asked that upon the said Lydia Newen and Eliza Maria Newen respectively undertaking, so long as they might remain in possession or receipt of the rents and profits of the hereditaments thereafter mentioned, to pay the ground rent in respect thereof, and to perform and observe the covenants and conditions contained in the lease under which the same were holden, and to keep the said Henry Ernest Barnes and John Bowly respectively indemnified against any present liability in respect of such rents, covenants, and conditions, and from time to time to supply to the said Henry Ernest Barnes and John Bowly all such information as they might reasonably require with respect to the said hereditaments, the said Lydia Newen and Eliza Maria Newen might be let, and until further order remain in possession and receipt of the rents and profits of the leasehold hereditaments respectively bequeathed by the said will, and dividends and income on the sum of 4700l. Great Western Rentcharge Stock, subject to the trusts of the said will, and for an order that the said Henry Ernest Barnes and John Bowly should deliver to the said Lydia Newen and Eliza Maria Newen all muniments of title in their possession relating to the said hereditaments, including counterparts of current leases and agreements for leases or tenancies, a schedule of the muniments so to be delivered being first signed by the applicants and delivered to the respondents, and that the said Henry Ernest Barnes and John Bowly should execute all proper authorities entitling the said Lydia Newen and Eliza Maria Newen to receive the dividends of such stock, and making provision for the costs of the application.

On the 28th Feb. 1894 E. L. Douglas, the mortgagee of the life estate, issued a summons asking for leave to attend the proceedings, which summons was adjourned into court to be heard with the originating summons.

Warmington, Q.C. and Vernon Smith for the plaintiffs. — This is an application that the plaintiffs, the tenants for life, may be let into possession of the leaseholds, and have the

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

Re NEWEN; NEWEN v. BARNES.

[CHAN. DIV.]

custody of the muniments of title relating to the property:

Re Wythes; West v. Wythes, 68 L. T. Rep. N. S. 520; (1893) 2 Ch. 369.

The application can be made by originating summons:

Re Bagot's Settlement; Bagot v. Kittoe, 70 L. T. Rep. N. S. 229; (1894) 1 Ch. 177.

Marcy for the defendant John Bowly.—The defendant John Bowly is a co-trustee, and also a beneficiary; he does not oppose the application.

W. F. Hamilton for the defendant Henry Ernest Barnes.—I do not oppose the application, but I wish to point out that Eliza Maria Newen claims the right to collect the rents. [KEKEWICH, J.—That seems to me a strong reason for letting the plaintiffs into possession, if they are willing to collect the rents without commission.] Then there are leaseholds of which the testator was lessee, paying a ground rent, and dilapidations should be provided for. Then I am entitled to be protected against personal liability:

Hoskins v. Campbell; Gibbon v. Campbell, W. N. (1869), p. 59.

A. D. Maclaren for the reversioners.—I submit that the present arrangement should continue. The plaintiffs are ladies, and will require assistance in managing the property. North, J. declined to give authority to sell settled estates to two ladies in the case of *Re Peake's Settled Estates* (69 L. T. Rep. N. S. 281; (1893) 3 Ch. 430). One of the plaintiffs has been appointed trustee; this should not be allowed:

Re Skeats' Settlement; Skeats v. Evans, 61 L. T. Rep. N. S. 500; 42 Ch. Div. 522.

A. F. Peterson for the mortgagee of the life estate.—The plaintiffs should not be allowed to have possession of the muniments of title; they should remain where they are or be handed to me. Secondly, the tenants for life should not be put into possession without the consent of the mortgagee: sect. 50 of the Settled Land Act 1882 (45 & 46 Vict. c. 38.)

Warmington, Q.C. in reply.—The power was for the executors or administrators of the last surviving trustee to nominate and appoint "any other proper person or persons." I admit Eliza Maria Newen could not appoint herself; that shall be set right.

KEKEWICH, J.—There are one or two points of some little interest arising out of this summons, but I desire before noticing them to observe that, though I propose to make a qualified order, I must not be understood as laying down the rule that tenants for life—equitable tenants for life—are, as a matter of course, entitled to go into possession. It would be wrong for me to do so, and I do not see any such rule in *Re Wythes; West v. Wythes*, and certainly *Re Bagot's Settlement; Bagot v. Kittoe* shows that this is not the course of the court. No doubt those cases show that the application may be made nowadays with much greater chances of success than before, and no doubt in time we shall be able to lay down some rules concerning the circumstances justifying such applications. To take the points raised independent of the merits, the first one is, can an application of this kind be properly made by originating summons? To that a short and con-

clusive answer is, that it was made by originating summons in *Re Bagot's Settlement* before Chitty, J., and he did not make any objection to it, and I do not see why I should; therefore, without referring to any particular order or rule, I pass that by as being reasonably clear. Secondly, who is entitled to be present to assist the court or to make objections to allowing the application? Of course the applicant is necessarily the tenant for life; perhaps with some other person; he must be essentially the applicant, and the application must be served on the trustees. The court looks to the trustees for all the assistance, all the information that they can give, and also not only information, but all the objections which can be reasonably urged, from the point of view of their own protection, and from the point of view of justice to other parties. I think the trustees ought, and should through their solicitors and counsel, take care of themselves and the estate, and the court ought to be satisfied with having the trustees here. If one of the trustees happens to be a beneficiary, an accident of frequent occurrence, then he should transfer the duty, and the other trustee should be separately represented. The next thing is to consider whether persons, who are interested in the property, but who are not affected by the order, should be represented? That is not a question which is raised here, but it was raised in *Re Bagot's Settlement*, and Chitty, J. got rid of it in this way, saying at p. 183 of (1894) 1 Ch.: "No order that I am now making will affect her position in any way." According to the ordinary rules a person in that position need not be served, and need not appear. Then there are persons, of whom I have an example here, who are interested in the application, those who are to come into possession when the estate comes into possession, namely, the reversioner or remainderman. It is a matter of importance in the case of leaseholds, where there are dilapidations, and covenants which if not observed create a liability on the estate. That observation is not confined to leaseholds, because you may have covenants with regard to freeholds. You may have property, with respect to which management, and the restriction of waste, and improvements are of the greatest importance, and the remainderman or reversioner may have a great deal to say about it. I think, however, the reversioner is not a necessary party, and the tenant for life ought not to make him a party, and certainly need not. If the reversioner knows of the application, he is entitled to appear and give information, and I am glad to hear counsel and the reversioner has given me assistance in this case. Then supposing the tenant for life has mortgaged his life estate, can the mortgagee be a party? Here, I think, I ought to go a step further, and say that the mortgagee not only can, but ought to be a party. The tenant for life is derogating from his own grant, that is, he is desiring to have possession which he had not at the time of the mortgage; he is seeking to take that away, and certainly to alter the position of the mortgagee. If the mortgagee is not before the court, I think it is the duty of the trustees to look after him, to inform the court of such mortgage, and at any rate to give the mortgagee an opportunity of appearing if the tenant for life has not served him. That disposes of the preliminary points,

which are perhaps of more importance than anything else in this case. Then, as to the facts, these ladies are tenants for life, and powers are vested in the trustees of sale and management. Ought that to prevent the court from giving the tenants for life possession, the power of dealing with the estate? I see no reason why. The legal estate is in the trustees; they have power to appoint a receiver and manager of the leasehold property, at a salary, or commission; that seems to have been done. The very existence of such a power points to the advantage of making such an order as I am asked to make. The tenants for life not unreasonably say, if the trustees cannot do that with their own hands, and want to appoint a receiver and manager at the expense of the estate, why should not we appoint our own receiver and manager? We shall at any rate have the advantage of paying our own servant, instead of somebody else's servant. I see no reason, as regards the trustees, why these ladies should not be put into possession. The trustees must be protected; they have a personal liability, as to leaseholds, &c., but they have an indemnity against the whole estate. But they have also other rights as against those estates, which depend upon their obligations to the remaindermen. They hold the whole estate on a trust to preserve it properly for the remaindermen, and if they neglect their duty they may make themselves liable as for dilapidations, or in their neglect in letting it. This matter had better be referred to chambers, when I can see counsel. I think the trustees should be fully protected against all liability, and not only pecuniary liability, and they ought to have such undertakings as will enable them to satisfy themselves that the trust estate is being preserved. So much for the trustees; their costs must be paid by the applicants. Then, as to the reversioners and the mortgagee, there is one point in common, and it is this: They say this is a trust estate, and we prefer the existing trustees, and that there should be no departure from the original arrangement. The mortgagee argues the point more forcibly than the reversioners, as the reversioners claim through the testator's bounty. They have an equitable estate in reversion, contingent upon the death of the tenants for life dying without issue living at their death, that is all the testator must be taken to have given them. If the tenants for life are entitled to possession the reversioners have no less right than before. I know I am interfering with the wishes of the testator, as was the case cited by Chitty, J. at p. 181 of (1894) 1 Ch., before Jessel, M.R. The reversioners claiming under the testator's bounty cannot be in a better position than the tenants for life, who claim under the same bounty. The mortgagee, I admit, can urge the point more strongly, for he has entered into a contract with an equitable tenant for life out of possession, and he may say, our bargain was that you should be equitable tenant for life, receiving your income from the trustees, having your property managed by trustees, and I should be able to look to them. Still I do not think a mortgagee can say, because I did not consider the matter, a tenant for life has no power to have possession. A mortgagee cannot forget that possession is sometimes given to tenants for life, and that such an application may be made. It is a stronger case than that of the reversioners, but still one, I think, which fails.

But the mortgagee raises another point. He says, in addition to the possession the tenants for life ask for the title deeds; the trustees are the proper custodians of the title deeds; if the tenants for life are entitled to the muniments, I must have them; they cannot hold them against me, and I am entitled to stand in their shoes. I think there is much to be said for that view. I think there is sufficient to prevent the handing over the title deeds to the tenants for life for all purposes. If they require to exercise the powers of the Settled Land Act, I think other questions arise, but I do not decide that. All I say is, that possession of the property cannot carry the possession of the title deeds. I think I have dealt with all the points. There are one or two cases I ought to refer to. There is only one case I need say much about after *Re Bagot's Settlement*. There is the case before North, J., *Re Peake's Settled Estates* (69 L. T. Rep. N. S. 281; (1893) 3 Ch. 430), in which it is said he held that the powers given by the Settled Estates Act 1877 ought not to be given to two ladies. It is quite possible to read the Weekly Note as meaning that, at the same time it is possible to read it otherwise. There is a discretion given to the court, and he exercised his discretion in thinking that there ought to be other trustees. I cannot think North, J. meant strictly that he declined to give the authority to two ladies. He cannot have meant that he never would listen to the application of ladies, but only in that particular case. Another point that arose in the discussion was that all the trustees appointed by the will are dead, and the last surviving trustee appointed an executor, who died in her lifetime, and then these two ladies, who are entitled to administer the estate, took out administration, with the will annexed, the result being that, under the Act, or under the will, they had power to appoint new trustees. That power goes to the surviving or continuing trustee, or the executor or administrator of the last surviving or continuing trustee. They had power to appoint "any other proper person or persons." They appointed one of themselves and two gentlemen. That, to my mind, was entirely wrong, that really comes within the decision of *Re Skeat's Settlement*; *Skeats v. Evans* (61 L. T. Rep. N. S. 500; 42 Ch. Div. 522); I have not the slightest doubt that it is wrong in principle. Mr. Warmington gives it up, on the ground that the power was to appoint "any other proper person or persons," and you cannot be any other person than yourself. I desire to say that I conceive the law to be that no trustee having a fiduciary power to appoint trustees can exercise that power by appointing himself alone, or with any other person. I think the proper thing to do will be that the lady shall retire by a proper deed, which will be indorsed on the appointment of new trustees in June 1887, which will effect the devolution of the estate on the two other trustees. I have not heard a suggestion that the other trustees are not proper persons. I propose to make an order letting the ladies into possession, which must not be drawn up until after the retirement of the trustee is effected, and until proper undertakings are also settled, and I shall adjourn the summons back to chambers for that purpose. As to the costs, the ladies must pay the costs of the trustees, that will include the costs of Mr. Bowly. As regards

CHAN. DIV.]

WIGGAN v. COX, SONS, BUCKLEY, AND CO.

[Q.B. DIV.]

the reversioners, they have come here to protect themselves. If they thought it worth while to come, I think they must pay their own costs. The mortgagee ought to have his costs, he is a proper party. He must be ordered to add his costs to his security, but if he asks for them he must have them paid by the applicants. The mortgagees will also have the costs of the summons for leave to attend.

May 8.—MINUTES OF ORDER.—“It appearing that by the will of the late Maria Newen, dated the day of , provision is made for indemnifying the estate of the above-named testator against all liability under the leases hereinafter mentioned, and the respondents being content with such indemnity, and the applicants by their counsel undertaking in manner following, that is to say—(1) to pay the several rents respectively reserved by the several leases whereunder the messuages and buildings subject to the trusts of the testator's will are respectively held, and to observe and perform all the lessees' covenants and conditions in the said leases respectively contained, and also the lessors' covenants in the underleases of the said messuages and buildings granted by the trustees of the testator's will; (2) to permit the trustees or trustee for the time being of the testator's will, or their or his agents, at all reasonable times to enter and inspect such part or parts of the said messuages and buildings as may be in the possession of the applicants, and from time to time to supply to the said trustees or trustee all such information as he, they, or she may reasonably require with respect to the said messuages and buildings, and each of them; (3) so long as the applicants remain in possession or receipt of the rents and profits of the said messuages and buildings to keep the estate of the said testator indemnified against any liability, and the said trustees or trustee indemnified against any personal liability by reason of the several covenants respectively contained in the said leases, and also to keep the trustees and respondents indemnified against any personal liability by reason of the several covenants contained in the underleases of the said messuages and buildings to which they were respectively parties, and of any other covenants or obligations properly entered into or incurred by them as trustees in connection with the said messuages or buildings, or any of them, the said trustees or trustees supplying the applicant with the information as to every such covenant, contract, or obligation. And the applicant, Eliza Maria Newen, by her counsel undertaking to retire from the trusts of the testator's will, and to consent to the vesting in her co-trustees alone of the trust property, and to execute and do at the cost of the said testator's estate all such deeds and things as may be necessary for that purpose; and the trustees, the respondents, undertaking to permit the applicants or their solicitors at all reasonable times to inspect, examine, and take extracts from or copies of any muniments of title in the possession of the respondents relating to the said messuages or buildings, or any of them, a schedule of such muniments to be delivered to the applicants. Let the applicants be let into possession and into receipt of the rents and profits of the said leasehold messuages and buildings. Liberty to the said trustees or trustee to apply to the judge in chambers as to resumption by the said trustees or trustee of possession of the said mes-

suages and buildings or any of them, and as to any other matter arising under or in connection with this order. And let the applicants pay to the respondents, the trustees, their costs of and incidental to this application, such costs to be taxed in case the parties differ; and let the respondent Douglas add his costs of and incidental to this application (including therein the costs of the said summons) to his security.”

Solicitors: King, Wigg, and Co.; A. G. Ellis; Troutbeck and Co.; Harold Smith and Gorrings; L. Saunt.

QUEEN'S BENCH DIVISION.

Thursday, March 15.

(Before CAVE and WRIGHT, JJ.)

WIGGAN v. COX, SONS, BUCKLEY, AND CO. (a)
Practice—Partners—Action against copartners in firm name—Judgment against the firm—Execution—Retirement of one partner before action brought—Non-liability of retired partner unless served with writ—Order XLVIIIa., rr. 1, 3, and 8.

In an action on promissory notes the defendants, copartners, were sued in the name of the firm, and the writ of summons was served at the house of business of the firm. Before the plaintiff commenced the action, and to his knowledge, one of the partners, the appellant, retired from the partnership. The retired partner was not served with the writ, he did not appear to the writ, nor did he admit he was a partner, nor had he been adjudged to be a partner. The plaintiff obtained judgment against the firm by default.

Held, that the plaintiff was not entitled to take out a summons for an order to obtain leave to issue execution against such retired partner, or to have his liability tried and determined, under Order XLVIIIa., r. 8, as he had not served him with the writ of summons in accordance with the proviso to rule 3 of that order.

APPEAL from chambers by S. H. Gifford, one of the defendants in the action, against an order made by Grantham, J. at chambers affirming the master's order giving the plaintiff leave to proceed against the appellant as being a member of the defendant firm.

The action was brought against the defendant firm by the plaintiff to recover the amount of certain promissory notes that had been given by the defendants, to the plaintiff. The defendants were sued in the name of the firm, and the writ of summons was served at the defendants' business place in accordance with Order XLVIIIa., rr. 1 and 3.

By rule 1 of this order it is provided that:

Any two or more persons claiming, or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action. . . .

And by rule 3 it is provided that:

Where persons are sued as partners in the name of their firm under rule (1), the writ should be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary: Provided that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable.

At the time when the promissory notes were given to the plaintiff by the defendant firm, S. H. Gifford, the appellant, was one of the partners, but before this action had been commenced he had ceased to be so, and this fact was known to the plaintiff before he instituted proceedings. The writ was never served on the appellant individually as a partner in the firm, and there was no appearance to the writ in his own name, and it was not admitted on the pleadings that he was a partner in the firm, nor had he been adjudged to be a partner. No defence was delivered, and in default thereof judgment was entered for the plaintiff for the full amount claimed and costs. The plaintiff then took out a summons for an order under Order XLVIII., r. 8, for "liberty to issue execution, or otherwise proceed against S. H. Gifford, as being a member of the firm of Cox, Sons, Buckley, and Co., the above named defendants, upon the judgment obtained herein."

Order XLVIII., r. 8, provides as follows:

Where a judgment or order is against a firm, execution may issue: (a) against any property of the partnership within the jurisdiction; (b) against any person who has appeared in his own name under rule (5) or (6), or who has admitted on the pleadings that he is, or has been adjudged to be, a partner; (c) against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave to do so, and the court or judge may give such leave if the liability be not disputed; or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

Dickens, Q.C. (Lindsell with him) appeared on behalf of the appellant.—This order cannot stand. The plaintiff has no right to an order to issue execution against the appellant under Order XLVIII., r. 8, for he has not served the writ of summons on the appellant in accordance with rule 3, nor is the plaintiff entitled to an order under rule 8 to have the issue as to the appellant's liability tried for the same reason. It is admitted that the dissolution of the partnership was made to the knowledge of the plaintiff, and therefore the plaintiff should have served a writ of summons upon him. This was never done, therefore it is submitted that the appellant was never a party to the action. The Legislature has laid down specific directions that where you wish to sue a retired partner you must sue him by name. It is submitted that in rule 8 the words "any other person" mean "any other person" who has been served after the dissolution. [Stopped by the Court.]

Tindal Atkinson for the respondent.—This order should be upheld. It is submitted that the appellant is a party to the action by reason of the

issue of the writ against the firm; the mere fact of non-service will not make the appellant any less a party to the action. The judgment that has been recovered has been recovered against all the members of the firm. In the case of the *Western National Bank of New York v. Percy, Triana, and Co.* (64 L. T. Rep. N. S. 543; (1891) 1 Q. B. 304), it is stated by Lindley, L.J. that if the partners of a firm are sued in the name of a firm they are sued individually, just as much as if their individual names were set out. It is submitted that rule 3 does not govern rule 8; these two rules are alternative. Rule 3 directs you how to serve a retired partner, and if you do not do that you may, on obtaining judgment against the firm, proceed against him under rule 8, and obtain an order to issue execution against him, or to have the issue as between you and him tried. [CAVE, J.—Your argument seems to me to go to prove that rule 3 is useless. WRIGHT, J.—The proviso in rule 3 gives full effect to rule 8. The very object of these rules was to obviate the difficulties that had arisen from the decisions in the cases of *Kendall v. Hamilton* (39 L. T. Rep. N. S. 250; 41 L. T. Rep. N. S. 418; 4 App. Cas. 504) and *Cambefort and Co. v. Chapman* (57 L. T. Rep. N. S. 625; 19 Q. B. Div. 229.)] The interests of a retired partner are quite sufficiently safeguarded by rule 8, for if he denies his liability he has the right to an order to have the issue tried and determined.

CAVE, J.—I am of opinion that the order made by the master is wrong, and cannot be upheld. Now the order that we have to deal with here is Order XLVIII., which deals with actions by and against firms and persons carrying on business in names other than their own. Rule 1 provides that any two or more persons being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the names of the respective firms of which such persons were copartners at the time of the accruing of the cause of action. Then, suppose the case of a firm consisting of three partners, one of whom retires, and two remain and continue to carry on the business of the firm under the same name. Is it to be said that the retired member is to be deemed to be properly served under rule 3 if one of the remaining partners, or the manager of the firm, is served at the principal place of business of the firm? I think not. Where the co-partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, it is pointed out in the proviso to rule 3 that such service is not to be deemed good service as against the retired partner, but that the writ of summons must be served upon him individually, if it is sought to make him liable. Before the rules were made allowing actions to be brought against firms in the firm name, the plaintiff was obliged to serve every person against whom he issued his writ, and any judgment signed against one not served would have been null and void. But now rule 8 lays down that, in certain cases where a judgment or an order has been obtained against a firm, execution may issue. Firstly, you may issue execution against any partnership property within the jurisdiction; secondly, against any person who has appeared in his own name under rule 5 or 6, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner; and lastly, against any person who has been individually served, as a partner, with the writ

Q.B. Div.]

Re BASSETT'S PLASTER COMPANY LIMITED.

[Q.B. Div.]

of summons, and has failed to appear. So that although you have not served a particular partner of a firm, yet you may make him answerable, and all this is quite consistent with rule 3. But the appellant in this case does not come under any of these headings. It is contended, however, on behalf of the respondent that, having obtained judgment, he is entitled under the latter part of rule 8 to apply and obtain leave to have the liability of the appellant tried and determined as being within the words "any other person" against whom he claims to be entitled to issue execution as being a member of the firm. I, however, think that rule 8 is governed by rule 3, and only applies where there has been no dissolution of partnership, or, if there has, it has not been to the knowledge of the plaintiff. In this case the plaintiff, although he knew when he commenced this action that the appellant was no longer a member of the firm, chose nevertheless to serve the remaining partners in their firm name, and did not trouble to serve the appellant, who had retired, individually. The plaintiff in a case like this, where he has knowledge of the retirement of one of the partners, cannot make that person liable unless he causes the writ of summons to be served upon him. I think, therefore, there has been no proper service upon the appellant, and that the plaintiff is not entitled to an order against him under rule 8. The order made by the master and affirmed by the judge was wrong, and I am of opinion that this appeal must be allowed.

WRIGHT, J.—I am entirely of the same opinion.

Appeal allowed.

Solicitors for the appellant, *Saxton and Son.*

Solicitors for the respondent, *Lindsay, Greenfield, and Masons.*

Thursday, April 12.

(Before CHARLES and COLLINS, JJ.)

Re BASSETT'S PLASTER COMPANY LIMITED. (a)

County Court—Jurisdiction—Winding-up of company—Writ of fi. fa. addressed to sheriff—Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), sect. 1, sub-sects. (1) (3) and (6).

The sheriff of the county is not the proper person to levy the amount of a debt in a matter arising out of the County Court under the Companies (Winding-up) Act 1890. The proper persons are the officers of the County Court, and a writ of fi. fa. should have been issued under the circumstances addressed to the high bailiff.

THIS was a summons referred by the judge in chambers to the Divisional Court to set aside a writ of *fi. fa.* addressed to the sheriff.

A debtor not having paid debts due to a company in liquidation upon an order to pay the same, the learned deputy County Court judge issued a writ of *fi. fa.* addressed to the sheriff to levy the amount of the debt. The company was being wound-up in the County Court.

The Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), sect. 1, sub-sect. (1), provides as follows:

The courts having jurisdiction to wind-up companies in England and Wales shall be the High Court, the Chancery Court of the Counties Palatine of Lancaster

and Durham, the County Courts, and the Stannaries Court.

Sub-sect. (3):

When the amount of the capital of the company paid up, or credited as paid up, does not exceed ten thousand pounds, and the registered office of the company is situate within the jurisdiction of the County Court having jurisdiction under this Act, a petition to wind-up the company, or to continue the winding-up of the company under the supervision of the court, shall be presented to that County Court.

Sub-sect. (6):

Every court having jurisdiction under this Act to wind-up a company shall for the purpose of that jurisdiction have all the powers of the High Court, and every prescribed officer of the court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof, or otherwise in relation to the winding-up of a company.

Sect. 32:

In this Act, unless the context otherwise requires, "prescribed" means prescribed by general rules.

By rule 20 (1) of the Companies (Winding-up) Rules 1890, under the heading of "Service and Execution of Process:"

It shall be the duty of the high bailiff of a County Court to serve such orders, summonses, petitions, and notices as the court may require him to serve; to execute warrants and other process, to attend any sittings of the court . . . and to do and perform all such things as may be required of him by the court.

Dale Hart for the debtor.—The sheriff is not the proper person to whom the writ ought to have been addressed in a matter arising out of the winding-up of company from the County Court; the proper officer was the high bailiff, he is an officer of the County Court, and the sheriff is not.

Ashton Cross for the liquidator of the company.—The County Court has the same jurisdiction in the matter of the winding-up of companies as in matters of bankruptcy. The Bankruptcy Act 1869 conferred upon the County Court judge sitting in bankruptcy all the powers and the jurisdiction of a judge of the Court of Chancery. The County Court judge liquidating a company has all the same powers and jurisdiction of a judge of the High Court, and therefore he has the same power under the Companies (Winding-up) Act 1890. He cited

Reg. v. The Judge of the County Court at Croydon, 51 L. T. Rep. N. S. 102; 53 L. J. 545, Q. B.; 13 Q. B. Div. 963;

Ex parte Reynolds; *Re Barnett*, 15 Q. B. Div. 169.

Macaskie for the sheriff.

CHARLES, J.—In this case the debtor who has applied to us in this matter must, I think, succeed. It has been contended on his behalf that the writ of *fi. fa.* which was addressed to the sheriff by the deputy County Court judge to levy the amount of a debt was bad because it should have been addressed to the proper officer of that court, viz., the high bailiff. It is said, on behalf of the liquidator, that, as sect. 1, sub-sect. (6) of the Companies (Winding-up) Act 1890 provides that every court having jurisdiction shall have "all the powers of the High Court," these words give the County Court all the powers of the High Court, and justified this writ being issued. I do not think these words do so. By sect. 32 of the Act, the word "prescribed" means prescribed by

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

Q.B.] MAYOR, &C., OF LEICESTER v. CHURCHWARDENS, &C., OF BEAUMONT LEYS, &C. [Q.B.]

the rules made under the Act; and sub-sect. (6) of sect. 1 of the Act says that "every prescribed officer of the court shall perform any duties which an officer of the court may discharge;" and rule 20 of the Companies (Winding-up) Rules 1890 constitutes the high bailiff of the County Court to be the officer to execute the process of the County Court. I am therefore of opinion that the debtor has succeeded in this contention, and this writ issued by the liquidator must therefore be set aside.

COLLINS, J.—I am of the same opinion. The Legislature has given the County Courts the same jurisdiction as the High Court in matters of the winding-up of companies and in bankruptcy proceedings, but these matters are to be dealt with by the County Courts under their own procedure, and by their own officers. The proper person to have executed this writ was the officer of the County Court—the high bailiff. The writ therefore in this case was bad.

Solicitor for the debtor, *F. Hatton*, agent for *Goodricke-Clarke*, and *Smith*, Birmingham.

Solicitors for the liquidator, *Harvey and Capron*, agents for *E. C. Newey*, Birmingham.

Solicitors for the sheriff, *Taylor, Hoare*, and *Taylor*, for *R. C. Heath*, Warwick.

Wednesday, May 9.

(Before WRIGHT and COLLINS, JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF LEICESTER (apps.) v. THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF BEAUMONT LEYS AND THE ASSESSMENT COMMITTEE OF THE BARROW-ON-SOAR UNION (resps.). (a)

Poor rate—Sewers—Sewage works—Rateability of—Beneficial occupation—Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96).

The appellants were the occupiers of a sewage farm and works, which comprised a pumping station, together with a "rising main" up which the sewage was forced from the pumping station to tanks, from which the sewage was carried to different parts of the farm by "sewage carriers," and "effluent culverts" by means of which the effluent was carried through pipes underground and discharged into a natural watercourse.

On behalf of the appellants it was contended that they were not rateable in respect of the "rising main," "sewage carriers," and "effluent culverts."

Held, that they all formed part of the sewage works, and that the appellants were therefore rateable in respect thereof.

THIS was an appeal against a poor rate for the parish of Beaumont Leys, in which the appellants were rated as occupiers of a certain sewage farm and sewage works at 3800*l.* gross estimated rental and 3350*l.* rateable value. The Court of Quarter Sessions for the county of Leicester dismissed the appeal subject to the following case to be stated for the opinion of this court:

1. The appellants are the urban sanitary authority of the borough of Leicester, acting under and in pursuance of the Public Health Act 1875, and they are the occupiers of a sewage farm, works,

and appurtenances in the said parish of Beaumont Leys, comprising in that parish an area of 1105a. 3r. 31p., of land. Of this area 100 acres are the property of the appellants, having been purchased by them on the 31st Dec. 1886 for 13,037*l.* 10s. The remaining 1005a. 3r. 31p. are part of 1275a. 1r. 3p. which the appellants hold under a lease for thirty years from Sir R. Tempest at a rent of 2689*l.* per annum for the whole, being at the rate of 2*l.* 2s. per acre.

2. The sewage works in the said parish comprise (1) a rising main up which the sewage is forced from a pumping station of the appellants, situate in the parish of Leicester Abbey, to (2) tanks upon the highest point of the said farm, whence it is distributed by (3) sewage carriers, consisting of main, open, and underground channels, by means of which the sewage is carried and delivered on to any part of the sewage farm; (4) effluent culverts, by means of which the effluent is carried through pipes underground and discharged into a natural watercourse.

3. The appellants have expended upon the said works in the said parish a sum of 35,111*l.*, of which 7427*l.* was for the rising main, 3961*l.* was for effluent culverts, and 12,973*l.* was for sewage carriers. The said farm has been so acquired and laid out, and is worked by the appellants, and the said sewage works have been constructed and are worked by the appellants under and in pursuance of the Public Health Act 1875 in the discharge of their statutory duty as the urban sanitary authority of the borough of Leicester, to dispose of the sewage arising from within their district, and not otherwise.

4. The said sewage farm and works are used and worked by the appellants as economically as possible, but whilst used for the statutory purposes aforesaid are incapable of yielding any profit, and cannot possibly be worked except at a very heavy loss, and the appellants are authorised by the Public Health Act 1875 to levy, and do levy, rates to the amount of the expenses incurred by them for the working of the said sewage farm. If the appellants desired to let the said sewage farm and works they would be unable to find any one to take them, even at a nominal rent, whilst subject to the statutory burden of the daily delivery thereupon of the Leicester sewage, but if wholly disconnected from the sewage system the 600 acres of pasture on the said farm might be let for 1200*l.* a year, and the remainder at 1*l.* an acre for agricultural purposes.

5. The appellants contended that the sewage works, consisting of the rising main, sewage carriers, and effluent culverts, are sewers within the meaning of the Public Health Act 1875, and that they are not empowered to become tenants from year to year of either the sewage farm or the said works. Further, they contended that the said rising main, sewage carriers, and effluent culverts are incapable under any circumstances of beneficial occupation, and that under both contentions the rate ought to be reduced accordingly. Further, they contended that they would not be willing and could not reasonably be expected to become tenants from year to year of the said sewage farm and works, and that they ought not to be rated in respect of the same or any part thereof. Further, they contended that the said sewage farm and works in their present use and condition, being incapable of beneficial

Q.B. Div.]

THE ATTORNEY-GENERAL v. DODD.

[Q.B. Div.]

occupation, are not rateable, or, if rateable, that the same should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing the same were not used as part of the sewage system, but disconnected therefrom and used for agricultural purposes, and that the rate should be reduced accordingly.

6. The respondents contended that the rent actually paid by the appellants for the 1005a. 3r. 31p., together with reasonable interest calculated upon the purchase money of the 100 acres, and upon the outlay on the said works, ought to be taken into consideration in ascertaining the annual value to the appellants of their occupation in the said parish. That the appellants being empowered, under the Public Health Act 1875 to rent land and construct sewage works thereon, and use the same for the purpose of fulfilling their statutory duties in disposal of the sewage, cannot be excluded from the category of hypothetical tenants. That the said farm and works are capable of beneficial occupation, and are, in fact, beneficially occupied by the appellants, who are thereby enabled to fulfil their statutory duties. That as the appellants would effect a pecuniary saving by paying to a private owner of the said farm and works a rent sufficiently high to support the present rate, instead of the rent and interest on purchase money and outlay for which they are now liable, the assessment is properly made upon an estimate of the net annual value of the hereditaments, in accordance with the Parochial Assessment Act. They contended, further, that the case is governed by the decision in the *Mayor, &c., of Burton-upon-Trent v. Churchwardens, &c., of Egginton* (61 L. T. Rep. N. S. 368; 24 Q. B. Div. 197), and that the present rate is right.

7. The Court of Quarter Sessions was of opinion, and found that, if the said sewage farm and works were in the hands of a private owner, he would let, and the appellants would have no option but to hire, the said farm and works at a yearly rent high enough to support the present rate.

8. If the court should be of opinion that the contention of the appellants is correct, then the order dismissing the said appeal is to be reversed.

9. If the court should be of opinion that the contention of the respondents is correct, and that the rate was properly made, then the order dismissing the appeal is to be confirmed.

Toller for the appellants.—It is submitted that the pipes or sewers in the present case are the same class of sewers as those which the House of Lords held to be not rateable in *London County Council v. Churchwardens, &c., of the Parish of Erith* (69 L. T. Rep. N. S. 725; (1893) A. C. 560). The "rising mains" are similar to outfall sewers, the only difference being that in the former the sewage is forced up, while in the latter it flows down by gravitation. It is admitted that the pumping station is rateable, as without it the sewage could not be got on to the farm. The "sewage carriers" are sewers within the meaning of the Public Health Act 1875:

Wheatcroft v. Local Board of Matlock, 52 L. T. Rep. N. S. 356.

They also fall therefore within the exemption from rating.

Etherington Smith, for the respondents, was not called upon.

WRIGHT, J.—I think that the exemptions from rating of sewers, which have been laid down in various cases, cannot be extended so as to include those which we now have to deal with. In the present case all the subject-matters of the rates are parts of, and adjuncts to, the sewer works and the sewage farm. The "rising mains" are artificial constructions by means of which the sewage is forced up-hill to tanks for the purpose of there being dealt with by chemical and other processes; the sewage is then passed into the "sewage carriers" for distribution over the farm; and the "effluent culverts" are used for the convenience of the sewage farm to take away the sewage after it has passed through or over the land. No part of these works is an ordinary sewer, and therefore, in my opinion, the whole is liable to be rated.

COLLINS, J.—I am of the same opinion. It seems to me that the whole of these works are for the benefit of those who occupy the sewage farm. But it has been objected that some portions, namely, the rising mains, sewage carriers, and effluent culverts, are not the subject-matters of rates. That argument was rested on the ground that these were sewers properly so called. But I think that looking at the case broadly, this system is the subject-matter of beneficial occupation, and we cannot sever the various parts, and say that they are to be differently treated. All the particular matters, in this case, are parts of one system, and therefore liable to be rated. This appeal must therefore be dismissed.

Appeal dismissed

Solicitors for the appellants, *Field, Roscoe, and Co.*, for *John Storey*, Town Clerk, Leicester.

Solicitors for the respondents, *Dean and Hande*, Loughborough.

Saturday, March 3.

(Before MATHEW and CAVE, JJ.)

THE ATTORNEY-GENERAL v. DODD. (a)

Inland Revenue—Voluntary settlement of land—Trust for sale—No actual sale of land—Liability of property to account stamp duty—Customs and Inland Revenue Act 1881 (44 Vict. c. 12), s. 38, sub-sect. 2 (c); Customs and Inland Revenue Act 1889 (52 Vict. c. 7), s. 11.

Where freehold property, passing under a voluntary settlement which contains a trust for sale, is to be considered in equity as converted into money, it is liable as personal property to account stamp duty under the provisions of sect. 38, sub-sect. 2 (c) of the Customs and Inland Revenue Act 1881.

By a post-nuptial settlement, made in the ordinary form, for carrying out conversion, land was assigned by the husband to trustees upon trust that they should, on the request in writing of the husband and wife or the survivor of them, and after the death of the survivor at their discretion, sell the property and hold the moneys arising from such sale upon certain trusts. The husband died, leaving his wife and children surviving. No request was made for sale, and no sale had actually taken place.

Held, that, although no request was made for the sale of the property, by reason of the trust for sale, the land was to be considered as converted into money, and was liable to account stamp

(a) Reported by W. W. ORR, Esq., Barrister at-Law.

Q.B. Div.]

THE ATTORNEY-GENERAL v. DODD.

[Q.B. Div.]

duty as personal property passing under the settlement.

INFORMATION by the Attorney-General on behalf of Her Majesty.

By an indenture dated the 22nd May 1885, and made between Charles Greenwood of the first part, Jane Greenwood, wife of the said Charles Greenwood, of the second part, and the defendant Francis Dodd and John Curtler (since deceased) of the third part, reciting that by an indenture of even date with and executed before the now stating indenture, and made between the same parties, the said Charles Greenwood had assigned certain freehold hereditaments situate in the county of Glamorgan, and therein particularly described, to the use of the said Francis Dodd and John Curtler, their heirs and assigns, upon the trusts and with and subject to the powers and provisions therein declared and contained concerning the same. And that it was thereby declared that the said Francis Dodd and John Curtler, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the now reciting indenture should, at the request or at the discretion therein mentioned, sell the said freehold premises in manner therein mentioned, and should hold the moneys arising from any such sale upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in an indenture of even date therein referred to, meaning the now stating indenture, and should pay the rents and profits of the said premises, until the same respectively should be sold, to the said Charles Greenwood or his assigns during his life, and after his death to the said Jane Greenwood during her life for her separate use, and without power of anticipation, and after the death of the survivor of the said Charles Greenwood and Jane Greenwood should hold the rents and profits of the said hereditaments until the same should be sold upon the trusts and subject to the provisions declared and contained concerning the same respectively in the said indenture of even date therewith meaning the now stating indenture.

By the indenture it was witnessed that, in consideration of the natural love and affection of the said Charles Greenwood for his wife and his children, it was thereby agreed and declared that the said trustees and the survivor of them, or other trustees or trustee for the time being, should stand possessed of the residuary or net moneys to arise from the sale under the said trust for sale, upon trust that the said trustees should, with the consent in writing of the said Charles Greenwood and Jane Greenwood or the survivor of them, and after the death of the survivor of them at the discretion of the said trustees, invest the same and pay the income arising from the said residuary or net moneys to the husband and his assigns for his life, and after his death to the wife during her life, and after the death of the survivor of them to the children as therein specified; and it was thereby agreed and declared that the said trustees should pay and apply the net profits of the said hereditaments until the same should be sold, or of the unsold part thereof for the time being to the person or persons and for the purposes for which the income of the investments thereinbefore directed to be made of the net moneys to arise from the sale thereof would be

payable or applicable if such sale and investment had been actually made.

The said Charles Greenwood died on the 5th Sept. 1887, leaving his wife Jane Greenwood and six children him surviving.

No actual sale of the hereditaments mentioned in the said indenture of the 22nd May 1885 has yet taken place.

Application has been made on behalf of Her Majesty's Commissioners of Inland Revenue to the defendant as the surviving trustee of the voluntary settlement made by the indenture of the 22nd May 1885, under the provisions of 44 Vict. c. 12, s. 38, sub-sect. 2 (c), for account stamp duty in respect of the property passing under the said settlement as being personal or movable property by virtue of the trust for conversion in the said indenture mentioned, but the defendant has refused and refuses to pay such duty on the ground that, as he contends, the said property is not personal property within the meaning of sect. 38 of the Customs and Inland Revenue Act 1881, but the informant charges that such contention of the defendant is not well founded.

The informant, on behalf of Her Majesty, prayed that it might be declared that the hereditaments and property passing under the indenture of voluntary settlement dated the 22nd May 1885, are and were at the death of the said Charles Greenwood personal or movable property within the meaning of sect. 38, sub-sect. 2 (c) of the Customs and Inland Revenue Act 1881, an account whereof ought to have been delivered by the defendant as trustee of the settlement pursuant to sect. 39 of the Act, and that account duty was and is payable by the defendant on such property according to the value thereof; and that an account might be directed to ascertain the amount of the duty so payable, together with interest at 5 per cent. per annum, and that the defendant may be ordered to pay the same.

The Customs and Inland Revenue Act 1881 provides:

Sect. 38 (1). Stamp duties shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof.

(2) The personal or movable property to be included in an account shall be property of the following descriptions, namely,

(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property.

By the Customs and Inland Revenue Act 1889 it is provided:

Sect. 11 (1). Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act 1881 is hereby amended as follows:

The description of property marked (c) shall be construed as if the expression "voluntary settlement" included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression "such property," wherever the same occurs, included the proceeds of sale thereof.

Q.B. Div.]

THE ATTORNEY-GENERAL v. DODD.

[Q.B. Div.]

Sir John Rigby (S.-G.) and Vaughan Hawkins for the Crown.—This was an ordinary settlement of land as money, which converted the land in equity into money as from the date of the deed, though the actual conversion by sale of the land might be delayed for any length of time. The time of the sale is not so important as the nature of the trusts imposed upon the trustees, and the effect here was that the land was made money for all purposes, including that of probate duty. The words inserted in the deed that this land was to be sold "at the request" therein mentioned might show that that had a retarding effect on the sale, but if the sale was to take place ultimately, thereupon it is a conversion in equity, though not in fact. If there had been a conversion in fact; if the land had been actually sold and the moneys received and invested, then the question could not have arisen. The real point therefore is, when this property was converted. We say it was converted when the direction for sale was given :

Thornton v. Hawley, 10 Ves. 129.

That case was with reference to the converse case of a conversion of money into land, but the same principles are applicable to both classes. That case also shows that the words "at the request" make no difference, and are the ordinary incidents of a settlement of this kind, and that the conversion here was an absolute and not a conditional one. Light is thrown on the subject in Davidson's *Precedents*, vol. 3, p. 43 (2nd edit.). He says there that "through the artifice of a trust for sale and declaration of trusts of the proceeds, land is often the subject of a settlement which for most purposes must be classed with money settlements," and at p. 3 of the same volume he deals with settlements of personal estate and settlements of real estate, and the terms of this deed are identical terms with those in Davidson's *Precedent* for carrying out conversion. I refer to these passages in Davidson for the purpose of showing that there is nothing special in this case, and that the use of the word "request" is common form. The same general principles as to conversion are laid down in *Wrightson v. Macaulay* (4 Hare, 487), *Lechmere v. Earl of Carlisle* (3 P. Wms. 219), and the many other cases which are collected in the notes to the case of *Fletcher v. Ashburner* (1 White & Tudor L. C. 968, 6th edit.). Those cases also show that the word "request" does not prevent the doctrine from applying. So in the case of *Clarke v. Franklin* (4 K. & J. 257) it was held that notwithstanding the trust was not to arise until after the settlor's death, the property was immediately converted upon the execution of the deed, and the land was taken as personalty though it was not converted until after the settlor's death. The case of *Re Taylor's Settlement* (9 Hare, 596) is an instance of a contrary construction, where the court considered that there was no conversion. It was there held that as a matter of fact there was no sale under the direction to sell, and also that upon the construction of that settlement actual sale might or might not take place, and the case was made to depend on this. The case differs totally from the other cases we have referred to, and the real reason of that decision is stated thus in the head-note: "That the estate having been real when settled, it was not meant by the settlement that it should become personal unless the husband and

wife requested it to be sold." This case shows that though the words "upon request" may be a condition precedent, yet if there be a trust to sell, whether that request is made or not, it alters the matter altogether. So in *In the Goods of Gunn* (9 P. Div. 242), it was held that where freehold property is by the doctrine of equitable conversion to be considered as personalty, it is liable to probate and legacy duty. A similar decision was arrived at in the case of *The Attorney-General v. The Marquis of Ailesbury* (58 L. T. Rep. N. S. 192; 12 App. Cas. 672), in which Lord Macnaghten gives a useful summary of the law on the subject: (12 App. Cas. at pp. 696, 697.) There is also the decision of Hall, V.C., in *James v. Castle* (33 L. T. Rep. N. S. 665), which illustrates the same principle as to conversion of land into money. Coming to the words of the Act, this property clearly comes within sect. 38, sub-sect. 2 (c) of the Act of 1881, as amended by sect. 11 of the Act of 1889. Here we have the proceeds of the land brought in, and we get a voluntary trust; the children of the marriage are volunteers unless they come within the marriage consideration, that is, unless the settlement be a marriage settlement in the ordinary sense. There can be no doubt the "property" is to include the proceeds of the sale of property, but of property which passed under a trust, and this is property passing under a trust. It was land of the settlor; it ceased to be his land and became his personal estate, and it was personal estate settled by voluntary settlement. It is therefore within the fiscal obligation of these sections, according to the decision in *In the Goods of Gunn* (*ubi sup.*), and is liable to this account stamp duty.

Herbert Reed, Q.C. (*Clavell Salter* with him) for the defendant.—Two points arise here. It is necessary to see from the construction of the deeds whether there was a conversion such as could make this estate personal or movable property, and, if so, whether the case comes within the section for fiscal purposes. As to the first point, I submit the trust for sale was on a contingency, namely, the previous request, and it by no means follows that in cases of this kind there is an out and out conversion. You must consider the whole instrument, and here the words are "shall at the request in writing" sell the property, and the whole deed contemplates that the sale shall take place only after such request. [MATHEW, J.—On the whole document the ultimate sale is contemplated.] No sale is necessary to carry out the objects of the settlement. In *Davies v. Goodhew* (6 Sim. 585), where in a marriage settlement there was a provision that money should, with the consent of the husband and wife, and not without, be laid out in the purchase of land, and where no such consent was given, it was held that there was no conversion. The words in that case "and not without" can make no difference between that case and the present, where the meaning is the same. The question now is, whether the property passing by this conveyance was personal or movable property, and it is sufficient for me to show that the sale contemplated was, at all events during the lives of the tenants for life, contingent on their requiring the property to be sold. The moment the settlement was executed the property ceased to be the property of the settlor, and if an ultimate conversion is intended then it cannot be said to

be personal property passing under the settlement. On the second branch of the case, the case of *Re the Goods of Gunn* (*ubi sup.*) has been referred to. There all that was decided was that where property is to be considered as personality it is liable to probate duty. The question there did not arise under this section, and that decision cannot be a guide to the construction of this section, and can hardly be considered as an authority for the general proposition that, where there is a trust for conversion it is a trust for conversion in view of these Customs Acts, and that a conversion takes place for fiscal purposes. *Re De Lancey's Succession* (L. Rep. 5 Ex. 102), reported as *The Commissioners of Inland Revenue v. De Lancey* (22 L. T. Rep. N. S. 239), is an authority for the contrary view. [CAVE, J. referred to *The Attorney-General v. Lomas*, 29 L. T. Rep. N. S. 749; L. Rep. 9 Ex. 29.] In *De Lancey's case* (*ubi sup.*) reference was made in the judgment of Bovill, C.J. to the case of *The Attorney-General v. Brunning* (3 L. T. Rep. N. S. 36; 8 H. of L. Cas. 243), where the effect of a contract by a deceased person to sell real estate was considered, and where the Court of Exchequer held that probate duty was not payable, and although the judgment in that case was reversed by the House of Lords, it was upon a ground which did not affect this point. Reference was also there made to the case of *Matson v. Swift* (8 Beav. 368), which was a decision of Lord Langdale, and the case was approved of; but opposed to this, in the case of *The Attorney-General v. Marquis of Ailesbury* (*ubi sup.*) *Matson v. Swift* was doubted. In *The Attorney-General v. Marquis of Ailesbury* (*ubi sup.*), *De Lancey's case* (*ubi sup.*), though referred to in the argument, was not referred to in the judgment, so that that case remains where it was. The property here was not, within the meaning of the 38th section, personal property passing under a settlement, which means property which was personal, and which as such passes under the settlement. Judgment ought therefore to be for the defendant.

MATHEW, J.—Three questions are raised in this case, firstly, that there was a conversion of the property from realty to personality; secondly, that if there was a conversion it was a conversion for specific purposes as well as for the purpose of the settlement in question; and lastly, that, assuming there was a conversion, the terms of the Act brought it within the fiscal obligation. On the first point we find two deeds; the property dealt with by the deeds realty; the main object of the deeds not to settle an estate but to provide for children referred to in one of the deeds; and every clause in both deeds contemplates the acquiring of land as realty which shall be treated as realty, but that further the time shall come when it shall be converted into personality, and when so converted, on failure of the objects of the trust, shall remain personality and be dealt with as personality. In these cases we must look at the real character of the transaction, and it seems to me that, having regard to the two deeds, we must treat this, so far as it has been accomplished, as a dealing with this land as an investment so long as it remains land, and as a dealing with the proceeds of sale subsequently in a similar manner. But it is said that we should attend to the language of these particular deeds, and that the power of sale according to the first of the two

deeds is subject to this, that it shall be exercised at the request of the husband and wife, or the survivor of them, and in the event of no request, subsequently at the discretion of the trustees. It was said for the defendant that this clearly made the conversion not imperative, but contingent and discretionary, and therefore that no conversion had taken place. But we have authorities upon the subject, and these appear to me to go to this: that clauses of that sort are only intended to give directions as to the time and circumstances under which the sale is to take place, but do not indicate that the sale must not take place ultimately, or that the property shall not be dealt with as if the sale had taken place. In *Thornton v. Hawley* (*ubi sup.*) no doubt there was a direction that the sale should take place with all convenient speed, but there was inserted the sale condition, as it has been called, that it should be at the request of the persons mentioned in the deed, and it was there held that that did not prevent conversion, and the clause in question was construed as a power to call on the trustees to act, and not to make the sale conditional on the consent of the persons named. That case is followed by *Wrightson v. Macaulay* (*ubi sup.*), and the same principle is indicated in the other cases that have been referred to. The Solicitor-General very properly brought to our attention a case that might be relied upon by the other side, the case of *Re Taylor's Settlement* (*ubi sup.*). There it was held that no conversion had taken place, for reasons which are plainly indicated in the judgment. The sale in that case was to take place during the lifetime of the husband and wife, and there was no provision that any sale should take place subsequently, and the ultimate destination of the property, if no sale took place, treated it as realty and not as personality. Therefore it was said that there was no out and out conversion. That clearly distinguishes that case from the present one, where the indication of an out and out conversion appears from the deeds, namely, that the property is ultimately dealt with as personality, and the last word about it is that it shall be personality and not realty. Then a second question was raised, whether, assuming that in equity we regard, and are bound to regard, this property as converted, it was converted for fiscal purposes. On the one hand our attention was called to the case of *In the Goods of Gunn* (*ubi sup.*), where land dealt with by will and directed to be converted was treated as subject to probate duty. It was said that that authority was recognised and sanctioned in the case of *The Attorney-General v. The Marquis of Ailesbury* (*ubi sup.*). Our attention was specially called to the observations of Lord Macnaghten in that case (12 App. Cas., at p. 695), and unquestionably the property there, regarded as money, although at common law it might be regarded as land, is treated as subject to fiscal obligation as if it were money. Mr. Reed called our attention to the case of *De Lancey's Succession* (*ubi sup.*). That unquestionably was a judgment of the Exchequer Chamber, and it would be an authority in his favour if we were bound to act upon it; but it is qualified by the decision in the case of *The Attorney-General v. Lomas* (*ubi sup.*), and is certainly inconsistent with the judgment of Lord Macnaghten in *The Attorney-General v. Marquis of Ailesbury* (*ubi sup.*), which appeared to receive the sanction of

Q.B. Div.]

WEGG-PROSSER v. EVANS.

[Q.B. Div.]

the other law lords present. I cannot myself see why in principle any such distinction should be drawn as is suggested by the case of *De Lancey's Succession* (*ubi sup.*). For all purposes land converted into money is to be treated as money, either for the purposes of a settlement or for fiscal purposes, and upon the ground that equity—and now the law, which follows equity—regards the land as money. Then the third point was whether the section of the Act applied, and really it is only necessary, assuming conversion to have taken place, to look at the Act to see that it does apply. I see no reason to doubt that sect. 38, sub-sect. 2 (c) applies to property of this description. My judgment therefore must be for the Crown.

CAVE, J.—I agree with the judgment that has been delivered, and for the reasons given.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitor for the defendant, *C. J. Rawlinson.*

April 7 and 14.

(Before WILLS, J.)

WEGG-PROSSER v. EVANS. (a)

Merger—Joint contract—Cheque given by one joint contractor—Judgment on cheque—Merger of right of action on the joint contract.

Judgment obtained on a cheque given by one of two joint guarantors for the debt due under the joint guarantee does not operate as a merger of the cause of action on the guarantee against the other guarantor.

ACTION tried by Wills, J. without a jury, as a "short cause" under Order XIV.

The action was brought to recover a sum of 179*l.* alleged to be due under a guarantee given by the defendant on the 27th Jan. 1890.

The guarantee was addressed to the plaintiff's agents, and was as follows:

Haywood Lodge Farm.—I hereby agree to become joint security with Mr. John Thomas, of Market-street, Pontypridd, for the due payment of the rent (38*5*l.** per annum) of the above farm by Mr. Thomas Williams, of the Bridgend Hotel, Pontypridd.—(Signed) JOHN EVANS.

Four days previously, namely, on the 23rd Jan. 1890, a document in identical terms was signed by Mr. John Thomas, in which he agreed to become joint security with Mr. John Evans for the due payment of the rent of the above farm.

The half-year's rent of the farm due on the 2nd Feb. 1893 being unpaid, application was made by the plaintiff to Mr. John Thomas for payment of the same under the guarantee.

In answer to such application Mr. John Thomas gave his cheque to the plaintiff for 179*l.* 17*s.* 6*d.*, but this cheque was returned to the plaintiff marked "refer to drawer."

The plaintiff thereupon commenced an action against Mr. John Thomas upon the said cheque to recover the amount thereof, and the plaintiff in Aug. 1893 recovered judgment for the amount of the cheque.

Execution had been issued upon this judgment, but it was unproductive.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

The plaintiff then commenced the present action upon the guarantee against Mr. John Evans, and the question now was, whether the plaintiff was entitled to maintain such action.

J. E. Bankes for the defendant.—The plaintiff is not entitled to maintain this action. Assuming this to be a joint guarantee, the right of action against the present defendant is extinguished by reason of the judgment recovered on the cheque given by one of the two joint guarantors for the joint debt. This is clearly shown by the judgment of the court in *Cambefort v. Chapman* (57 L. T. Rep. N. S. 625; 19 Q. B. Div. 229), a case which is on all-fours with this. There it was held that an unsatisfied judgment against one joint contractor on a bill of exchange given by him alone for the joint debt was a bar to an action against the other joint contractor on the original contract. That case is precisely the same as the present, and is undistinguishable from it, as here a cheque has been given by one of two joint guarantors for the joint debt, and judgment has been recovered on that cheque, and according to *Cambefort v. Chapman* (*ubi sup.*) the judgment so recovered extinguishes the cause of action on the guarantee.

A. T. Lawrence for the plaintiff.—The case of *Cambefort v. Chapman* (*ubi sup.*) does not conclude this case. There the defendant Chapman was in fact jointly liable on the original cause of action, and it subsequently happened that the vendor of the goods, which were the subject-matter of the action, obtained an acceptance from the other partner who was jointly liable, and got judgment on this acceptance, and it was held that the judgment on that security had merged the cause of action against the other partner because they were originally joint debtors. Here it is not clear that the guarantee was a joint guarantee. Assuming it was a joint guarantee, it is governed by the case of *Drake v. Mitchell* (3 East, 251), where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, and it was held that such judgment was no bar to an action against the three. That case is precisely in point here, and shows that the judgment recovered on the cheque given by Thomas does not extinguish the right of action against Evans on the guarantee.

The further arguments and cases cited appear sufficiently in the judgment.

The question was also argued as to whether this was a joint guarantee, but the judgment proceeded upon the assumption that it was a joint guarantee.

Cur. adv. vult.

April 14.—WILLS, J.—This is an action brought by the plaintiff against Mr. Evans on a document which is dated the 27th Jan. 1890, addressed to the agents for the plaintiff. Mr. Thomas had already, on the 23rd Jan.—four days before—signed a memorandum in identical terms, which had no force at all unless and until the other was signed. On the signature by Mr. Evans, the present defendant, it appears to me that both of these documents would be operative, and there is the clearest possible expression of intention by both parties that they should be jointly liable as security for the rent. I have no doubt whatever,

therefore, that this is a joint guarantee by Evans and Thomas. The plaintiff now brings his action against Mr. Evans to enforce the guarantee. Mr. Evans has no answer to it upon the merits, but his answer is one which, if it be good, he is entitled to. He says: "Thomas was applied to to discharge the liability we were jointly under; he gave a cheque for the amount, and upon that cheque an action was brought and judgment recovered." That judgment has been fruitless, and has produced nothing, and the guarantee has not been satisfied in any sense. It is now said that this was a judgment recovered substantially for the same cause of action against one of the two joint contractors, and upon the principle of *King v. Hoare* (13 M. & W. 494) and *Kendall v. Hamilton* (41 L. T. Rep. N. S. 418; 4 App. Cas. 504), the remedy against one party is merged in the judgment and gone, inasmuch as, if the other defendant, jointly liable, insists upon it he has a right to have his co-surety joined as defendant; and it is said that this can no longer be done on account of the merger, and that, therefore, the present defendant's position is altered, and he is discharged. This depends upon whether the judgment on the cheque, which was given as a conditional payment of the liability upon the guarantee, does operate as a merger of the action on the guarantee. Though the matter is technical and difficult, I have come to a clear conclusion that this position cannot be maintained, and that my judgment must be for the plaintiff. I will deal with the matter first upon principle and then upon authority. Upon principle the cause of action—I am dealing with the present cause of action on the guarantee—once vested can only be got rid of by release, payment, accord and satisfaction, or merger. Now, the action on the guarantee against Evans is not released. There is no accord and satisfaction. The cheque was certainly not accepted in any other than the usual way, and the giving of the cheque was not intended to discharge the liability on the guarantee. It seems to me that the cause of action upon the guarantee is not merged. Something else is merged, but not this cause of action, and, upon principle, therefore, it would seem that the cause of action is not gone. I agree that, under ordinary circumstances, if a second action were brought on the guarantee against Thomas, justice would require that this second action should be stayed, because it would be perfectly useless to have two judgments, which could not both be enforced. The staying of the action is, in my judgment, the process that would have to be applied, and that very fact is an indication that an appeal would have to be made to the jurisdiction of the court to prevent a wrong being done on general principle, and in violation of the general jurisdiction, and it is an indication that the cause of action, as a cause of action, is not discharged. If Evans were to insist upon having Thomas joined as a co-defendant, I cannot think that a court would not stay the action, because, as far as Thomas is concerned, effectual justice would be done. He could be protected from a double execution, and in respect of costs the court could do the amplest justice to him, and at the same time prevent the injustice being done of having Evans discharged from a liability which is honestly his, and which he cannot get rid of except by this highly technical defence. The only object I can see suggested in the authorities

upon the subject of one defendant insisting upon having another co-defendant joined with him in such an action, is, that he may once for all in the same action have the amount of his liability and the existence of the original debt ascertained, so that one action may do for all. If he were joined for that purpose, that purpose would be effectually satisfied without exposing him to any amount of costs or litigation that he would not otherwise be exposed to, and if any question of contribution arose between them, that question might, and could be, decided in an action against the two guarantors, or in an action for contribution, and the second defendant, if he were disposed to dispute the original debt or the amount of it, would be obliged to have it decided in one form of action or the other, and I cannot see how any injustice or hardship would be done to him by allowing him to be made a defendant in the action on the guarantee, although the judgment had already been recovered on the cheque. That seems to me how the matter ought to stand upon principle. I have to inquire whether the authorities present any obstacle to my so deciding. I need not deal with *King v. Hoare* (*ubi sup.*), because that has been reviewed and explained in *Kendall v. Hamilton* (*ubi sup.*) in the House of Lords. In the judgments of Lord Cairns and Lord Selborne in that case, emphasis is laid upon the fact that the recovery against the co-defendant had been for the same cause of action, and that is the key-note of the judgment. The *ratio decidendi* in that case, as it appears to me, was that in the action against one partner the other might have been joined. In this case in the action brought against Thomas on the cheque the other defendant could not have been joined. So far, it seems to me, there is no authority for the defendant's proposition. I observe that a very great lawyer, the late Mr. Bullen, in his book (Bullen & Leake, 3rd edit., p. 651) certainly takes the view I am now taking of the law. It is true he puts at the end of his note *Price v. Moulton* (10 C. B. 561), which is an authority for the first half of his sentence but not for the latter. Therefore, as far as this authority is concerned, it is only the expression of Mr. Bullen and Mr. Leake's opinion, but they were both very great lawyers, and persons whose opinion is entitled to very great respect. He there says: "Where a higher security is given for the identical debt due under the inferior security, the merger of the debt takes place by operation of law independently of the intention of the parties." That is the decision in *Price v. Moulton* (*ubi sup.*); but he adds, "where the debts are not identical, or the parties are not the same, there is no merger, and the second security does not discharge the first unless given and accepted in satisfaction and discharge, which is a different ground of answer." How stands authority upon this matter? *Drake v. Mitchell* (3 East, 251) seems to me to be an express authority, and an authority created by very great lawyers, and it seems to me to be very clear, and entirely to cover this case. The difficulty is created by the case of *Cambefort v. Chapman* (57 L. T. Rep. N. S. 625; 19 Q. B. Div. 229), where my brothers Field and Manisty, under circumstances which appear to be equally undistinguishable from this present case, decided the other way. There Field, J. says of *Drake v. Mitchell* (*ubi sup.*):

Q.B. Div.]

WEGG-PROSSER v. EVANS.

[Q.B. Div.]

"On looking into that case it is clear that the decision proceeded on the technical rule that the giving of a bill of exchange could not suspend the remedy on the covenant, which was a security of a higher nature." I have read the report in that case with all possible care, and I am bound to say I do not think that judgment went in the least upon that. That fact is mentioned in the argument, but it is mentioned in this way, as showing that the bill of exchange in itself did not get rid of the cause of action on the covenant, because it was said, being a lower security, it could not operate as a merger of the higher security. Exactly the same observation arises here. The giving of the cheque, which is not a security of a higher nature than the obligation on the guarantee, cannot discharge the guarantee by way of merger. It also seems to me that the only way in which the fact of the bill of exchange there was dealt with in the argument was to show that the giving or the taking of the bill of exchange in itself would not operate as a merger. It does not matter whether the original cause of action was of a higher nature, like a covenant or a special debt, or whether it was a simple debt on a guarantee, clearly the giving of the cheque does not operate as a merger of that cause of action. It seems to me, therefore, that *Drake v. Mitchell* (*ubi sup.*) stood on precisely the same footing as *Cambefort v. Chapman* (*ubi sup.*), in which clearly the giving of the bill of exchange would not operate as a merger of the original cause of action for goods sold. Field, J. in *Cambefort v. Chapman* (*ubi sup.*) goes on to say that if they decided otherwise than as they were deciding, their decision would be in opposition to the decision in *Bridges v. Berry* (3 Taunt. 128). After careful examination of *Bridges v. Berry* (*ubi sup.*), I must express my dissent from that decision. In that case, however, in which the action was on two bills of exchange, there was a neglect to give notice of dishonour to the defendant, and the position of the defendant was hopelessly altered for the worse by the delay. That seems to me to be the *ratio decidendi* in that case, and it is so treated by Byles on Bills, where the authority is discussed. Therefore that case did not for a moment say that if both bills had been dishonoured, with no other complication, there would not have been a right of action on both bills. Manisty, J., in his judgment in *Cambefort v. Chapman* (*ubi sup.*), does not seem quite satisfied with the reason given by Field, J., and he adds another, which he calls the more substantial ground, which is, that the bill in *Drake v. Mitchell* (*ubi sup.*) was given as a "collateral security, and was not given for the same liability or debt as was secured by the covenant." "Collateral security," I suppose, means an independent security, and it is nothing more than saying that the two causes of action existed at the same time. I do not see why the bill which was given in that case was a collateral security for the covenant any more than the cheque given in this case was a collateral security for the guarantee. They stand precisely on the same footing, and that reason for distinguishing *Drake v. Mitchell* (*ubi sup.*) does not exist in the present case. During the argument a passage was cited from Byles on Bills (15th edit., p. 311), where he says: "Judgment recovered on a bill or note is an extinguishment of the original debt as between the plaintiff and the defendant."

The first authority cited for that is Bayley, p. 325, but I have referred to Bayley, and there is not a word or hint of that on that page. The other authority, which is cited for the proposition, is *Claxton v. Swift* (2 Show. 441, 494), in which the Court of King's Bench, in the time of James II., decided that recovery against the original drawer of a bill discharged all the prior parties to it. The court there decided that which is certainly not the law at the present day, and was not even the law then, because that decision was reversed by the Exchequer Chamber, but there is not one word of authority for the proposition which is so reported in this way, and I cannot help thinking that what Byles, J. meant in this passage of his book was that the judgment operated as an extinguishment of the original cause of action on the bill, and that when he speaks of the original debt he means the original cause of action on the bill. Certainly, I think a passage of that kind cannot be accepted as conclusive against the cogent consideration which, as it seems to me, presses the other way. There was also cited from the same page of Byles on Bills the passage: "But a judgment recovered against one of several joint makers or joint acceptors, though without satisfaction, is a good defence to an action against the others." That is the decision in *King v. Hoare* (*ubi sup.*). There were some other cases cited by Mr. Bankes, and the one which apparently comes nearest to this case is the case of *Buckland v. Johnson* (23 L. J. C. P. 204), but that case, it seems to me, has really nothing to do with this. That was a case in which the plaintiff, having the right either to sue for a wrong as a tort, or, as the old phrase was, to waive the tort and sue in *assumpsit*, had chosen to sue for the tort. He had sued for conversion of the goods and recovered 100*l.* It afterwards turned out that the person who had converted the goods had received 150*l.* for them, and he then desired to waive the tort, and to sue in an action of contract on the implied contract to hold the 150*l.* for his use, because the goods were his originally. The court said "No, you cannot do that; the action in tort and the action in *assumpsit* are mutually exclusive. If you sue in tort it is because you treat it as a tort, and you cannot afterwards treat the identical cause of action under another name as a contract. Equally, if you have chosen to sue in contract and waive the tort, you cannot fall back upon it." But the present case, it seems to me, is not a case in which there was an election. I think it is a case in which both causes of action subsisted at the same time. I may further remark that during my whole experience of over forty years as a pleader it has always been the common practice in an action on a bill of exchange to put in a count on the consideration. You did not recover or have execution for two sums; but I do not ever remember that the plaintiff was called upon to elect whether he would go upon the bill or on the consideration. That is a strong observation, as showing that the two causes of action existed concurrently, and it seems to me to have some bearing on the present question. I therefore come to the conclusion that the present defence is not maintainable, and that there must be judgment for the plaintiff for 11*l.* 17*s.* 6*d.*, which is the sum the plaintiff now asks for.

Judgment for the plaintiff with costs.

Q.B. DIV.] N. M. ROTHSCHILD & SONS v. COMMISSIONERS OF INLAND REVENUE. [Q.B. DIV.]

Solicitors for the plaintiff, *Woodcock, Ryland, and Parker*, for *E. M. Underwood*, Hereford.

Solicitors for the defendant, *Wrentmore and Son*, for *Walker, Morgan, Rhys, and Bruce*, Pontypridd.

Thursday, March 1.

(Before MATHEW and CAVE, JJ.)

MESSRS. N. M. ROTHSCHILD AND SONS v. THE COMMISSIONERS OF INLAND REVENUE. (a)

Inland revenue—Coupons on foreign loan—Subsequent issue of coupons—Liability of coupons to stamp duty as bill of exchange—Stamp Act 1870 (33 & 34 Vict. c. 97), s. 48 and schedule—Revenue Act 1889 (52 & 53 Vict. c. 42), s. 16.

In the year 1881 the Hungarian Government issued a number of bonds forming a State loan, bearing interest payable half-yearly at certain specified places, one of these places being London, at the offices of Messrs. R. and Sons. The bonds were of perpetual obligation, and were provided with talons and interest coupons for ten years, and the talon provided that the Hungarian Government would deliver to the bearer of the talon, after the 1st July 1891, new coupons and another talon. Accordingly, in 1891, new talons with coupons for the ensuing ten years' service of interest were issued, and one of these new coupons, payable on the 1st Jan. 1892, was stamped with a penny stamp as a bill of exchange payable on demand.

Held, that the new coupon was a bill of exchange within the meaning of sect. 48 of the Stamp Act 1870, and that it did not come within the exemption in the schedule to the Act, or in sect. 16 of the Revenue Act 1889, as a "coupon or warrant for interest attached to and issued with any security," and was therefore properly stamped as a bill of exchange.

CASE stated by the Commissioners of Inland Revenue under sect. 13 of the Stamp Act 1891.

In Dec. 1891 a coupon or warrant for interest, payable on the 1st Jan. 1892, in respect of a bond of the Royal Hungarian Consolidated State Debt, bearing interest at 4 per cent. per annum, was presented by Messrs. N. M. Rothschild and Sons, as agents in London for the Hungarian Government, to the Commissioners of Inland Revenue under the provisions of the 18th section of the Stamp Act 1870, for the opinion of the Commissioners as to the stamp duty (if any) with which the coupon was chargeable.

The coupon or warrant for interest was printed in the Hungarian, French, English, and German languages, and, as printed in English, it was as follows:

Four per Cent. Royal Hung. Consolidated State Debt. Pay 1st Jan. 1892 at either of the places marked on the back.

The places marked on the back for payment were Vienna, Paris, London (at N. M. Rothschild and Sons), Berlin, Frankfort, and the word "pay" in the coupon meant "payable."

The coupon is issued for payment of interest upon one of a series of Royal Hungarian Bonds, forming the 4 per cent. loan of 1881. These bonds are also printed in the Hungarian, French,

English, and German languages, the following being a copy of the bond as printed in English:

Royal Hungarian bonds bearing interest at 4 per cent. payable in gold, issued in conformity with the Law XXXII. of the year 1881. Bond for 100 florins=250 francs=10l. sterling=202.50 marks German currency. The Royal Hungarian Minister of Finance declares that this bond for 100 florins in gold forms part of the Consolidated Hungarian State Debt, which is exempt from every tax. This bond bears interest at the rate of 4 per cent. per annum, payable half-yearly in gold on the 1st Jan. and the 1st July in each year. The holder of this bond may, on surrender of the coupon, receive the interest either in Budapest or in Vienna, in florins in gold; in Paris in francs; in London in pounds sterling; in Berlin and Frankfort in marks, German currency, at the fixed rate of 10 florins gold=25 francs=1l. sterling=20¹¹/₁₀₀ marks. This bond is provided with a talon and interest coupons for ten years, at the expiration of which the bearer of the talon will receive on delivery of the same, a fresh coupon sheet with another talon. The principal and interest of these bonds are exempt now and for ever from all Hungarian stamp duties and income taxes.

The following is a copy of the talon as printed in English:

Coupon Order.—The Royal Hungarian State Debt Office will deliver to the bearer of this talon, on or after the 1st July 1891, new coupons and another talon.

The bond, which from its tenor is a perpetual obligation on the part of the Hungarian Government to the holder thereof, is stamped with the *ad valorem* duty applicable to a mortgage, &c., "being the . . . principal or primary security for the payment or repayment of money," and unstamped coupons or warrants for the interest payable each half-year down to July 1891 were attached to the talon and issued with the bond.

These coupons were detached, and payment made upon them at one or other of the indicated places out of moneys provided at such places for that purpose as each half-year's interest fell due.

In July 1891 Messrs. N. M. Rothschild and Sons, as London agents for the Hungarian Government, were furnished by that Government with new talons with coupons for the ensuing ten years' service of interest, payable on each of the bonds, and they issued a notice accordingly to the holders of the bonds as to the renewal of coupons, informing such holders that new coupon sheets could be obtained in London up to the 1st Jan. 1892 at certain charges.

The coupon presented to the commissioners for their opinion thereon is the first in date of the coupons on the new sheet attached to the new talon, issued upon and against the surrender by the holder thereof of the first talon issued with the bond, such new talon being an exact counterpart of such original talon; the renewal of the talons with coupons for each ten years being necessitated by the practical impossibility of issuing sheets of coupons for the payment of interest for all time, at the time of issuing the bonds.

The Revenue authorities, at the time of the issue by Messrs. Rothschild of the notice as to the new coupons, intimated their opinion to them that the new coupons should each be stamped with a stamp for one penny as a bill of exchange payable on demand, within the meaning of the Stamp Act 1870, and after a correspondence on the matter such coupons were, under protest,

stamped accordingly on behalf of the Hungarian Government.

The coupon having been already stamped with the duty of one penny, the commissioners expressed their opinion that it was a bill of exchange payable on demand, and properly stamped with the duty of one penny, and the commissioners signified that the full amount of stamp duty with which the document was by law chargeable had been paid.

Messrs. N. M. Rothschild and Sons were dissatisfied with the finding of the commissioners on the grounds (1) that the coupon is not a bill of exchange within the meaning of the Stamp Act 1870; and (2) if it is, that it falls within the exemption (9) under the head "Bill of Exchange" in favour of a "coupon or warrant for interest attached to and issued with any security"; and (3) that at least it comes within the meaning of the extension of that exemption in sect. 16 of the Revenue Act 1889 (52 & 53 Vict. c. 42) as being a "coupon or warrant for interest attached to and issued with any agreement or memorandum for the renewal or extension of time for payment of a security," and is not liable to any stamp duty.

The question for the opinion of the court is, whether the said document is liable to the duty of one penny, applicable to a bill of exchange payable on demand, or if not, whether it is liable to any duty, or whether it is exempt from duty.

The Stamp Act 1870 (33 & 34 Vict. c. 97) provides:

Sect. 48. The term "bill of exchange," for the purposes of this Act, includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person, or to draw upon any other person for, any sum of money therein mentioned.

In the schedule, under the head "Bill of Exchange," the stamp duties upon bills of exchange are specified, and there are certain exemptions from this duty. Exemption (9) provides an exemption in favour of "coupon or warrant for interest attached to and issued with any security."

This exemption was extended by sect. 16 of the Revenue Act 1889 (52 & 53 Vict. c. 42), which provides:

The exemption from stamp duty under the head "Bill of Exchange" in the schedule to the Stamp Act 1870, of "coupon or warrant for interest attached to and issued with any security," shall extend to a coupon or warrant for interest attached to and issued with any agreement or memorandum for the renewal or extension of time for payment of a security.

Sir Henry James, Q.C. (Pollard with him) for the plaintiffs.—It is a matter of practical necessity that the talon with the coupons attached should be renewed at the end of ten years. There could not be issued a bundle of very heavy coupons in perpetuity, and for that reason a provision is made for the issuing of fresh coupons at the end of that time. It is admitted that, in respect of the first talon and the coupons attached, no stamp is required; but it is said that, if the convenient and necessary course is adopted of issuing these coupons from time to time, a stamp is necessary, whereas if they were all issued together no stamp would be necessary. The question now is, whether this coupon is a bill of exchange within sect. 48. We do not contend that a bill of exchange, to be

subject to duty within that section, must be an accepted bill of exchange. But we do contend that there must be at least a drawee; there must be a person to whom the bill of exchange is directed, so that from that person the holder of the coupon shall be entitled to receive payment. There is no such drawee here, and no person to whom the holder of the coupon can apply for payment, or from whom he can be entitled to receive payment. Messrs. Rothschild are not such persons, for the coupon does not state that the money shall be paid or found by Messrs. Rothschild, but only that it shall be payable at any of the places mentioned, and the mention of their name in the coupon merely amounts to a statement that, if the holder goes to the offices of Messrs. Rothschild, there he will find the money mentioned in the coupon, and that there the Hungarian Government will pay the same. That is a very different thing from saying that Messrs. Rothschild will pay, and the insertion of their name merely indicates the place of payment. This, therefore, does not satisfy the words of sect. 48, "payment by any other person." This coupon, therefore, is not a bill of exchange within sect. 48. Then comes the question of the exemption. This coupon clearly comes within the exemption in the schedule to the Stamp Act 1870, sub-sect. 9, under the head "Bill of Exchange," as a "coupon or warrant for interest attached to and issued with any security." Then there is an extension of this exemption in sect. 16 of the Act of 1889—repealed, but repeated in the Act of 1891. As we are in a stronger position under the 16th section of the Act of 1889 than under the Act of 1870, we take the Act of 1889 as being the exemption relied on. The coupon that is now issued is issued attached to a talon, and that talon is issued in substitution of the talon which was attached to and issued with the bond of 1881. Now the talon of 1881 contains an undertaking that, when the coupons are expended by time, a new coupon shall be issued and take the place of the old; they shall be the same as the old ones were, with the extended period represented by the new coupons. Now the second talon is issued, and it contains a promise within it that there shall be a renewal at the end of the time, and it is *totidem verbis* the same as the one of 1881, and contains a promise for renewal. The new talon, therefore, which is a substitution of the first talon, now contains an agreement and an undertaking that there should be a renewal or extension of time for the payment of the security, a renewal of the coupon sheets. We submit, therefore, that this coupon of 1891 is issued with and (constructively) attached to the original security. That is the first point, and the next point is that the talon is in itself a document or agreement containing within it forms for the renewal or extension of time for the payment of the security. That being so, it comes within the exemption of the 16th section of the Act of 1889.

Sir Charles Russell (A.G.) (*Danckwerts* with him) for the Crown.—We do not deny here that the coupons of 1881 are exempt; they are clearly exempt. All that are attached to the security and issued with the security are exempt. The first point is, whether this is or is not a bill of exchange within the meaning of the Stamp Act 1870, and it is wholly immaterial to consider whether it is a bill of exchange within the Bills

Q.B. Div.] N. M. ROTHSCHILD & SONS v. COMMISSIONERS OF INLAND REVENUE. [Q.B. Div.]

of Exchange Act 1882 or at common law. Looking at sect. 48, there is no doubt that this coupon purports to entitle a person, whether named therein or not, to a particular sum of money. It entitles the person to payment who produces it, and who satisfies the persons who are to pay that he is the proper person to receive the money on production of the coupon. But it is said that, to make this a bill of exchange, there must be a payer and there must be a drawee. The true construction of the document is, that it is mentioned by the authority issuing the coupon that they have instructed Messrs. Rothschild to pay the money to the proper person. It is an intimation which the Hungarian Government convey to the person holding the coupon, "Go to Messrs. Rothschild and somebody will pay you." How does that differ from the case of a cheque drawn on a banker? A banker is not bound to pay because a cheque is drawn on him; he does not undertake to pay the cheque unless he is furnished with money, and this case is exactly like a cheque. The Government say, "Here is an order upon my bankers, go for your money." Therefore it comes within the meaning of the words "payment by any other person." Coming to the exemption, if this coupon is a coupon or warrant for interest attached to or issued with a security, it is for the purposes of this Act a bill of exchange, and accordingly exempt from duty. To come within the exemption, it must be a coupon not only attached to, but issued with a security. The two things must concur; it must be issued at the same time, and be attached to the security:

The Australasian Mortgage and Agency Company Limited v. The Commissioners of Inland Revenue, 16 *Bettie* (Scotch Session Cases), p. 64.

That case is perfectly parallel to the present, as here we have an assurance by Messrs. Rothschild that the State Government will, at the named place and at the instance of the named persons, pay the money. Our contention is, that the coupon here is precisely the same as in the *Australasian* case, if you substitute the Hungarian State Government for the *Australasian* Company, and that case shows that this is a bill of exchange payable on demand. The case does not fall within the exemption, as here the bonds are bonds of perpetual obligation, and cannot be paid off at the will of the State. This talon is, within the purposes and provisions of the Act of 1870, a bill of exchange, and a talon such as this, carried from ten years to ten years with the accompanying coupons, is not either an agreement or memorandum for a renewal or extension of time within the meaning of sect. 16 of the Revenue Act 1889. The security is the original bond, and what is re-issued in 1891 cannot in any sense be a memorandum or an agreement for an extension of time. It is part of the original arrangement that there shall be this succession of talons which cannot all be massed together, and it was wholly foreign to the intention of the parties to regard this as an extension of time, or an agreement for an extension of time. Moreover, if it were such an agreement, it would have to be stamped as such, but it is not so stamped. Upon those grounds the commissioners were right. [He also referred to the Local Authorities Loans (Scotland) Act 1891 (54 & 55 Vict. c. 34), s. 41, sub-sects. 11-13, and the form in the schedule K. to that

Act, as showing the nature of a coupon in such a case as this.]

Sir Henry James, Q.C. in reply.

MATHEW, J.—The document in question here, which is alleged by the commissioners to be subject to this tax, is a coupon of the Hungarian Government in respect of a bond, issued by the Government as part of a loan transaction. The form of the coupon is given, and, if we were to judge of its effect merely by the language used, there would be much force in the argument of Sir Henry James, which was intended to show that all that was meant was to notify to the holder of the bond the places where the interest would be payable. But, in construing this coupon and in ascertaining its effect, we must bear in mind its commercial character. A coupon is a security of the highest value; it is a security which, when issued by such a Government as this, is regarded in the commercial world as good as gold; it passes from hand to hand before and after it becomes payable, and is regarded as cash. In other words, the Hungarian Government informs those who lend money to it that there will be, at the time when the interest becomes payable, money in the hands of their bankers or their agents, at these different places, to pay the amount of the interest. That being the character of the document, in what way does it differ in its commercial meaning from a bill of exchange or a cheque? It is an intimation to the holder that the money will be forthcoming for the payment of the coupon through the hands of the agents of the borrowers, the Hungarian Government. Bearing that in mind, we have now to turn to this sect. 48 of the Stamp Act 1870. [His Lordship then read the section.] That section appears to me to describe a coupon. Anybody holding a coupon would consider himself entitled to present it as a draft for payment by Messrs. Rothschild of the amount of money stated in it. Then our attention was called to the very material provision in the Act itself, namely, the terms of the schedule. It will be observed that, in sect. 48, a bank-note is exempted from stamp duty; but if we turn to the schedule, an addition has been made to that exemption, for among the exemptions is a "coupon or warrant for interest attached to and issued with any security." Adding that to the exemptions in sect. 48, it is quite clear that this coupon is treated by the Legislature as a bill of exchange, and would fall under the other provisions of the Act if it were not for the exemption. We are fortified in that view by the judgment in the Scotch court to which we have been referred, and I am unable to distinguish the document or coupon in that case in its commercial character from the coupon issued in the present case. If the matter stood there, it is quite clear that a coupon must be subject to this tax; but there is a later Act which was relied on by Sir Henry James, and we have to consider the section of that Act very carefully, with every desire, if possible, to extend it to the document in question. That section is sect. 16 of the Revenue Act 1889, and it was said that the document in question came under the protection of that clause. But again we are compelled to adhere to the letter of the clause, and nobody who reads the section, bearing in mind the decision of the Scotch court, can doubt that it

Q.B. Div.] **ANGLO-CONTINENTAL GUANO WORKS v. BELL** (Surveyor of Taxes). [Q.B. Div.]

was exactly measured by the decision of the Scotch court, because in that case there was a memorandum and an agreement too for renewal and extension of the time of payment of a security. Such a case clearly was within the language of the section. But is this case? I regret to have to come to the conclusion that the section does not embrace this case, and for the reason that the obligation is admitted to be perpetual in its character, and therefore there can be no memorandum for the renewal or extension of time for payment of a security. That being so, the language does not apply to this particular case, and we are compelled to say that it stands as it would have stood under the Act of 1870, and that the document is liable to this tax. For these reasons I consider that the appeal must be dismissed.

CAVE, J.—I am of the same opinion. It was contended with considerable force that this document is not a bill of exchange in the ordinary mercantile sense of the term; but it is clear from sect. 48 that documents are intended, for the purposes of the Stamp Act 1870, to be included in that term, which would not, according to ordinary commercial language, be so included. Now does the document in this case "purport to entitle any person to payment by any other person of any sum of money therein mentioned," within the meaning of the section? It seems to me clear that it does purport to entitle the holder to payment of the sum of two pounds. That being so, it seems to me that it comes within every requirement of the Act. I am by no means satisfied that it is at all necessary, to bring it within the section, that it should be a mandate directed by one man to another to pay a sum of money to a third person. The section does not say so. All it says is: "a document entitling any person, whether named therein or not, to payment by any other person of a sum of money"; and I think it is now enough to say that, in my judgment, it does come within the words of the section, and is a document purporting to entitle the holder to receive from another person the sum of money (two pounds) therein mentioned. If then it is a bill of exchange within sect. 48, is it within any of the exceptions which have been engrafted on that section? The first exception is to be found in the schedule of the same Act, an exemption of a "coupon or warrant for interest attached to and issued with any security." In order that that exemption may prevail, the Legislature required that the coupon should be attached to and issued with the security. The security in this case is the bond, and this coupon is not attached to or issued with it in the ordinary meaning of those words; and I think it is not sufficient to say that by possibility it might have been attached to and issued with it. It is enough to say that it is not attached to and issued with it, and consequently does not come within the exemptions contained in the schedule. But then there is another exemption contained in the 16th section of the Act of 1889, and at first I was induced to think that this coupon might be brought within that exemption, but I am now satisfied that that cannot be done. No doubt the words in that section do extend the exemption contained in the schedule to the Act of 1870, but only in those cases where the coupon is attached to and issued with some agreement or memo-

randum for the renewal or extension of time for the payment of a security. In this case the new coupons are attached to and issued with the new talon, and it therefore must be shown to amount to an agreement or memorandum for the renewal or extension of time for the payment of the security. But the security only entitles the holder to perpetual payment of a sum of money half-yearly by way of interest upon a bond for so much money, and consequently this talon is not a memorandum or agreement for the renewal of that security. The security does not require to be renewed, because it has not expired. Neither is it a memorandum or agreement for an extension of the time for payment of the security, for there is no time fixed for the payment of the security, and the talon does not give any extension of time for the payment of the security. It merely purports to entitle the holder of it at the end of ten years to receive another talon and another set of coupons. That is what the talon is intended to do. It settles the person who is entitled to the new talon and the new coupons, and it is a memorandum to that effect. But that is not a memorandum either for a renewal or for an extension of time for payment of a security. I therefore come to the conclusion that the Legislature has expressed in plain terms an intention that this document should be subject to the stamp duty, and that it has not expressed an intention to exempt it from that payment, and I may add that it seems to me certain that in the exemptions contained in the 16th section of the Act of 1889 the Legislature confined itself to dealing with the difficulty which arose in the Scotch case with reference to the Australasian bond. I agree therefore that our judgment must be for the respondents.

Appeal dismissed.

Solicitors for the appellants, *Daves and Sons*.
Solicitor for the respondents, *The Solicitor of Inland Revenue*.

Thursday, March 1.

(Before MATHEW and CAVE, JJ.)

THE ANGLO-CONTINENTAL GUANO WORKS v.
BELL (Surveyor of Taxes). (a)

Income tax—Short loans for purpose of buying for cash—Interest on—Right to deduct interest—Profits and gains—Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 100, sched. D., case 1, rr. 1 and 3.

A foreign firm had a branch house in London, which was carried on as a separate business, with a separate capital. To enable the London house to buy goods more advantageously for cash, instead of on credit at a higher price, the London house obtained short loans from the foreign house and from bankers, and paid interest on such loans to the foreign house, and in making up the return of their profits assessable under the Income Tax Acts, they claimed to deduct the interest paid for the sums so borrowed as being necessary expenditure in the business.

Held, that the interest paid by the London house on these short loans could not be deducted by them in ascertaining their profits assessable under the Acts.

CASE stated by the Commissioners for the General

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Purposes of the Income Tax Acts for the Beacon-tree Division of Essex, under sect. 59 of the Taxes Management Act 1880.

The appellants are a German company incorporated according to German law for the purpose of buying and selling Peruvian guano, and manufacturing and selling prepared guano and artificial manures. They have their central office at Hamburg, and branches in London, Antwerp, and elsewhere.

The London house is carried on as a separate business, with a separate capital of 150,000*l.*, and it conducts the whole of the appellants' business in the United Kingdom and the Colonies.

Guano is imported into England in large cargoes, and is so bought and sold. The value of a single cargo varies from 5000*l.* to 15,000*l.*, and the cash price of a cargo in the London market being considerably lower than the credit price, it is the practice of the appellants' London house to buy for prompt cash instead of by bill at a future date. The London house frequently purchases for resale or manufacture cargoes of guano, exceeding its capital of 150,000*l.*, and, in order to pay cash for the guano so purchased, the London house borrows from the central office and from bankers abroad large sums of money of fluctuating amounts. The London house repays the sums so borrowed from time to time whenever funds are available.

In the meantime interest is computed and paid at the rate of 4 per cent., or at the bank rate for the time being, if the Bank of England rate exceed 5 per cent., and the total amount of the interest which has so accrued upon such loans is at the end of each half-year, debited by the London house in the interest account. All the sums advanced by the central office and by bankers abroad are repayable at no fixed date, but are short loans repayable and repaid from time to time as suits the convenience of the parties.

A general account is kept between the London house and the central office, also between the London house and the other branches. These accounts for the most part relate to the purchases of raw material required for the business, the London house paying for the raw material purchased in England on behalf of the central office or such other branches, and consigned to the central office or such other branches, and the central office or such other branches paying for the raw material purchased on the Continent on behalf of the London house and consigned to the London house. The central office is, in the current account, credited with the sums paid by the central office on trading accounts on behalf of the London house and debited with the sums paid by the London house on behalf of the central office.

Interest is computed on the fluctuating daily balance of this account at a minimum rate of 5 per cent. per annum. At the end of each half-year these accounts are made up, and the balance of interest is debited or credited as the case may be. The same practice is followed with the other branches.

The London house allows discounts to its customers for unexpired prompts, and discounts bills given by those of its customers who do not pay in cash, and charges its customers interest on the amount of overdue invoices.

The London house keeps an "interest account," on the debit side of which are entered all the sums paid as aforesaid by the London house for interest in respect of advances and payment and the discounts allowed to customers, and the expenses incurred in discounting customers' bills. On the credit side are entered all the sums similarly payable by way of interest by the central office to the London house.

The total amount of the debit side of this interest account, as so kept, largely exceeded the credit side in each of the three years previous to 1888.

At the end of each of these years the balance to the debit of the interest account was carried down and debited to the "profit and loss account" of the London house, and treated as part of the expenses of carrying on the business of the London house, and as necessary to be deducted from the profit in order to ascertain the net profit of the year's business.

The appellants made, for the purpose of showing the profits assessable under schedule D. to the income tax for the year 1888, a return of the average profits of the London house for the three years preceding 1888, in which they estimated their profits in each of those years at the amount of the balance to the credit of the profit and loss account as so made up.

The appellants contended that the sums were properly deducted by them in ascertaining the taxable profits of the London house, inasmuch as they represent in effect a part of the cost incurred by the London house in the purchase of the goods bought by them for the purposes of the business, and if the goods had been bought, as is usual in most mercantile transactions, not for cash, but upon a limited credit, and paid for by bills payable at a future date, a higher price would have been paid for the goods, and such higher price would have been properly entered in the books as the cost price of the goods. They contended that the interest paid for the sums so borrowed—being not greater than the difference between the cash and the credit price of the goods—is properly to be taken into account as necessary expenditure, and is properly to be deducted from the receipts in ascertaining the profits.

The surveyor of taxes objected that the account so made up was confined to the profits and gains of the London house, and contended that the interest payable by the London house must be considered annual interest because charged at a fixed rate per cent. per annum, although it might accrue *de die in diem*, and he quoted *Bebb v. Bunny* (1 K. & J. 216) in support of his contention, and that such interest was therefore chargeable as part of the profits and gains of the London house in accordance with 5 & 6 Vict. c. 35, s. 102, and was not admissible as a deduction in estimating such profits and gains: (5 & 6 Vict. c. 35, s. 100, sched. D., case 1, r. 4).

He also contended that the advances received from the central office by the London house were in effect capital with which the company at Hamburg fed the London house, thus enabling the house to do business at greater profit, and that the charging interest on such advances was a mere matter of account, such interest being interest on the capital employed in the business of the London house, and therefore not admissible

as a deduction in estimating the profits and gains thereof (5 & 6 Vict. c. 35, s. 100, sched. D., case 1, r. 3); and that the interest payable to the central office and to foreign bankers would altogether escape assessment for income tax unless it were charged as a part of the profits and gains of the London house.

The commissioners held that the interest payable or accountable for by the London house to the central office—whether the sums were advanced by the central office itself or by bankers through the central office—is in law yearly interest at ascertained rates, payable or accountable for by the London house, and therefore liable to duty. And that the said sums were, in effect, interest upon capital employed in the business, and that therefore, by reason of 5 & 6 Vict. c. 35, s. 100, case 1 r. 3, the sums could not be set against or deducted from the profits of the business.

The question for the opinion of the court was, whether the appellants ought to be allowed to deduct the sums paid or allowed by the London house as before mentioned.

The Income Tax Act 1842 (5 & 6 Vict. c. 35) provides:

Sect. 100, sched. D., First case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act.

Rule 1. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years . . . and shall be assessed, charged, and paid without other deductions than is hereinafter allowed.

Rule 3. In estimating the balance of profits and gains chargeable under schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of

Then follow the different things in respect of which no deductions are allowed, which include any sum employed or intended to be employed as capital in such business.

Rule 4. In estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains.

Finlay, Q.C. (A. T. Lawrence with him) for the appellants.—In the course of their business the London house has two courses open to them; they may buy on credit, or they may buy for cash. If they buy on credit they have to pay a higher price for the goods; if they buy for cash, as they do here, they can buy at a smaller price, thereby saving the difference; but if they do so buy, they have to borrow these sums from the central office or from bankers to enable them to do so. The short loans so effected are loans in respect of the interest on which no deduction could be made by the London house in paying back the loans:

Goslings and Sharpe v. Blake, 61 L. T. Rep. N. S. 311; 23 Q. B. Div. 324.

If they bought the goods on credit they would have to pay a larger price, which would represent the cash price *plus* a sum which would be equivalent to the interest. If, therefore, the usual course had been followed, and the goods bought on

credit, the extra sum paid would have represented in fact a part of the cost incurred by the London house in the purchase of the goods; but this extra sum represents the interest on the loans obtained to enable the house to buy for cash. It follows, therefore, that this interest represents a part of the cost, and is properly to be taken into account as necessary expenditure. When the trader has not got capital of his own, but borrows at yearly interest, then, according to rule 4 of case 1, no deduction could be made. But that is not this case. This case is where a person has not got cash of his own, or where he does not borrow it at yearly interest, but gets it on short loans; then the interest paid for these short loans may be deducted in estimating the profits. That was the case of *Goslings and Sharpe v. Blake* (*ubi sup.*), and as regards short loans from bankers we are within the authority of that case. [*Sir Charles Russell* (A.-G.).—That case has been met by statute; by sect. 24 of 51 & 52 Vict. c. 8.] Sect. 24 of that Act leaves this case untouched. It only deals with the case of interest of money or annuities not payable out of profits or gains brought into charge to the tax. Referring to rule 4, there is nothing in the rule to prevent us from deducting the interest on these loans. The person to whom interest is paid on these short loans makes profits thereby, and the person to pay income tax on the interest on these short loans is the banker who can make a profit on such interest. Our point is that, so far as the London house get short loans from bankers, then the interest on these short loans is a necessary part of carrying on the business. As to the point of the "annual interest," the case of *Goslings and Sharpe v. Blake* (*ubi sup.*) shows that this is not a case of "annual interest" at all.

Sir Charles Russell (A.-G.) (*Danckwerts* with him) for the Crown.—We give up the point as to the "annual interest." Our short point is that under schedule D. only deductions mentioned in the schedule are allowed in estimating the profits, and the deductions claimed in this case are not mentioned in the schedule, and are therefore not allowable. The point in *Goslings and Sharpe v. Blake* (*ubi sup.*) was simply this: the banker there had said that he had lent sums of money on short loans, and he said that the borrower in paying back the principal and the interest on these short loans had claimed that he had a right to deduct, and had deducted, the income tax from the payment of the interest on the loans. What the court decided—and all that the court decided—was that there was no obligation on the part of the banker to allow such deduction of the income tax on the interest, and no right on the part of the borrower to claim it. That was ultimately set right by sect. 24 of the Customs and Inland Revenue Act 1888 (51 & 52 Vict. c. 8). Going back to schedule D., the schedule only authorises the deductions there specified, and this is not one. Looking at rules 3 and 4, there is a difference in the words; rule 3 refers to gross profits and rule 4 refers to net profits. Sect. 102 of the Act charges with duty all annual interest not otherwise charged, but that point as to this being "annual interest" we do not contend for. The cost of obtaining these loans is not a part of the expenditure of the business, and cannot be deducted as such. In the case of *Portobello Town Council v. Sulley* (2 Tax Cases 647), it was held that where

a burgh council were required by Act of Parliament to provide a burial ground, and when the receipts therefrom exceeded the working expenses, they were allowed to deduct the working expenses in estimating their profits for income tax purposes, but were not allowed to deduct interest which they had to pay on undischarged capital debt, which the council had to borrow for the construction of the cemetery. It is said this is a short loan; but what is a short loan? Is it a loan for a week, or a month, or three months? No such limitation of time can be fixed. [CAVE, J.—A loan for less than a year?] If I borrow for one year it is not a short loan, but it is suggested that if I borrow for one day less than a year it is a short loan. That is a *reductio ad absurdum*. The same principle is laid down by the Scotch Court in the case of the *Arizona Copper Company v. Smiles* (3 Tax Cases, 149 (Nov. 1891)). There a company had borrowed money to be employed in its business, and had covenanted to pay annual interest thereon, and to repay the capital with an additional bonus of 10 per cent., and it was held that the bonus paid could not be claimed as a deduction in estimating the assessable profits. Finally, the case of *The Gresham Life Assurance Society v. Styles* (67 L. T. Rep. N. S. 479; (1892) A. C. 309) is a distinct authority for our contention, more especially the judgments of Lord Halsbury and Lord Herschell. These authorities are conclusive on the point.

Finlay, Q.C. in reply.

MATHEW, J.—I think our judgment here must be for the respondent. The facts are these: The foreign firm appears to have been carrying on business in England at the central office in England and to have supplied from time to time for the purposes of the English business what capital was required. In addition to the supply from that source, it appears that through the foreign house or through the English house, short loans were obtained from time to time from bankers to enable the house here to pay more advantageously its obligations in respect of the purchase of cargoes of guano. It is said that, although it cannot be contended that the capital supplied by the foreign house to the English house could be made the subject of any deduction, the cost which is incurred of those short loans obtained from bankers ought to be deducted before you can ascertain the profits of the business assessable under the Income Tax Acts. It appears to me clear, when you look at the language of the Act, that what is intended to be assessed are the profits of the particular business, and that these profits are to be ascertained in the ordinary way, without reference to the consideration as to whether or not a particular partner or all the partners are trading with borrowed capital. The language of sect. 100 is plain: [His Lordship then read sect. 100, schedule D., case 1, r. 1.] Then we come to rule 3, and we find a statement of the sums that are not to be deducted from the profits to be assessed, and amongst these charges are many charges analogous to the particular one which it is said ought to be the subject of deduction. Deduction is not to be permitted for the things mentioned in the rule. On reading this rule, it is perfectly clear that in the hands of the partners deductions of that class and character are not to be made, because, if made, you would not be

ascertaining what really are the profits, not of the partners, but of the business. The cases to which our attention has been called seem to me entirely to bear out that view. It is quite clear that where debentures are granted by a company, no deduction can be made from the profits of the business carried on by that company for the interest payable on the debentures. And the last case which has been referred to—the case of *The Gresham Life Assurance Society v. Styles* (*ubi sup.*)—appears to me to be an authority expressly in point. The language of Lord Halsbury in that case is quite clear, and the language of Lord Herschell is equally clear, that what you are dealing with under those Acts are the profits of the business, and not of the individual partners. For these reasons I think our judgment must be for the respondent.

CAVE, J.—I am of the same opinion. The section which governs this case is sect. 100, the schedule, and the rules contained in that schedule. By the first rule of the first case in that schedule it is provided: [His Lordship then read the rule.] Now, what is the balance of profits or gains of such trade? It is contended by Mr. Finlay that in order to ascertain the balance of the profits or gains of such trade, you must take into consideration the question whether the trader is trading with borrowed money or with capital of his own. It seems to me that that is not so; that the gains of the trade are quite independent of the question of how the capital money is found; that the gains of the trade are those which are made by legitimate trading after paying the necessary expenses which you have necessarily to incur in order to get the profits, and that you cannot for that purpose take into consideration the fact that the firm or trader has to borrow some portion of the money which is employed in the business. If you did that it would lead to very extraordinary results. You might have a firm of two partners who, having a very thriving business, were continually putting fresh capital into that business; one of them is a man of means, and consequently he is able to put in the capital which is required from his own money without borrowing; the other is a man who has not so much means and he has to borrow. Suppose a sum of money is wanted temporarily on a particular day, for the purpose of the business, and one partner can find it and the other cannot, without borrowing it temporarily until some other money comes in to him from some other source, there would then be no profits or gains of the business; but there would be the gains of A. and the gains of B. Those are not the gains of the business, which are a totally different thing. If you cannot take B.'s temporary borrowings into account in ascertaining what are the profits of the business, Mr. Finlay has been quite unable to point to any provision in these rules which enable him to make any deduction. Therefore if, as I said, and as I think has been made out, these cannot be deducted in arriving at the profits or gains of the trade, they surely cannot be deducted in respect of any rule contained here, because there is no such rule to which we have been referred, and none that I can find. The result is that the contention of the appellants cannot be made out, and that the respondent is entitled to succeed.

Appeal dismissed with costs.

[CT. OF APP.]

IVES AND BARKER v. WILLANS.

[CT. OF APP.]

Solicitors for the appellants, *Hollams, Sons, Coward, and Hawksley.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 23 and 24.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

IVES AND BARKER v. WILLANS. (a)

APPEAL FROM THE CHANCERY DIVISION.

Arbitration—Staying proceedings in action—Statement of claim, requiring delivery of—“Step in the proceedings”—Unfitness of arbitrators—Rules of Court 1883, Order XX., r. 1 (b)—Arbitration Act 1889 (52 & 53 Vict. c. 49), s. 4.

A “step in the proceedings,” in sect. 4 of the Arbitration Act 1889, means some application to the court by summons or motion, and does not include an application by letter or notice from one party to another, or by correspondence between their respective solicitors. Where, therefore, a defendant to an action relating to a matter agreed by the parties to be referred to arbitration has, under Order XX., r. 1 (b), of the Rules of Court 1883, given notice that he requires the delivery of a statement of claim, he is not thereby precluded from applying under the section to stay the proceedings in the action, such a notice not being a “step in the proceedings” within that section.

The fact that the arbitrators named in a contract for the execution of engineering works are the engineers of the persons for whose undertaking the works contracted for are being done, or the fact that they have previously expressed an opinion as to some of the matters in dispute, does not, in the absence of evidence of fraud or collusion, render them unfit to act as arbitrators. *Decision of Kekewich, J. affirmed.*

ON the 22nd July 1889, the defendant, John William Willans, entered into a contract with the Liverpool Overhead Railway Company for the construction of a high-level railway.

The contract contained (*inter alia*) the following clauses :

4. The works shall be executed in compliance with the provisions hereinafter contained, and with the best materials and workmanship, and in the most workmanlike manner, and to the satisfaction in all respects of the company's engineers for the time being, and of the inspecting officer of the Board of Trade.

Then followed references to the plans and specifications and sections, and power was given to the engineers to order the removal of improper materials.

37. If any question, difference, or dispute shall arise between the company and the contractor touching the construction or meaning of anything contained in these presents or in the said specification, plans, or sections, or any of them, or as to any works, plant, material, matters, or things, which the company shall require the contractor to execute, do, or supply, under or by virtue of

these presents, or as to any extra, or additional, or supplemental works which may be so ordered by the engineers as aforesaid, or as to the price to be paid by the company and the contractor for the same or any of them, or as to any matter of account between the company and the contractor, or as to any moneys alleged to be payable by the company to the contractor, or by the contractor to the company, or as to the rights, duties, liabilities, or obligations of either party under or by virtue of these presents, or as to any other matter or thing in any way arising out of or relating to the premises, the matter or difference shall be referred to the engineers, whose decision thereon shall be final and conclusive on both parties, and neither of the parties hereto shall commence or prosecute any action against the other of them touching any of the matters aforesaid, unless and until the matter in difference shall have previously been submitted to the engineers for their decision, and the engineers shall have refused or wilfully neglected for the space of one month after service upon them of notice in writing requiring them so to do to adjudicate thereon.

On the 24th Aug. 1889 the defendant entered into a sub-contract with the plaintiffs, Ives and Barker, for the erection and fitting up by them of the work required for the railway.

The material provisions of the sub-contract were as follows :

Whereas by an agreement (hereinafter called the principal agreement), a copy of which, and of the specification of works scheduled thereto, has for the purpose of identification been signed by or on behalf of the parties hereto, and is intended to be hereunto annexed, the contractor has contracted with the said Liverpool Overhead Railway Company to construct, so far as described in the principal agreement, an overhead high-level railway. And whereas the erection, painting, and tarring, comprising the setting out, carting, and putting together, rivetting, erecting, painting, and tarring of the wrought and cast iron work, steel, and other work mentioned in the schedule hereto form part of the work which by the principal agreement the contractor has undertaken to provide or do. . . . Now, these presents witness that it is hereby agreed between the parties hereto as follows :—1. The sub-contractors shall for the contractor, at their own cost, by their own workmen, appliances, shops, plant, staging, tools, and power, and in such manner, times, and by such tools, appliances, &c., as shall be determined or approved by engineers and the contractor and in accordance in all respects with the requirements of the principal agreement and of the specification of works therein referred to, so far as they respectively apply to the works of the description now in question, set out all the foundations, also take to all the wrought and cast ironwork, steel, and other work and materials therefor mentioned in the schedule hereto at the stations in Liverpool, as such are delivered from the manufacturers in accordance with their drawings, specification and contract, load up, cart, unload, stack, set out, level, put together, rhymer, drill, punch, as is reasonably necessary in this work, close up, fit and rivet together where and as required, erect, fix and rivet in place, test, paint, tar, and finish the same complete, finding at their own cost the paint and tar as specified, for the nett price of 25s. (twenty-three shillings) per nett ton of finished work mentioned in the schedule. . . . 3. The sub-contractors shall, unless otherwise instructed by the contractor in writing, put together and rivet up the girders and flooring of all the plates, girder spans, and the other girders, flooring and work, as far as is possible, in the shops to be provided by them, that the work may be proceeded with satisfactorily and continuously day and night, if so required, and shall convey the same to the place of erection. . . . Care will be taken to have the work made at the manufacturers' works in such a way as to make all the parts as accurate and as nearly interchangeable as is reasonably possible in such work.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

[CT. OF APP.]

IVES AND BARKER v. WILLIAMS.

[CT. OF APP.]

and any suggestions on these points from the sub-contractors will have consideration, but it is understood that subject to such care the sub-contractors take to the work as delivered by the manufacturers at Liverpool, and at their own cost correct and adjust any ordinary imperfection of workmanship, the intention being that under this contract the sub-contractors shall take the work as and in the condition in which it is delivered by the manufacturers ready for erecting according to specification, the method of manufacture and the condition in which the work is to be delivered being at this time known to them.

9. All questions arising from this agreement shall be settled by the engineers in the manner mentioned in the principal agreement, and the arbitration clauses contained in the principal agreement shall be treated as being herein repeated with the substitution only of the names of the contractor and sub-contractors for those of the company and the contractor.

On the 1st July 1893 the plaintiffs issued the writ in this action against the defendant, claiming (amongst other relief) specific performance of the sub-contract and damages for alleged breach thereof.

The defendant duly appeared to the action, and, at the time of entering appearance, gave the plaintiffs notice in writing requiring a statement of claim to be delivered.

On the 20th July 1893 the defendant took out the summons, asking that, pursuant to sect. 4 of the Arbitration Act 1889, all further proceedings in the action might be stayed on the ground that the matters in difference had been agreed to be referred to arbitration, and that he, the defendant, was ready and willing to submit to arbitration.

In opposition to the summons, the principal question raised was, whether the defendant had, by requiring the delivery of a statement of claim, "taken a step in the proceedings" within the meaning of sect. 4 of the Arbitration Act 1889, and so precluded himself from making the application to stay.

Sect. 4 of the Arbitration Act 1889 provides that, if any party to a submission commences any legal proceedings in any court against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance and before delivering any pleadings, or taking any other "steps in the proceedings," apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The other questions raised were, that the interest and duty of the company's engineers, who were appointed arbitrators, would conflict, as the arbitrators and the defendant were alleged by the plaintiffs to be acting in collusion and were joint company promoters, and also that the arbitrators had been guilty of discreditable conduct; and, further, that several of the matters in dispute between the plaintiffs and the defendant forming the subject-matter of the action were outside the sub-contract of the 24th Aug. 1889.

On the 3rd Nov. 1893 the summons came on to

be heard before Kekewich, J., when his Lordship decided that the request by the defendant that a statement of claim might be delivered was not a "step in the proceedings" within the meaning of sect. 4 of the Arbitration Act 1889, but that there must be some application to the court by summons or motion to constitute a step in the proceedings. Upon this point the case is reported in 69 L. T. Rep. N. S. 710; (1894) 1 Ch. 68.

His Lordship also decided in favour of the defendant the other questions raised, declining to allow the evidence as to the character of the arbitrators to be read. And the learned judge made an order, under sect. 4 of the Arbitration Act 1889, staying all proceedings in the action, except as to certain claims in respect of matters which were outside the submission to arbitration. No order was made as to costs.

The plaintiffs now appealed.

Benshaw, Q.C. and *A. F. Peterson* for the appellants.—First, we say that the defendant, before he issued his summons, took a "step in the proceedings" within the meaning of sect. 4 of the Arbitration Act 1889 when he required the plaintiffs to deliver a statement of claim. [*KAY, L.J.*—Asking the other side to take a step is not taking a step yourself.] Yes, because, if a defendant says "send me a statement of claim," he cannot deny that that is a step. The notice requiring the delivery of a statement of claim was given by the defendant under the Rules of Court 1883, Order XX., r. 1 (b). It is not compulsory upon a plaintiff to deliver a statement of claim, but under rule 1 (d) he may deliver one voluntarily, though under rule 1 (e) at the risk of costs if he does so unnecessarily. Accordingly, in giving a notice requiring a statement of claim, the defendant is electing that the action shall go on—that he desires it to proceed. That is therefore "taking a step in the proceedings" within sect. 4 of the Act, and thereby the defendant forfeits his right to stay. He cannot come now to the court and ask the court to stay the action. A summons for particulars, or an application for leave to administer interrogatories, is a "step in the proceedings" within the section:

Chappell v. North, 65 L. T. Rep. N. S. 23; (1891) 2 Q. B. 252, 256.

[*KAY, L.J.*—An application by letter for extension of time for putting in a defence has been held not to be a step in the proceedings: *Brighton Marine Palace and Pier Limited v. Woodhouse*, 68 L. T. Rep. N. S. 669; (1893) 2 Ch. 486.] Where a party to a submission against whom legal proceedings have been commenced by another party to the submission applies to the court for a stay of proceedings until security for his costs be given, he has taken a "step in the proceedings" such as to disentitle him to apply afterwards to the court, under sect. 4, to have the proceedings in the action stayed:

Adams v. Catley, 66 L. T. Rep. N. S. 687; 40 W. R. 570.

Neither party is to do anything inconsistent with his right to have the matters in dispute settled by arbitration. [*KAY, L.J.*—If a party is to be put to his election, as to whether he will allow the action to proceed or have recourse to arbitration, he must be acquainted with all the facts of the case, and know definitely what his rights are. Unless a defendant had delivered to him the

[OT. OF APP.]

IVES AND BARKER v. WILLIAMS.

[CT. OF APP.]

plaintiff's statement of claim he might not know exactly what the plaintiff's case was, and whether or not it would be a proper matter to be settled by arbitration. One can readily conceive a case where the issues might not be sufficiently disclosed by the writ.] Not, we submit, where, as here, there is a formal document containing a clause submitting all disputes to arbitration. [KAY, L.J.—But he may not know precisely the breaches of the contract relied upon.] The defendant is bound to show from the beginning that he is ready and willing to go to arbitration. Then we say that the proposed arbitrators by their conduct have put themselves in such a position as to render themselves unfit persons to be judges in the matters in dispute between the parties. That is a question which turns on the evidence. That sort of point has been before the court recently in two cases:

Jackson v. Barry Railway Company, 68 L. T. Rep. N. S. 472; (1893) 1 Ch. 238;

Nuttall v. Mayor, &c., of Manchester, 8 Times L. Rep. 513.

Further, we say that, if all the matters in dispute between the parties, several of which are outside the sub-contract, cannot be referred to arbitration, none of them ought to be:

Turnock v. Sartoris, 62 L. T. Rep. N. S. 209; 43 Ch. Div. 150.

Warmington, Q.C. and *Bramwell Davis* for the respondent. [LINDLEY, L.J.—We need not trouble you as to the first point, but only on the two others.] The appellants have not made out that the arbitrators will be so biased as to be unfit to act in that position. Their competency to sit as arbitrators cannot be impugned; and this must be done before the court will interfere:

Eckersley v. The Mersey Docks and Harbour Board, Ct. of App., 16th March 1884, unreported.

In *Jackson v. Barry Railway Company* (*ubi sup.*) it was laid down that the party objecting to the arbitrators appointed must show that they have prejudged the case; and that the appellants here have entirely failed to establish. As to *Turnock v. Sartoris* (*ubi sup.*), the point there was not similar to the present, and that authority does not touch this case. We submit, therefore, that the defendant is entitled to an order, under sect. 4 of the Arbitration Act 1889, for a stay of proceedings, the matters in dispute being covered by the arbitration clause in the sub-contract.

Renshaw, Q.C. replied.

LINDLEY, L.J.—This is an appeal from a decision of Kekewich, J. staying proceedings in this action, and in fact and in substance referring the matters in dispute to arbitration. The order being made under the 4th section of the Arbitration Act 1889, which I will read presently. It was an application made by the defendant, and the appeal is by the plaintiffs, and the plaintiffs' grounds for appealing, now that we have heard them, are reduced to three: First of all, they say that the application to stay was too late, because the defendant had taken a step in the action. The other grounds of complaint go to what I may call the merits of the case. The plaintiffs attack the fairness of the arbitrators: that is their second head. Their third head is this, that inasmuch as the whole of the action is not referred to the arbitrators, no part of it ought to be referred

by the court in the exercise of its discretion. Now, in order to deal with the several points I will read sect. 4 of the Arbitration Act 1889, because a great deal turns upon that. Sect. 4 runs thus: [His Lordship read the section, and continued:] Now as to the first point about the application being too late, the facts are these: The plaintiffs issued their writ against the defendant; the defendant entered appearance; by the præcipe and by the formal document he required a statement of claim. That was contemporaneous with the entry of the appearance. Then he wrote a letter to the plaintiffs' solicitors saying that he should desire a statement of claim. That is all he did. He took no other steps—if those are steps—before he made the present application for a stay under the section to which I have referred. The contention on the part of the plaintiffs is, that the defendant is too late because he asked for or gave notice that he should require a statement of claim. That is said to be the taking of a step in the proceedings. Now, the language of the section requires a little attention. It is quite obvious that the step to be taken must be a step taken by the applicant. The section does not say before any pleadings are delivered by anybody, or any step is taken by anybody; but that the party applying before delivery of the pleadings—that is, before he delivers pleadings or takes any other steps in the proceedings—may apply. The question we have to consider, therefore, is narrowed down to this: whether a request by one party to another to take a step is taking a step himself. That is what the defendant did. He asked the plaintiffs contemporaneously on the next day to take a step, viz., to deliver a statement of claim. I cannot say that the defendant was taking a step in these proceedings which precludes him from making the present application. And I do not think that it would be good sense if we held the contrary, because what did the defendant do? Addressing myself now to the substance of the case I find that he was served with a writ, and the writ showed him that there was a claim for breach of contract. That he knew the contract I do not doubt; but he did not know from the writ what the particular breaches were in respect of which the plaintiffs were suing him, and, until he did know that at all events, how was he to form an opinion as to whether it would be desirable to apply or not? He had not the materials before him to enable him to exercise his judgment in the matter. And it appears to me, therefore, that we should be doing an injustice to a defendant if we said that he must apply under the section before he knows what the plaintiff is suing him for. Quite apart, therefore, from the case not being within the words, I do not think that it is within the spirit or the sense of the Act. Before a man can make up his mind as to which of the alternatives he intends to take, he ought to know what the alternatives are, and ought to be in a position to exercise some kind of judgment in the matter. And if we were to hold that the defendant ought to apply, and was too late, we should be saying that he should do that before he knew what to apply for. I think, therefore, that the decision of the learned judge in the court below was right on that part of the case. I think that the authorities go to this, that a step in the proceedings means some application to the court or something

of that nature, and not talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as issuing a summons or something of the kind which is, in the technical sense, a step in the proceedings. Now I pass to the second point. That point, as I have already said, goes to the merits. It is an attack on these arbitrators. In order to deal with that point it is of the utmost importance that we should see what is the agreement between the parties which is comprised in what is called the sub-contract of the 24th Aug. 1889, made between Willans the defendant, and the plaintiffs Ives and Barker. The sub-contract refers to a principal contract of an earlier date, namely, the 29th July 1889. It is impossible to understand the sub-contract without looking at the principal contract, which is referred to in the sub-contract itself. The principal contract is for the construction of the Liverpool Overhead Railway, and it is made between the Liverpool Overhead Railway Company of the one part and Willans, the contractor, of the other part, and by that principal contract Willans contracted to make the Overhead Railway. The material clauses are as follows: [His Lordship read the provisions of the contract of the 22nd July 1889, as set forth above, and continued:] Now that is a very tight-fitting bond, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well that a dispute between the contractor and the company is in substance in this kind of business a dispute between the contractor and the company's engineers, whose business it is to see that the works are done for the company according to the agreement and the plans and specifications. So that the real agreement between the contractor and the company is this, that, if there is any dispute between them, although the engineers are to tell the contractor what to do, and order him to do what they like consistently with the agreement, their decision must be final. Now, what is the business explanation of that? How does it happen that a contractor will agree to be bound by such a very stringent provision? The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other, and it has been ascertained by long experience that engineers of the highest character may be trusted. The sub-contract arose in this way: Willans agreed to make the works in question, but he found it necessary to enter into sub-contracts with other people; with others, as in this particular case, not to make the things, but to put together the things which were made. The sub-contract with which we have to deal, and which was entered into between Ives and Barker of the one part and Willans of the other, refers to the original contract. [His Lordship read the provisions of the sub-contract of the 24th Aug. 1889, as set forth above, and continued:] Now, pausing there, let us see what that agreement really amounts to. What is it that the contractor, or sub-contractors I must call them now, agree to when they sign and enter into that sub-contract? They agree to be bound in all disputes between them and the contractor, that is, Willans, by the decision of the engineers of the company. They knew the arbitration clauses contained in the original contract,

and they knew what the duties of those engineers were, and they knew that amongst other duties was that of passing or rejecting the materials. The sub-contractors agreed to put up the materials which were to be supplied, relying upon the honour and character of the engineers to reject such as were unfit, and they were willing, as the contractor himself was willing, to submit any difference between them and the company—which indirectly is really a difference between them and the engineers—to the arbitration of those engineers themselves. That is what was contemplated, and that was the substance of the bargain. Now, if that is so, what must the sub-contractors not only allege, but prove, in order to make out that, in a dispute between them and Willans, the contractor, these engineers as arbitrators are not proper persons to decide that dispute? It is obvious that they must prove a great deal more than that the engineers have formed an opinion already upon the subject of the dispute. It is obvious that they must prove a great deal more than that there is a difference of opinion, and that they must give way to the decision. They must attack the character of the engineers to such an extent and in such a manner as to show that the engineers will probably be guilty of some misconduct in the matter of the arbitration—that they will not act fairly. That is really what it must come to. Having chosen to put themselves in that condition they cannot complain of the legitimate consequence, but they can complain of the illegitimate consequence. And if it were true that these engineers were in collusion with the contractor so as to act unfairly, or so as to lead the court to suppose that they would act unfairly, there would be some ground for saying that this arbitration clause ought not to be enforced. But as to that, it appears to me, I confess, having heard the evidence read, that there is really no evidence which deserves serious consideration so far as collusion is concerned. It is said that the contractor and the engineers are co-promoters of companies. That is an allegation which may amount to anything, and may amount to nothing, and we cannot entertain such loose statements as that. A much more definite statement is the statement that the contractor and engineers have precluded themselves from acting justly, because they have already passed improper materials. Now, if there was any reason whatever to suppose that the engineers had passed materials which they knew and believed were unfit that would be a very serious charge indeed. But the charge does not come up to that, or anything like it. The charge is put in this way: "We, the sub-contractors, complained to you that some girders and other things were unfit; you treated our complaint as frivolous." What does that mean? It means that the engineers did not think they were unfit. That is precisely one of the very things which the sub-contractors contemplated and agreed to submit to. It was the engineers' duty to exercise their own judgment, and any difference of opinion must of course be accepted. The sub-contractors must go far beyond that in order to convince the court that these engineers are not men who ought to be trusted after the trust and confidence which has been put in them deliberately by the sub-contractors themselves. That part of the case seems to me to break down almost, if not quite, as conclusively as the part

CT. OF APP.]

IVES AND BARKER v. WILLIAMS.

[CT. OF APP.]

relating to the suggestion of collusion and impropriety. Now, the third point is this: It is said that the language of sect. 4 of the Arbitration Act 1889 only gives the power to stay. The language is that the court, if satisfied that there is no sufficient reason why the matter should not be referred, may make an order staying the proceedings. It is said that, inasmuch as the whole of the controversy between the parties cannot be referred to arbitration, it is not right and proper or convenient and there is no sufficient reason for referring anything. It is all or none—and the case which was cited of *Turnock v. Sartoris* (62 L. T. Rep. N. S. 209; 43 Ch. Div. 150), it is said, goes to support that view. Now, that which is to be referred under the 4th section of the Arbitration Act 1889 are matters which are agreed to be referred, and if matters which are agreed to be referred are mixed up in an action with matters not agreed to be referred, there is no reason why the 4th section should not be applied to those matters which have been agreed to be referred, leaving the action to go on as to the other matters. But I quite see that, if the matters agreed to be referred were not the main matters in dispute, but formed a subordinate part and trifling part, and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part, and let the action go on as to the large part. That is what occurred in the case of *Turnock v. Sartoris* (*ubi sup.*), but that is not the case here. The position is reversed. The great controversy is as to the matters which have been referred, and the matters which have not been referred are comparatively small. And I see no reason at all why those matters which have been referred should not be referred, and the action go on as to the rest if it is found worth while to go on with them. Accordingly, I have come to the conclusion that the decision of the learned judge in the court below was right, and must be affirmed; and the appeal must therefore be dismissed, with costs.

LOPES, L.J.—I am of the same opinion. The first point made is, that this application is too late under the 4th section of the Arbitration Act 1889, and the real question which is raised is this: whether or not asking for a statement of claim is a step in the proceedings within the meaning of that section. Now I am clearly of opinion that it is not. In this case the writ was issued for breach of contract and for damages, and the defendant entered an appearance and simultaneously asked for a statement of claim. The words of the section are to be looked at. The section says that, if any party to a submission commences any legal proceedings in any court against any other party to the submission—then come these words, “in respect of any matter agreed to be referred.” Now these words “in respect of any matter agreed to be referred” appear to me to be important, because I think that all that the defendant here really did was this: He had a statement of claim before him of a very general kind, and he naturally said: “This is a submission in respect of certain matters which were agreed to be referred, and when I look at this statement of claim it is very general indeed, and I cannot tell how much of this cause of action, how much of the claim in dispute, comes within this submission to refer, and how much, on the other hand, is

without it.” For that purpose what he did was this: He applied for a statement of claim in order thereby more definitely to ascertain for himself what was within the submission and what might be without it, in order that when he knew that he might then elect what he should do—whether, in point of fact, he should do that which would be a step in the action, or whether he should forbear. Now I do not think that an application of that kind for a statement of claim is a “step in the proceedings” within the meaning of the section. Therefore I am of opinion that the learned judge in the court below was perfectly right in the view which he took on that part of the case. But then another and important part of the case is this: It is said that these engineers as arbitrators are not to be trusted, and it is submitted that the arbitration should not be allowed to proceed. Now, it must be borne in mind that these are not arbitrators in the ordinary sense of the word. They are arbitrators chosen and selected by the parties, selected with the knowledge that to some extent they must have an interest in the direction of their employers. It is well known they must have it, and I think the words of Bowen, L.J. in the case of *Jackson v. Barry Railway Company* (68 L. T. Rep. N. S. 472; (1893) 1 Ch. 238), at the commencement of his judgment, are highly instructive as to what the position of engineers or arbitrators is in a case like the present: [Reads from the judgment.] Every word of that judgment appears to me to apply to the present case. Now shortly I will deal with the two main attacks which are made against these engineers and arbitrators. I think the chief one is this: It is said that they are not fit to be trusted because they have prejudged a certain question with regard to the action, namely, the quality and fitness of certain materials. The answer to that to my mind is, that the parties perfectly well knew, when they consented that these engineers should be arbitrators, and that difficulties such as these which are now suggested might arise—they perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question. They knew that these engineers had that to do as well as to act as arbitrators in what is termed the larger arbitration. Knowing that, they agreed that they would accept them as arbitrators, and it appears to me that they cannot now turn round and say that, because the engineers’ judgment is erroneous, therefore they are not bound to accept it. They agreed to be bound by the engineers’ judgment, however erroneous it might be, provided it was honest, and provided it was not tainted with fraud or with misconduct. Now, so far as I can gather, it cannot be suggested that the engineers have acted fraudulently; nor can I find any evidence of any misconduct on their part. If a case of this kind could have been made out, that the engineers perfectly well knowing that these materials were improper, with that knowledge passed them, that, to my mind, would have been strong ground for assenting to the application which Mr. Renshaw is now making. But there is nothing of the kind. I say that that is no ground whatever, having regard to the peculiar nature of this arbitration, for stopping the arbitration. Now, another ground is made, which is this: It is said that the arbitrators could not behave properly

because a question of their competency may be involved. I think that that is entirely disposed of by the unreported case of *Eckersley v. Mersey Docks and Harbour Board*, the judgment of which was read from the shorthand notes. Another attack is made upon them on the ground of collusion. It is said that the engineers and the defendant are acting in collusion. All I can say with regard to that is, that that charge is so wild and so vague, and that in respect of it there is so little that is conclusive, that I desire to adopt the view that they have acted not at all in that way; I think, therefore, that that ground fails also. In my opinion, therefore, the decision of the learned judge in the court below was right, and I think that this appeal ought to be dismissed with costs.

KAY, L.J.—I also agree with the decision of the learned judge in the court below, and I agree entirely with the judgments that have been pronounced in this court, particularly with the very careful judgment of Lindley, L.J.; and I should say nothing in the matter at all, only that I think it involves some very important questions to which I can hardly be contented to give my silent assent. As to the first question, whether requiring a statement of claim is taking a step in the action within the meaning of sect. 4 of the Arbitration Act, I am very clearly of opinion that it is not, for the reasons which have already been given, and particularly for this reason: When a writ has been issued, however carefully it is indorsed, it may very well be that the defendant who is sued may not completely understand from the writ what the entire scope of the action is. Mr. Renshaw's argument on the point—and I agree with that argument—is, that the defendant has to exercise an election whether he will allow the action to go on or avail himself of an arbitration clause like that in the agreement now before us, and apply to the court to stay the action. But it is essential to every case of election that a person who is put to election shall thoroughly understand the facts which make it necessary for him to elect. In this case what the defendant did was, in the first instance, to require that a statement of claim should be delivered. He did so simultaneously with giving notice of his having entered an appearance in the action. But he did not wait till the statement of claim was delivered. On the contrary, he withdrew that notice, and then gave this notice of motion to stay proceedings under the arbitration clause. He applied, as I understand, to stay all the proceedings in this action. When the scope of the action became apparent upon the argument of the case it was found that he had gone too far; that he did not thoroughly understand what the scope and extent of this action was, and he included in his motion to stay that part of the action which referred to a matter which was outside the agreement containing the clause of arbitration. Nothing could show more clearly how improper it would be to say that requiring a statement of claim—a statement of claim which would show him what the scope of the action was more clearly and definitely than he could make out from the writ—would be, when he made that request, the taking by him of such a step in the action as would debar him from exercising the election which he ought only to be bound to exercise when he thoroughly understands what the nature of the action against him is. I therefore think that the learned judge in the

court below on that point was entirely right in deciding that it was not a step in the action within the meaning of the 4th section of the Arbitration Act 1889. The other points are of vastly more importance. It seems to be a custom now—I suppose it is almost inveterate—that in large contracts of this kind the engineers who are employed to watch the contractors on behalf of the company which is undertaking the great work should be named as the arbitrators between the employers and the contractors if a dispute should arise. One can see, and the course of decisions of late years in this court has shown it, that that must lead now and then to questions of difficulty between the two contracting parties. To make the engineers, who are employed by the persons who engage the contractors to do the work, the arbitrators of every question that arises between the two contracting parties puts those engineers, and must put those engineers, sometimes into a very difficult position indeed. But, as men of business in this court, we have to deal with the practice which has become, as I have said, almost inveterate, constantly done, and a thing which contractors and employers thoroughly understand, which they are entirely accustomed to, and which nothing that we can say would in the least alter or do away with. Now, what is the course which this court ought to take as a matter of business in questions of this kind? Here is this kind of practice, thoroughly understood, introduced, and acted on from day to day, and contractors who enter into contracts of this kind know very well that the engineers are put into a position which makes them for some purposes not the most proper arbitrators that could be selected. They know perfectly well that the engineers are employed by the other party to the contract; that they have to watch the work that is done; that they have, as is quite usual in contracts of this kind, to determine whether the materials are good or not, to determine whether the work is or is not properly done. And they know that any question that arose between the two contracting parties would probably be a question which the engineers in the course of their employment as engineers would already have had before them and have had to consider and to form some judgment upon. With that knowledge the contractor does agree that the engineers shall be the persons whose decision upon the questions that arise between him and his employers shall be absolutely final; that they shall be put into the position of arbitrators and judges from whom there is no appeal whatever. Now, I have no doubt that that is done for the reasons already indicated by Lindley, L.J., mainly, I think, because engineers who are put into that kind of position are persons of known integrity, far above any suspicion of improper dealing, and the contractor is content to be bound by the decision of arbitrators who are in a position of very considerable difficulty. Also I daresay the other motive which Lindley, L.J. referred to has very much to do with the matter, namely, that competition is so keen that railway companies and great employers of labour and other persons who have large works to put into the hands of contractors find that they have no difficulty in obtaining contractors who are willing to submit to such terms. Now in this case there has been, first of all, the faintest possible suggestion, not supported

[CT. OF APP.]

IVES AND BARKER v. WILLANS.

[CT. OF APP.]

by an atom of anything like proof, of collusion between the engineers, who are celebrated men, and the defendant to this action, who was the original contractor, the plaintiffs being the sub-contractors. I disregard entirely the suggestion that has been made upon that point, because I do not think it comes to more than a mere suggestion, and I think that there would be the greatest possible danger of involving persons who employ contractors in interminable litigation if an arbitration clause of this kind could be set aside upon a mere suggestion such as that which I am now dealing with. I think that that is entirely out of the question, and I am sorry that upon such very insufficient materials any such suggestion should have been made. The most material thing that strikes my mind which has been put forward really in order to show that the engineers are not proper arbitrators in this case is this: It is said—and although no particular instance is given, the evidence is supported in a way I will indicate in a moment—that these engineers have in the exercise of their duty as engineers approved and passed various materials in iron which the sub-contractors by the terms of their sub-contract were bound to put together in order to construct this overhead railway in Liverpool which is the subject of the contract. It is said that, having already approved these materials, they are the last persons in the world who should be made arbitrators in a question as to whether the materials were good or not. Now that, I confess, struck me as being the strongest point that was made by the plaintiffs in this case, and they confirmed their evidence on that point in this way: by specifying the dates of letters which they had written to the engineers complaining of the quality of some of the iron materials furnished. Besides that, they said that they had in innumerable instances made verbal representations to the same effect, but that all these representations had been treated by the engineers as frivolous; that is to say—I am putting it as I understand the argument was—that the engineers had in each one of these instances exercised their judgment against the plaintiffs, and in such a manner as to make them most unfair arbitrators in a question as to the sufficiency of those materials which they had already approved and passed. But then one must look back at the contract, and I find on looking back at the contract that it seems to have this effect: In the original contract the materials for the construction of this railway were to be such as the engineers should approve, and their approval was made by the terms of the contract between the contracting parties, the company who are forming this railway and Willans, the defendant in this action, sufficient and conclusive. So that, in the absence of *mala fides*, if the engineers did approve the materials there was an end of the matter, and the contractor was entirely bound by that approval. In the sub-contract the original contract to that extent is adopted, and the sub-contractors, who had not furnished any materials themselves, but had only to put together the materials which were furnished to them, took these materials from Willans, the person with whom they contracted, and took them upon the terms of the original contract, namely, that they were to be materials which the engineers had approved as between Willans and the company. Therefore again, as between Ives and Willans, the approval by the

engineers of the quality of the materials is to be a binding thing. Supposing the question were attempted to be raised before the arbitrators, who are third persons altogether, whether the materials were good or not, and it was proved in the absence of any such *mala fides* or misconduct that the engineers had approved and passed these materials, then I think that the judge would not go behind their approval for a moment. I think that the judge would say that, according to the contract, that is to be sufficient evidence that the materials were proper and right, and no judge and no arbitrator would allow evidence in the absence of some suspicion of *mala fides* or misconduct to show that that approval of the engineers was at all improper, and that the materials, notwithstanding that approval, were not good and sufficient. That is one answer. The other answer is, that these parties with their eyes open entered into this contract; they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties; and they agreed that in any question that arose which was submitted to arbitration those engineers should be the arbitrators. Now, after that agreement they turn round and say, "We cannot prove that you have acted dishonestly; we can only say that you approved of the materials, and we allege that those materials were not good notwithstanding your approval, and therefore that you cannot properly sit as arbitrators." That is not fulfilling the obligation which is incumbent upon them, namely, to make out that those arbitrators—to use the language of the Master of the Rolls (Lord Esher) in the unreported case of *Eckersley v. The Mersey Docks and Harbour Board*—will be so biased when they come to exercise their duty as arbitrators that they are unfit to sit in that position. I think that that is not made out, even upon that argument which seems to me the very strongest that was used on behalf of the plaintiffs in this case in order to show that the arbitrators were not proper arbitrators to decide the question between the two parties. With respect to the rest of the case I have very little indeed to add. It is said that there is sufficient reason for not allowing this arbitration to go on in the fact that the action has proceeded as to a very small part of it. I agree entirely with the observations that have been made, and I have no doubt that that is a matter which the court should regard. But looking at how much of this action is allowed to go on, and seeing what a very small part indeed it is of the questions which have been raised between the parties, and seeing that it relates merely to a comparatively small question which was not included in the agreement which contains this arbitration clause, I do not think that there is sufficient reason here on that ground to prevent the arbitration going on. On the whole, though I feel very much impressed by the difficulty of the position in which these arbitrators are placed by reason of their being both arbitrators and engineers of the company which is forming this overhead railway, I do not think that a sufficient case has been made out for allowing the action to go on. And I think the learned judge in the court below was right in the conclusion at which he arrived. Therefore I think that this appeal should be dismissed with costs.

Appeal dismissed.

CHAN. DIV.]

Re WHISTON'S ESTATE; LOVATT v. WILLIAMSON.

[CHAN. DIV.]

Solicitor for the appellants, *James Kirkley*, agent for *Davidson and Barker*, South Shields.

Solicitors for the respondent, *Addleshaw, Warburton, and Trenam*, agents for *Addleshaw and Warburton*, Manchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 13 and 14.

(Before CHITTY, J.)

Re WHISTON'S ESTATE; LOVATT v. WILLIAMSON. (a)

Settlement—Equitable estate—Limitations—No words of inheritance—Life interest—Construction.

In 1845 *W.* voluntarily settled an equity of redemption in certain freehold estates in trust for his wife for life, with remainder to himself for life, and after his death in trust for his children. The question now arose, what interests the children took, *W.* and his wife being both dead.

Held (following *Meyler v. Meyler*, 11 L. Rep. Ir. 522), that an equitable limitation, by way of trust executed, now has the same construction as a legal limitation, and in the absence of words of inheritance the children took life estates only.

ORIGINATING SUMMONS.

By a voluntary settlement dated the 21st Aug. 1845, after a recital that George Whiston was desirous of settling all his freehold and personal estate for the benefit of his wife, himself, and their children, and the other objects of the trusts thereinafter contained, the equity of redemption of certain freehold premises was granted and assured to trustees and their heirs upon trust to permit the settlor's wife to receive the rents during her life; and after her decease, in case the settlor survived her, upon trust to permit him to receive the rents during his life; and after the death of the survivor, then, as to and concerning the said messuages and hereditaments, and the rents, issues, and profits thereof, in trust for such child or children of the settlor by his said wife begotten and to be begotten, as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain the age of twenty-one years, or be married under that age, which should first happen, the same to be, if only one such child, paid, assigned, or transferred unto him or her solely, or if two or more such entitled children, then to be paid, assigned, or transferred in equal shares as tenants in common, and the share of each such son was to be paid, assigned, or transferred at his age of twenty-one years, and of each daughter at her age of twenty-one years or day of marriage, which should first happen, or so soon thereafter as the decease of the survivor of the said G. Whiston and his wife would permit. Then followed a power of maintenance, and an advancement clause which provided that it should be lawful for the trustees for the time being, with the consent of the settlor's wife and the settlor, or the survivor of them, and, after the death of such survivor, at the discretion of the

trustees, to raise any part not exceeding one moiety of the share or portion, or respective shares or portions, of which any child or children of the settlor and his wife should be actually or presumptively entitled of and in the trust estate, and to apply the money so raised for his or their advancement, so that the moneys so to be raised and applied for any such child or children respectively should be considered as part of his or their share or portion, shares or portions, under the settlement.

In the events which happened, two children only survived the settlor George Whiston, who died in July 1866, and his widow died in Dec. 1880.

This summons was taken out by the trustees to determine (*inter alia*) whether, there being no words of inheritance in the limitation to the children in the settlement, they took estates in fee or for life only under it.

Byrne, Q.C. and Kenyon Parker for the trustees and other interests.—The children took life estates only:

Holliday v. Overton, 15 Beav. 480.

Alexander, Q.C. and *Albert Jessel* for the children's interests.—All the earlier text-books agree that, in limitations of an equitable estate in fee, words of inheritance are not necessary:

2 Coke on Littleton (Butler's note) 290, b. xvi.;

1 Cruise's Digest, 343;

1 Hayes' Conveyancing, 5th edit., 91;

Williams' Real Property, 17th edit., 173.

The settlor clearly intended to benefit his children, as is shown by the recital; and the advancement clause points to something more than a life estate. The deed could, if necessary, be rectified by the insertion of the word "heirs," the fee being plainly intended to pass:

Re Bird's Trusts, 3 Ch. Div. 214.

Fawcus for another interest.—The later text-writers do not concur with the older ones in their view as to the limitations of equitable estate in fee:

Elphinstone's Interpretation of Deeds, 276, r. 104;

Lewin on Trusts, 9th edit., 114.

Holliday v. Overton (15 Beav. 480) is followed in *Meyler v. Meyler* (11 L. Rep. Ir. 522) and *Middleton v. Barker* (29 L. T. Rep. N. S. 643; W. N. 1873, p. 231); and both of these cases are in accordance with the rule enunciated in *Elphinstone*.

Alexander, Q.C. replied.

CHITTY, J.—The point I have to decide is, what interest did the children take under the settlement of 1845? It is admitted that the real estate settled by George Whiston was only an equity of redemption, and that the legal estate therefore was, and still is, outstanding. The settlement contains a series of formal limitations in favour of the settlor's wife, the settlor, and their children; but when you come to read the actual words of limitation to the children, the words "heirs" or "fee simple" are not used. If the case had to be decided according to the doctrine of legal limitations, it is plain that these children would only take life interests; but the limitations are, as a fact, only of an equitable interest, and on this point some of the older text-writers, such as Cruise and Hayes, seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law, so

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re CLEMENTS; CLEMENTS v. PEARSALL

[CHAN. DIV.]

that the court had some latitude in the construction of equitable limitations like the present; but the more modern text-writers seem to have rather come round in their opinions, and in *Elphinstone* on the Interpretation of Deeds it is stated, "an equitable limitation by way of trust has the same construction as a legal limitation." In *Lewin* on Trusts it is laid down that, if an estate be conveyed by deed to the use of a trustee and his heirs, in trust for the settlor for life and after his death upon trust for his children simply, without the word "heirs," the children by analogy to legal limitations take an estate for life only. These more modern statements of the law are opposed to the opinion of the older text-writers; still, in support of this later view, both the writers I have mentioned refer to and cite the three cases, *Holliday v. Overton* (*ubi sup.*), *Lucas v. Brandreth* (2 L. T. Rep. N. S. 785; 28 Beav. 274), and *Tatham v. Vernon* (4 L. T. Rep. N. S. 531; 29 Beav. 604), together with the latest decision on the subject, the Irish case of *Meyler v. Meyler* (*ubi sup.*), where *Chatterton, V.C.* considered himself bound by those three cases in *Beavan*, and came to a conclusion in accordance with the rule laid down in *Elphinstone*. My impression is, that both *Sir G. Jessel, M.R.* and I myself have decided this very point, though it does not seem to have been reported. Though *Meyler v. Meyler* (*ubi sup.*) is not binding upon me here, I nevertheless think the reasoning of the Irish Vice-Chancellor is correct, and that he came to a right conclusion. Then the decision of *Bacon, V.C.* in *Middleton v. Barker* (*ubi sup.*), as far as I can gather from the report in the *Weekly Notes*, is in further support of this view. For these reasons, and without considering it necessary to review all the authorities again in detail, I hold that these children took a life interest only under the settlement. The recital that the settlor was desirous of settling all his freehold and personal estate in favour of his children was relied on in the argument, and it was said that this would distinguish the case from the earlier authorities and justify a more liberal construction being put on the deed. But, in my opinion, that recital is not sufficient to carry the fee to the children; besides, the settlor might have intended the reversion in fee to result to himself after giving the children the benefit of a life interest. Then the advancement clause was relied on as showing that something more than a life estate must have been intended; but I do not think that this assists the argument on behalf of the children, as it is plain that an incautious draftsman had got hold of an advancement clause suited for a will and inserted it in this deed; but no words there used are sufficient to enable me to decide otherwise than I have done. The result therefore is, that though the interest of the settlor in the freeholds was equitable only, the true construction of this deed, with a formal series of legal limitations, is such as I have already stated.

Solicitors: *Joseph and Hyam; Thomas White and Sons.*

Feb. 14 and 15.

(Before CHITTY, J.)

Re CLEMENTS; CLEMENTS v. PEARSALL (a)

Will—Contingent legacy—Specific gift to trustees—Intermediate income—Infants—Maintenance—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 43.

A testator, by his will made in 1886, bequeathed the sum of 4000l. *Victoria Four per Cent. Stock*, held by him at the date of his will, or which might be held by him at his death, or the like sum out of any larger amount of the stock which might be held by him at his death, or any sum of that stock less than 4000l. in nominal value held by him, and such a sum of cash as with the nominal value of such stock would make 4000l., or, in the absence of any such stock then held by him, the sum of 4000l. cash, to the trustees of his will, in trust for two granddaughters contingently on their surviving him and attaining twenty-one, in equal shares; and he devised and bequeathed the residue of his estate to his trustees upon trusts for conversion and distribution as therein mentioned. At the testator's death, in 1892, a sum of 4000l. *Victoria Four per Cent. Stock* was standing in his name.

This was an application by the grandchildren, who both survived him and were still infants, for maintenance out of the intermediate income of this stock.

Held, that, as on the principle of the decision in *Re Medlock; Ruffle v. Medlock* (54 L. T. Rep. N. S. 828), the fund being both segregated from the estate and vested in trustees for the benefit of the objects of the gift on the happening of the contingency, the intermediate income accruing from it would belong absolutely to the granddaughters on attaining twenty-one, they were entitled, under sect. 43, sub-sect. 1, of the *Conveyancing and Law of Property Act 1881*, as interpreted by *Re Dickson; Hill v. Grant* (52 L. T. Rep. N. S. 707; 29 Ch. Div. 331), to maintenance out of such income.

Long v. Ovenden (44 L. T. Rep. N. S. 462; 16 Ch. Div. 691) explained.

THIS was a summons taken out by trustees of a will and adjourned into court for the determination of various questions in connection with the administration of their testator's estate, and in particular of a question of maintenance, under the following circumstances:

William Clements, by his will dated the 15th July 1886, after appointing his wife and three other persons to be executrix and executors respectively, and trustees of his will, and giving certain pecuniary legacies, bequeathed the sum of 4000l. *Victoria Four per Cent. Stock* held by him at the date of his will, or which might be held by him at the date of his death, or the like sum out of any larger amount of the stock which might be held by him at the date of his death, or any sum of that stock less than 4000l. in nominal value held by him, and such a sum of cash as with the nominal value of such stock would make 4000l., or, in the absence of any such stock then held by him, the sum of 4000l. cash, to the trustees of his will, in trust for such of his granddaughters, Florence Tillie and Dora Winifred

(a) Reported by H. M. CHARTERS MACPHERSON, Esq.,
Barrister-at-Law.

Pearsall, as should survive him and attain in his lifetime or afterwards the age of twenty-one years, and if these conditions should be fulfilled in the case of each of them, then in equal shares between them. And he declared that, during the infancy of both or either of his said granddaughters, the trustees might sell the whole or any portion or portions of the said Victoria Stock, the title whereunto might still be contingent, and that the proceeds of such sale should be subject to the general provisions as to investment thereinafter contained. After making certain other specific devises and bequests, the testator devised and bequeathed all his real and personal property, not thereinbefore specifically disposed of, to the said trustees absolutely, upon trust for conversion and investment as therein mentioned.

The testator died in 1892, and at the date of his death he was possessed of a sum of 4000*l*. Victoria Four per Cent. Stock. Both the granddaughters named in the will survived the testator and were now respectively thirteen and a half and eleven years of age. Their father had applied to the trustees for maintenance for them out of the intermediate income of this sum of stock; and the question was whether this could be safely paid by them for this purpose.

B. Burleigh Muir for the trustees.

Levett, Q.C. and *Underhill* for other parties.

G. J. Duncan for the granddaughters.—There is an immediate gift to the trustees of this specific sum of stock, and a complete severance of the fund from the rest of the estate; and consequently the granddaughters are entitled to maintenance out of the intermediate income:

Re Medlock; Ruffle v. Medlock, 54 L. T. Rep. N. S. 828;

Long v. Ovenden, 44 L. T. Rep. N. S. 462; 16 Ch. Div. 691.

Hickey for those interested in the residuary estates.—The income is not carried by this contingent gift, and it falls into the residue until the happening of the contingency (*Guthrie v. Walrond*, 47 L. T. Rep. N. S. 614; 22 Ch. Div. 573); and there is no case which goes the length of deciding that a contingent specific legacy carries the intermediate income also. The illustration in the judgment in *Long v. Ovenden* (*ubi sup.*) is incorrect or incorrectly reported. *Re Medlock; Ruffle v. Medlock* (*ubi sup.*) is distinguishable, because the will there contained a provision that, if the grandchildren did not attain a vested interest, the legacy was to fall into the residue.

Duncan in reply.—In *Guthrie v. Walrond* (*ubi sup.*) the vesting of the legacy was contingent, which distinguishes it from the present case. The fund is at once set apart and vested in the trustees upon the testator's death, and carries the income from that date:

Boddy v. Dawes, 1 Keen, 362.

CHITTY, J.—The question is, whether sect. 43 of the Conveyancing and Law of Property Act 1881 applies to this trust legacy so as to entitle these infants to maintenance. The testator's bequest is in these words: [His Lordship read the bequest from the will and continued:] In the events which happened, the testator had standing in his name at his death the exact sum of 4000*l*. Victoria Stock, which accordingly passed

to the trustees under the gift which I have just read. The gift, therefore, was a specific gift to the trustees, to be held by them on the trusts therein mentioned. When a specific legacy is segregated from the mass of the testator's estate, to go on a contingency, it carries with it all accretions to the contingent legatee on the happening of the contingency. It appears plainly from the authorities, notwithstanding a possible slip of the late Master of the Rolls in *Long v. Ovenden* (*ubi sup.*), that where there is a specific gift to an infant on attaining twenty-one, the intermediate income does not pass. In that case a different proposition was apparently stated, but the Master of the Rolls was clearly intending to deal with the case of postponed enjoyment, and not of postponed vesting; and probably he meant to say, if indeed he did not actually say so, "If 10,000*l*. Consols is given to A. payable on his attaining twenty-one." Then the illustration he gives would be correct. In the present case, there may be said to be a double segregation: first, of the legacy from the mass of the testator's estate; and, secondly, it is given to trustees for the benefit of the contingent legatees, upon distinct trusts. Had the testator not left such stock standing in his name at his death, this would have been a gift of a pecuniary legacy, and it would have been the duty of the trustees to invest it, and hold it on the trusts indicated in the will. I think my decision in the present case may very properly turn on the principle laid down by Kay, J. (now Kay, L.J.) in *Re Medlock* (*ubi sup.*). In that case, the testator bequeathed to his trustees a sum of 750*l*. upon trust to pay and divide the same equally between such of his three grandchildren, naming them, as should be living at his death, and should then have attained the age of twenty-one years or be married, or should thereafter attain that age or marry. Clearly on the happening of the contingency the grandchildren would take nothing, unless they attained twenty-one or married. And then the testator went on to provide that, in default of any such person attaining a vested interest, then the said sum of 750*l*. and the investments representing the same should fall into the testator's residuary personal estate. Now Kay, J. enunciated this proposition as the foundation of his judgment: "Therefore, it seems to me upon principle that, if it is clear upon the testator's will that he has directed the contingent legacy to be immediately set apart for the benefit of the objects of the gift when the contingency which he has indicated happens, when that contingency does happen the fund set apart, with all its accretions, belongs to the contingent legatees. The question is whether in this case I find such a segregation." There is no question that, on the will in the case before me, this legacy is both segregated and vested in trustees for the objects of the gift when the contingency happens, and, therefore, upon the principle of the decision in *Re Medlock*, the intermediate income arising from this stock would belong to the *cestui que trust* contingently on their attaining twenty-one. The case of *Guthrie v. Walrond* (*ubi sup.*) is not the same as the present case. It was the simple case of a specific legacy given to a person on the happening of a contingency; and Fry, L.J. accordingly held there that the income fell into the residue. I am unable to draw any distinction between the present case and that of *Re Medlock*

CHAN. DIV.]

Re HAMBRO; HAMBRO v. HAMBRO.

[CHAN. DIV.]

on the ground, suggested in the arguments, that in that case there was a direction that the 750*l.* was to fall into the residue in the event of the grandchildren not attaining a vested interest, because that clause only expresses in particular terms the general effect of a residuary gift such as that in the will before me. The result is, I think, these two granddaughters would be entitled absolutely to the intermediate income of the Victoria Stock on attaining twenty-one, and the trustees have power under sect. 43, sub-sect. 1, of the Conveyancing Act, as interpreted by *Re Dickson* (*ubi sup.*), to allow maintenance out of it. I should add that I consider the case of *Long v. Ovenden* (*ubi sup.*) is an authority in favour of the result I have arrived at, notwithstanding the slight error in the judgment to which I have already referred.

Solicitors: *Morrison*s, agents for *Morrison*s and *Nightingale*, Redhill; *Robinson* and *Stannard*.

May 9 and 10.

(Before NORTH, J.)

Re HAMBRO; HAMBRO v. HAMBRO. (a)

Jointure—Rentcharge—Charge on rents and profits—Right to have arrears raised by sale.

By a settlement dated the 3rd April 1861, and made on the marriage of Baron H. and his wife, certain lands and hereditaments were assured to R. to the use of Baron H. for his life, and after his death to the use, intent, and purpose that his said wife should during her life receive and take by and out of the rents and profits thereof one clear yearly rentcharge or sum of 3000*l.* at common law or by custom, with full powers, in case of nonpayment for twenty-one days, of entry, and perception of rents and profits and distress from time to time, to secure payment of the said rentcharge and all arrears thereof. There was no term limited to secure this rentcharge, but the hereditaments were limited subject to the rentcharge to trustees for a term of 1000 years to raise portions, and subject to the said term, and charged and chargeable as aforesaid, to certain uses and trusts under which H. C. H., a son of Baron H. by his first marriage, was at the date of this summons entitled in fee simple. Baron H. died in 1877; the jointure was paid in full to his widow until Michaelmas 1893, but no payment was made in Dec. 1893, the owner alleging that the rents were insufficient. The widow took out a summons for a declaration that her jointure was charged on the corpus as well as on the rents, that the arrears might be raised by sale or mortgage, and for a receiver. It was admitted that the jointure was a continuing charge on the rents.

Held, that it was unnecessary to decide whether the jointure was charged on the corpus as well as on the rents, for, even if it were a simple charge on the rents, the court had jurisdiction to order the arrears to be raised by sale or mortgage, but that at the present time and under existing circumstances a sale ought not to be directed nor a receiver appointed. The summons was therefore ordered to stand over, with liberty to apply.

By an indenture dated the 3rd April 1861, being a settlement made on the marriage of Charles

Joachim Baron Hambro with E. F. Greathed, widow, his second wife, the lands and hereditaments therein described were assured to Edward Rawlings and his heirs for ever, to the use (after the solemnisation of the said intended marriage) of the said Baron Hambro and his assigns during his life, and after his death in case he should die in the lifetime of the said E. F. Greathed,

To the use, intent, and purpose that the said E. F. Greathed and her assigns shall and may yearly and every year during her natural life have, receive, and take by and out of the rents and profits of the said messuages, farms, land, tenements, hereditaments, and premises one clear yearly rentcharge or sum of 3000*l.*, such rentcharge or sum of 3000*l.* to be free and clear of and from all taxes, charges, and deductions whatsoever . . . and to be in full for her jointure and in lieu, bar, and full satisfaction of and for her dower or thirds at common law or by custom, freebench, or widow's part . . . and to be paid by equal quarterly payments on the usual quarter days, the first payment to be made on such of the same days as should first happen after the death of the said Baron Hambro, with full powers (in case of nonpayment for twenty-one days) of entry and perception of rents and profits and distress from time to time to secure payment of the said rentcharge and all arrears thereof, and all costs and expenses occasioned by the nonpayment thereof.

And after a provision as to the maintenance of children, the said hereditaments were assured, "subject to the said yearly rentcharge of 3000*l.* and the securities hereinbefore provided for the recovery thereof," to the use of trustees for a term of 1000 years to raise portions, and "From and after the expiration or sooner determination of the said term of 1000 years, and in the meantime subject thereto and to the trusts thereof, and charged and chargeable as aforesaid" to the uses of a prior settlement of the 30th Dec. 1852.

Under this settlement Henry Charles Thomas Hambro, the eldest son of Baron Hambro by his first wife, was the first tenant in tail, and at the date of this summons he had barred the entail, and was entitled in fee simple.

The said Baron Hambro died in Nov. 1877, leaving his wife surviving. There was no issue of this marriage. The jointure was regularly paid until Michaelmas 1893. The payment for the Christmas quarter of that year was not paid, and H. C. T. H. Hambro wrote to the Baroness that the rents were not more than sufficient to pay the three quarters already paid.

On the 6th Feb. 1894 the Baroness E. F. Hambro took out this summons, asking for a declaration that her jointure was charged on the corpus as well as on the rents and profits of the hereditaments comprised in the settlement, or that it constituted a continuing charge on the rents and profits; that the arrears of the said jointure might be raised by sale or mortgage of a sufficient part of the said hereditaments, and for a receiver.

Swinfen Eady, Q.C. and *Jenkins* for the applicant.—This summons is taken out under R. S. C. Order LIVA., r. 1, which was added last November. Before that time the proceedings must have been commenced by writ. The question is, whether the jointress is entitled to have the arrears of her jointure raised by sale. We may say, that the jointure is a charge on the corpus of the estate, or at least a continuing charge on the rents. [*Cosens-Hardy*, Q.C.—We do not dispute that it is a con-

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

CHAN. DIV.]

Re HAMBRO; HAMBRO v. HAMBRO.

[CHAN. DIV.]

tinuing charge on the rents.] After the uses in favour of the applicant, the estate is limited to trustees for a term, "subject to the said yearly rentcharge," and after the expiration of the term the property is limited to further uses, "subject to the term and charged and chargeable as aforesaid." It is plain, therefore, that the defendants are to take nothing till the jointure is paid and is charged upon the corpus. But whether it is so charged or not, the jointress is entitled to have the arrears raised by a sale. It is admitted that the charge is a continuing one on rents and profits, not limited to those accruing during the applicant's life. If there were a term limited to secure the jointure, it might be said that they ought to be raised by a mortgage under the term, but, as there is no term, a sale is the proper remedy. The most recent case on the subject is *Re Tucker; Tucker v. Tucker* (69 L. T. Rep. N. S. 85; (1893) 2 Ch. 323), where your Lordship ordered a sale. The leading authority on the question is *Cupit v. Jackson* (13 Price, 721), where the Court of Exchequer ordered a sale, though there does not appear to have been any charge of the annuity on the corpus, except by the same powers of distress and entry as there are here. In *Hall v. Hurt* (2 J. & H. 76) Wood, V.C. followed *Cupit v. Jackson*, treating it as settled law that a sale might be ordered to raise arrears of a rentcharge. In *Taylor v. Taylor* (30 L. T. Rep. N. S. 49; L. Rep. 17 Eq. 324) Hall, V.C. refused to order a sale to raise the arrears of annuities, which he held to be a charge on the income only. But in *Horton v. Hall* (L. Rep. 17 Eq. 437), less than a fortnight afterwards, the Vice-Chancellor followed *Cupit v. Jackson* (*ubi sup.*), and explained his decision in *Taylor v. Taylor* as depending on the fact that the property charged was in strict settlement, though that does not appear from the report. *Phillips v. Gutteridge* (7 L. T. Rep. N. S. 402; 3 De G. J. & Sm. 332) shows that a charge on rents and profits is a charge on the corpus unless there is something to limit it. Here there is nothing. The jointure is, therefore, a charge on the corpus. But whether it is so charged or not, the jointress is entitled to a sale.

Coxens-Hardy, Q.C. and *G. J. Wood* for the defendant (the owner of the estate).—There is a fundamental difference between a common law rentcharge and an annuity, and there is neither principle nor authority for raising arrears of a common law rentcharge by sale. The owner of a legal rentcharge has certain perfectly well-understood remedies by statute and at common law, and when they are exhausted he has no further remedy. The jointure in this case is given in lieu of dower or thirds, which are only payable out of rents and profits. There is nothing in the settlement to make a charge upon the corpus. The gift over is not subject to the jointure, but "subject to the term and charged and chargeable as aforesaid;" those are mere words of reference and cannot extend the charge. *Thomas v. Sylvester* (29 L. T. Rep. N. S. 290; L. Rep. 8 Q. B. 368) shows the nature of a rentcharge, and the means of recovering it. It was followed in *Searle v. Cooke* (61 L. T. Rep. N. S. 189; 62 L. T. Rep. N. S. 211; 43 Ch. Div. 519). With the possible exception of *Hall v. Hunt* (*ubi sup.*) all the cases cited were cases in which the court held, rightly or wrongly, there was a charge on the corpus of the land. In *Cupit v. Jackson* (*ubi sup.*) the *ratio decidendi* was

that the annuity was an incumbrance. In *Graves v. Hicks* (11 Sim. 551), the next case on this subject, Shadwell, V.C. refused to order a sale, and the whole case depended on the order which had been made on further consideration that the annuities were a charge: (see 6 Sim. 391.) *White v. James* (26 Beav. 191) was a case of a fee farm rent, and there was a covenant which showed that it was charged on the corpus. *Hall v. Hurt* (*ubi sup.*) is the one possible exception. The report does not show that there was any charge on the land there, but the Vice-Chancellor only professed to follow *Cupit v. Jackson* (*ubi sup.*) where there was a charge. In *Phillips v. Gutteridge* (*ubi sup.*) the whole question was, whether an annuity was charged on the corpus. Lord Westbury's decision may have been right or wrong in the particular case, but, if he meant to lay down as a general principle that a charge on rents and profits is in all cases a charge on the fee, there are subsequent decisions of the Court of Appeal against him. *Taylor v. Taylor* (*ubi sup.*) is, we submit, exactly in point. It is true that the Vice-Chancellor made an order for sale in *Horton v. Hall* (*ubi sup.*), but in that case there was clearly a charge on the corpus. In *Scottish Widows Fund v. Craig* (20 Ch. Div. 208), another case before Hall, V.C., there was a charge by order of the Inclosure Commissioners. *Bailey v. Badham* (53 L. T. Rep. N. S. 13; 30 Ch. Div. 84) clearly shows that something more is wanted than a mere charge on rents to make a charge on the corpus. The case before your Lordship, *Re Tucker* (*ubi sup.*), was a mere question whether certain annuities were or were not a charge on the corpus. It is clear that the court has power to sell where there is such a charge; but there is no case which decides there is such a power when there is only a charge on rents.

Swinfen Eady, Q.C. in reply.—*Bailey v. Badham* (*ubi sup.*) was a case of tithe-rentcharge. It only decided that tithe could not be raised by sale, and has no application to an ordinary rentcharge. *Birch v. Sherratt* (17 L. T. Rep. N. S. 153; L. Rep. 2 Ch. 644), shows that the gift over is conclusive on the question of a charge on the corpus.

NORTH, J.—The first question asked here is whether this jointure is a charge on the corpus as well as the income, and that I do not propose to decide, because it does not seem to me to be necessary for deciding the real point, which is, whether there is a right to have a sale of the estate for the purpose of raising the arrears of the annuity. I confess I felt some little doubt about the abstract question whether it can be said that the jointure is a charge on the corpus or not, because this case, although it comes very near to *Birch v. Sherratt* (*ubi sup.*) seems distinguishable in this way, that the words which are said to throw a charge on the corpus are these: "From and after the end, expiration, or sooner determination of the said term of 1000 years, and in the meantime subject thereto," that is, to the term and the portion secured by it, "and charged and chargeable as aforesaid," seem to me to refer to the jointure rentcharge, and to be words of reference and nothing more. It is not as if the words were "charged and chargeable with the jointure rentcharge as aforesaid, and subject thereto," then to uses, and so on. That

CHAN. DIV.]

Re HAMBRÖ; HAMBRÖ v. HAMBRÖ.

[CHAN. DIV.]

would have been like *Birch v. Sherratt* (*ubi sup.*). Under these circumstances I do not think it necessary to express an opinion on that abstract question, because, if it is not a charge on the corpus still it is, in my opinion, a case in which the jointress has a right to resort to a sale of the corpus, to pay the arrears. Then we come to this point: there is a jointure rentcharge strictly so called. In my opinion the cases show that, where such a rentcharge falls into arrear and cannot be recovered by the exercise of the powers of distress and so on, the court has power to raise the arrears by a sale or mortgage of the capital of the estate. It is clear also that the court has a discretion. Because there is jurisdiction it does not follow as a matter of course that the court will exercise it immediately after a small amount falls into arrear. I do not think that in this case the time has come at which I could order any sale; but dealing with the question whether the court has power to order a sale, I think it has. It was said that in all the cases referred to except *Hall v. Hurt* the corpus of the property as distinguished from annual income is charged with the rentcharge. I do not think that is a correct criticism upon the decisions. In *Cupit v. Jackson* (*ubi sup.*) I see no reason for saying that the property was charged in the sense which I have just mentioned. The limitations were these: The property was conveyed in trust that the settlor should himself receive thereout an annuity for life of 45*l.*, and that his wife should receive another 30*l.*, "and to the further intent and purpose that in case the respective annuities, yearly rents, or sums of 45*l.* and 30*l.* or either of them, should be behind or unpaid by the space of twenty-eight days," and so on, then the annuitants might enter "into and upon the said messuages thereinbefore charged with the payment of the respective annuities, yearly rents, or sums of 45*l.* and 30*l.*, and into or upon any or every part or parts thereof and distrain," and so on. Then further on there were powers to receive and take by and out of the messuage the annuity or yearly sum of 60*l.*, and so on. I do not think that the phrase "thereinbefore charged with the payment of the annuities" amounts to making the annuities themselves a charge on the corpus. Unless that is so, it is simply an annuity or rentcharge issuing out of the property, and that that was the true construction of the document before the court is evident from the judgment of the Lord Chief Baron, who says that what they had to deal with was a rentcharge. He speaks of the statutory remedy that a person who has a rentcharge has, and says, "I do not know that the plaintiff may not avail herself of those remedies, but the effect of either might be very uncertain." It was held in that case that it was a rentcharge, and there were certain remedies which the owner of a rentcharge could have recourse to; but that it was not necessary to limit the owner of the rentcharge to such remedies as these, and an additional remedy could be given by the court. The reason given is this: "I think the bill is sustainable notwithstanding that objection, and that her having the possibility of a remedy at law is not of itself an answer to it. The remedy in equity is more convenient and effectual than the legal remedy. It is in many respects a better and a safer remedy. The annuity being a charge and an incumbrance on a real estate itself, and

not merely a demand against the owner of the estate" (the contrast the judge makes is between a charge on the estate and a claim against the owner, not between a charge on the corpus and a charge on the rents). "I apprehend the court might, if necessary, raise the arrear out of the estate by sale or mortgage, and in practice that is a sufficient equitable ground of application to a court of equity for relief, because it is out of the powers of a court of law." Then in *Graves v. Hicks* no doubt the yearly rentcharges were charges on the residuary estate, not confined, as I gather, to real estate, but they had been declared to be by the order on further consideration a charge on residuary real estate. In that case the Vice-Chancellor declined to order the realisation of the arrears by a sale of property. But he does not put it on the ground of want of jurisdiction. He deals with it upon a separate ground altogether, that, although there was clearly jurisdiction to direct a sale, the court had a discretion not to do it if it did not think fit, and the fact that the property was settled would be a reason for not doing it. Then in *White v. James* (*ubi sup.*) there seem to have been ordinary legal rentcharges, and I think nothing else. The report says that, "By an indenture of the 30th Jan. 1865, Robert Smale, in consideration of 50*l.*, granted to the plaintiff for ever a rentcharge of 40*s.* issuing out of this piece of land and the six cottages," and that was followed by a covenant that, if it should be in arrear for forty-one days, the grantee might enter and distrain as therein mentioned. He also covenanted for title, and that the hereditaments should for ever remain charged with the rentcharge free from all incumbrances except those in the schedule. I am not satisfied that the meaning of that covenant is that the rentcharges were charges on the corpus of the property in any sense but this, that they were legal charges issuing out of the property, and that being so, the decision of Sir Samuel Romilly would be in point. My view is fortified by this, that I do not find in any of the cases in which that case has been cited that any distinction was drawn or any reliance placed upon that covenant. It is obvious that Lord Hatherley in *Hall v. Hurt* understood this case as I do; it did not occur to him that there was any difference between *White v. James* and *Hall v. Hurt*. It seems to be perfectly clear, and it was admitted that the latter is a case where there was a clear rentcharge only. Then we come to *Taylor v. Taylor*, and I must say that case is not very satisfactory. I am not quite satisfied that we know all that took place in it. In the first place, the report given of it in the Law Reports and in the *Weekly Reporter* (22 W. R. 349) (a) differ a good deal. It is very shortly reported in the Law Reports, and, being more fully reported in the *Weekly Reporter*, I think it is more probable that that is the correct report. The great difficulty arises from the fact that the ground of the decision is put by the Vice-Chancellor himself ten days later as having been totally different from that which appears by the report. The facts in that case were that the property was settled; it corresponded with the posi-

(a) The report in the LAW TIMES (*ubi sup.*) is fuller than either, and appears to show that the learned judge relied chiefly on the fact that the property was settled.

tion of the property in *Graves v. Hicks*. The report does not show that the Vice-Chancellor placed much reliance on that, but the report of the latter case does represent him as saying that it was on that ground he went. In *Horton v. Hall* there was a legal rentcharge and nothing else. The case of *White v. James*, which was, apparently, not called to the attention of the Vice-Chancellor in *Taylor v. Taylor*, having been cited in *Horton v. Hall*, he says: "In a recent case before me, *Taylor v. Taylor*, *Cupit v. Jackson* was referred to, and I declined to apply it, because in *Taylor v. Taylor* the land charged with the annuities or yearly payments was in strict settlement (that is to say, if it had not been for that he would have applied it); but that is not so with the land in this case, and, therefore, having regard to the case of *White v. James*, I shall follow *Cupit v. Jackson*, and make the order asked for." Therefore, those two cases taken together, taking the first as explained in the second, are very clear, and show he declined to direct the sale where the property was subject to a succession of trusts or limitations, but did direct it where it was not. In the present case it is not so subject. I should refer to the report in *Horton v. Hall*, in the *Weekly Reporter*, because it is expressed there very clearly (22 W. R. 391): "Vice-Chancellor Hall made the order asked for, and remarked that he should here follow *Cupit v. Jackson*, though he had in *Taylor v. Taylor* refused to do so on the ground that the land subject to the chief rent was there in settlement, which was not the case here." That was the ground for deciding *Horton v. Hall* as it was decided, and that is what the Vice-Chancellor said was his ground for having decided *Taylor v. Taylor* as it was decided. The case of *Phillips v. Gutteridge* (*ubi sup.*) I do not think is very much in point. The case of the *Scottish Widows Fund v. Craig* is, I think, in point because though no doubt the rentcharge was charged on the inheritance, yet I think the whole of the Vice-Chancellor's judgment is addressed to the case of its not being charged on the inheritance, because he argues from an ordinary case, which he describes in these words: "It may be said no doubt that the object of making the charge on the inheritance was not to give any remedy beyond those specially provided by the statute, but only to bind those in remainder, or the succession of the incumbent of the living. I must, however, take the facts as I find them, and if this be a rentcharge which would ordinarily be raisable by the court out of the inheritance, by resorting to it in the mode usually adopted by means of a sale or mortgage of it—if that be the character of the charge, I do not see that I should be justified in holding that there is anything in the statutes that deprives the plaintiffs, the owners of the rentcharge, of the ordinary remedies." That is to say, he refers to an argument showing that the charge on the inheritance did not help the parties, and when he proceeds to point out that it is unnecessary to go into that, it does not matter if it does not help them, because the ordinary rights of persons in this position are such as will give them all that they are asking for. Then he goes on dealing with the case as that of a rentcharge which in ordinary cases is raisable out of the inheritance, and then he says, "It seems to me that, quite independent

of any special provision in the statutes which have been referred to, the plaintiffs, the owners of the rentcharges, are entitled, on ordinary principles, to claim the assistance of the court for the purpose of raising the charge, and I am not aware of any authority which states that, because there are powers of distress and entry upon the property belonging to an ecclesiastical corporation, and because the payments which are to be made in respect of the rentcharge are not to be perpetual, but will be determined in a certain time, the owner of the rentcharge shall not be entitled to the ordinary remedies of having it raised by a sale or mortgage." Then he refers to *White v. James*, *Cupit v. Jackson*, *Graves v. Hicks*, and *Hall v. Hurt*. He does not refer to either of his own two previous decisions. I take it at this time, which is subsequent to the former decisions, he was laying down in clear terms what are the ordinary rights (independently of any special statutory provision) of a person entitled to a legal rentcharge which has fallen into arrear. Then the later case before Bacon, V.C. (*Bailey v. Badham, ubi sup.*) does not seem to me to help one much. I think he was dealing with the case as being something that was not a rentcharge, although something in the nature of a rentcharge. A rentcharge in respect of tithes in respect of which only two years could be recovered was not a rentcharge in the ordinary sense; therefore it was a special case, not throwing any light upon the numerous cases on which I have just commented, and does not affect in any way what I consider to be the legitimate conclusion of those cases. As to *Tucker v. Tucker*, that does not seem to me to carry it any further. There was an additional ingredient there that the corpus clearly was charged with the annuities, annuities which were very likely rentcharges, but were not the less annuities. No one disputes that in that case there can be a sale. I do not think this is a case where there should be any sale at present. All I can do is to say, the court, being of opinion that there is jurisdiction to order the raising by sale or mortgage of the arrears of the rentcharge, but that there is no ground at present for exercising the jurisdiction, directs the summons to stand over, with liberty to apply.

Solicitors: *Preston, Stow, and Preston*, for *Rooke and Coker*, Bath; *Haaves, Wood, and Ware*.

QUEEN'S BENCH DIVISION.

Thursday, April 19.

(Before CHARLES and BRUCE, JJ.)

SINGLETON v. ROBERTS, STOCKS, AND CO. (a)

Practice—Service of writ—Foreign firm with English agent—Writ against firm in firm name—Setting aside writ—Carrying on business within jurisdiction—Order XLVIIIa., r. 1.

A writ was issued, under Order XLVIIIa., r. 1, against a firm in the firm name. The firm was a foreign firm carrying on business abroad, but the members of the firm were British subjects. They employed the plaintiff to purchase goods in England for shipment to them abroad, and one of the partners was generally in England and chose the goods to be purchased. The plaintiff ordered and paid for these goods in his own name

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Q.B. Div.]

SINGLETON v. ROBERTS, STOCKS, AND CO.

[Q.B. Div.]

and forwarded the same to the defendant firm abroad, and he received from the defendants sums of money on account from time to time, leaving a balance for which the writ was issued. The writ having been served personally on one of the partners while in England:

Held, that, upon the facts, the defendant firm did not carry on a business within the jurisdiction, and that consequently there was no authority for issuing the writ against the firm in the firm name, and that the issue and service of the writ ought to be set aside.

MOTION to set aside the issue and service of a writ of summons.

The action was brought against the defendant firm in the firm name, and was to recover the sum of 383*l.*, balance due for the price of goods sold, and for profits due on the sale of goods, and for money advanced by the plaintiff to the defendants.

The writ was indorsed with a statement that "it was not for service out of the jurisdiction," and it was served personally at Liverpool upon Mr. H. W. Roberts, a partner in the defendant firm.

The present application was to set aside the issue and service of this writ on the grounds that the defendants are a foreign firm carrying on business at Buenos Ayres and not within the United Kingdom; that they have no place of business or office within the United Kingdom; that the plaintiff had no right to sue the defendants in their firm name; and that the service of the writ upon H. W. Roberts, a member of the defendant firm, whilst on a visit to this country, was not a good service of the writ.

The affidavit upon which the application was founded set out that the defendant firm carry on business as general merchants at Buenos Ayres, in the Republic of Argentina, under the name of Roberts, Stocks, and Co.; that upwards of four years ago H. W. Roberts emigrated to Buenos Ayres, where two years ago he commenced business as a partner in the firm of Roberts, Stocks, and Co., and, on the retirement of the third partner, he continued in partnership with A. L. Stocks under the same name of the firm; that Roberts arrived in England in Dec. 1893 on a visit, and left England for Buenos Ayres on the 28th March 1894, this being the only time he had visited England since he emigrated four years ago; that on the 28th March 1894, while the said H. W. Roberts was on the landing stage at Liverpool about to embark for Buenos Ayres, the plaintiff himself personally served Mr. Roberts with the writ of summons in this action; that the firm of Roberts, Stocks, and Co., have not at any time carried on business in the United Kingdom, and have not had any place of business or office in the United Kingdom; that the partners in the firm have not, nor have either of them, permanently resided within the United Kingdom for upwards of two years last past, and they have only temporarily resided in the United Kingdom when on a visit, and with the intention of returning abroad; that at the time of service of the writ the said Mr. Roberts was the only member of the firm in this country.

In opposition to the motion an affidavit was made by the plaintiff in which he set out the course of business with the defendants. He

stated that he commenced to do business with the defendants in July 1892; that the defendant A. L. Stocks, being then in England, called upon him and asked him to do business with his firm and to purchase goods for shipment to them in Buenos Ayres, and that in the result he (the plaintiff) agreed to purchase such goods as the defendant chose, and to forward them to his firm; and that he was to charge the price of such goods to them, and was to receive as his commission one-half of the profits on the sale of the goods; that the defendant Stocks accompanied him to different firms in Manchester, where he chose various kinds of goods, and the plaintiff then ordered the same in his own name and paid for them in due course out of his own money, and forwarded them to the defendants at Buenos Ayres; that in Jan. 1893 one of the defendant firm, who has since retired, came over to England, and in a letter written in Manchester on behalf of the firm offered fresh proposals for their future business, and that the plaintiff elected to continue the business with the defendants on the commission terms mentioned in such letter; that after such arrangement he (the plaintiff) accompanied this partner to various Manchester warehouses, where such partner chose quantities of goods for which he (the plaintiff) paid in due course, and which he subsequently shipped to the defendants at Buenos Ayres, and that he had also advanced certain sums of money to the defendants when they were in England to cover their current expenses; and that he received from time to time from the defendants various sums of money on account, and that there is a balance of 383*l.* due to him in respect of the above transactions.

The plaintiff also stated in his affidavit that the defendants are natural-born British subjects, and that they quite recently went out to South America and commenced business there, and that they are almost continually in personal communication with England, and pay frequent visits to this country; that their usual course has been that on one partner returning from England to Buenos Ayres another has set out for England, and this has continued down to the present; that one or other of the partners is usually in England about every six months; that the greater part of the claim in this action is in respect of goods purchased by some member of the defendants' firm while in Manchester from manufacturers or warehousemen there, and paid for by him (the plaintiff) at the request of such partner out of his own moneys, and debited against the defendants.

Order XLVIII*a.*, r. 1, provides:

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action, &c.

T. W. Chitty for the plaintiff.

J. E. Bankes for the defendants.

CHARLES, J.—In this case we are asked to set aside a writ which has been issued under Order XLVIII*a.*, r. 1, against a partnership in the firm name. The firm carries on business at Buenos Ayres, and the only point for decision here is whether we are satisfied that they also carry on business within the jurisdiction. We need not trouble as to the place at which this writ was served, as it was served personally on Mr.

Q.B. Div.]

INNES v. NEWMAN.

[Q.B. Div.]

Roberts, one of the partners. The affidavit on which this application to set aside the writ was founded sets out only circumstances of which the person making the affidavit had no personal knowledge, but from the affidavit of Mr. Singleton, the plaintiff, we think it is clear that the defendant firm does not carry on a business within the jurisdiction. That being so, there is no authority for issuing this writ in the form in which it is issued. It was suggested that as this firm consisted of British subjects it could not be considered a foreign firm. This view was based on a misapprehension of some expressions of Fry, L.J. in the case of *Russell v. Cambefort* (61 L. T. Rep. N. S. 751; 23 Q. B. Div. 526), but we need not further consider it, as it was not insisted upon. The real point argued was, whether the business here was a business carried on within the jurisdiction. With regard to that it is quite clear from the plaintiff's affidavit that he (the plaintiff) was an agent of the defendant firm and nothing more. Then it was argued that the contract of agency was made in Manchester, but that cannot be sufficient to bring the case within the rule. It was also urged that the partners themselves had done a great deal more in the conduct of the business in this country than was done by the agent McCallum in the case of *Grant v. Anderson* (66 L. T. Rep. N. S. 79; (1892), 1 Q. B. 108), or by Macphail in the case of *Baillie v. Goodwin* (55 L. T. Rep. N. S. 56; 33 Ch. Div. 604). But from the facts as set out in the affidavits and letters, it is plain that in reality the relation between the parties here was nothing more than that of principal and agent, although from time to time the defendants themselves personally interfered as to what goods should be bought by the agent from manufacturers in Manchester. That, however, is not sufficient to constitute a carrying on of this business within the jurisdiction. We think, therefore, that the defendants are entitled to have the writ set aside with costs, but inasmuch as the plaintiff's affidavit shows that the writ is in respect of the breach of a contract to be performed in England, we think we ought to amend the writ and to give leave to serve the amended writ upon the partners at Buenos Ayres.

BRUCE, J.—I am of the same opinion.

Issue and service of the writ set aside, with liberty to the plaintiff to amend the writ by inserting the names of the individual partners as defendants, and with liberty to serve the amended writ at Buenos Ayres or elsewhere.

Solicitors for the plaintiff, *Pritchard, Englefield, and Co.*, for *Sampson and Price*, Manchester.

Solicitors for the defendants, *Wynne, Holme, and Wynne*, for *R. J. Jones and Co.*, Liverpool.

Wednesday, May 9.

(Before WRIGHT and COLLINS, JJ.)

INNES v. NEWMAN. (a)

Municipal corporation — Bye-law — Validity — Reasonableness — Noise in the streets — Annoyance of inhabitants — Complaint by only one inhabitant.

A municipal corporation passed a bye-law by which any person making any violent outcry, noise, or disturbance in any street to the annoyance of the inhabitants of the borough should be liable to a penalty.

An inhabitant of the borough complained to a police constable of a boy, who was making an incessant and violent outcry in the street by shouting the name of a newspaper. The constable summoned the boy before the justices, who refused to convict him upon the ground that there was no proof that more than one inhabitant was annoyed by the shouting of the boy, and that therefore the case did not fall within the bye-law.

Held, that the justices were wrong, as it was sufficient to prove that one inhabitant had been annoyed.

THIS was a case stated by the justices for the borough of Cambridge for the opinion of this court.

At the hearing a bye-law was proved in the following terms:

It is ordered that if any person shall, after this bye-law comes into force or operation, make any violent outcry, noise, or disturbance in the market, or in any of the streets or public places of this borough, to the annoyance of the inhabitants of the said borough or the frequenters of such market, streets, or public places respectively, or if any person selling goods or provisions or offering goods or provisions for sale in the market or in any of the streets or public places of this borough shall use abuse, profane or obscene language to any other person or persons in such market, streets, or public places respectively, every person so offending in the premises or any of them shall forfeit and pay as follows: For the first offence a sum not exceeding 40s., and for the second or any subsequent offence a sum of not less than 40s. nor more than 5l.

On the 1st March 1894 the respondent was in Trinity-street in the borough opposite the window of Arthur Matthew's house and shop and was yelling out "*Daily News*" incessantly for six minutes. A police constable proved that the respondent was making a violent outcry, but it was not proved or alleged that the police constable was annoyed by the violent outcry.

No other inhabitant except Arthur Matthew was called, nor was any proof given of anyone but Arthur Matthew being annoyed. The justices refused to convict.

Law for the appellant.—It is submitted that the justices were clearly right in holding that this bye-law is not unreasonable. It was not necessary, in order to bring the respondent within the terms of the bye-law, to prove that more than one inhabitant was annoyed by the noise caused by the respondent. It was held in *Stanley v. Farndale* (56 J. P. 709) that a boy was wrongly convicted under a similar bye-law for shouting in a street; but in that case no evidence was called to prove that any inhabitant was annoyed. In the present case one inhabitant was annoyed, and it is submitted that that is sufficient.

No one appeared for the respondent.

WRIGHT, J.—It is quite clear that this bye-law is not unreasonable. If there was a noise sufficient to cause annoyance to the inhabitants, it was not the less an offence because only one inhabitant was annoyed by it. The case must be remitted back to the justices with this expression of our opinion.

COLLINS, J. concurred.

Appeal allowed.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. Div.]

WALKER (app.) v. LAXTON (resp.).

[Q.B. Div.]

Solicitors for the appellant, *Foss and Ledsam*,
for *J. E. L. Whitehead*, Town Clerk, Cambridge.

Wednesday, May 9.

(Before WRIGHT and COLLINS, JJ.)

WALKER (app.) v. LAXTON (resp.). (a)

Industrial Schools Act 1866 (29 & 30 Vict. c. 118),
s. 14—*Elementary Education Act 1876* (39 & 40
Vict. c. 79), s. 13—*Industrial Schools Acts
Amendment Act 1880* (43 & 44 Vict. c. 15), s. 1
—Child living in house resided in by prostitutes
—Order for removal to industrial school—Right
of private person to apply for order.

The Industrial Schools Act 1866 provides by sect. 14
that any person may bring before two justices
any child apparently under the age of fourteen
years that comes within certain descriptions
therein specified, and the justices may order the
child to be sent to a certified industrial school.

The Elementary Education Act 1876 enacts by sect.
13 that where the local authority are informed
by any person of any child in their jurisdiction,
who is stated by that person to be liable to be
ordered by a court to be sent under the *Industrial
Schools Act 1866* to an industrial school, it
shall be the duty of the local authority to take
proceedings under the *Industrial Schools Act 1866*
accordingly, unless the authority think it is
inexpedient to take such proceedings.

The Industrial Schools Acts Amendment Act 1880
extends the descriptions of children under the
Industrial Schools Act 1866 to children living
with common prostitutes.

Held, that any private person might bring a child
before the justices with a view to the justices
sending such child to an industrial school, and
that it was not necessary to show that an appli-
cation had been made to the local authority
requiring such local authority to bring the child
before the justices.

THIS was a case stated by the justices of the
borough of Cambridge, who had dismissed a
complaint by Richard Walker, a local officer for
the Society for the Prevention of Cruelty to
Children, alleging that Ethel Laxton, of 3, Brown's-
yard in the said borough, a child apparently under
the age of fourteen years, was residing with
common or reputed prostitutes.

Ethel Laxton, who is about eight years of age,
resided with her mother Mary Laxton at 2,
Brown's-yard in the borough. Her sister Fanny
Laxton also resided in the same house. Fanny
Laxton, who was about eighteen years of age,
was proved to be a common prostitute. On
this evidence the appellant asked the justices to
make an order to send the child Ethel Laxton to
a certified industrial school under the provisions
of 29 & 30 Vict. c. 118, and 43 & 44 Vict. c. 15.
The justices were satisfied that the child was
residing with Fanny Laxton, a common prostitute,
but it was not shown that the local authority had
been applied to, and had declined to take proceed-
ings under 39 & 40 Vict. c. 79, s. 13. It appeared
that the appellant had reported the case to the
officer of the school attendance committee of the
borough, but it was not shown that the school
attendance committee had by any resolution of
that body deemed it inexpedient to take such

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

proceedings, or that the appellant had been autho-
rised or requested by the local authority to take
proceedings. The justices, however, on reading
sect. 13 of 39 & 40 Vict. c. 79 were of opinion that
an application should have been made to the
local authority under that section, and proof
given that they had declined to take proceedings,
and on this ground they dismissed the complaint.

The question of law arising on the above state-
ment for the opinion of this court is: Whether it is a
condition precedent to making an order under the
Industrial Schools Act 1866, as amended by 43 &
44 Vict. c. 15, that proof should be given that
application had been made to the local authority
under 39 & 40 Vict. c. 79, s. 13, and that they had
declined to take proceedings.

The Industrial Schools Act 1866 (29 & 30 Vict.
c. 118) enacts:

Sect. 14. Any person may bring before any two justices
or a magistrate any child apparently under the age of
fourteen years that comes within any of the following
descriptions: [None of the four descriptions given in
this section apply to the present case.] The justices or
magistrate before whom a child is brought as coming
within one of those descriptions, if satisfied on inquiry
of that fact, and that it is expedient to deal with him
under this Act, may order him to be sent to a certified
industrial school.

The Elementary Education Act 1876 (39 & 40
Vict. c. 79) enacts:

Sect. 13. Where the local authority are informed by
any person of any child in their jurisdiction who is
stated by that person to be liable to be ordered by a
court under this Act to attend school, or to be sent
under this Act, or the *Industrial Schools Act 1866*, to an
industrial school, it shall be the duty of the local autho-
rity to take proceedings under this Act or the *Industrial
Schools Act 1866* accordingly, unless the local authority
think that it is inexpedient to take such proceedings.

*The Industrial Schools Acts Amendment Act
1880* (43 & 44 Vict. c. 15) enacts:

Sect. 1. Sect. 14 of the *Industrial Schools Act 1866*
shall be read and construed, as if, after the four several
descriptions therein contained, there were added the
following descriptions, namely: That is lodging, living, or
residing with common or reputed prostitutes, or in a
house resided in or frequented by prostitutes for the
purpose of prostitution; That frequents the company
of prostitutes.

Poland, Q.C. and *H. O. S. Ellis* for the appel-
lant.—The justices were wrong in dismissing the
complaint in this case. Any person may under
the *Industrial Schools Act 1866* make such an
application to the justices, and there is nothing in
the *Elementary Education Act 1876* which takes
away such a right from private persons. The
latter Act confers the duty of making the applica-
tion also upon the local authority, so that a private
person need not make the application to the
justices in his own name unless he desires to do so.

No one appeared for the respondent.

WRIGHT, J.—It seems to me to be clear that
under these statutes either a local authority or a
private individual has the right to proceed as if
the other had no authority. The case must be
remitted back to the justices with this expression
of our opinion.

COLLINS, J. concurred.

Appeal allowed.

Solicitors for the appellant, *Foss and Ledsam*,
for *J. E. L. Whitehead*, Town Clerk, Cambridge.

BANK.] *Re* WELCH; *Ex parte* TRUSTEES OF STAR OF THE WEST LODGE OF ODDFELLOWS. [BANK.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, March 6.

(Before WILLIAMS and WRIGHT, JJ.)

Re WELCH; *Ex parte* TRUSTEES OF STAR OF THE WEST LODGE OF ODDFELLOWS. (a)*Bankruptcy — Friendly society — Money in the possession of secretary virtute officii — Preferential claims — Friendly Societies Act 1875 (38 & 39 Vict. c. 60, s. 15, sub-sect. 7.**By the Friendly Societies Act 1875, sect. 15, sub-sect. 7: Upon the bankruptcy of any officer of a society having in his possession by virtue of his office any money belonging to the society, the trustee in bankruptcy shall, upon demand in writing of the trustees of the society, pay such moneys to the trustees of the society in preference to any other debts or claims against the estate of such officer.**The secretary of a friendly society, whose duty was to collect subscriptions and receive money for the society, but to hand over at once all moneys so received to the treasurer, wrongfully retained in his hands large sums of money belonging to the society and did not hand them over to the treasurer. On bankruptcy ensuing the society claimed to have, under sect. 15, a right to the assets of the bankrupt in preference to other creditors.**Held, that the society had such a preferential right in respect of moneys properly received by the secretary, and in his possession by virtue of his office; and that such right was not lost by reason of the secretary having been allowed to retain moneys wrongfully, and not hand them over to the treasurer.*

THIS was an appeal from the decision of the judge of the Cornwall County Court.

The debtor Welch had been since 1874 the permanent or financial secretary of the Star of the West Lodge of the Independent Society of Odd-fellows.

The permanent or financial secretary's duties, as proved before the County Court judge, were to receive subscriptions and certain other moneys, to attend lodge meetings, to take minutes, conduct correspondence, keep the accounts, and balance them when required, and generally to carry out the instructions of the lodge; but all money received and collected by the secretary was to be handed over to the treasurer at the lodge meeting. He was to be in fact the conduit pipe through which all moneys went to the treasurer. The treasurer had to enter into a bond for 100*l.* and was allowed to keep 100*l.* in hand every fortnight, the balance being invested. The secretary had not to enter into any bond. An officer called the Noble Grand paid out the sick pay, the list of those entitled to it was furnished by the secretary and the money came from the treasurer. If the sick lived at a distance the money was sent by post by the secretary to them, and this money was obtained from the Noble Grand.

By the rules of the society it was enacted:

(3.) That the treasurer shall render a true account of all moneys received by him. He shall take charge of the funds of the lodge not invested and pay all demands.

(4.) The permanent or financial secretary (hereinafter designated P. S.) shall have the charge and custody of the books, papers, and other necessaries; he shall answer

all communications addressed to the Noble Grand (N. G.) or the lodge, he shall attend all meetings at the time appointed for opening, or be fined sixpence, unless he send a written apology satisfactory to the lodge, and he shall keep a correct account of the receipts and expenditure of the lodge.

The greatest laxity had prevailed for years, Welch had been allowed to collect moneys at his shop, and to send sick pay away out of moneys he had collected and not paid over to the treasurer; he was also allowed to collect instalments of interest due on a loan from the Penrhyn Corporation, both in cash and by cheques payable to his order.

In Sept. 1893 Welch absconded and was subsequently made bankrupt. His assets, which consisted chiefly of stock in his grocer's shop and book-debts, amounted to about 450*l.* The trustees of the society made a claim against the trustee in bankruptcy of Welch that 723*l.* 6*s.* 2*d.*, or such other sum as should be ascertained to have been received by Welch as secretary of the society, should be admitted by the trustee in bankruptcy as a preferential claim under sect. 15 of the Friendly Societies Act 1875 before the other debts of the bankrupt.

The County Court judge allowed the claim, and this was an appeal from his decision.

The grounds of appeal were: (1) that the society had not, either under sect. 15 of the Friendly Societies Act 1875 or sect. 2 of the Preferential Payments Act 1888, the preference or priority which the trustees claimed; (2) that the moneys in respect of which proof was made were not in the possession of the debtor by virtue of his office; (3) that the debtor was not an officer of the society to whom sect. 15, sub-sect. 7, of the Friendly Societies Act 1875 applies.

By sect. 15, sub-sect. 7, of the Friendly Societies Act 1875 (38 & 39 Vict. c. 60):

Upon the death, or bankruptcy, or insolvency of any officer of a society having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment, or other process be issued, or action or diligence raised against such officer, or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorised by the society, or by the committee of management of the same to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer.

Herbert Reed, Q.C. and Muir Mackenzie for the appellants.—The learned County Court judge was wrong. This money was not in the hands of the secretary of the society by virtue of his office, and, that being so, sect. 15, sub-sect. 7, of the Friendly Societies Act 1875 does not apply, and the society has no preferential claim, but can only prove like ordinary creditors. It was the treasurer's duty to receive all moneys, and he was required to give security; the secretary was not required to give security, and if he received and retained money it was because the rules were not obeyed. The secretary no doubt received rightly the contributions on lodge nights, but there was a treasurer to whom he had to pay them over, and who had given a bond; and the secretary had

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

[IN BANK.] *Re EVELYN; Ex parte THE GENERAL PUBLIC WORKS AND ASSETS CO.* [IN BANK.]

no power under the rules to hold any money received. In *Ex parte Fleet*; *Re Jardine* (19 L. J. 10, Bank.), the bankrupt was the actuary and cashier of a savings bank, it was the committee's duty to receive the deposits, but they allowed the cashier to do so, and the court held that the deposit were not received by the bankrupt by virtue of his office. Here 400l. is found in this man's hands, and the society allows this to go on; they are, therefore, not entitled to protection, for that to entitle them to protection they must obey the rules. This is not a case where sect. 15, sub-sect. 7, applies, as explained by *Re Miller*; *Ex parte The Official Receiver* (67 L. T. Rep. N. S. 601; (1893) 1 Q. B. 327). Here the moneys were not in his possession by virtue of his office. [WILLIAMS, J.—Did he receive them by virtue of his office? He would rightly receive the contributions on lodge nights. In *Ex parte Ross* (6 Ves. 802) Lord Eldon, referring to sect. 15, sub-sect. 7, said the provision was "very liberal, and perhaps more liberal than just, that all creditors, however meritorious, shall be sacrificed to the demand of a friendly society." It is not enough that he should hold the funds, they must be in his possession as the proper officer :

Ex parte Orford, 1 De G. M. & G. 483;
Ex parte Harris, 1 De G. 162.

The intention is, that the officer who gives the bond should be the person to receive and hold money, and that is the treasurer, and the very fact that the secretary holds the moneys here shows that he did not hold them "by virtue of his office," and that being so, the society has no preferential claim.

Tindal Atkinson, Q.C. and *Bernard Abrahams*, for the trustees of the society, were not called upon.

WILLIAMS, J.—I am of opinion that the judgment of the learned County Court judge was correct. I do not understand the learned judge to have decided what sum was properly received by the bankrupt; that he leaves open for further inquiry, as he says the proof for 723l. 6s. 2d. (or such sum as may be ascertained if necessary) is to be admitted as a claim in preference to any other debts or claims. It was admitted that there were certain sums included in this account which were properly received by the bankrupt as financial secretary to the society, and if any money was once properly received by the officer under the rules of the society, it becomes money in his hands as an officer of the society within these rules until he has paid it over to the treasurer or disposed of it according to the rules of the society, and sect. 15 of the Act of 1875 was not intended to alter the previous Act of 18 & 19 Vict. c. 63. I think that moneys properly received by an officer of the society are just as much within sect. 15 of the Act of 1875 as they would have been within 18 & 19 Vict. If this is not so, consider what the result must be; the result would be this, that, if an officer received the moneys of the society and did not hand them over at the proper moment, inasmuch as he would then be retaining those moneys wrongfully, those moneys would be outside this section, and if that meaning is given to the section, its operation is at once limited to practically nothing. Of course the money must be received "by virtue of his office," as no one would say that, if the society

had a hall porter as one of its servants, and he received moneys, that would necessarily be a receipt by him as an officer of the society. The County Court judge has found that sums of money were received by the secretary *virtute officii*, and I entirely agree with his conclusion in fact. The intention obviously was, with regard to certain moneys, and doubtless with regard to contributions, that the secretary should be the officer who should receive them.

WRIGHT, J.—I agree.

Appeal dismissed

Solicitors for the appellants, *Rowcliffes*, for *Jenkins*, Falmouth.

Solicitors for the respondents, *J. A. Bartrum*, or *Dobell*, Truro.

Tuesday, May 1.

(Before WILLIAMS and KENNEDY, JJ.)

Re EVELYN; Ex parte THE GENERAL PUBLIC WORKS AND ASSETS COMPANY. (a)

Bankruptcy—Sale by mortgagees of debtor's property—When court will restrain sale.

An undischarged bankrupt having mortgaged his reversionary interest in certain property to a company to secure a loan, subsequently became bankrupt a second time, and the company offered for sale the reversionary interest, subject to the rights of the trustee and the creditors under the first bankruptcy. The County Court judge, on the motion of the official receiver as trustee in the first bankruptcy, restrained the completion of the sale.

Held (on appeal), allowing the appeal, that though the Bankruptcy Court could probably prevent a sale which would interfere with the due administration of the estate, or with their officer in the performance of his duty, especially if the sale purported to be of the same property which the trustee had to administer, the present case was not one in which such an order ought to be made.

THIS was an appeal from the decision of the judge of the Rochester County Court.

In 1890 the debtor was adjudicated bankrupt, and a trustee was appointed, who was released in 1893. On the 3rd May 1893 the bankrupt, while still undischarged, gave the General Public Works and Assets Company Limited a charge over his reversionary interest under the will of Sir G. Evelyn, which by the death of an intervening interest had become valuable, in certain estates in Durham to secure a sum of 500l. In Oct. 1893 the debtor was again adjudicated bankrupt, and on the 9th Jan. 1894 the reversionary interest was offered for sale by the mortgagees. The property was described as the "valuable reversion to freehold estates and mines in the county of Durham, producing about 4500l. per annum," and condition 6 of the conditions of sale was as follows :

In the year 1890 and previous to succeeding to the immediate reversion now offered for sale, the gentleman through whom the vendors' title is derived was adjudicated bankrupt. Debts believed to amount to an aggregate principal sum of 4218l. 4s. 2d., or thereabouts, were proved in this bankruptcy, from which the bankrupt has not been discharged. Unless the concurrence of the trustee shall have been obtained before the day of the

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IN BANK.] *Re EVELYN; Ex parte THE GENERAL PUBLIC WORKS AND ASSETS CO.* [IN BANK.]

sale, of which notice shall be given, the property is offered for sale subject to the rights of the trustee and the creditors under the said bankruptcy.

The property was sold, and the official receiver, as trustee, on the 28th Feb. 1894 applied to the County Court judge of Rochester to restrain the completion of the sale. The County Court judge granted the application, and the mortgagees appealed. The grounds of appeal were, amongst others, (1) that the County Court had no jurisdiction; (2) that an undischarged bankrupt has power to create on the interest which he has in property vested in the trustee a mortgage, and the mortgagee has a right to dispose of the interest so mortgaged, and an injunction cannot be granted restraining him from so doing.

Herbert Reed, Q.C. and Muir Mackenzie for the appellants, the mortgagees.—The court had no jurisdiction to restrain this sale even outside the Bankruptcy Court. There was no contractual relation between the trustee and the mortgagees, who are mere strangers. Next, the Court of Bankruptcy cannot restrain this sale, for an undischarged bankrupt has a right to deal with what is his own, subject to the rights of the trustee, and his mortgagees had a right to sell, subject, of course, to the trustee's rights. This is all that was done here. The trustee's rights are expressly reserved by condition 6. There was no attempt to sell the trustee's property, but only an interest subject to it. All bankruptcy does is to take a man's property for his debts, and no more (*Banks v. Scott*, 5 Madd. 493, 501), and here there will be a surplus. A bankrupt has left in him a possibility on which he can create a security with power of sale—i.e., the right to the reversion after the payment in full of the creditors—and this the mortgagees might have sold privately. The case of *Ex parte Sheffield*; *Re Austin* (40 L. T. Rep. N. S. 15; 10 Ch. Div. 434), only turns on the right of the assignee of the reversion to interfere with the administration of the estate. There can be no injury done to the creditors in the first bankruptcy or otherwise.

Lawson Walton, Q.C. and Stephen Lynch for the respondent.—The learned judge was right. The effect of this sale was to injuriously affect the interests of the trustee, and the court can and will interfere. Condition 6 was misleading. The purchaser was not told of the second bankruptcy, but only of the first, and the purchaser was left to infer that the trustee was a party to the sale, whereas he had no notice of it, and yet he is the owner of the very reversion which was sold. This amounts almost to a slander of the real owner's title, and this court will restrain it, and this doctrine is not confined to trade interests as in *Thomas v. Williams* (43 L. T. Rep. N. S. 91; 14 Ch. Div. 864). Here they purport to sell a "valuable reversion," and there is no trace of any qualification until you come to condition 6. The court ought to interfere to protect its officer, and the learned judge was therefore quite right.

Reed, Q.C. in reply.

WILLIAMS, J.—I have come very reluctantly to the conclusion that this order was wrong, and that the learned judge had no jurisdiction to make it. I will first of all deal with the matter as if there was no reservation in the sixth condition of the title of the trustee. I will assume that it was merely a sale, or what purported to be a sale, of

property which vested in the trustee. There was no contractual relation between the trustee and those persons who are called mortgagees; they are mere strangers. Under these circumstances, even outside the Bankruptcy Court, there would be no right to restrain the sale in the circumstances of this case. No action or proceeding had been commenced by the trustee against these mortgagees, though whether what the mortgagees have done would afford a good cause of action by the trustee against the mortgagees, I do not know, for no such action was pending. Then, secondly, if this case be looked at with regard to condition 6, it is plain that the mortgagees are only selling subject to the trustee's title, and therefore under these circumstances, whatever possibility there might have been of a proceeding being taken against the mortgagees, if they purported to sell the trustee's interest, it is clear in the present case, having regard to the terms of condition 6, they did not purport to sell his property, but only an interest subject to it, so that no action lies against them by the trustee. If any such action would have been possible, I should have said that a bankruptcy court was not the proper place in which to commence it, or to try and enforce these rights; but Mr. Reed has consented that the rights of the parties should be dealt with in bankruptcy, and by us, and that is treated as an admission of jurisdiction. The outcome of that is merely that no cause of action arose to enable the trustee to proceed against these persons for having purported to sell the interest which they purported to sell. This does not put an end to the matter, because, even though no action lies by the trustee against the mortgagees, it might be that the Court of Bankruptcy might have a right to prevent these persons from interfering with its officer in the performance of his duty, and I am very clear that, if this was such an interference by anyone with its officer in the performance of his duty, the court could interfere to prevent that. In the case of *Helmore v. Smith* (56 L. T. Rep. N. S. 72; 35 Ch. Div. 449), which was a case where there was a receiver appointed by the court—it was not in bankruptcy, it was in the course of an action in the Chancery Division—a former clerk of the firm, the partnership in which was being dissolved, sent round a circular to the customers of the firm, containing an unfair statement of the effect of the order that had been made by the court, and soliciting their custom for his own business. That is, as I understand it, that Mr. Smith, the defendant here, tried to prejudice the sales by the receiver in this business by urging that under the order of the court the receiver had no right to effect these sales, and under these circumstances Mr. Smith asked the old customers to come to him, and the court held that the circular was a libel on the business carried on by the receiver and manager appointed by the court, and that as such it was a contempt of court, and they made an order committing Mr. Smith to prison for contempt, unless he gave an undertaking not to continue to publish the libel and to solicit the customers of the dissolving partnership. I only cite this case as being a strong example showing how far the court will go if it finds that its officer is being interfered with in his duty. That case does not, however, enable us to uphold the decision of the County Court judge; the application to him was quite different from the application in *Helmore v.*

[IN BANK.]

Re LAMB; *Ex parte* THE BOARD OF TRADE.

[IN BANK.]

Smith, which was a motion for contempt for interference with an officer. I say nothing as to whether such a motion would be successful under the circumstances of the present case. All I do say is, that the present motion, and the order made on it restraining perpetually these gentlemen from selling, must be wrong. It may be that the court could make an order to prevent a sale by these persons while the administration was still pending, if the sale would interfere with the due administration of the estate or their officer, or, at all events, in a case where the sale purported to be of the same property which the trustee had to administer, and of the same interest. That was not the motion before the learned County Court judge, nor was the property sought to be sold the property or interest in property which the trustee had to sell. It seems to me that, without in any way saying that in no case of an attempted sale of property in the official receiver's hands could the court interfere, it is enough to say that in this case the motion was wrong in form, and that the learned judge had no power to make the order for a perpetual injunction. Whatever may be the circumstances in which the court ought to interfere to restrain anyone from interfering with the official receiver in the performance of his duty, it is clear that the case of a person claiming under a bankrupt is a case in which the court ought specially to interfere.

KENNEDY, J.—I agree with the reasons given by Williams, J. for the reversal of the decision of the learned County Court judge, and I also desire to express my feelings of reluctance quite as strongly. There might be cases in which the plain duty of the court would be to protect the official receiver in preventing damage to the estate in his hands which somebody else was seeking to deal with as if it belonged to him, but the arguments of the learned counsel have satisfied me that, however much one may feel that there are some points in this transaction which one would like to have seen dealt with differently, yet they are right in saying in this case that the County Court judge had not a foundation to go upon in making the order he has done in granting the injunction. I am bound therefore to come to the same conclusion as my learned brother. *Appeal allowed.*

Solicitors for the appellants, G. S. and H. Brandon.

Solicitors for the respondents, Hadden-Woodward and Co., for Richard Prall, of Rochester.

Thursday, May 10.

(Before WILLIAMS, J.)

Re LAMB; *Ex parte* THE BOARD OF TRADE. (a)

Bankruptcy—Selection of same trustee by creditors of two estates—Objection by Board of Trade—Notification to court—General rule.

The creditors of two estates, each of which claimed an interest in a certain asset known as the Maplin Sands, selected the same man to be trustee of each estate. The selected trustee was himself a creditor of both estates, but to a larger extent of one than of the other. The Board of Trade objected to the trustee on the ground that he could not act with impartiality, and at the

request of the creditors notified their objection to the court.

Held, that though as a general rule the court would support the Board of Trade when it overrode on reasonable grounds the wishes of the creditors in regard to the selection of a trustee, still, having regard to the very strong expression of opinion by the creditors who considered that the peculiar nature of the assets and the necessity for unity of action required the appointment of this particular man as trustee of both estates, the court would sanction this appointment, notwithstanding the general rule.

THIS was a notification to the court by the Board of Trade, at the request of creditors, of their objection to the appointment of J. Gregson as trustee of the bankrupt's estate.

On the 17th Jan. 1894 the debtor was adjudicated bankrupt, and on the 31st Jan. J. Gregson was appointed trustee, with a committee of inspection. On the 24th Jan. 1894, J. Gregson was appointed trustee of the estate of J. Emerson, also bankrupt. In the statement of affairs of Emerson's estate, J. Gregson appeared as a partly secured creditor for 3086l. 16s. 3d., the security being a charge on the Maplin Sands, in Essex, and he put in a proof for 3132l. as due on certain bill transactions; in the statement of affairs of Lamb's estate, J. Gregson appeared as a creditor for 393l. 18s. 10d. The chief asset claimed by both estates was a share in the Maplin Sands, in Essex. The Maplin Sands had been originally purchased in 1881, and had been the subject of an arbitration between the Crown and other persons. One-third of this property had prior to these bankruptcies become vested in Col. Moffat, while the remaining two-thirds were claimed by the bankrupt George Lamb, but the bankrupt John Emerson claimed one-third of Lamb's share under the terms of a letter dated the 1st Feb. 1889. The Board of Trade in their report said that in the administration of the two estates conflicting claims to this one-third share would arise, in which it will be the duty of the trustee of the estate of G. Lamb to maintain the claim of that estate while it will also be the duty of the trustee of Emerson's estate to maintain the claim of that estate to this one-third, and these conflicting claims may have to be decided by litigation; and that, having regard both to the proof which J. Gregson had lodged in Emerson's bankruptcy and the security he stated he holds on the one-third share, it would be to his advantage to maintain the claim of Emerson to the one-third share against that of G. Lamb. The Board of Trade therefore objected to the appointment of Gregson as trustee of the estate of G. Lamb, on the ground that his connection with or relation to the bankrupt and his estate made it difficult for him to act with impartiality in the interest of the creditors.

On the 28th Feb. 1894 Gregson was invited to withdraw from the trusteeship of Lamb, and on his declining to do so the Board of Trade formally objected on the 19th March to his appointment, but confirmed his appointment on the 22nd March as trustee of Emerson's estate. On the 3rd April a majority in value of the creditors of George Lamb requested the Board of Trade to notify to the court their objection to his appointment.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

FINCH AND OTHERS v. COMBE AND OTHERS.

[PROB.]

By the Bankruptcy Act 1883, sect. 21 (2),

The person so appointed [as trustee] shall give security in manner prescribed to the satisfaction of the Board of Trade, and the board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally: (3) Provided that where the board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity.

Sir John Rigby, Q.C. (A.-G.) and Muir Mackenzie for the Board of Trade.—The Board of Trade object to the appointment of Gregson as trustee of Lamb's estate, as it is impossible for him to act under the circumstances with impartiality. There are serious competing claims to be decided upon, and though no doubt he may not have to decide them all, still some of his functions are judicial, and he must at least hold an impartial hand. The Board of Trade think that there should be a separate trustee for each estate, but if there is to be only one trustee, then Gregson's interest is such that it is undesirable that he should be that one. There is no doubt that a majority in value of the creditors are in favour of his appointment, but that is always used as an argument, and it is just in these cases the board must interfere. The real question is, "Will it be difficult for him to act with impartiality?" and this is certainly the case here, for that as trustee of one estate he is a claimant against the other.

Reed, Q.C. (Carrington with him).—This trustee is the choice of the creditors, and his appointment ought to be upheld. A creditor can always be appointed a trustee, and this man is the one person who knows all about this property and the various claims made to it. The creditors think that it is only by uniting the two interests that the property can be properly realised. The court can always deal with any decision of the trustee, and set him right if wrong, so that no difficulty can arise.

Mackenzie in reply.—It is no answer to say that the court can always set the trustee right if wrong:

Re Martin, 21 Q. B. Div. 29, 34; 58 L. T. Rep. N. S. 889.

WILLIAMS, J.—Speaking generally, I think that having regard to the very difficult discretion that the Board of Trade has to exercise with regard to this matter, I mean in regard to superseding the choice made by the creditors of a trustee, the court ought to support the Board of Trade if the objection is one which can reasonably be supported, and in this case I am not at all prepared to say that the objection cannot be reasonably supported, as no doubt in point of form Gregson has an interest, as being one of the creditors of Emerson's estate, which might conflict with his duty when having to consider whether Emerson's estate had a proper claim to one-third of the assets of Lamb's estate. In the face of that I could not say that the discretion exercised by the Board of Trade was unreasonable, but in spite of that and of the general rule I have just laid down I think I ought not to

support the objection of the Board of Trade. The objection is twofold; in the first place it was said that nobody ought to be trustee of two estates between which conflicting claims may arise. Now if the proposition is put in that way it goes too far; the Bankruptcy Act and practice recognise that that is not so. Every time you have joint adjudications between partners and separate distributions of joint and separate assets, questions will arise between these two estates, and I have never heard it said that the trustee in bankruptcy was not competent to deal with these questions. I do not say that it may never be a good objection that questions may arise, but I think that in this particular case it should be borne in mind that no questions of this kind are likely to arise. There is one question of title as to which the personal interference of the trustee would have hardly any bearing. The further objection is, that not only have the creditors appointed the same trustee to look after two estates with conflicting interests, but that trustee has a greater interest in the success of one estate than of the other. What is said on the other side? First, there is the very strong expression of opinion of the creditors of both estates, and they say that, having regard to the nature of the property, they think it of paramount importance that one gentleman should represent both of them. I do not know whether they meant to say they have a common interest against a Government Office, but they do say that unity is essential, and that is just the thing that I must take into consideration. There is great force in the observation that this is a very peculiar estate; it is a large waste of land, and if it has a value it is a large value; but all depends upon the negotiations between the creditors and the War Office, and it is said that these negotiations cannot be carried on successfully unless with the concurrence of the mortgagees, and Gregson's position will make him a *persona grata* to all. It is of the utmost importance, having regard to the nature of the property, that there should be unity. Notwithstanding the general rule, I do not think I ought to maintain this objection.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade*.

Solicitors for the creditors, *W. Rawlins*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Feb. 1, 26, 27, and March 12.

(Before the PRESIDENT (Sir F. H. Jeune.)

FINCH AND OTHERS v. COMBE AND OTHERS. (a)

Will—*Paper pasted over legacies and names of legatees*—*Wills Act (1 Vict. c. 26), s. 21*—*Writing on will "apparent"*—*Probate of writing as deciphered by experts*.

When pieces of paper or other substance are pasted over a will by a testator, the court is at liberty to ascertain what is written underneath the superimposed paper or other substance by focussing sunlight upon the back of the particular portion of the will in question by means of a framework of brown paper, cardboard, or other opaque substance, and by drawing down the blinds of the room.

(a) Reported by H. DURLY GRAZEBROOK, Esq., Barrister-at-Law.

[PROB.]

FFINCH AND OTHERS v. COMBE AND OTHERS.

[PROB.]

THIS was a suit to amend the probate of a will by including therein certain words which had been pasted over by the testator with slips of paper.

On the close of the evidence, it was agreed that the President should nominate an expert to examine the will. The instructions to the expert (Mr. Scargill-Bird) and the results of his investigation, together with all other material facts, appear in the judgment.

Sir W. Phillimore and Searle, for the plaintiffs, referred to the decision of Sir James Hannen:

In the Goods of Horsford, 31 L. T. Rep. N. S. 553; L. Rep. 3 P. & D. 211.

There is nothing in the report to show that more was done than to pick up the documents and look at them. There is nothing to prove that any evidence was at that time before the court to show whether the writing underneath the pieces of paper could be read or not. The question of estoppel has been raised since the case was last before the court, but is now abandoned. They referred to

In the Goods of Ibbetson, 2 Curt. 337;
In the Goods of Beavan, 2 Curt. 369;
In the Goods of Rippin, 3 Curt. 121;
Townley v. Watson, 3 Curt. 761;
Lushington v. Onslow, 6 Notes of Cas. 183;
In the Goods of James, 1 Sw. & Tr. 238;
In the Goods of Harris, 2 L. T. Rep. N. S. 118; 1 Sw. & Tr. 536;
In the Goods of Maccabe, 29 L. T. Rep. N. S. 250; L. Rep. 3 P. & D. 94.

It is very difficult to reconcile the last-named case with the later decision upon the present will:

In the Goods of Horsford (*ubi sup.*).

Cheese v. Lovejoy (37 L. T. Rep. N. S. 295; 2 P. Div. 251) was also referred to.

The PRESIDENT.—I entirely protest against the notion that the physical eyes of the judge are to be the test.

Deane, for Mrs. Horsford Davies and her husband, who had petitioned the Chancery Division for a declaration that she was entitled to the fee simple.—“Apparent,” according to Sir James Hannen’s view in this very case, means apparent on the face, that is, what can be seen by ordinary inspection—not what can be read by the aid of instruments and other artificial means. It is clear from the judgment *In the Goods of Horsford* (31 L. T. Rep. N. S. 553; L. Rep. 3 P. & D. 211) that the court may not remove the pieces of paper. The court must look at what is on the face of the document, and cannot go behind it. But, if the court is entitled to look at the back of the paper in order to decipher the writing, no artificial means may be employed. If other means might be used, why should not the court erase or remove the pieces of paper? [The PRESIDENT.—You may use magnifying glasses.] If there were an erasure of something written on the face of the document, glasses might be used to discover what the word originally was. If a man takes such pains as this to obliterate what was on the will, then, if you can no longer read what was apparent on the face of the will, the court must not seek to read it by evidence *aliunde*. It is for the court to say what is the meaning of the word “face” as indicated by Sir James Hannen, and what is the meaning of the word “apparent”

in sect. 21 of the Wills Act. If a paper is held up to the light, that is not looking at the “face” but at the body of the document. In some cases of dependent relative revocation, the court has no doubt sought evidence *aliunde*. It is reasonable to suppose that all the passages were obliterated at the same time, because they all relate to the same beneficiaries, and were pasted over with the object of cutting out those beneficiaries. This is not a case of dependent relative revocation:

In the Goods of Horsford (*ubi sup.*).

[The PRESIDENT.—I do not think that by the word “inspection” Sir James Hannen meant to exclude “transpection.”] The judgment in that case is binding on this court. The case of *Cheese v. Lovejoy* (*ubi sup.*) does not apply.

Priestley for the legal personal representative of Sir Robert Marsh Horsford, the executor of the will.—The court must regard the document in the state in which it was left by the testator. The words of the Act contain an ambiguity, and it is then within the province of the court to see what was the intention of the deceased to that extent merely. The testator undoubtedly looked at the paper as it lay in front of him in the ordinary way on a table. The court should look at the document from the testator’s point of view, when he had completed the pasting over. If the testator had held it up to the light, he must have seen that there were words still legible underneath the pieces of paper he had pasted on the parts of the will.

Upjohn and R. Rowlands, on behalf of one of the next of kin, opposed the amendment of the probate.

Phillimore, in reply.—No part of a will can be revoked except by the *animus* accompanied by an act of destruction: Wills Act (1 Vict. c. 26, s. 20). That section and the following section are *in pari materia*, and the court cannot apply a different canon to the two sections. “On the face” is a metaphysical expression which the other side seek to use physically, and to tack on to the word “apparent” in sect. 21 of the Wills Act. Drawing down partially the blinds of a room is only the same thing as having a very small window. *Nunc constat* that if one had a sufficiently small window and looked at this document, one might not be able to read the words. The whole object of the section of the Wills Act is to see that a testamentary document is testamentarily revoked. If this pasting over were allowed to prevail, a testator might make a new will or bequest every day by pasting on and taking off pieces of paper. Even little alterations with a pen must be made testamentarily. Sir James Hannen quoted Sir H. Jenner Fust with approval, and had no intention of departing from what that learned judge had laid down, or of disagreeing with the passages in Williams on Executors which are applicable to this case.

Cur. adv. vult.

The PRESIDENT.—The question in this case, which relates to the will of Captain Horsford, made on the 1st April 1868, is whether four passages in that will, over which pieces of paper were pasted subsequent to its execution, are to be admitted to probate. On the last three of these pieces of paper additions to the will are written, no such writing appearing on the first of them. Captain Horsford also executed a codicil.

[PROB.]

FFINCH AND OTHERS v. COMBE AND OTHERS.

[PROB.]

of the 29th July 1874, in which one passage was covered by a piece of paper pasted on it, an addition to the codicil being written on such piece of paper. At the end of 1874 the case of this will and codicil came before Sir James Hannen, and is reported in 31 L. T. Rep. N. S. 553; L. Rep. 3 P & D. 211. Sir James Hannen decided that probate should be granted of the will with the passages covered up, in blank; but, with regard to the codicil, he held that, applying the doctrine of dependent relative revocation, the piece of paper pasted on might be removed and the words so disclosed admitted to form part of the codicil. The parties who are now applying to me were not parties to the proceedings in 1874, and it is admitted that they are at liberty to ask me, as they do, to admit the concealed words to probate. I think, therefore, that I have no right to consider myself bound by the above decision of the late President so far as it turned on a question of fact. By any decision of his on a question of law given in this case I am, of course, bound, exactly as if it had been given in any other case. The question whether the doctrine of dependent relative revocation ought not to be applied to the concealed passages in the will, as well as to the concealed passage in the codicil, was suggested, though not pressed before me. Sir James Hannen decided that this doctrine could not be invoked with regard to the will, though it could with regard to the codicil; but whether it can or not seems to me, in the main, though not entirely, because construction is involved, to be a question of fact rather than of law, depending on the point whether the testator intended by pasting slips of paper over passages in his will to revoke those passages absolutely, or, in order to substitute others for them. If it were necessary to decide this matter again, I should not differ from Sir James Hannen's decision; but in the view which I take of the case it is not necessary. What I propose to consider is whether the words concealed by the pieces of paper are not "apparent" within the 21st section of the Wills Act. The facts as to the legibility of the concealed words are now clear, and it is the investigation of these facts and the result of such investigation that constitute the difference between the case presented to me and that which was before Sir James Hannen. Expert evidence was called before me on each side to prove by what means, and how much of, the concealed passages can be read. That evidence was not altogether in agreement, though it presented no great differences. At the request of the parties, therefore, I obtained a report from an independent source; and I was fortunate enough to secure the assistance, for which I am greatly indebted, of Mr. Scargill-Bird, the Assistant Keeper of the Public Records. His report, I think, places the facts beyond doubt, and I accept it as my finding. He says: "1. When the document is simply held up in the air against the light, the writing underneath the slips is visible but not legible. 2. When the document is held against a pane of the window a few words can be made out, but not sufficient to convey an intelligible meaning. 3. When the document is held against a pane of the window, and the light is concentrated on the passage to be read by surrounding it with cardboard, or a similarly opaque material, the whole of the concealed portion may be read with the exception of two or three words.

4. When, in addition to the conditions defined (No. 3), the room is darkened by drawing down the blinds, the legibility of the passage in question is not materially affected. I used no magnifying glasses or other artificial aids to sight, as I did not need them." I find also that the words in question are not more legible now than at any previous period. Now, am I at liberty to grant probate of the words which Mr. Scargill-Bird has read? The question, I think, turns upon sect. 21 of the Wills Act, as explained by the authorities. The 20th section of the Wills Act provides that a will or codicil or any part thereof may be revoked by its being burnt, torn, or otherwise destroyed, with the intention of revoking the same. Under this provision it is clear that even a partial destruction, if the intention of the testator to revoke be shown, would be effectual to work a revocation. The 21st section deals with obliterations, interlineations, or other alterations in the will made after the execution thereof. It might have been supposed that the Legislature would have provided that if it was clear that by such alteration the testator intended to bring about a partial revocation of his will, his intention should be carried out by his act of alteration. But that is not the provision which the Legislature has made. It is enacted that such alteration, whatever the intention of the testator in making it, shall be effectual only if the words or effect of the will before alteration be not apparent, and shall be wholly ineffectual if such words or effect be not apparent. If, then, the words before alteration are apparent, they must be taken to form part of the testamentary disposition; but if they are not apparent, no extrinsic evidence can be admitted to show what in fact they were. The difficulty in the present, and in several cases which have been decided, is, What is the meaning of the word "apparent" within this section? No case exactly like the present appears hitherto to have arisen. But there are several cases which, dealing with erasures and alterations made of, or over, words in a testamentary document, show in what cases words so obscured are considered to be "apparent," and by what means they may be made so "apparent." The first of these cases was that of *In the Goods of Sir Charles Ibbetson* (reported in 2 Curt. 337), decided in 1839. In that case Sir Herbert Jenner Fust said, "The alterations and erasures should be carefully examined by persons accustomed to inspect writings, in order to ascertain how the will originally stood. Possibly, with the use of a glass, that may be discovered, but I am quite unable to make it out." In that case, as it turned out, it could not be discovered what the parts obscured originally were. In the case of *In the Goods of James Beavan* (2 Curt. 369), decided by the same learned judge in the following year, a word had been altered, but in such a way that the original word remained, beyond question, apparent. In that case probate was granted with the original word. A more important case is that of *Townley v. Watson* (3 Curt. 761), decided in 1844. In that case the question dealt with by the learned judge was whether the words in question must be themselves "apparent," or whether they may be proved by extrinsic evidence. The learned judge said, referring to the 21st section of the Wills Act: "What, then, is the interpretation to be put on this section, when either words in a will or the

[PROB.]

FFINCH AND OTHERS v. COMBE AND OTHERS.

[PROB.]

effect of words are so effectually effaced or obliterated as not to be apparent? Now, I think the *prima facie* construction must be 'apparent on the face of the instrument itself,' and not that suggested in argument, namely, 'capable of being made apparent' by extrinsic evidence. What is an obliteration? Is it not by some means covering over words originally written so as to render them no longer legible? I cannot understand if the Legislature really intended that extrinsic evidence should be admitted why a few more words were not added which would have freed the section from all doubt—for instance, why it was not thus penned: 'Unless the words should be capable of being made apparent.' There may be instances; and there may be inconveniences—I do not say that there are—in the construction I am putting on the section; but I think it impossible to read the words and not say it was the intention of the Legislature that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament." The case of *Lushington v. Onslow* (6 Notes of Cas. 183), decided also by Sir Herbert Jenner Fust in 1848, shows, as it appears to me, that in the view of that learned judge resort might be had both to the aid of experts and to the assistance of magnifying glasses for the purpose of deciphering obliterated words. In that case the learned judge allowed erased words to form part of the probate, although it must, I think, be clear to every one who looks at the original will in that case, that nothing but the assistance of a very skilful expert, and, I should say, also of a powerful magnifying glass, could possibly have discovered what the original words were. The only other case which I think it necessary to mention before that of the present will is the case of *In the Goods of Maccabe* (29 L. T. Rep. N. S. 250; L. Rep. 3 P. & D. 94), decided by Sir James Hannen. I do not think that in that case Sir James Hannen expressed any different view as to the means allowable to be resorted to for the purpose of deciphering erased words from that previously expressed by Sir Herbert Jenner Fust, or subsequently expressed by himself. It is true that he says: "It is stated by Messrs. Chabot and Netherliff that they can, with the assistance of a magnifying glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say that they see. If this were the case of a simple obliteration I should not be able to act upon the evidence of those experts, for the Statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent." In that case Sir James Hannen admitted to probate the words suggested by the experts, accepting extrinsic evidence, on the doctrine of dependent relative revocation, and giving weight to the opinion of the experts only as being consistent with the other evidence. But I think that Sir James Hannen did not intend to say that the aid of experts and magnifying glasses might not be resorted to in order to determine if words were apparent, but only that in that particular case he was not satisfied with the opinion of the experts that the words could in fact be read

by any means. Having looked at the will in question, it seems to me clear that no tribunal could be satisfied that the words were, in fact, apparent, even though experts professed to be able to read them. In the case of the present will, decided a few months after that last mentioned, Sir J. Hannen quoted with approval a passage in Williams on Executors (6th edit. 139) referring to the means for deciphering allowed by Sir Herbert Jenner Fust, but decided that, as chemical agents had not, in practice, been resorted to in order to remove ink marks, so a piece of paper pasted on a testamentary document could not be removed. The result of the authorities, therefore, appears to be that the words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the Wills Act if experts using glasses, when necessary, can decipher them and satisfy the court that they had done so, but that it is not allowable to resort to any physical interference with the document so as to render clearer what may have been written upon it. For the purposes of this case, I must hold that a pasting over a piece of paper is an obliteration within the meaning of the Act. It is not, perhaps, an exact use of the word according to ordinary parlance, where, as in the case of this codicil, and no doubt in regard to this will, the piece of paper could with perfect ease be removed, leaving the document intact. Parts of a document sealed up under an order for discovery can hardly be said to be obliterated. A picture would be said to be concealed rather than obliterated if a curtain is drawn before it, or a letter if placed in an envelope. If the pasting on of pieces of paper in the case of a will were not an obliteration within the meaning of the Act, then all difficulty would be obviated by the very simple process of their removal. But I cannot hold that they did not constitute such an obliteration. In the original sense of the Latin word from which obliteration is derived (in Facciolati *obliterare* is defined *aliquid literis superducere*), a placing of a piece of paper over writing would be an obliteration; and undoubtedly Sir James Hannen has so held with regard to this will. In the present case I am satisfied that the words in question may be read by an expert by the means only of placing an opaque substance, such as a piece of brown paper, round the passages in question, when the page is held against a window-pane. These means appear to me to fall well within those permitted by the authorities I have mentioned. If it is permissible to use a magnifying glass, I presume of any strength, and with or without the additional employment of a lens, by which the light upon the object might be concentrated—which are all artificial means—*à fortiori*, as it seems to me, is it allowable to place a piece of brown paper round an object on which it is desired to discern writing. That is not to resort to artificial means at all. The rays from the object are not deflected, and there is no concentration of light upon it. All that is done is to exclude superfluous light, and the action of thus using a piece of paper appears to me not to differ in principle from the action of a man who shades his eyes in sunshine to look at a landscape, or of a man who forms his hand into a tube the better to enable him to see a picture. The argument addressed to me against this view turns upon what I think was a mistaken interpretation of the words, "on the face of an instru-

Div.]

ROGERS v. ROGERS (the QUEEN'S PROCTOR showing cause).

[Div.]

ment" employed in the judgment of Sir Herbert Jenner Fust from which I have quoted. It is said that in this case the words in question are not "apparent" on the face of the instrument, but are made apparent only by transmission of light through the back of the document and by the words being exhibited against that light. But I do not think that, in using the words "on the face of the instrument," the judges who have employed them intended to draw any distinction between seeing the front of the document, with no light behind it, and seeing the document with light transmitted through it. They were drawing a distinction between what could be seen to be the contents or effect of the instrument as against what could be inferred to be its language from extrinsic evidence. To some extent the use of the phrase appears to me metaphorical, much as one says a pleading is bad on the face of it. I am by no means sure, however, that even in the strictest sense of the words the writing in question is not apparent "on the face of the instrument" when it is read in the way in which it can be read in this case. The watermark on foolscap, though generally illegible if the paper be laid on a table, becomes clear when the paper is held up to the light. It appears to me that in that case the words or date of the water-mark are not only apparent, but apparent on the face of the paper. When an illuminated clock is seen at night, I think that the hands and figures are apparent, and apparent on the face of the clock. Can it be said that on the moment of the clock being lighted they cease to be apparent on its face, and become apparent on something else, or on nothing? But even if the writing in question can in this case properly be said not to be "apparent on the face of the instrument," I must remark that the Act of Parliament itself speaks of words being "apparent," and that to insist on their being apparent "on the face of the instrument," in the sense sought to be attributed to the phrase, is to put a gloss on the language of the Act, which is not permissible. I think, therefore, that the words in question, as read by Mr. Scargill-Bird, are apparent within the meaning of the 21st section of the Wills Act, and that, therefore, they should be admitted to probate, and that the probate should be amended accordingly.

Solicitors: for the plaintiffs, *Woodcock, Ryland, and Parker*, agents for *Ffinch and Chanter*, Barnstaple; for the defendant *Combe, Surr, Gribble, and Co.*; for the defendants *Rosina Horsford Davies and G. W. Davies, Sharpe, Parker, and Co.*

DIVORCE BUSINESS.

Jan. 20 and 24.

(Before the PRESIDENT (Sir F. H. Jeune.)

ROGERS v. ROGERS (the QUEEN'S PROCTOR showing cause). (a)

Divorce—Adultery and cruelty—Decree nisi—Collusion and condonation after decree—Intervention—Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7—"Material facts not brought before the court"—Pleadings—Adultery subsequent to condonation—Revival—Rescission of decree—Practice—Costs.

(a) Reported by H. DURLY-GRAZEBROOK, Esq., Barrister-at-Law

A wife obtained a decree nisi for the dissolution of her marriage upon the grounds of her husband's adultery and cruelty.

The Queen's Proctor intervened to show cause why the decree should not be made absolute, alleging that the decree had been obtained, contrary to the justice of the case, by the suppression of material facts; that the petition had been prosecuted in collusion with the respondent; and that, since the date of the decree, the petitioner had condoned the adultery and cruelty upon which the decree was based. The petitioner denied the allegations of the Queen's Proctor, and also pleaded that, if she had condoned the acts of adultery and cruelty upon which the decree was founded, such condonation had been cancelled, and her right to complain of the said offences had been revived by the acts of adultery committed by the respondent subsequently to such condonation.

Upon findings of fact that there had been condonation and collusion since the decree nisi, and that the respondent, after the said collusion and condonation had taken place, had committed adultery:

The Court, in rescinding the decree and dismissing the petition, held, that the collusion was a sufficient ground for refusing to make the decree absolute, and was a "material fact" within the Matrimonial Causes Act 1860 (23 & 24 Vict. c. 144), s. 7, which had been suppressed, and which the Queen's Proctor was right in bringing to the knowledge of the court, inasmuch as, the decree nisi being only the inchoate part of the decree, and the suit not being completed until after the decree absolute, the petition, although not presented, had been prosecuted in collusion, and on this ground should be dismissed; but

Held, that where there has been adultery which has been condoned by the petitioner, and where that condonation has been followed by other acts of adultery on the part of the respondent, such condonation is not a "material fact" within the terms of sect. 7, and is not a ground for rescinding a decree nisi.

Whether the Legislature has made collusion an absolute bar to relief in suits for dissolution of marriage, Quære.

THIS was the hearing of the Queen's Proctor's intervention in a suit where the wife had obtained a decree nisi on the ground of the cruelty and adultery of her husband.

Mary Melsom Rogers, the petitioner, was married to the respondent, Frederick Rankin Rogers, on the 10th Aug. 1887, and they cohabited at various places, one child being born issue of the marriage.

On the 1st June 1892 the wife filed her petition, alleging that her husband had frequently during 1891, and upon the 7th April 1892, committed adultery with Isabella Crompton; that he had also committed adultery with women unknown, and that on the 22nd May 1892, and for two years prior to the petition, he had treated his wife with cruelty, and she prayed the court to dissolve the marriage.

The respondent did not defend, and on the 14th Nov. 1892 the Court pronounced a decree nisi.

On the 6th June 1893 the Queen's Proctor filed his plea, alleging: 1. That the decree was obtained contrary to the justice of the case by

Div.]

ROGERS v. ROGERS (the QUEEN'S PROCTOR showing cause).

[Div.]

withholding from the knowledge of the court material facts, which were thereafter more particularly set forth. 2. That the petition had been prosecuted in collusion with the respondent. 3. That since the 14th Nov. 1892 the petitioner had condoned the adultery (if any) and the acts of cruelty (if any) committed by the respondent. And the Queen's Proctor prayed the court to rescind the decree *nisi*, to dismiss the petition, and to condemn the petitioner in the costs of the Queen's Proctor.

The petitioner, in her answer, filed on the 21st July 1893, denied each and all of the allegations contained in the Queen's Proctor's plea.

On the 12th July 1894 the petitioner, by leave, amended her answer by adding thereto the following paragraph:

That if the petitioner condoned the adultery and the acts of cruelty committed by the respondent, such condonation has been cancelled, and the petitioner's right to complain of such adultery and acts of cruelty has been revived by the respondent's adultery subsequent to such alleged condonation.

The Queen's Proctor's reply to the amended answer was as follows: The subsequent adultery of the respondent alleged in the amended answer (the commission of which by the respondent the Queen's Proctor does not admit) is no answer in law to the plea of the Queen's Proctor.

The petitioner, while admitting visits by the respondent to her house, on and from the 30th Oct. 1892 to 5th Jan. 1893, denied in the witness box that any sexual intercourse had taken place between them upon any of those occasions.

Pickford, Q.C. (T. S. Little with him) for the petitioner.—It is practically admitted that if the petitioner were to file a fresh petition on the facts now before the court, there would be absolutely no defence to it. It would be a remarkable result, were the court now to deprive the petitioner of the remedy to which she would be entitled tomorrow upon the same set of facts. [The PRESIDENT.—If there has been an agreement to conceal material facts, would that not be collusion? And if there has been collusion, must not the decree absolute be refused?] Unless marital intercourse has taken place between the petitioner and respondent, the facts proved do not amount to condonation. Condonation has been defined as a restitution of the offending party to his or her former position in the house and the household. If these persons were not in the position of husband and wife, and if this were a question of adultery, the facts proved would be extremely difficult to meet or explain. It is submitted, however, that the inference to be drawn is not the same. Facts like those proved here could not be explained in relation to a charge of adultery, except upon the basis of sexual intercourse having taken place. In the case of a husband and wife, there is a greater probability of their remaining together in a bedroom, or in a room where a bed has been made up, without any act of connection taking place between them. If the facts proved do not amount to collusion, the court should make the decree absolute:

Moore v. Moore (the Queen's Proctor showing cause)
67 L. T. Rep. N. S. 530; (1892) P. 382.

There is no case in which a decree *nisi* has been rescinded on the ground of collusion between the parties after the decree was pronounced. [The PRESIDENT.—What distinction is there between

collusion and adultery after decree *nisi*?] The Matrimonial Causes Act 1860 (23 & 24 Vict. c. 144), s. 7, deals, in the first portion, with collusion in obtaining the decree *nisi*; the second part of the section goes on to deal with interventions after decree *nisi*. It is a question whether the second part is intended to do more than enable the Queen's Proctor to intervene instead of one of the public; and, if so, the collusion referred to in the first part of the section is confined to collusion in obtaining the decree. [The PRESIDENT.—I am not sure of that. Why should not one of the "material facts" be the collusion, as in the case of *Butler v. Butler*, 62 L. T. Rep. N. S. 344; 15 P. Div. 66?] It is submitted that condonation, for a time concealed from the knowledge of the court and followed by fresh adultery, would not be a sufficient ground for leading the court to refuse a decree. If it is shown that the court has been cheated and deceived in granting the decree *nisi*, that decree may be rescinded. A distinction seems to be drawn between collusion and the suppression of material facts. [The PRESIDENT.—Is not that the fallacy that underlay the case of *Butler v. Butler* (*ubi sup.*)? If the "material facts" are directed to adultery or connivance, it may well be, that, unless they establish the charge in either of those cases, there may be no ground for refusing a decree. But, if the "material facts" are directed to collusion, the case is different.] In *Butler v. Butler* (*ubi sup.*) the collusion was in obtaining the decree *nisi*. [The PRESIDENT.—The authorities go to show that the decree *nisi* and decree absolute are to be treated as one; the former being the inchoate portion.] There may, in fact, be no real difference, but the section draws a distinction. The facts are only "material facts," if, in the event of their having been laid before the court at the hearing of the petition, the court would have refused the decree *nisi*. If all the facts now in evidence had been laid before the court, it would still have granted the decree *nisi* in this case. This concealment was only for a time. It has ceased. Is the court going to lay down, that a petitioner under these circumstances is to be debarred for ever from obtaining relief? [The PRESIDENT.—No. The collusion ends with the particular suit in regard to which the parties colluded. In *Butler v. Butler* (69 L. T. Rep. N. S. 54; (1893) P. 185) I held that the collusion was gone, and I granted a decree in the second suit, subject only to the question whether the verdict of adultery and cruelty against the husband did not for ever debar him from obtaining any relief. The decree would have been made absolute but for those findings in the former suit against the husband.] The words of the section are "for the purpose of obtaining a divorce, contrary to the justice of the case." The court has, therefore, to consider whether it is contrary to the justice of this case that a divorce should be granted. In order to find collusion, the court must be satisfied that there was an intention to deceive. There was, here, no such intention. It is admitted that the petitioner would be entitled to relief upon the existing facts if she were to present a fresh petition, and it should require a strong case to induce the court to deprive her of relief upon the present petition.

Inderwick, Q.C. and Guy Stephenson for the Queen's Proctor.—If the court comes to the con-

Div.]

ROGERS v. ROGERS (the QUEEN'S PROCTOR showing cause).

[Div.]

clusion that there has been condonation, it will also find that there has been collusion. [The PRESIDENT.—What would be the result in a case where there was adultery, condonation, subsequent adultery, then an application for a decree *nisi* and the withholding from the knowledge of the court the fact that the first adultery had been condoned?] No such case has come to our knowledge, but in *Alexandre v. Alexandre* (23 L. T. Rep. N. S. 268; L. Rep. 2 P. & D. 164), there was adultery, condonation, and subsequent adultery. In that case the husband, in his petition, alleged two acts of adultery against his wife, and there was no suggestion of collusion. The wife did not appear. The Queen's Proctor intervened, and the judge came to the conclusion that, although he was bound to grant a decree upon proof of the second act of adultery, the Queen's Proctor was quite right in bringing the matter before the court. [The PRESIDENT.—It is a question whether *Alexandre v. Alexandre* (*ubi sup.*) is good law now. I am inclined to think that it is; but the Lords Justices who decided *Butler v. Butler* (62 L. T. Rep. N. S., at pp. 346, 347; 15 P. Div., at pp. 72, 74) seem to have thrown doubt upon it.] *Alexandre v. Alexandre* (*ubi sup.*) does not go as far as the petitioner must ask the court to go in the present case. The collusion dealt with in sect. 7 is collusion either before the decree *nisi* or afterwards. The Queen's Proctor has no desire to bring before the court, upon intervention, matters which are not material; and if the court rules that, in cases of this kind, where there has been adultery, then condonation, and subsequent adultery, its hands are tied and that it is bound to make the decree absolute, the Queen's Proctor will know what course to pursue in the future. The Queen's Proctor and the Attorney-General, upon whose fiat he acts in these interventions, desire the opinion of the court, as to whether adultery which has been condoned can be revived in the manner now suggested, and, whether it is competent for the court to take notice of the subsequent adultery for the purpose of granting a decree; or whether, on the other hand, there must be a fresh suit. [The PRESIDENT.—Is not that covered by *Moore v. Moore* (67 L. T. Rep. N. S. 530; (1892) P. 382?) The Queen's Proctor did not oppose the decree in that case, being satisfied that all the parties had acted with perfect *bona fides*. There had, moreover, been no attempt at secrecy. [The PRESIDENT.—It is not suggested in the present case that the subsequent adultery was connived at in any way.] A distinction is drawn in *Collins v. Collins* (9 App. Cas. 205), and also in the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) between condonation of adultery and condonation of other matrimonial offences. The point was commented upon very strongly in the House of Lords. That case was discussed upon the law of England and the law of Scotland as applicable to revival of adultery which had been condoned. Condonation is a bar, because it is condonation of the adultery upon which the decree *nisi* was granted. The adultery alleged in the petition is entirely got rid of by the condonation, and the subsequent adultery of the husband would only give the wife a right to petition the court, either by means of a fresh suit, or, if the court thinks fit, by supplemental petition. This is not a question of cruelty having been condoned and revived. By the Act, there

must be some act of adultery which has not been condoned when the decree is made. If the court had decided, as was argued in *Collins v. Collins* (*ubi sup.*), that they could not go behind the decree *nisi*, all these questions would not be material; but the court took the view that the suit was subsisting until after decree absolute, and that anything which occurred between the parties might be inquired into before the decree absolute. The difficulty about the ecclesiastical cases is that, in those courts, a woman was only entitled to a divorce *à mensi et thoro*, but she was entitled to that upon the ground of cruelty, and it is difficult to understand why those courts should have gone into charges of both cruelty and adultery, when the wife, who was petitioning, was entitled to her decree upon proof of one offence only. Possibly she was entitled to more alimony if she proved two offences. But in all those cases there has always been some uncondoned offence upon which the court could, and did, act. In view of the opinions expressed in *Collins v. Collins* (*ubi sup.*), the Queen's Proctor has thought right to bring the whole matter before the court, with the object of obtaining an opinion as to the practice to be pursued in future. It appeared to the Attorney-General and the Queen's Proctor that these were "material facts" to bring to the knowledge of the court. There has been condonation. That condonation, in itself, involved an agreement between the petitioner and respondent, which in their view would be a collusive agreement, and would amount to collusion. But, assuming that the court should be in favour of the petitioner upon the point of collusion, and against her on the ground of condonation, this petition must, it is submitted, be dismissed, leaving the petitioner to the relief she may be entitled to on filing a fresh or a supplemental petition.

Pickford, Q.C. in reply.—*Collins v. Collins* was a Scotch case, and does not therefore affect the decisions in the English courts. Unless *Collins v. Collins* (*ubi sup.*) destroys the effect of *Dent v. Dent* (13 L. T. Rep. N. S. 252; 4 Sw. & Tr. 105), and *Durant v. Durant* (1 Hagg. Eccl. 733), these are distinct authorities for saying that the original adultery has, if condoned, been revived by the subsequent adultery. If the court looks at anything subsequent to the decree *nisi*, it must look at everything which has occurred since then. The court cannot take the decree *nisi* as the terminus for one purpose, and then say that the decree absolute is the terminus for another purpose. The question which the court should consider is whether, upon all the facts, it would have granted the decree *nisi*.

The PRESIDENT.—In the first place, I have to find what the facts in this case really show, because on that will depend which branch of the law has most to be considered. A good many facts are beyond dispute. It is clear that the husband was guilty of cruelty and adultery, and that subsequently certain incidents occurred, as to which I shall have to consider whether, when viewed by the surrounding circumstances, they amount to condonation of those offences. Whether they do or do not amount to condonation, it is clear that, after those incidents, there was further adultery by the respondent. The special point of difference arises as to some of the evidence con-

Div.]

ROGERS v. ROGERS (the QUEEN'S PROCTOR showing cause).

[Div.]

cerning the relations between the husband and wife after the decree *nisi*, and, what is more in question, the inferences which are to be drawn from facts which are almost outside the range of dispute. I attach very little importance to the one meeting between the husband and wife before the decree *nisi*. I think that its only materiality is to show that the relations between the parties were not of a hostile character, and that carries us some way in estimating what the relations between them were, after the decree was pronounced: [His Lordship considered the evidence.] I cannot, therefore, avoid the conclusion that, on one or more of the occasions referred to, marital intercourse did, in fact, take place between the petitioner and respondent. That is condonation. Then arises the question: Was there collusion, that is to say, was there an agreement between the petitioner and respondent to conceal the facts which pointed to that condonation? [His Lordship concluded that there was.] That being so, the authorities seem to me to point clearly to the decision which I must arrive at. The whole matter is based upon the Divorce Act 1857 (20 & 21 Vict. c. 85). Sect. 30 of that Act provides that a petition is to be dismissed if the petitioner has connived at or condoned the adultery complained of, or, if the petition is presented or prosecuted in collusion with either of the respondents. Sect. 31 deals in a similar way with other bars, except that it gives the court a discretion in regard to adultery, unreasonable delay, cruelty, desertion, and wilful neglect or misconduct conducing to the adultery of the respondent. At the time the Act of 1857 was passed the distinction between decree *nisi* and decree absolute did not exist. The decree dissolving a marriage was afterwards, by the Matrimonial Causes Act 1860 (23 & 24 Vict. c. 144), divided into two parts: the decree *nisi* or first part being only the inchoate decree, which, at the end of a prescribed period, ripened into the decree absolute. At the same time that that provision was made, the power of intervention was, by sect. 7, given to any member of the public, and was also given, under special circumstances, to the Queen's Proctor. The power given to the Queen's Proctor was divided into two parts. He might, on information being furnished to him, take such steps as the Attorney-General might think necessary or expedient. This might include his making appeals before the court, in the same way as one of the public might do; or, if he suspected collusion between the parties for the purpose of obtaining a divorce contrary to the justice of the case, he might, under direction of the Attorney-General, and by leave of the court, intervene and plead. It is to be observed that the section does not create any new cause for refusing to make the decree *nisi* absolute. It only provides machinery and methods by which the court may be placed in a position to act under the provisions of sect. 29 or sect. 30, as the case may be, in refusing to make the decree absolute. But it is, I think, equally clear from the decisions, that events happening after the decree *nisi* might be made the subject of intervention, and might be brought before the court. The first case I will refer to in this connection is *Hulse v. Hulse and Tavernor* (24 L. T. Rep. N. S. 847; L. Rep. 2 P. & D. 259), where it was held that the court was bound, before making the decree abso-

lute, to take notice of any material facts not previously brought before it, even if they had occurred after the decree *nisi* was pronounced. I do not pause to inquire whether events happening since the decree *nisi* are "material facts not brought before the court" within the meaning of the earlier part of sect. 7 of the Act of 1860. In the case to which I have referred, it is clear that the learned judge thought that they were; and he said that, in his view, adultery committed after the decree *nisi* was not the less a fact not brought before the court because it had not then occurred. I am, however, aware that, in the subsequent case of *Howarth v. Howarth* (9 P. Div. 218), doubt has been expressed as to whether that is a correct view. For the purposes of the present case, however, it does not appear to me to matter very much inasmuch as it is collusion with which I have now to deal. It is clear that collusion taking place after the decree *nisi* is a "material fact" which may be brought before the court, and is just as much a ground for refusing to make a decree absolute as it would have been for refusing a decree *nisi* if it had occurred before the decree *nisi* was pronounced. This, I think, is all that it is necessary for me to say with regard to collusion. I quite agree that where it is not collusion, but adultery or condonation, that is charged, we must, of course, be careful to see that the material facts brought forward are such as establish a ground for refusing the decree upon the intervention. If, when the matter is looked into, the facts brought forward, although material, do not prove that which they are put forward to establish, there is, then, no ground for refusing the decree; because a mere keeping back of material facts is not, in itself, a ground for such refusal, unless they bring the case within the words of sect. 29. That is what, I think, was decided in *Alexandre v. Alexandre* (23 L. T. Rep. N. S. 268; L. Rep. 2 P. & D. 164). In that case, there was adultery which was condoned and adultery which was not condoned, and the court decided—and, I think, properly decided—that you must see what facts were proved at the hearing of the petition, and if you find that there remained material for founding a decree upon, even though part of the case may have been shattered by the material facts subsequently brought forward, there was still sufficient ground for allowing the decree to go. The court has always to consider whether the material facts brought forward establish a case for refusing the decree. There is no difference, in this respect, between collusion, condonation, adultery, or other offences. In the present case, it is collusion that is set up by the Queen's Proctor, and, if the facts establish that charge, it is immaterial that they do not establish something more—whether, in fact, they also prove condonation. It is immaterial, if the facts establish condonation, plus subsequent adultery. The point then, is whether the facts now brought forward establish collusion. The authority upon this point is to be found in the case of *Butler v. Butler* (62 L. T. Rep. N. S. 344; 15 P. Div. 66). The petitioner and respondent in that case, colluded together to keep back material facts from the court, the wife agreeing not to prove adultery against her husband with more than one person, and the husband agreeing to offer no evidence against his wife. That agreement being brought to the knowledge of the

Div.]

THE GEORGE.

[ADM.]

court, the jury eventually found that there had been a concealment of material facts, and that the parties had been colluding together with the object of concealing those facts. The jury, however, failed to find a verdict that the wife had committed adultery, so that the only point established was collusion to withhold material facts. I think that I may say of this case, as was said by the Court of Appeal in that one, that there has been a concealment of material facts, which facts would have shown collusion and condonation. And, inasmuch as collusion in that direction has been established, it is immaterial whether before the decree *nisi* or after it. Upon that point, therefore, the Queen's Proctor is entitled to succeed. There is a very material difference between one party not disclosing material facts, and an agreement between two parties not to disclose material facts. Agreement is the very essence of collusion. It is not very easy to see whether the Legislature has made collusion an absolute ground for refusing a divorce; but it has been so held. Inasmuch as a public duty is cast upon the court not to grant a divorce except under proper circumstances, it ought not to be deprived of its main assistance, namely, the vigilance which each party, if hostile, would exercise against the other. That is sufficient to dispose of this intervention; but I would say a few words on the other branch of the case. It is argued that, even though there were no collusion, yet if there was condonation of the adultery upon which the decree *nisi* was pronounced, this alone ought to be a ground for refusing to make the decree absolute, even though there was subsequent adultery. The case of *Moore v. Moore* (the Queen's Proctor showing cause) (67 L. T. Rep. N. S. 530; (1892) P. 382) is in point. In that case there was condonation, followed by cruelty, and, although after the decree *nisi*, the learned judge, Barnes, J., held that there was no reason why the decree should not be made absolute. He based his view upon *Dent v. Dent* (13 L. T. Rep. N. S. 252; 4 Sw. & Tr. 105), although the decision in *Collins v. Collins* (9 App. Cas. 205) was brought before him. In the case of *Moore v. Moore* (the Queen's Proctor showing cause) (*ubi sup.*) the perfect *bona fides* of the petitioner was admitted; but that seems to be immaterial. Whether one looks at the matter as revival of previous adultery, or, as getting rid of condonation, in either case the result is the same. There is strong authority for saying that subsequent misconduct revives previous misconduct. The case of *Palmer v. Palmer* (2 L. T. Rep. N. S. 363; 2 Sw. & Tr. 61) is, no doubt, not a conclusive authority, but I think that the decision in *Dent v. Dent* (*ubi sup.*) is so, inasmuch as the cruelty came last; and unless the cruelty had the effect of reviving the previous adultery, it is impossible to see how the decree absolute could have been pronounced. I do not think that *Collins v. Collins* (*ubi sup.*) can be considered as overruling *Dent v. Dent* (*ubi sup.*). Looking at the matter the other way, viz., as subsequent adultery getting rid of condonation, then I think that *Alexandre v. Alexandre* (*ubi sup.*) is an authority for saying that the court must look at all the circumstances of the case. In either aspect, the subsequent adultery has the effect of allowing the decree to be made absolute. The only way in which the argument could be used would be by saying that

the condonation gets rid of the prior adultery, and, therefore, takes the case out of sect. 30, in which case the subsequent adultery should be considered as immaterial. Upon the authorities of *Dent v. Dent* (*ubi sup.*) and *Moore v. Moore* (*ubi sup.*), I hold that the condonation proved in this case is not material, because it has been got rid of by the subsequent adultery of the respondent; but I think that the collusion between the petitioner and respondent is sufficient ground for rescinding the decree. I make an order, rescinding the decree *nisi*, and I dismiss the petition.

Inderwick, Q.C. said he had been instructed to ask for costs, but he was content to leave the matter in the hands of the court.

The PRESIDENT.—The Queen's Proctor brings cases like this before the court upon public grounds, and I think that, unless some moral fault on the part of a petitioner is established, the order rescinding the decree may well be made, without costs. In this case, therefore, I make no order as to the costs of the intervention.

Solicitor for the petitioner, *Walter H. Cowl*.

The Queen's Proctor.

NOTE.—A fresh petition was forthwith filed and came on for hearing on March 12 as an undefended case, and a decree *nisi* was pronounced by the President, who held that, as the Queen's Proctor had already had all the facts before him in the former suit, and as it was improbable that he would intervene again; and, seeing also that the time which had elapsed since the decree *nisi* in the former suit was pronounced was of such long duration as to make it highly improbable that anyone else would intervene, these were grounds for allowing the petitioner to apply for a decree absolute at the expiration of three months, as was done in the case of *Fitzgerald v. Fitzgerald* (31 L. T. Rep. N. S. 270; L. Rep. 3 Prob. & Div. 136).

ADMIRALTY BUSINESS.

April 21, 25, and 26.

(Before the PRESIDENT (Sir Francis Jeune), assisted by TRINITY MASTERS.)

THE GEORGE. (a)

Damage—Negligence—Natural and probable consequence—Remoteness of damage.

A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manœuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway and the full force of a strong gale, the towing hawser parted, and she was driven ashore, doing damage to the plaintiffs' property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the court that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, and

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

ADM.]

THE GERTOR.

[ADM.]

considering the wind and weather she would meet whilst being towed, it was

Held, that the damage following upon such breaking of the tow rope was a natural consequence of the defendants' original negligence, and that the owners of the ship were liable for such damage.

THIS was an action by the Mayor, Aldermen, and Burgesses of Dover, against the owners of the steamship *Gertor*, for damages occasioned by the *Gertor* coming into contact with and damaging two groynes and an outfall sewer, the property of the plaintiffs.

It appeared that the *Gertor* whilst on a voyage from Hamburg to Barry, in water ballast, came to an anchor off Dover, but, being in want of bunker coals, came in and anchored between the two buoys inside the Admiralty Pier. There was a strong gale with heavy squalls, and the *Gertor*, which was light, at once began to sheer and to drag, and, although she steamed up to her anchors, she kept dragging during the squalls for a period of between two and three hours, during which time she was making efforts to get her anchors, the chains of which had fouled, in order to go further out to a safer anchorage. Shortly after getting her port anchor she sheered and dragged, and then drove foul of the south pier of the harbour entrance. The tug *Lady Vita* then came out of the harbour, and offered assistance which it was alleged she refused to take, and she then drifted across to the north pier, and lay there, heading to the northward, between the end of the north pier and the Mole rocks, having broken her propeller against the south pier. The tug's assistance was then taken, and she towed her away to the northward, the only direction then possible. Soon afterwards when tow and tug got into the full force of wind and sea away from the lee of the Admiralty Pier, the hawser parted, and the *Gertor* was driven on to the beach below the castle, where she did the damage complained of.

The plaintiffs alleged unskilful and negligent navigation and management of the *Gertor*, and charged the defendants with want of reasonable care and skill in not preventing her from coming in contact with, and doing damage to, the plaintiffs' property. They alleged, in particular, that the *Gertor* was improperly anchored, that those in charge of the *Gertor* attempted in an improper manner to get up her anchors, and that they neglected to take the assistance of a tug, or take other precautions whilst the anchors of the *Gertor* were being weighed, so as to perform the manoeuvre safely, and to keep her with her head seawards and clear of the harbour piers. The plaintiffs further charged the *Gertor* with failing to take any measures to procure the assistance of a tug both before and after colliding with the south pier, and with neglecting and refusing to take such assistance when offered. No negligence was alleged against the defendants after the tug had made fast to the *Gertor*.

The defendants by their defence denied that the *Gertor* was unskilfully and negligently navigated and managed, and said that all reasonable care and skill were used by those on board the *Gertor*, and that the collision with the piers and the subsequent stranding were attributable to the act of God, and could not have been avoided by any human judgment or foresight.

At the conclusion of the plaintiffs' evidence

Dr. Baikes, Q.C. (Sir W. Phillimore and Holmes with him) for the defendants.—There is no evidence of any negligence causing the damage complained of. Assuming that there was negligence anterior to the breaking of the hawser, which is denied, such negligence was not the cause of the damage. The cause of such damage was the breaking of the hawser, and this was not due to any negligence on the part of the defendants. The injury must be the inevitable result of the negligence. The damage in the present case is too remote:

The Lords Bailiff; Jurats of Romney Marsh v. The Corporation of the Trinity House, L. Rep. 7 Ex. 247.

Aspinall, Q.C. (Butler Aspinall with him) for the plaintiffs.—To say that the damage must be the inevitable result of the negligence complained of is to put it too high. It is sufficient if it is the natural and probable consequence, or if it is not unlikely to happen as a consequence. For instance, where cattle, frightened by the negligence of a railway company's servants, break away from their drover and ultimately wander into a railway, where they get injured, into which they would not have got but for the improper act of a third person, the company is responsible for the damage to the cattle:

Sneesby v. The Lancashire and Yorkshire Railway Company, L. Rep. 9 Q. B. 263;

The City of Lincoln, 62 L. T. Rep. N. S. 49; 6 Asp. M. L. C. 475; 15 P. Div. 15;

Hill v. New River Company, 9 B. & S. 303.

In the present case, inasmuch as the tug was obliged to tow out to the northward and so get into the seaway, the wind and sea which she necessarily encountered were under the circumstances more than likely to cause the breaking of the hawser, and, if the Trinity Masters so advise, it follows that the breaking of the hawser and the consequent going ashore of the ship were probable consequences of the defendants' negligence.

The PRESIDENT, after consulting the Trinity Masters, stated that they were of opinion that the probabilities were very great that the hawser would break under the circumstances then existing, and that, consequently, the plaintiffs had made out a *prima facie* case.

The defendants then called their witnesses, and after argument on the facts, judgment was given as follows:

The PRESIDENT.—A point for my consideration in this case is whether or no after the tug got hold of the *Gertor*, there being no negligence on the *Gertor's* part after that time, it could be said that her previous negligence, if any, was the cause of damage which resulted, so as to render her owners liable? The law is clear; the damage must be the natural consequence of the negligence to which it is ascribed, and, if there be any intervening cause which prevents the result being the natural result of the first negligence, of course the first negligence ceases to be the proximate cause. In every case it must be a question of fact, and in the cases which have been mentioned in the books, what the court in every instance considered was whether the first cause so far continued that it was the proximate and the natural cause of the eventual damage. That I thought was a

ADM.] *Re* PRINTING TELEGRAPH, &C., CO. OF THE AGENCE HAVAS; *Ex parte* CAMMELL. [APP.]

doubtful point in this case, but it was one to be decided with regard to the particular facts; and, looking at where the vessel was, looking at the way she was towed off, looking at the very dangerous place from which it is proved she had to be towed, and having regard to the particular circumstances of the weather at the time, and the nature of the vessel being towed with so much freeboard as she had, the Trinity Masters think that there were great probabilities of an accident of that kind happening which did happen, viz., the hawser breaking, and the vessel going ashore. I think when it is found that there is a great probability of such a matter happening, that fact brings the case within the rule that the result, if it is the natural result, is caused by such negligence which, in this case, must be considered the proximate cause. When that is decided, the sole remaining question is, whether there was negligence before that time on the part of the *Gertor*. That has come down to two points: First, whether the vessel ought to have taken assistance to hold her head up during the time she was getting her anchor to shift, very properly, into a better position than she then occupied. It is clear that she neither sought nor desired assistance. The captain has said that even had he known there was a tug available he would not have taken that assistance. The propriety of his conduct is a question of nautical experience and skill, and the Trinity Masters think he ought to have obtained the assistance of the tug, and the last witness called on behalf the *Gertor*, who is a gentleman of vast experience, places it beyond all doubt when he says she was in a bad berth, and required assistance to get her anchors up properly. Under these circumstances I can have no doubt that there was negligence at that time. Again, I think that there was negligence later, when she got alongside the pier, in not utilising the services of the tug which were certainly then at her disposal. The mate has said that if she had had assistance then her head might not have got across the harbour as it did, and the Trinity Masters think it would not, and that if she had then got a tug she would have been taken out to the open sea in the direction in which she eventually tried to proceed. If it is the case that the tug *Lady Vita* offered her assistance, and it was refused, that makes it all the stronger. I cannot accept the view, especially after the evidence given by the boatman, that the captain did not perfectly well know what the tug was there for. I dare say he did, up to the last moment, abstain from taking the services of a tug for a reason which it is not hard to conjecture, but he abstained too long, and the Trinity Masters think he was negligent in so doing. Therefore, there was negligence on both those matters, and I think negligence which was the proximate cause of the damage. There will, therefore, be judgment for the plaintiffs, and the usual order for a reference to ascertain the damage, if any.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchards, and Barham*, agents for *E. W. Klocker*. Dover.

Solicitors for the defendants, *Downing, Holman, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 16, 17, and 26.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re THE PRINTING TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS; *Ex parte* CAMMELL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Director—Qualification shares—Implication of agreement to acquire—Entry of name on register—What constitutes register—Estoppel—Acting—Resignation—Rectification of register—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 25, 35.

The articles of association of a company provided that the first directors should be appointed by a majority of the subscribers of the memorandum of association; that the qualification of a director should be the holding of 200l. of share capital, in respect of which all calls for the time being due should have been paid, and that this qualification should apply as well to the first directors as to all future directors; but that such first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification. The articles further provided that the office of a director was to be vacated if he ceased to hold the requisite number of shares; or, in the case of a first director, if he failed to obtain them within the prescribed time; or if he should send in a written resignation to the board, and the same should not be withdrawn for seven days or be previously accepted.

C. signed the memorandum of association for one share, and was appointed a first director. He attended a few meetings of the directors, but was not present at a meeting on the 29th March 1893, when resolutions were passed for an allotment of shares, and forty 5l. shares, for which he had not applied, were allotted to him. His name had been entered for the forty shares on certain sheets of paper called allotment sheets, which were laid before the board and signed by the chairman and secretary when the shares were allotted.

The month prescribed by the articles ended on the 29th April 1893. After that date C. did not act as a director, and until the middle of May 1893 did not become aware that his name was on the register. On the 1st May 1893 he received a form of application for shares, and a request for payment of the amount due on application. On the 7th May 1893 he wrote resigning his office of director, and thereafter did not act in that capacity. On the 23rd May 1893 the entries in the allotment sheets were copied into the formal register of members.

C. applied, under sect. 35 of the Companies Act 1862, to have his name removed from the register in respect of all the shares except the one for which he signed the memorandum of association. The company was not in liquidation.

Held, that the allotment sheets were never intended to be the formal register of the company such as

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

[APP.] *Re* PRINTING TELEGRAPH, &C., CO. OF THE AGENCE HAVAS; *Ex parte* CAMMELL. [APP.]

was required by sect. 25 of the Companies Act 1862, but merely contained materials to be used in making up that register; that they did not constitute the register; and that C.'s name was therefore not really on the register until after he had resigned.

Held also, that the company had no implied authority under its articles to place C.'s name on the register after the month had elapsed from the date of the first allotment of shares; that his name was entered without sufficient cause; and that, therefore, he was entitled to have it removed.

Re Metropolitan Public Carriage, &c., Company; Brown's case (29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. App. 102) considered.

Re Anglo-Austrian Printing and Publishing Union; *Ex parte* Isaacs (66 L. T. Rep. N. S. 250, 593; (1892) 2 Ch. 158) distinguished.

Decision of Stirling, J. (ante, p. 74) affirmed.

APPEAL by the above-named company from a decision of Stirling, J. (ante, p. 74).

On the 17th April, after the appeal had been opened, a question was raised whether the respondent Cammell was in fact registered as a shareholder on the 29th March 1893, or at some later date, and the case was adjourned for further evidence. It appeared from such further evidence that certain sheets of paper called allotment sheets were prepared in the office of the company for use at the directors' meeting of the 29th March. They contained the names of a number of proposed allottees, with the particulars concerning each required by sect. 25 of the Companies Act 1862 to be contained in the register of members, except that the occupations of the allottees were not stated. In these sheets one column was set apart for reference to the formal register of the company. The sheets were fastened together by a paper fastener, and they bore the title "Allotment Book."

On the 29th March, when the resolutions for allotment were passed, these sheets were signed by the chairman and secretary of the company. The company did not have in its possession any formal register of members until the 23rd May 1893, on which date the entries in the allotment sheets were copied into the formal register. Upon this evidence it was contended on behalf of the company that in the interval between the 29th March and the 23rd May these allotment sheets constituted the register of the company within sect. 25; that Cammell was registered as a shareholder from the 29th March; and that, after the expiration of one month from that date, he was not entitled, having regard to art. 64 of the company's articles of association, to have his name removed.

Buckley, Q.C. and E. S. Ford for the appellants.—Where a person is acting as director, whose duty it is not so to act unless he has acquired his qualification shares, then, if his name is on the register in respect of those shares, whether he knows it or not, he is deemed to have applied for them, and is estopped from saying that he ought not to be on the register. In this case the name of the respondent being actually on the register, it is unnecessary for the appellants to show that he applied for shares or knew of the allotment thereof. Having actually got the shares, he is estopped from saying that the registration was not legitimate, because he has acted as director,

and he cannot be heard to say that he did that without qualification:

Re The Portuguese Consolidated Copper Mines; *Ex parte* Lord Inchiquin, 64 L. T. Rep. N. S. 841; (1891) 3 Ch. 28.

There was a perfect right to put him on the register on the 29th March. It is true that until the 29th April he was entitled to acquire his shares elsewhere; but it was his duty, if he acted, to acquire shares from some quarter within the month. [KAY, L.J.—This point was considered in *Re* The Metropolitan Carriage and Repository Company; Brown's case, 29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. App. 102, 106, 109.] At the expiration of the month he was under a duty as one who had acted as director to take the shares from the company:

Re Australian Direct Steam Navigation Company; Miller's case, 3 Ch. Div. 661, 665; 5 Ch. Div. 70.

The company had the right to put him on the register for his qualification shares at any time; then within the month he might have objected, but as a matter of fact he did not do so. His want of knowledge is of no consequence:

Brown's case (ubi sup.).

The present case falls within class 2 referred to in

Re Columbia Chemical Factory Manure and Phosphate Works; Brett's case; Hewitt's case, 47 L. T. Rep. N. S. 571; 49 Ib. 479; 25 Ch. Div. 283.

It was there laid down that, where shares are registered in a director's name, he is presumed to know what was done. [KAY, L.J.—In *Re* The Anglo-Austrian Printing and Publishing Union Limited; *Ex parte* Isaacs (66 L. T. Rep. N. S. 250, 593; (1892) 2 Ch. 158) it was held that the articles of association were sufficient to fix with liability as contributories of the company directors who had acted without duly acquiring their qualification shares. But the articles in that case were considerably stronger than in the present. A director may estop himself from disputing his being a shareholder—per Cotton, L.J. in

Re The Wheel Buller Consols; *Ex parte* Jobling, 58 L. T. Rep. N. S. 823, 826; 38 Ch. Div. 42.

In that case the director was held not to be liable, but the shares had not been registered in his name. The respondent here became the holder of forty shares and did not repudiate them. Therefore his office was not *ipso facto* vacated under art. 70 at the end of the month, for at that time he had actually got his qualification shares. The fact that this company is not in liquidation makes no difference in the principle on which the case must be decided. Further, we submit that he did act after the expiration of the month, or at least that he held office. He resigned on that footing. The court will therefore assume that he agreed to take shares. [KAY, L.J.—It is implied contract if anything. That is the best way to put it. It cannot, I think, be said that the respondent's conduct amounted to estoppel. A man cannot be estopped by conduct which is ambiguous.]

Graham Hastings, Q.C. (G. P. C. Lawrence with him) for the respondent.—The respondent never applied for or agreed to take shares, and the company had no right to allot any to him and put him on the register before the expiration of a month from the first allotment on the 29th March.

APP.] *Re* PRINTING TELEGRAPH, & CO., CO. OF THE AGENCE HAVAS; *Ex parte* CAMMELL. [APP.]

Art. 64 does not impose on a director any duty or contract to take shares; it only says that he shall have a month within which to acquire them, and art. 70 says that if he does not so acquire them he shall *ipso facto* cease to be a director. The respondent never knew of the allotment; he did not by acting as director during the month become affected with notice of the allotment and registration, or precluded from denying that he was a shareholder. On the 29th April he ceased to be a director, and he has not acted since. [At this point in the argument the question referred to above, as to whether the respondent was in fact registered as a shareholder on the 29th March 1893, or at some later date, was raised. The case accordingly stood over in order that evidence on the subject might be adduced. The effect of such evidence appears from the statement set forth above. The argument was then resumed, as follows:] I submit that the circumstance that the respondent's name was not duly registered until after he had resigned his office of director determines this appeal. Sect. 25 of the Companies Act 1862 requires every company to cause to be kept in one or more books a register of its members, containing, besides the names and addresses of the members, their occupations, if any, together with a statement of the shares held by them. Under sect. 37 of the Companies Act 1862 the register of members is to be *prima facie* evidence of any matters by that Act directed or authorised to be inserted therein. In the allotment sheets produced there is no statement of the members' respective occupations. The appellants cannot set up as a register of members that which was never intended to be a register. The evidence shows that these allotment sheets could not have been intended as a register of members. They were merely sheets prepared by the secretary of the company for the purpose of showing what shares were to be allotted, and, the company being a going concern, unless they can show that every statutory requisition has been complied with, cannot say that the register is represented by these allotment sheets. The effect of an error in registration appears from *Re Land Credit Company of Ireland*; *Weikensheim's case* (28 L. T. Rep. N. S. 253, 653; L. Rep. 8 Ch. App. 831). [KAY, L.J.—In *Re Underbank Mills, &c., Company* (53 L. T. Rep. N. S. 957; 31 Ch. Div. 226) the sufficiency of a registration of a mortgage, in compliance with sect. 43 of the Companies Act 1862, was considered. LOPES, L.J. referred to *Wolverhampton New Waterworks Company v. Hawkeford*, 7 C. B. N. S. 795.]

Buckley, Q.O. in reply.—Sect. 25 of the Companies Act 1862 is directory only. What has to be looked at is the substance of the matter. The substance is, that there is here a document, signed by the chairman of the company, which contains the material particulars required by the statute. Except with reference to the use of the register as *prima facie* evidence under sect. 37 of the Act of 1862, the provisions as to the mode of keeping the register are merely directory:

East Gloucestershire Railway Company v. Bartholomew, 17 L. T. Rep. N. S. 256; L. Rep. 3 Ex. 15.

The omission of unimportant details in the register does not make any difference as to its effectiveness:

Irish Peat Company v. Phillips, 1 B. & S. 598, 629.

[LINDLEY, L.J.—The difference between those cases and the present is, that the allotment sheets here were never intended to be the register of the company.] But the allotment sheets lead to the formal register, and represent the completed book until that itself is prepared. They constituted a register; they were not simply slips of paper. They are binding on the company. No officer connected with the company could say that the allotment sheets were not the register, and no member could say so either. Furthermore, supposing the allotment sheets are not the register, does that affect the case? For even if the respondent's name was not registered on the date in question, the contract between him and the company was completed by the allotment of the shares to him and is binding upon him, and specific performance of that contract could be enforced. I submit therefore that, whether his name was registered or not, he being the holder of shares under an executed contract cannot now repudiate them. It is too late for him to attempt to do so. The contract here is quite as binding as it was in *Isaacs' case* (*ubi sup.*), and that case is on all-fours with the present. Then I contend that, the respondent being himself a director, it was his duty to see that a proper register was kept by the secretary. And it does not lie in his mouth to say that, although it is perfectly true the allotment sheets contain all the requisite materials, they do not constitute a register within the statute. As regards the costs, if the court should be against the respondent on the question of registration, I submit that there should be no costs allowed of this appeal, since the point now taken was not raised at all in the court below.

LINDLEY, L.J.—I do not think we ought to reverse the decision of Stirling, J. in this case. This is a limited company, formed in March 1893 under articles of association, two of which are important. Art. 64 provides that the qualification of a director shall be the holding of 200l. of share capital (that is, forty shares), in respect of which all calls for the time being due shall have been paid; and this qualification is to apply as well to the first directors as to all future directors; but that the first directors shall be allowed one month from the first general allotment of shares of the company in which to acquire their qualification. By art. 70 the office of a director is to be vacated (c) if he ceases to hold the requisite number of shares, or, in the case of a first director, if he fails to obtain them within the prescribed time; (d) if he shall send in a written resignation to the board, and the same shall not be withdrawn for seven days, or be previously accepted. Cammell was named as an original director in a prospectus issued shortly after the company was formed, and he attended one or two meetings during the first month of the company's existence. On the 29th March 1893, at a meeting at which he was not present, forty shares were allotted to him and the other directors as their necessary qualification. On the 7th April another meeting was held, at which the minutes of the previous meeting were read. Cammell was not present at that meeting, but he was present at a meeting held on the 14th April, when the minutes of the meeting of the 7th April were read. There was some controversy whether he knew of the allotment. Stirling, J. came to the conclusion that he did not, and I accept that conclusion. On

APP.] *Re* PRINTING TELEGRAPH, &C., CO. OF THE AGENCE-HAVAS; *Ex parte* CAMMELL. [APP.]

the 29th April the month expired within which the original directors were bound to acquire their qualification shares. After the expiration of the month, and before there was any registration book of the company in existence, but after Cammell's name had been put on the allotment list on the 29th March in respect of the forty shares, the secretary sent to Cammell a form of application for these shares, which Cammell never signed, and which he ultimately returned. In the beginning of May Cammell wrote once or twice, excusing himself from attending the meetings of the directors, and on the 7th May he sent in his resignation. On the 26th July, Cammell having then recently ascertained that his name was on the register of members, wrote to the secretary requesting to have his name removed. In September he received a notice of a call in respect of these shares, and in October proceedings were commenced against him to enforce the call. On the 1st Nov. he moved to rectify the register by removing his name therefrom. At that date his name was on the register. The motion was made under sect. 35 of the Companies Act 1862, which authorises an application to the court where the name of any person is without sufficient cause entered in the register of members. Cammell's case is, that his name was entered in the register without sufficient cause. The questions we have to consider are, when was he put on the register, and with what authority? In the court below it was assumed that there was a proper register in existence before he sent in his resignation, namely, on the 7th May, and that he had been put on the register in respect of these forty shares before that date. It now turns out that until some time after that date the only documents on which his name appeared were certain allotment sheets. His name was put on these allotment sheets on the 29th March, and the question is, whether these can be regarded as the register. The authorities which have been cited show that a book or document intended to be a register may be admitted as a register although the requirements of the Act of Parliament as to the keeping of a register have not been regularly complied with. But I am not aware of any authority for saying that rough memoranda on sheets of paper not intended as a register at all, but intended as materials from which a register may be prepared, can be a register. It is clear from the evidence that these allotment sheets were never intended, to be the register. They were allotment sheets giving certain details respecting the allottees, and containing a column referring to the register, and were intended as materials from which the register was to be formed as distinguished from the register itself. We should be straining the language of the Act of Parliament and straining the evidence if we were to hold that these sheets constituted the register. Cammell's name was therefore not in fact put on the register until after he had resigned. But was there then authority to put his name on the register? Mr. Buckley says that the articles conferred on the company an irrevocable authority to put him on the register after the expiration of the month. I do not think we can spell out of the words of the articles any such authority as that. These articles are not so strong as the articles in *Isaacs' case* (66 L. T. Rep. N. S. 250, 593; (1892) 2 Ch. 158), where such an authority was implied. I do not think that

the fact that Cammell sent in his resignation is conclusive, but I am much impressed with this fact, that the company did not treat him as being a shareholder in respect of these forty shares on the 29th April, because the secretary of the company, instead of treating him as a shareholder, asks him on the 1st May to sign an application for shares. This resignation, coupled with his refusal to do that which the company had invited him to do, viz., sign the application for shares, is, in my judgment, sufficient to put an end to the authority of the company. The company therefore had no warrant for putting his name on the register on the 23rd May. The problem which we have to solve is easier than that which was presented to the court below, as we have not to consider what would have happened if he had been placed upon the register at the earlier date. I think that the judgment of Stirling, J. was right, and that the appeal must be dismissed with costs.

LOPES, L.J.—It is clear that Cammell's name was not on the formal register until after he resigned his post of director, but it is said that certain allotment sheets are in point of fact under the circumstances of this case to be regarded as the register. In my judgment they cannot be so regarded. They are called "Allotment Book," and they are the materials from which the register is to be subsequently compiled. There are in these allotment sheets omissions of some of the requirements of the Act of Parliament, though that may not be conclusive. But all these things go to show that these allotment sheets were not intended to be the register. There is also the column containing references to the register, clearly showing that the thing subsequently compiled by the company was to be the register. Therefore Cammell resigned before his name was on the register. But it was said that, as he did not resign until after the 29th April, there was under the articles a continuing authority to the company to put his name on the register. But there is another matter which is important, viz., that that was not the view which the company took of their position, because they sent him on the 1st May and on the 5th May a form of application for shares, which clearly shows that they did not then regard him as a shareholder. That form he returned to the company without signing it. Therefore I think that there was no such continuing authority as has been contended for. I think, therefore, that the decision of the court below was right.

KAY, L.J.—In all the cases in which a person has been elected a director, and has acted as a director, and by the terms of the articles ought to hold certain shares in order to qualify, I am extremely reluctant to allow him to escape from his obligation to take shares if I can find any reasonable means of holding him to his obligation. Lord Selborne thus sums up the law in *Brown's case* (29 L. T. Rep. N. S. 562; L. Rep. 9 Ch. App. 102). After dealing with the *Marquis of Abercorn's case* (4 De G. F. & J. 78), he says (at p. 106 of 9 Ch. App.): "The other authorities are all cases in which as a matter of fact shares had been registered in the name of the director, which circumstance occurs in this case also, and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered when a director tried to get rid of the shares

CT. OF APP.] *Re THE HERCYNIA COPPER COMPANY; Ex parte RICHARDSON.* [CT. OF APP.]

actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was therefore a just conclusion of fact that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part I see no reason to doubt that the various cases which arose on that state of circumstances were well decided.” [His Lordship then referred to certain dicta of Malins, V.C. in some of the cases, and continued thus:] The true result to be drawn from those authorities appears to be that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate as unauthorised by himself the registration of shares which in the ordinary course of the business of the company have actually been placed in his name, and which were needful for his qualification.” The first question is whether these allotment sheets, which are headed with these words, “Allotment Book,” and which are not formally in the shape of a book, but are sheets of paper attached to one another by a pin, are a register within the meaning of sect. 25 of the Companies Act 1862. I do not consider the word book in that section to be essential, and if these sheets had really been treated as the register until the formal book had been prepared, I should be inclined to hold that the entry of Cammell’s name in those sheets would be a sufficient compliance with the Act of Parliament as to registration, and Cammell could not then well have escaped. These allotment sheets were actually written before the shares were in fact allotted, but they were produced at the meeting of the 29th March, at which the shares were allotted, and were then adopted and were signed by the chairman. Cammell himself was not present at that meeting. The month within which Cammell was to acquire his shares expired on the 29th April. During that interval he occasionally acted as director and attended meetings. After that time he never attended any meetings, and he sent excuses for not attending the meetings, but he did not formally withdraw from the directorate until the 7th May. During that period there had been no other register in existence but these allotment sheets. Upon the whole I come to the conclusion, for the reasons already given by the Lords Justices who have preceded me, that these sheets were not such a register as the Act requires. Therefore, until the 23rd May, we cannot treat Cammell as being on any register of the company. But he was then put on, he having withdrawn on the 7th May. Mr. Buckley argued that the terms of the articles were such that Cammell was bound by an agreement to become a member, at any rate from the 29th April, and that after that date he could not object to registration. I cannot read the articles in that way. In *Isaacs’ case* (66 L. T. Rep. N. S. 250, 593; (1892) 2 Ch. 158) the words were “shall be deemed to have

agreed to take the said shares,” but these articles contain no such words as those, therefore I do not think that point can succeed. But then I have considerable difficulty as to another point. Between the 29th April and the 7th May, when Cammell withdrew from the directorate, he must be treated as having authorised the officials of the company to put his name on the register, and if in that interval his name had been put on the register he could not have repudiated that authority. Then is his mere resignation of the position of director necessarily a determination of that authority? The obligation to become a shareholder put on him by the articles began from the time when he became a director, and at the end of the month within which he was allowed to acquire the shares the company had authority to put him on the register without any further communication with him. Did his mere resignation of the position of director put an end to that authority when the obligation to become a shareholder commenced from the time of his acceptance of the office? I do not think it necessary to give any decided opinion on that, because in this case something else occurred which did put an end to it. On the 1st May the secretary sent him for his signature a form of application to take shares, which he did not sign. He was not told then that shares had been allotted to him, and he did not know of such allotment. Again, on the 5th May, the secretary wrote again calling his attention to the matter. Cammell never signed that application. On the contrary, he returned it unsigned. I think that that, coupled with his resignation, was enough to determine the implied authority of the company to put him on the register, and that the registration on the 23rd May was too late.

*Appeal dismissed.*Solicitors for the appellants, *Beyfus and Beyfus*.Solicitors for the respondents, *Slaughter and May*.*Monday, April 30.*

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re THE HERCYNIA COPPER COMPANY LIMITED; Ex parte RICHARDSON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—List of contributories—Director’s qualification shares—Implied contract to take shares.

The articles of association of a company which was incorporated in July 1891 provided that the qualification of a director should be the holding of shares of the nominal amount of 250l.; that the first directors might act before acquiring their qualification; but that, unless within one month from their appointment they acquired such qualification, they should be deemed to have agreed to take the same, and the same should be allotted to them accordingly. R. was one of the persons named as the first directors in the articles. On the 21st July 1891, after the registration, he wrote to the consulting engineer of the company a letter in which he referred to the fact of his having signed the articles and a prospectus, in which his name appeared as a director. On the 8th Sept. 1891 he wrote to the secretary

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

[CT. OF APP.]

Re EDWARD WINKLE, JUN.

[CT. OF APP.]

resigning his appointment as director. The directors accepted his resignation, but allotted to him qualification shares to the nominal amount of 250l. R. never attended any of the meetings of the directors, or otherwise acted as a director. In the winding-up of the company the liquidator settled R. on the list of contributories in respect of those shares. A summons was taken out by R. to have his name removed from the list. It was decided by Wright, J. (sitting as an additional judge of the Chancery Division, ante, p. 236) that the fact that R. authorised the company by the letter of the 21st July 1891 to hold him out to the world as a director, and that he allowed himself to be named as a first director, was evidence that he had agreed to take the shares; that that conclusion was fortified by the letter of the 8th Sept. 1891; and that his name must therefore remain on the list. On appeal: Held, that the inference to be drawn from the fact that R. had assented to the articles and to the prospectus was that he agreed to become a director on the terms of the articles to which he had assented; and that therefore his name was rightly placed on the list of contributories in respect of his qualification shares.

Re The Anglo-Austrian Printing and Publishing Union Limited; Ex parte Isaacs (66 L. T. Rep. N. S. 593; (1892) 2 Ch. 158) applied.

Decision of Wright, J. affirmed.

APPEAL by Richardson from a decision of Wright, J., sitting as an additional judge of the Chancery Division (ante, p. 236).

Gregory Ellis (Bingley with him) for the appellant.—The appellant's name was wrongly placed upon the list of contributories, and ought to be removed. He never applied for any shares in the company, and no contract to take shares can be implied from the fact of his signing and approving of the articles and prospectus. He neither was present at any of the board meetings, nor in any way acted as a director. On the 8th Sept. 1891, less than two months after the incorporation of the company, he wrote the letter resigning his office, and his resignation was accepted by the company. The present case is distinguishable from *Re The Anglo-Austrian Printing and Publishing Union Limited*; Ex parte Isaacs (66 L. T. Rep. N. S. 593; (1892) 2 Ch. 158), as there Isaacs acted on several occasions as a director; but here the appellant did not act on any occasion. The effect of the decision in *Ex parte Isaacs* (ubi sup.) is, that the court must find some contract on a person's part to become a director. The mere fact that he signed the articles of association is not sufficient. It is not enough to show that he consented to become a director unless it can also be shown that he consented to become a director on the terms of the articles. Can the court infer that the appellant consented to become a director on the terms of the articles from the circumstances of this case?

Whinney, for the respondent, the liquidator, was not called upon to argue.

LINDLEY, L.J.—I think that this is a clear case. The question is one of inference only, and I do not see so much difficulty in it as Wright, J. seems to have felt. Here is a company formed and registered in July 1891. A couple of days beforehand a copy of the prospectus and a print of the articles of association are sent to Mr. Richardson. His name appears on the prospectus as a director.

The letter which the company sent to him on that occasion is not forthcoming. But the answer which he returned to them on the 21st July 1891 has been produced. From that it appears that he signed the prospectus and the articles, and I suppose it must be taken that he assented to them. What is the inference to be drawn from that? The articles run thus: [His Lordship read arts. 80 and 84, and continued:] In its inception the company's shares were 10l. each. They appear to have afterwards been turned into 1l. shares. Judging from the terms of Mr. Richardson's letter of the 21st July 1891, and from the terms in which he resigned his position as director by the letter of the 8th Sept. 1891, I cannot feel that it is open to me to draw any inference at all except this, that he did agree to become a director on the terms of art. 84, to which he had assented. If you go a little further behind, you find a Mr. Cheesewright, who is said to have agreed to provide the qualification shares for Mr. Richardson, and it is possible that the latter may have a good cause of action against the former. I think that this is quite as strong a case as *Ex parte Isaacs* (ubi sup.). The only difference is that in that case Isaacs did act as a director, whereas Mr. Richardson has not done so. But he has agreed to become a director, and has assented to the articles. And when the month had expired the shares were properly allotted to him. In my opinion the decision of Wright, J. was perfectly correct; and the appeal therefore fails, and must be dismissed with costs.

LOPES and KAY, L.J.J. agreed.

Appeal dismissed.

Solicitor for the appellant, J. J. G. Pugh, agent for G. J. L. Morgan, Swansea.

Solicitors for the respondent, Slaughter and May.

Monday, May 7.

(Before LINDLEY, LOPES, and KAY, L.J.J.)

Re EDWARD WINKLE, JUN. (a)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunatic—Scheme of maintenance—Allowance to wife—Execution creditor—Receiver—Priority—Lunacy Act 1890 (53 Vict. c. 5), s. 117.

Under sect. 117 of the Lunacy Act 1890 the court has no power to sanction an allowance for the future maintenance of a lunatic's wife out of his property in priority to the payment of his debts. On the 16th March creditors of a lunatic recovered judgment against him in an action for their debt. On the following day a writ of f. fa. was lodged with the sheriff, and he on the 19th March took possession of the lunatic's goods. On the same day the lunatic's wife was appointed interim receiver of his property until a summons taken out by her on the 12th March for the sanction of a scheme of maintenance had been dealt with. The sheriff withdrew.

Held, that the property of the lunatic was by reason of the appointment of the receiver placed under the control of the court; and that the creditors could only be allowed to take it subject to proper provisions being made for his maintenance; but that the order for maintenance would be made

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

so as not to affect any priority which the creditors might have obtained by lodging their writ with the sheriff; and that no variation would be made in the scheme of maintenance without notice to them.

THIS was an application by Marion Winkle, the wife of the above-named Edward Winkle, a person of unsound mind, not so found by inquisition, asking for the confirmation by the court of a scheme of maintenance approved by the master, under sects. 116 and 117 of the Lunacy Act 1890.

The lunatic was thirty-six years of age. There were no children of the marriage. He had formerly carried on business at Malvern.

On the 12th Jan. 1894 he was removed to a lunatic asylum.

On the 9th Feb. an action against him was commenced in the Queen's Bench Division by his bankers, claiming the sum of 315l. 7s. 6d., the amount of an overdraft on his current account on the 5th Feb.

On the 27th Feb. a guardian *ad litem* was appointed.

On the 12th March the applicant took out this summons, asking (1) that she might be at liberty to sell and dispose of the stock-in-trade and goodwill of the business of the lunatic, together with the lease of the house where it had been carried on, either as a going concern or otherwise; (2) that she might be at liberty to retain out of the proceeds of such sale the sum of 2l. weekly for the maintenance of herself and the lunatic; (3) that she might also pay out of the proceeds of such sale the costs incurred in defending the action in the Queen's Bench Division.

The summons was returnable on the 21st March.

On the 16th March the plaintiffs in the action in the Queen's Bench Division recovered judgment under Order XIV. for the amount of their claim and costs.

On the 17th March a writ of *fi. fa.* was lodged with the sheriff, and on the 19th March he took possession of the lunatic's goods.

On the same day Davey, L.J., sitting in lunacy, made an order appointing the applicant interim receiver of the property of the lunatic with power to take immediate possession thereof before giving security until the summons had been dealt with.

On the 21st March, Grantham, J. ordered the sheriff to withdraw, and directed a stay of proceedings in the action. The sheriff thereupon withdrew.

On the 3rd April the summons came before the master in lunacy, and he sanctioned the sale of the lunatic's assets, and directed that the same should be paid into court and invested in consols, and out of the dividends and by periodical sales of the consols 1l. per week should be raised for the maintenance of the lunatic, and 1l. per week for the maintenance of his wife, the applicant; and he allowed the cost of the application and of defending the action in the Queen's Bench Division out of the estate.

On the 23rd April a divisional court of the Queen's Bench Division, upon an appeal by the plaintiffs in the action, set aside the order of Grantham, J.; and ordered that the plaintiffs should take no fresh proceedings to enforce the judgment therein by *fi. fa.* until the matter had

been brought before the judge or master in lunacy.

By sect. 117 of the Lunacy Act 1890 "the judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the judge thinks most expedient for the purpose of raising, or securing, or repaying, with or without interest, money which is to be, or which has been, applied to all or any of the purposes following: (a) payment of the lunatic's debts or engagements; (b) discharge of any incumbrance on his property; (c) payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit; (d) payment of or provision for the expenses of his future maintenance."

The application now came on to be heard before the Lords Justices sitting in lunacy.

E. S. Ford for the applicant.—The appointment of the receiver has placed the lunatic's property under the protection of the court. It is a judicial act, and is considered as taking effect from the earliest time possible, and therefore has precedence over the execution put in on the same day:

Wright v. Mills, 4 H. & N. 488.

The court will not allow the judgment creditors to take any of the property out of its control without making due provision for the maintenance of the lunatic:

Re Pountain, 59 L. T. Rep. N. S. 76; 37 Ch. Div. 609;

Re Pink, 49 L. T. Rep. N. S. 418; 23 Ch. Div. 577;

Re Plenderleith, 69 L. T. Rep. N. S. 325; (1893) 3 Ch. 332.

That would include provision for the maintenance of his wife. [KAY, L.J.—Does the order of Davey, L.J. include maintenance for the wife? No; only the order of the master. [LINDLEY, L.J.—Is there any authority for allowing maintenance to a lunatic's wife as against his creditors? Sect. 117 of the Lunacy Act 1890 does not say anything about maintenance for the family of a lunatic.] I do not know of any authority on the point, unless *Re Pink* (*ubi sup.*) can be regarded as one. There the expenses of the past maintenance of the lunatic's wife and children were allowed as against his creditors (see p. 581 of 23 Ch. Div.)

LINDLEY, L.J.—Under sects. 116 and 117 of the Lunacy Act 1890 I doubt if we can support the lunatic's family. I do not think that any authority goes so far as to allow us to make such an order as is now asked for. Sect. 117 of the Act of 1890 is the section which provides what is to be done in such a case as this, and there is no mention there of the maintenance of the lunatic's wife. It is a somewhat strong thing to prefer a lunatic debtor to his creditors; but it would be still stronger if his wife and family were to be preferred to them also. We cannot sanction that part of the scheme which allows maintenance for the wife.

LOPES and KAY, L.JJ. concurred.

Ernest Pollock for the respondents, the judgment creditors.—[LINDLEY, L.J.—We need not hear you on the point as to the maintenance of the lunatic's wife. But what have you to say as regards the 1l. per week for the lunatic personally? As to the maintenance of the lunatic, his goods are bound as from the date of the *fi. fa.*, and

CT. OF APP.]

LEMMON v. WEBB.

[CT. OF APP.]

the respondents are in the position of creditors who have a charge on his property. [KAY, L.J.—In *Re Plenderleith* (*ubi sup.*) the creditors had obtained charging orders, but maintenance was allowed to the lunatic as against them. LINDLEY, L.J.—Would the respondents not be sufficiently protected if we made the order without prejudice to any priority which they may have obtained under their judgment? That would suspend their right to execution. That is all.] The respondents are entitled to a debt which bears interest, and I ask for payment to them under the scheme. They acquired security by their judgment which they obtained before the receiver was appointed, and they have no need to invoke the aid of the court to obtain payment of their debt, like the creditors in *Re Plenderleith* (*ubi sup.*). If the order suggested is made the respondents will be prevented from obtaining satisfaction of their debt. They ought to be saved the costs of proving any claim again, and are entitled to an order declaring and establishing their priority. [KAY, L.J.—We cannot do that. The other creditors are not before us.]

LINDLEY, L.J.—What we propose to do is this: We propose to confirm the order as to the 11. per week maintenance for the lunatic, but discharging so much of it as allows maintenance for his wife. The order is to be without prejudice to any charge or priority which the judgment creditors may have acquired by lodging their writ with the sheriff on the 17th March. No variation is to be made in the scheme without notice to the judgment creditors. The costs of the applicant must come out of the lunatic's estate. The judgment creditors can add their costs to their judgment. The position of affairs is this: In point of fact the property of the lunatic is subject to the control of the court by reason of the appointment of the receiver. The question is, what is to be done? The situation is one of constant occurrence. An execution creditor is not entitled to take the property of the lunatic from under the protection of the court and drive him into a pauper asylum. He is only entitled to take the property subject to proper provision being made for the maintenance of the lunatic. That is a well-settled rule of the court, and we are not going to alter that. On the other hand, the creditors are entitled to payment of their debt subject to such maintenance, and we think it just to preserve to them all their rights, as between them and the other creditors, although the sheriff has given up possession to the receiver. It is possible that the lunatic may be hereafter taken under the care of his wife, and the maintenance might then be increased, but that could not be done without notice to the creditors.

LOPES and KAY, L.J.J. concurred.

Solicitors for the applicant, *Street, Poynder, and Whatley*, agents for *H. L. Whatley*, Great Malvern.

Solicitors for the respondents, *Black and Moss*, agents for *Edward Nevinston*, Great Malvern.

April 24, 25, 26, 27, and May 8.

(Before LINDLEY, LOPES, and KAY, L.J.J.)

LEMMON v. WEBB. (a)

APPEAL FROM THE CHANCERY DIVISION.

Nuisance—Adjoining owners—Trees overhanging neighbour's land—Abatement of nuisance—Removal of branches—No obligation on part of owner of land to give notice to owner of trees—Injunction—Damages.

The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land; and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

Decision of Kekewich, J. (70 L. T. Rep. N. S. 275) reversed.

THIS was an appeal by the defendant from a decision of Kekewich, J. restraining the defendant from cutting the ornamental timber overhanging his property without previously giving notice to the plaintiff, to whom such timber belonged.

The plaintiff and the defendant were the owners of adjoining residential properties. The plaintiff had acquired his property in 1879, and the defendant had acquired his about 1881. On the boundary of the plaintiff's land there were certain ancient large oak and elm trees growing on his land, which had branches of considerable age and size overhanging the defendant's land. A public bridle-path ran parallel to the boundary. The defendant alleged that these branches injuriously interfered with certain farm buildings on his land and obstructed the entrance thereto. The defendant, without giving any notice to the plaintiff, cut down several of the branches. The points at which some of the branches were cut were a few inches within the boundary line of the plaintiff's land. Accordingly the plaintiff brought this action against the defendant, claiming a declaration that the defendant was not entitled to cut any branches off the plaintiff's trees which overhung the defendant's land when such overhanging had continued for many years, and an injunction and damages. Evidence was adduced to show that the branches cut were considerably more than twenty years old. There was no evidence that the overhanging branches were likely to be dangerous to life or health, and the defendant had been aware of their existence for about fifteen years. It did not appear that the trees were visible from the plaintiff's residence nor that the cutting of the branches impaired the beauty of his property.

Kekewich, J. said that the authorities showed that the inconvenience caused by the overhanging of a neighbour's tree must be treated as a nuisance of omission. In this case, the nuisance being one of long standing, the defendant, except in the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

case of immediate danger, was not entitled to remove it without giving reasonable notice to the plaintiff. As no notice had been given and no immediate danger was proved, the act of the defendant was wrongful, and he must pay 5*l.* damages and the costs of the action (70 L. T. Rep. N. S. 275).

From that decision the defendant now appealed.

Marten, Q.C. and Job Bradford for the appellant.—Kekewich, J. granted an injunction against the defendant on the ground that reasonable notice was necessary before the defendant had the right to abate the nuisance caused by the overhanging boughs of the plaintiff's trees. But we submit that he has that right without giving any notice whatever. The defendant is entitled to his property *usque ad cælum*, and has the right on his own land to cut the overhanging branches of a neighbour's trees :

Bro. Abr. "Nusans," pl. 28;

Norris v. Baker, 1 Roll. Rep. 393, 394; *sub. nom.*

Morrice v. Baker, 3 Bulst. 196;

Pickering v. Rudd, 4 Camp. 219; 1 Stark. N. P. 56.

Nothing is said there about notice being required. But on the question of notice see

Penruddock's case, 3 Co. Rep. 205; old paging, 5 Co. Rep. 100.

In that case the neighbour entered someone else's land to abate the nuisance. That case, therefore, is entirely beside the mark as regards the present case. [LINDLEY, L.J.—Excluding any question of danger, what right has a person to take the law into his own hands? Why cannot he request the owner of the trees to abate the nuisance?] But why should the person affected by the nuisance be required to give notice to the person committing it? The overhanging trees constitute a trespass, and the neighbour ought not to have cast upon him the additional burden of giving notice. What advantage would there be by giving notice? The shortest way is to cut the boughs without giving notice. [KAY, L.J.—The boughs are none the less the property of the owner of the trees because they overhang the property of his neighbour. The reason for requiring notice is to give the owner an opportunity of doing the work himself before you take the law into your own hands. Then he can do it in the way that best suits him.] It has never been held that, with regard to the cutting of overhanging boughs, notice to the owner of the trees is necessary. The general rule may be that, before abating a nuisance, notice to the person committing it should be given. But there is an exception made to that rule in the case of the overhanging boughs of trees. All the authorities state it as a general proposition that notice is not required in the case of trees: (for example, see *Gale on Easements*, 3rd edit., pp. 419, 420.) [LINDLEY, L.J.—The authority most in favour of the appellant is what Best, J. says in his judgment in *Earl of Lonsdale v. Nelson* (2 B. & Cr. 302, 311): "There is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them." Then there is always the question of emergency to be considered. You cannot tell from day to day what may happen, or what danger may be caused by overhanging boughs. And therefore, on that ground, the person suffering from a nuisance of that kind ought to be

allowed to abate it without giving any notice. They referred also to

Viner's Abr. vol. 20, "Trees";

Pollock on Torts, 3rd edit., pp. 369, 370.

Warmington, Q.C. and E. F. Norton for the respondent.—[LINDLEY, L.J.—We need not hear you on the point as to emergency.] As regards the other point, we submit that the defendant has committed a trespass in two ways: By cutting the plaintiff's trees he has committed a trespass, for anyone who lops the trees belonging to another person commits a trespass on his land, since *quicquid plantatur solo solo cedit*. Furthermore, the points at which he cut the branches were in the plaintiff's property. [KAY, L.J.—Beyond all question he could do so if he gave notice. The authority for that is overwhelming.] Here the defendant gave the plaintiff no notice and no opportunity of abating the nuisance, if it was a nuisance. Where the nuisance has not been created by the person upon whose property it exists, then the neighbour cannot abate it. We submit that Kekewich, J. was perfectly correct in holding that the defendant had no right to abate the nuisance without giving the plaintiff notice. The plaintiff's trees have overhung the defendant's property for over twenty years; the boughs have existed for much longer than twenty years. Overhanging trees do not constitute a nuisance if they have existed for so long a time as that, and their existence has been acquiesced in by the party affected thereby. Therefore, having regard to the age of the plaintiff's trees, and the projecting branches, he has acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually fill. Either under the Statute of Limitations or by prescription the plaintiff has acquired a right to keep the branches where they have grown. Suppose it was the case of a building belonging to the plaintiff overhanging the defendant's land for the period of twenty years. It might be a nuisance, but it could not be abated by the defendant. For where a man erects on his own land something which projects over his neighbour's land, and it remains undisturbed for a sufficient length of time, his neighbour cannot remove it nor maintain any action in respect of it. *Penruddock's case* (*ubi sup.*) decides that every overhanging bough is a nuisance. Why then should there be a difference between overhanging boughs and overhanging buildings? [LINDLEY, L.J.—This is a novel doctrine that you are suggesting.] We rely on

Jones v. Williams, 11 M. & W. 176.

That case does not accept all that was laid down in *Earl of Lonsdale v. Nelson* (*ubi sup.*), which, therefore, does not receive any further authority from *Jones v. Williams* (*ubi sup.*). They referred also to

Blackstone's Commentaries, 16th edit., bk. 3, ch. 1, pl. 4;

Holder v. Coates, 1 Moo. & Malk. 112, 114, n.;

Chitty on Pleadings, 7th edit., vol. 3, p. 364;

Co. Litt. 26 a.

Marten, Q.C., in reply, referred to the following authorities as further supporting the contentions urged by him in opening the appeal:

Masters v. Pollie, 2 Roll. Abr. 131;

Crowhurst v. Amersham Burial Board, 39 L. T. Rep. N. S. 355; 4 Ex. Div. 5;

CT. OF APP.]

LEMMON v. WEBB.

[CT. OF APP.]

Wandsworth Board of Works v. United Kingdom Telephone Company, 51 L. T. Rep. N. S. 148; 13 Q. B. Div. 904;
Chadwick v. Trower, 6 Bing. N. C. 1;
 Co. Litt. 9 a.

Cur. adv. vult.

May 8.—The following written judgments were delivered:—

LINDLEY, L.J.—The plaintiff and the defendant in this case are adjoining landowners. Some old trees situate on the plaintiff's land had branches which projected over the defendant's land. The defendant cut off so much of these branches as projected over his land, and he did so without going on to the defendant's land and without previous notice to him. The question is, whether the defendant was justified in so doing. Kekewich, J. thought not, and gave the plaintiff judgment for 5*l.* and costs, and from this judgment the defendant has appealed. There is some controversy as to whether the defendant did not cut rather more than he himself says he did and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpety purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the plaintiff and a request to him to cut them and a non-compliance by the plaintiff with that request. It was contended on behalf of the plaintiff that, having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled, and that either under the Statute of Limitations or by prescription the plaintiff had a right to keep the branches where they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord Ellenborough did not think it would: (see *Pickering v. Rudd*, 4 Camp. 219; 1 Stark. N. P. 56.) According to our law, the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in the third edition of Gale on Easements (pp. 419, 420), to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the

analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty, but it is quite inconsistent with the authorities to which I will refer presently, and no court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it. The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the law for centuries—see Bro. Abr. "Nusana," pl. 28; *Norris v. Baker* (1 Ro. Rep. 393); *Pickering v. Rudd* (4 Camp. 219; 1 Stark. N. P. 56); *Crowhurst v. Burial Board of Amersham* (39 L. T. Rep. N. S. 355; 4 Ex. Div. 5)—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Kekewich, J. intimate any doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with, and the real question is whether notice is required by law. The authorities to which I have referred do not allude to the necessity of notice. In *Pickering v. Rudd* (*ubi sup.*), which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but assigned and alleged an excessive cutting. Lord Ellenborough held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in Chitty on Pleading, 6th edit., vol. 3, a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the seventh edition of the same work, vol. 3, p. 364, such an averment is introduced, and reference is made to *Jones v. Williams* (11 M. & W. 176). *Jones v. Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land; it does not show what a man may or may not do on his own land. But in *Jones v. Williams* (*ubi sup.*) Parke, B., who delivered the judgment of the court, referred (at p. 182) to a case in Jenkins's Sixth Century Cases, and to *Penruddock's case* (5 Co. Rep. 100) as authorities for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained. But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgment of

Best, J. in *Earl of Lonsdale v. Nelson* (2 B. & Cr. 302, 311) is explicit that overhanging trees may be lopped by the owner of land over which they hang without notice. Best, J. says the right so to lop them is an exception to the general rule which requires notice before a nuisance not created by the owner of what creates it can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards. [His Lordship read extracts to that effect from the judgment of Best, J., and continued:] What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots. In *Gale on Easements* (3rd edit., pp. 419-420) it is said that: "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it. Supposing no easement to exist, there seems nothing to take this out of the ordinary rule that a man may abate any encroachment upon his property; and, therefore, that he may cut the roots of a tree so encroaching, in the same manner that he may the overhanging branches (*Palmer*, 536). The decided cases bearing upon this subject have turned rather upon the question of property in trees growing upon the limits of two adjoining heritages, than upon the question of easement." This passage has the authority of the late Willes, J., who edited the edition from which I have read the foregoing extract. The law on the subject is, in my opinion, as follows: The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface. The defendant contended that he was justified in cutting the plaintiff's trees because they were in imminent danger of falling; but this is not proved, and my judgment is not based on grounds of urgency. The appeal, therefore, must be allowed, and the appellant must have the costs of the appeal, and judgment must be entered for the defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant, there will be no order as to the costs of the action.

LOPES, L.J.—That the defendant had a right to cut the boughs of the plaintiff's trees which projected over his land is beyond question, but whether he was justified in so doing without giving the plaintiff previous notice is a matter that requires consideration. I am of opinion that he was. It was argued that, the branches of the plaintiff's trees having for a long time overhung the land of the defendant, the plaintiff had ac-

quired a right to the occupation of so much of the space as was covered by the projecting boughs, either by the Statute of Limitations or by prescription. There is no authority for such a contention, and in no previous case (of which there are many) where the question of overhanging boughs has been considered, was it ever suggested. In *Pickering v. Rudd* (4 Camp. 219, 221) Lord Ellenborough said: "Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded." And again, in the 3rd edition of *Gale on Easements*, at p. 419, there is the following passage: "There appears to be no authority in the English law that, in the absence of express stipulation, an easement can be acquired by user to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment and the perpetual change in the quantity of inconvenience imposed by it." I assume, therefore, as no easement exists, and as no right is acquired under the Statute of Limitations, that there is nothing to take the case of encroaching trees out of the ordinary rule that a man may abate any encroachment upon his property, and that his right to cut the branches or roots projecting into his land is incontestable. But can this be done without previous notice to the person to whom the offending tree belongs? I answer the question in the affirmative. In my judgment the adjoining owner is, without any previous notice, entitled to cut as much of the tree as encroaches upon his land (whether it be branches or roots), provided that in so doing he does not enter or trespass on the land of the owner of the tree, and confines himself to his own land. There is direct authority to this effect. *Pickering v. Rudd* (4 Camp. 219; 1 Stark. 56) was, amongst other things, an action for breaking, lopping, and damaging a Virginian creeper which grew on the plaintiff's garden and spread itself over the defendant's house. The defendant cut away that portion of the creeper which was over his house without touching the surface of the plaintiff's premises. The defendant justified the cutting on the ground that the creeper was unlawfully spreading over his house, and that he removed it because it was an incumbrance on his premises. The plaintiff replied that the defendant had used greater force than was necessary. There was no suggestion that previous notice to the plaintiff was necessary before the defendant was justified in cutting the creeper. Lord Ellenborough says: "The defendant justified the removal of the tree as being noxious to his premises; the plaintiff by his replication admits it to have been mischievous to some extent, and the issue is, whether the defendant used more force than was necessary. The plaintiff admits a breaking to be necessary, and therefore it cannot now be drawn into question whether a breaking was necessary or not." There are observations in the judgment of Best, J. in *The Earl of Lonsdale v. Nelson* (2 B. & Cr. 302, 311) which strongly confirm the view I take with regard to the non-necessity of notice. The learned judge is drawing a distinction between nuisances caused by an act of commission and those caused by omission. He says: "Nuisances by an act of commission are committed in defiance of those whom such nuis-

[CT. OF APP.]

LEMMON v. WEBB.

[CT. OF APP.]

ances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission except that of cutting the branches of trees which overhang a public road, on the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes this case from most of the other cases that have occurred." Best, J. clearly does not consider any notice necessary in the case of overhanging branches. I thought at first the learned judge was referring to cases where there was danger to life or property—cases of emergency—but that is not so, for his subsequent remarks show that he considers notice unnecessary in all cases of nuisances arising from omission if there is any emergency. *Jones v. Williams* (11 M. & W. 176) was relied upon by the plaintiff. But in that case the defendant entered upon the land of the plaintiff, which distinguishes it from the case now under consideration. In that case it was held that a party has no right to enter upon the land of another in order to abate a nuisance of filth without a previous notice to the owner of the land to remove it, unless it appears that the latter was the original wrong-doer by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health. The case of trees was not noticed in the judgment, but it is to be observed that Erle, who argued for the plaintiff, at the end of his argument, says: "The only case in which, according to the authorities, a notice or request is unnecessary is that of trees overhanging a highway, the reason being that anyone may lawfully stand there and cut them." The distinction in my judgment is this: A man may without previous notice cut the boughs of his neighbour's trees which overhang his land if he can do so without trespassing on his neighbour's land; but he cannot justify a trespass on another's land for the purpose of cutting boughs or roots projecting into his own land without previous notice. It was suggested in this case that the boughs could not have been cut without some trivial trespass on the plaintiff's land; but if there was any trespass, which is doubtful, it was unintentional and of the slightest kind. The action was not brought in respect of any such trespass, but in order to test the right to cut the trees. However, as there is always some risk of committing a trespass in removing overhanging boughs, it is a wise precaution to give notice. The appeal must be allowed.

KAY, L.J.—This is an action for damage for cutting boughs off the plaintiff's trees. The trees are large oaks and elms of great age, and the boughs overhung the land of the defendant. They were cut off by the defendant without any previous notice to the plaintiff. What is the legal position when trees growing on the land of A. extend their roots and boughs into and over the adjoining land of B.? It was argued that it is the same as if A. had built a house on the edge of his own land, with cellars within the land of B. and a projecting upper storey extending over B.'s land. But in that case B. might bring against A. an action of trespass or ejectment. Would trespass or ejectment lie against the owner of the tree?

In the case of the house there is an occupation by A. of B.'s land to the extent of the encroachment, and this, by lapse of time, may grow into a right, and, in such a case, by the ordinary rule an action will lie, without any proof of damage. Is the extension by natural growth of the roots or boughs of a tree into and over the land of another, an occupation of that land which can become a right by lapse of time? Or, is this encroachment simply a nuisance, and, if so, can it be abated by the owner of the land encroached on? If it can, must he, before abating it, give notice to the owner of the tree? It is argued that, where the boughs or roots can be cut without entering upon the land of the owner of the tree, notice should not be necessary. The owner of the land encroached upon has a right to use his own land, either by digging in the soil or by building upon it, and if there be roots or boughs in the way he should be allowed to remove them without notice to anyone. On the other hand, it is said notice is necessary in all cases before a nuisance can be removed, except when the occupier of the adjoining land has himself caused the nuisance, or except where an emergency happens, and there is danger to life, or health, or property, and no time to give notice. It may be that roots and boughs may be cut without entering upon the adjoining land on which the trees stand, but the roots and boughs belong to the owner of the trees, and to cut them is to interfere with his property. It is reasonable and more likely to promote good feeling between neighbours that notice should be given before cutting, in order, as was said in *Earl of Lonsdale v. Nelson* (2 B. & Cr. 302), that the owner may have an opportunity of removing the encroachment himself. It is necessary to examine carefully the authorities on that question. In Brooke's Abr. "Nusans," pl. 28, it is stated, per Keble, that a man is not bound to lop a tree which incumbers a roadway, "chemin," and therefore it should seem that another (that is, I suppose, some one not the owner of the trees) may do it. But nothing is said there about notice. Keble was not a judge. This, therefore, is a statement by counsel accepted by the reporter as law. In *Hale de Portibus Maris* (1 Hargrave's Tracts, p. 87) it is said that: "Any man may justify the removal of a common nuisance either at land or by water, because every man is concerned in it." And he instances a case of the burgesses of Southampton justifying the throwing down of a weir in a creek of the sea which hindered the navigation. "But," he continues, "because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice." In 20 Vin. Abr., under the head "Trees" (E)—Disputes between neighbours, I find: "1. If trees grow in the hedge and the fruit falls into another's ground the owner may go and take it. . . . 2. If the boughs of your trees grow out into my land I may cut them: (per Croke, J., Roll. Rep. 394, pl. 15, Trin. 19 Jac. B. R. S. P.; per Croke, J., 3 Bulst. 198.) 3. A tree grows in A.'s close and roots in B.'s, yet the body of the main part of the tree being in the soil of A. all the residue of the tree belongs to him also: (2 Roll. Rep. 141; Hill. 17 Jac. B. R.; *Masters v. Pollie*)." There is added in a side note: "But if it grows in a hedge which divides the lands of A. and B. and the roots take nourishment of both their lands, it was

adjudged they are tenants in common of it: (2 Roll. Rep. 255; Mich. 20 Jac. B. R. Anon.)" This shows that the roots in another man's land belong to the owner of the tree, and it is only where the tree is on the boundary line so that the trunk is partly in the land of each of the adjoining owners that they become joint owners of the tree (see *Holder v. Coates*, 1 Moo. & Malk. 112.) I have examined the authorities referred to in Viner. The dictum of Croke, J. (1 Roll. Rep. 394, pl. 15) is this: "If the boughs of your tree 'excesce en mon terre jeo poio eux succider mes jeo ne poio justefier le succider de eux devant ils excesce en mon terre pur timor del' exrescer.'" In *Pickering v. Rudd* (4 Camp. 219, 220; 1 Stark. N. P. 56) nailing a board to a wall so that the board overhung the land of another was held not to be a trespass, Lord Ellenborough saying: "I do not think it is a trespass to interfere with the column of air superincumbent on the close." He intimates that firing a gun so that the shot would strike the soil of another would be a trespass, but he doubts whether firing across another's land where the soil was not touched, or the passage of a balloon over the land, would be trespass, and says that if any damage was occasioned by the board there would be an action on the case. In order to place the board the defendant cut away a Virginian creeper which grew in the plaintiff's garden and spread over the side of the defendant's house. He managed to do this, the report states, by means of ropes and a scaffolding suspended over the plaintiff's garden without touching the surface of the plaintiff's premises. There was no statement in the pleadings or evidence, so far as appears, that notice had been previously given of the intention to act. Under the direction of Lord Ellenborough, who said that it was admitted on the record that some damage had been done by the continuance of the tree, and that the question was, whether in removing the mischief the defendant had done any damage to the tree which might have been avoided, there was a verdict for the defendant, and in the ensuing term the King's Bench refused to permit a new trial. In *Fay v. Prentice* (1 C. B. 828) it was clearly intimated that, if a man were to erect any building overhanging the land of another, an action of trespass in which it is not necessary to show damage would lie; but where an action on the case is brought instead to recover damages for the nuisance thereby occasioned, it is necessary to show damage to support the action. In *Penruddock's case* (5 Co. Rep. 100) the question was whether a writ of *quod permittat prosternere* would lie for the feoffee of a house to which a nuisance was being committed by the drip from an adjoining house, which had been built before the feoffment to him, and was in the possession of an assign of the person who built it, and it was held it would, because this was a continuing nuisance, and it seems to have been held that he might himself abate the nuisance. In the *Earl of Lonsdale v. Nelson* (2 B. & Cr. 302, 311) Best, J. states the law thus: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a

public road or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice." In that case the action was for trespass in entering the land of the plaintiff. It was attempted to justify it by pleading that the entry was for the purpose of repairing an ancient building necessary for the maintenance of a fort partly within the plaintiff's land. It was held that before such entry notice should have been given, in order that the plaintiff might have an opportunity to do the repairs himself rather than suffer the intrusion of strangers. It is not quite clear from the language of Best, J. whether a man may lop the boughs of his neighbour's trees so far as they extend over his land without notice, except in case of some emergency occasioning danger to life or property. The judgment contains several important propositions. (1.) The overhanging of the boughs of a neighbour's tree is a nuisance occasioned by omission. (2.) Where a nuisance is occasioned by an act of commission the person injured may abate the nuisance without notice to him who actually committed the nuisance while he is in possession. (3.) So where the security of life or property is in danger, and there is no time to give notice, the person injured may abate a nuisance occasioned by an omission. (4.) In all other cases of nuisances by omission, Best, J.'s opinion seems to be that the individual injured must not himself abate the nuisance, but should appeal to a court of justice. (5.) The abatement of a nuisance occasioned by the overhanging boughs of trees is stated to be the only other case in which the injured person may abate the nuisance himself. But it is not distinctly said that he may do so without notice except in a case of emergency where there is no time to give such notice. *Jones v. Williams* (11 M. & W. 176; 12 L. J. N. S. 249, Ex.) was an action of trespass for entering the plaintiff's dwelling-house. The defendant pleaded that the plaintiff injuriously and wrongfully permitted filth to accumulate on his premises, and that the defendant entered to abate this nuisance. After verdict for the defendant, the plaintiff applied for judgment *non obstante veredicto*, and he obtained it, the plea being held bad because it did not state whether the plaintiff himself placed the filth on his premises, or whether it was placed by another and he omitted to remove it; nor did it state that the plaintiff was under any obligation to remove it, and it did not aver a previous notice to the plaintiff. The court decided (1) that if the plaintiff had placed the filth there himself the defendant might enter or remove it without notice; (2) so possibly if there was any obligation on the plaintiff to remove it, by custom or otherwise, and he did not; (3) but if the filth was placed there by another, and the plaintiff

CT. OF APP.]

CRADOCK v. THE SCOTTISH PROVIDENT INSTITUTION.

[CT. OF APP.]

succeeded to the possession of the *locus in quo*, afterwards notice would be necessary before the defendant could enter to remove it. The judgment of Parke, B. continues thus: "We do not rely on the decision in *The Earl of Lonsdale v. Nelson* (*ubi sup.*) as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil which no authority warranted; but Lord Wynford's dictum is in favour of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion where the omission is the non-removal of a nuisance erected by another. *Penruddock's case* (*ubi sup.*) shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench on the argument, the judges of that court agreed that the nuisance might be abated without suit in the hands of the feeoffee, that is, as it should seem, with notice." And for confirmation of this his Lordship refers to Jenkins's Sixth Century Cases, 57, where the case is so stated, and notice for abatement is said to be necessary. He concludes that a notice or request is necessary in the case of a continuance of a nuisance by an alienee of the property, and that the plea was bad. And Lord Abinger added a further exception where there was such immediate danger to life or health as to render it unsafe to wait to give notice. It is significant that, in the report of Lord Wensleydale's judgment (when Parke, B.), in 12 L. J. N. S. 249, 251, Ex., he is stated to have read Lord Wynford's dictum as having excepted the case of cutting the boughs of overhanging trees as a nuisance which might be abated without notice. In the judgment in the authorised report (11 M. & W. 176) this reading of Lord Wynford's dictum is omitted. It would appear that, on further considering the words, Lord Wensleydale was not satisfied that this was their true meaning. The result of the authorities seems to be this: The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so. Whether he may do so without notice is not stated distinctly in any of the cases, but on the whole I think that this is the meaning. In the older cases it is said that the owner of the land encroached on may cut the boughs, and nothing is said about giving previous notice, and I think that the true reading of *Pickering v. Rudd* (*ubi sup.*) is, that he may do so without notice if he can do it without trespassing upon the land in which the tree grows. I come very reluctantly to this conclusion. I think the legal question very doubtful. In my opinion it would be better if the law were that, before cutting a neighbour's tree, notice should be given in order to afford to the owner of the tree an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice. There was no emergency in this case.

The defendant has acted in an unneighbourly manner, and I cannot help thinking he intended to cause annoyance. I do not think he ought to have any costs of the action, and I am reluctant to give him costs of the appeal.

Appeal allowed.

Solicitors for the appellant, *Walter Webb and Co.*

Solicitors for the respondent, *Broughton, Nocton, and Broughton.*

May 7 and 8.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

CRADOCK v. THE SCOTTISH PROVIDENT INSTITUTION. (a)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage—Priorities—Charge of annuity—Receivership deed—Notice.

To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used, but it is sufficient if the court can gather from the instrument an intention by the parties that the property referred to should constitute a security.

By virtue of a marriage settlement of the 7th March 1875, C. C. was entitled to an annuity of 300l. charged upon the life estate of C. in certain family property, and secured by a term vested in trustees. By a receivership deed of even date with and reciting the settlement, C. covenanted to pay the annuity to C. C. for her sole and separate use. And it was witnessed that C. appointed W. as receiver to receive the rents of the property, in the name of C. during his life, and thereout, after paying all outgoings, to pay the annuity of 300l. The deed also contained a covenant by C. not to revoke the appointment of the receiver during the life of C. C. In 1880 the defendant institution became mortgagees of the life estate of C. They had notice of the receivership deed, but declined to pay the annuity to C. C., alleging that no charge was created by the deed.

Held (affirming the decision of Romer, J.), that by the receivership deed the annuity of C. C. was in equity charged upon the life estate of C., and had priority over the mortgage of the defendants.

APPEAL by the defendants from a decision of Romer, J. (69 L. T. Rep. N. S. 380).

Crackanthorpe, Q.C. and W. D. Rawlins for the appellants, substantially repeated the arguments adduced by them in the court below.

Neville, Q.C. and Charles Browne, for the respondents, were not called upon to argue.

The COURT (Lindley, Lopes, and Kay, L.JJ.) agreed with the decision of Romer, J., and dismissed the appeal with costs.

Solicitors for the appellants, *Clarke, Rawlins, and Co.*

Solicitors for the respondents, *Surr, Gribble, Bunton, and Gribble*, agents for *Wm. Higford Griffiths, Campden.*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.] *Re A CONTRACT BETWEEN TUBBS & THE MAYOR, &C., OF LONDON.* [CT. OF APP.]

April 28, 30, and May 10.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re A CONTRACT BETWEEN TUBBS AND THE MAYOR, &C., OF LONDON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Delay in completion of contract—Payment of interest by purchaser—Delay not attributable to “wilful default” of vendors—Conditions of sale.

In March 1892 T. agreed to buy from the Corporation of London certain freeholds; and the conditions of sale provided that the purchase should be completed on the 24th June 1892, and that if from any cause whatever other than the “wilful default” of the vendors, the purchase money should not be then paid, the purchaser should pay interest thereon from that date. The particulars of sale stated that the property was acquired by the vendors in 1824 under a private Act of Parliament, and was being sold under the powers of that Act. On the 16th June the purchaser inspected the plans, and discovered that the sale plan comprised land which the vendors had not acquired until 1864. An abstract of this part of the property was delivered on the 25th June, and eventually the title was accepted on the 30th Sept., and the purchase was completed on the 13th Feb. 1893. The purchaser paid interest on the purchase money from the 30th Sept., but he declined to pay interest for the period between the 24th June and the 30th Sept. on the ground that the delay was caused by the “wilful default” of the vendors, inasmuch as by their own admission they had not examined the documents in their possession before making the misstatement as to their title. There was evidence that the purchaser was not ready with his purchase money by the 29th Sept.

Held (dissentiente Kay, L.J.), that the omission of the vendors to verify the statement in the particulars of sale was not, under the circumstances, tantamount to “wilful default” on their part.

But held, by all the Lords Justices, that that omission was not the real cause of the delay in completing the purchase, inasmuch as the real cause was the inability of the purchaser to find the purchase money at the time specified; and that, therefore, the purchaser was liable to pay the interest claimed by the vendors.

Decision of Chitty, J. affirmed.

THIS was a summons taken out, under the Vendor and Purchaser Act 1874, by the Mayor and Commonalty and Citizens of the City of London asking for a declaration that they were entitled to interest at the rate of 5 per cent. per annum upon a sum of 88,290*l.* from the 24th June 1892 to the 29th Sept. 1892, which sum was payable under a contract, dated the 18th March 1892, on the sale of real estate made between Henry Thomas Tubbs and the Mayor, &c., of London.

By the conditions of sale it was, amongst other things, provided that the purchaser of the property should pay a deposit of 10 per cent. on the amount of his purchase money, and that the purchase should be completed on the 24th June 1892; and that if from any cause whatever, other than wilful default on the part of

the vendors, the remainder of the purchase money should not then be paid, the purchaser should pay interest thereon at the rate of 5 per cent. per annum from that day to the day of actual payment thereof.

The further facts of the case, as found by Chitty, J., sufficiently appear from his Lordship's judgment.

On the 13th Feb. 1894 the summons came on to be heard before Chitty, J., when the following judgment was delivered:—

CHITTY, J.—To escape from payment of interest under this contract the purchaser must show, first, that the vendors were in default in the performance or discharge of some duty imposed upon them as vendors under the contract, and that such default on the part of the vendors was wilful; and, secondly, that the cause of the contract not being completed by conveyance was this wilful default on the part of the vendors. The contract was entered into on the 18th March 1892, and the time fixed for completion was the 24th June following, more than three months therefore being allowed by the contract to elapse between the date of the contract itself and the time for completion. The actual completion took place on the 13th Feb. 1893, and instead of taking one conveyance of the land sold to himself, the purchaser, who had in the meantime resold in parcels the property or a considerable part thereof, took conveyances to the sub-purchasers, being, as I understand it, some thirty in number. The vendors were not bound by the contract to execute these thirty conveyances, but being a great corporation they made no objection on that score. Now, on the completion the purchaser admitted that he was liable to pay interest from the 30th Sept. to the 13th Feb., and that interest he paid. But in regard to the period which elapsed between the 24th June and the 30th Sept. he says he was not liable and declined to pay interest. The question which I have to decide is, whether the purchaser is or is not liable for this interest. The property sold is described, and the description is generally accurate, as the site of Farringdon Market. The particulars include a map, which map has a note to the effect that the accuracy of the map is not guaranteed. The fourth condition relates to the title, and put shortly, it is to the effect that the property was taken by the vendors under an Act of Geo. 4, about the year 1824, and has been many years used for the purpose of Farringdon Market, and is now being sold under a statutory power. “A copy of the said Act,” say the conditions, “may be seen at the office of the Comptroller of the Chamber of the City of London during business hours on the five working days prior to the sale, and the purchaser, whether he shall inspect the same or not, shall have and shall be deemed to have purchased with full notice of everything contained in or to be implied from the provisions of the said Act. The purchaser shall not require any proof that the property was purchased or taken under the said Act other than a statutory declaration to be made, if required, at the expense of the purchaser by the Comptroller of the Chamber of the City of London that the vendors have been in possession of the property for upwards of thirty years, nor shall the purchaser inquire into or question the title of the vendors

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.] *Re* A CONTRACT BETWEEN TUBBS & THE MAYOR, &C., OF LONDON. [CT. OF APP.]

to the property, nor require any abstract or evidence of title (other than as aforesaid), nor the production or delivery over of any deeds, nor require any further or other covenant by the vendors than that they have not done any act to incumber the property." The contract does not contain any stipulation with reference to the time for delivering the abstract, or the making of requisitions thereon. On the 9th April the purchaser by his requisition required that a copy of a map, which is referred to in the statute of Geo. 4, should be supplied so that it may be seen that the sale plan does not comprise any more land than that delineated on the deposited plan, and he asks where the original can be inspected. In the same month of April the vendors answer that the purchaser may inspect the plans at the office of the town clerk at Guildhall as provided by the Act of Parliament itself. On the 7th May the purchaser says that he will inspect it so that he may be satisfied that the whole of the land contracted to be sold is delineated on it, and asks for an appointment. On the 12th May he is told he can see it at any time if he will give a day's notice. Now, the point in regard to this map is this: The statute enables the corporation, the vendors, to take the lands comprised in the schedule. The Act requires that a map or plan of the lands should be deposited at the office of the town clerk of the city to remain open for inspection. When the schedule is referred to which is the leading description—for the plan is not otherwise referred to on the face of the Act with the exception of a section about errors—it is seen that that schedule is not complete without reference to the plan, and in the description of the particulars in the schedule there are in the first column the words "number on plan." Now, when the schedule is compared with the deposited plan which I have before me it appears, on a comparison of this plan with the sale plan, that a part of the property included in the sale plan is not included in the deposited plan, and when the deposited plan is properly inspected it appears that a part of the property included in the sale plan, which for shortness I will call the Angel Inn, and one or two small sections of land on that side, are not included therefore in the powers which the city had to take under the statute of Geo. 4, the fact being, that on the deposited plan the Angel Inn and these other little plots of ground are delineated, but have no numbers; and not being numbered, therefore, are not imported into the schedule. What happened was this: The vendors, that is to say, the officers of the corporation who put up the property for sale, had not made a strict comparison between the schedule and the deposited plan. Now, I continue to narrate the facts as between the vendor and the purchaser from the point where I previously had stopped. The purchaser being, as already shown, at liberty to inspect the deposited plan on the 13th or 14th May, did not think fit to go to the office where the plan was until the 16th June. He allowed a month or rather more to elapse before he availed himself of the opportunity that was given him. He had not, I gather, inspected the plan, although he might have done so before he entered into the contract. In one sense, and I think in a true sense, on the facts I have stated, the deposited plan was a part of the title, because, as I have said, it was necessary to look at the plan

to see what were the numbers that were referred to in the schedule to the Act. No explanation is given in the evidence why the purchaser did not make this inspection sooner. Then, on the inspection being made, the omission (I use a natural word) appeared, and it was at once, when the error, like all other errors, was pointed out, apparent that the vendors could make no title under the Act of Geo. 4 to a part of the ground sold, amounting, as I am told, to some tenth part of the whole; but, no doubt, as counsel for the purchaser urged, an important part—a part which I could not disregard as between vendor and purchaser. Then a subsequent abstract was required and sent, for the vendors had a title to the omitted plots, as I will now call them, but not the title they thought they had. The further abstract was sent on the 25th June. The purchaser does not appear to have been desirous of pushing on the matter with any great vigour or energy, and he delivered his requisitions on the 23rd July, and those requisitions were answered with promptitude by the vendors on the 28th, and even at that time the purchaser had some other outstanding requisitions in regard to the title to the main part of the land sold, namely, in regard to a faculty, there having been a burial ground. Then all the requisitions and objections as to title were finally disposed of, either by being answered or by being waived, by the 30th Sept. The purchaser had not set apart his purchase money by the 24th June, nor indeed was he ready to complete, as is shown by the subsequent facts, until February of the year 1893; but there is an endeavour made on his part to show that he would have been ready on the 24th June had it not been for this defect in the title discovered by him on the 16th June. After stating some facts in his affidavit with reference to this matter, he says this in the 18th paragraph: "By reason of the facts above stated, I was never in a position to make the necessary financial arrangements to enable me to complete the said purchase by the date named in the said conditions of sale, or, in fact, at any time prior to the 29th Sept. 1892." He does not say that he was ready to complete on the 29th Sept., and, as a judge of fact, in my opinion he was not; and I say that, notwithstanding a paragraph in a further affidavit which he has filed, in which he attempts to give some explanation. Now this is a short statement of the leading facts of the case, and I have come to the conclusion that the delay in completing the purchase was not attributable to any default on the vendors' part, and if it be necessary after that expression of opinion to deal with the question of wilful default, in my opinion this is not a case of wilful default within the meaning of the stipulation that I have before me in the contract between the vendor and purchaser. The objection really, when analysed, is an objection to title, and upon a question of that sort I refer, without repeating them, to the very valuable observations that were made by Knight Bruce, L.J. in *Sherwin v. Shakespear* (5 De G. M. & G. 517), observations which are still in point, although that was not a case of a qualified condition in regard to the payment of interest. It appears to me that I should be straining the meaning of these words adversely to the common intention of the parties if I were to say that here is a case of "wilful default" on the part of the vendors. I do not propose to enter

[CT. OF APP.] *Re A CONTRACT BETWEEN TUBBS & THE MAYOR, &C., OF LONDON.* [CT. OF APP.]

into any disquisition on the meaning of those words, beyond saying that, I think the term "wilful" is a very good English word, although, like many English words, it is susceptible of various meanings, as may be found by looking at any dictionary. In considering the question of what is wilful default, as I have already intimated, in my opinion, regard must be had to the nature of the contract, and the duties, reciprocal or otherwise, imposed by the contract upon the parties. And if the argument on the part of the purchaser were pressed to its legitimate extreme, it appears to me that a purchaser would scarcely ever be liable to pay interest under such a condition as this, because, as is well known, having regard to the title to land in this country, the most careful vendor cannot be prepared to show a perfect title in the first instance. Mr. Levett said that the vendor must look at his own deeds. That proposition may be accepted, and that, if he does not look at his deeds, he is in default; and it is "wilful default" not to look at them. But that is not the point. So far as this part of the case is concerned, the question is the degree of attention or the degree of examination he must make, and the knowledge, too, that he must have in many cases, which I put by way of illustration during the argument, of the construction of the instruments and knowledge of law. I agree that there is no question of law here in any fair sense of the term. I agree that, if the vendors (I mean of course by "vendors" the officers intrusted with that duty) had carefully examined the plan in question, they would have discovered what the purchaser did discover on the 16th June, and might have discovered upon the 18th May. But I think I should be straining the meaning of the term unfairly as against the vendors if I said that this omission on the vendors' part was wilful default. I have said already that I do not propose, although it is a very interesting subject, to pursue the various arguments, and indeed the judgments, upon the meaning of that term. Speaking for myself, I am not much impressed by the substitution, by way, not of definition, but of explanation, of some other terms such as "spontaneous," or "voluntary"—terms of Latin origin—for the purpose of explaining the common English word "wilful." With these observations I conclude my judgment, holding that the vendors are entitled to the interest claimed. Accordingly I will make a declaration in the terms of the summons, with costs to be paid by the purchaser.

From that decision the purchaser now appealed.

Levett, Q.C. (Vernon R. Smith with him) for the appellant.—The question is, what caused the delay in the completion of the purchase in this case? I submit that it was not caused by the purchaser, as was found by *Ohitty, J.* And I ask the court to hold that his Lordship came to a wrong conclusion when he decided that the purchaser was liable. On the contrary, the vendors were alone responsible for the delay that has occurred. The vendors recklessly made a statement that they need not have made at all—a statement which they intended the purchaser to rely upon—and that being an erroneous statement, was "wilful default" within the meaning of the condition. To have made that statement, and then not to have taken the trouble to verify it, constitutes "wilful default." The meaning of "wilful de-

fault" in conditions similar to the present has been considered in:

Williams v. Glenton, 13 L. T. Rep. N. S. 727; L. Rep. 1 Ch. App. 200;
Re Young and Harston's Contract, 53 L. T. Rep. N. S. 837; 29 Ch. Div. 691; 31 Ch. Div. 168;
Re Hetling and Merton's Contract, 68 L. T. Rep. N. S. 749; (1893) 3 Ch. 269;
Elliott v. Turner, 13 Sim. 477, 485;
De Visse v. De Visse, 1 Mac. & G. 336.

[*LINDLEY, L.J.*—In *Sherwin v. Shakspear* (5 De G. M. & G. 517) the observations of Lord Cottenham in *De Visse v. De Visse* (*ubi sup.*) were corrected, and the distinction was shown between wilful default and non-wilful default in a condition of sale such as the one here.] I submit that it is clear, on the authorities that I have cited, that the vendors in this case have been guilty of that description of "wilful default" which this condition was designed to meet. It could never be intended that a vendor should be allowed to be as negligent as he chooses, and then to say that he has been merely inadvertent in his conduct. [*KAY, L.J.* referred to Webster's Conditions of Sale, pp. 281, 283.] Before making a statement of the kind that they did, it was the vendors' duty to have verified it, and, having omitted to do so, they cannot now say that they are entitled to interest for the period covered by the delay.

Whitehorne, Q.C. and *A. J. Allen* for the respondents.—The delay in the payment of the purchase money was not attributable exclusively to the default of the vendors. In the cases cited, the purchaser had his money ready; but here it is proved that the purchaser had difficulty in obtaining the purchase money, and his inability to do so was the real cause of the delay in completing the purchase. Assuming, however, that there has been default on the vendors' part, can it be said that it has been such "wilful" default as is aimed at by the condition? The true definition of "wilful" appears from

Lewis v. The Great Western Railway Company, 37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195, 206.

The purchaser could have ascertained that the whole of the property sold was not sold under the Act of Geo. 4, by verifying for himself the statement made by the vendors on the subject.

Levett, Q.C. in reply.—The very point taken by the other side as regards the purchaser verifying for himself the statement made by the vendors was dealt with by the Court of Appeal in

Redgrave v. Hurd, 45 L. T. Rep. N. S. 485; 20 Ch. Div. 2, 13.

In that case Sir George Jessel, M.R. said: "If a man is induced to enter into a contract by false representation, it is not a sufficient answer to him to say, 'If you had used due diligence, you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations." [*LOPES, L.J.*—The decision in *Re Arnold*; *Arnold v. Arnold* (42 L. T. Rep. N. S. 705; 14 Ch. Div. 270) proceeds on the same lines.]

Cur. adv. vult.

[CT. OF APP.] *Re A CONTRACT BETWEEN TUBBS & THE MAYOR, &C., OF LONDON.* [CT. OF APP.]

May 10.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal by a purchaser from an order of Chitty, J. directing him to pay interest on his purchase money according to certain conditions of sale. By those conditions the purchase was to be completed on the 24th June 1892, and “if from any cause whatever, other than wilful default on the part of the vendors, the purchase money was not then paid,” it was to bear interest at 5 per cent. It is obvious from the language of this condition that a distinction is intended to be drawn between defaults on the part of the vendors which are “wilful” and those which are not; and that interest is to be payable, even although there may be some default non-wilful on the part of the vendors, and some delay in the completion of the purchase occasioned by such default. In order to exonerate the purchaser from liability to pay interest he must prove some “wilful default” on the part of the vendors, which caused delay in the completion of the purchase. Proof by the purchaser that he could not prudently complete the purchase by the day named, owing to some difficulty arising on the investigation of the vendors’ title, is not of itself enough to exonerate the purchaser from payment of interest, for it is quite possible that such difficulty may not be owing to any wilful default on the part of the vendors. Lord Cottenham’s observations on this subject in *De Visse v. De Visse* (1 M. & G. 336) were corrected in *Sherwin v. Shakspear* (5 De G. M. & G. 517), and ever since that decision the courts have always recognised the distinction between wilful and non-wilful defaults in dealing with conditions of sale worded like that before us. The meaning of the term “wilful default” in conditions of this kind was carefully examined in *Williams v. Glenton* (13 L. T. Rep. N. S. 727; L. Rep. 1 Ch. App. 200); *Re Young and Harston’s Contract* (53 L. T. Rep. N. S. 837; 31 Ch. Div. 168); and *Re Helking and Merton’s Contract* (68 L. T. Rep. N. S. 749; (1893) 3 Ch. 269). But none of these cases quite cover the present case, as there was not in them, as there was here, a misstatement by the vendor of the nature of his own title. This misstatement arose from a very natural, though unfortunate, oversight of the vendors’ agents. The property sold all belonged to the vendors, and they had for years been in possession of it, and their title was in fact free from all objections; and their solicitors, who are responsible for the preparation of the particulars and conditions of sale, knew this to be the case. Their knowledge of the goodness of the title led them to be less careful than they otherwise would have been in describing it. They described it thus in condition 4: “The property was purchased and taken by the vendors . . . in or about the year 1824, under the powers of an Act 5 Geo. 4, c. 151, and has for many years past been used or retained for the purposes of Farringdon Market, and is now being sold under a statutory power so to do. A copy of the said Act may be seen at the office of the Comptroller of the Chamber of the City of London . . . and the purchaser, whether he shall inspect the same or not, shall have, and shall be deemed to have purchased with, full notice of everything contained in, or to be implied from, the provisions of the said Act. . . .” Now this statement was incor-

rect. The great bulk of the property had been acquired nearly fifty years ago under the statute referred to. But about one-tenth of it was acquired considerably later, some twenty-six or twenty-seven years ago, and for the last quarter of a century both portions had been thrown together and used as one market-place. Unfortunately, the title was not examined, or not examined with proper care, before the conditions of sale were framed. This was unquestionably a default; but, in my opinion, it was not “wilful.” I do not propose to examine this word with scientific accuracy. It is sufficient to observe that to make up one’s mind not to verify a statement is “wilful,” but that simply not to think about verifying it is not wilful. I am aware that in *Elliott v. Turner* (13 Sim. 477) Shadwell, V.C. expressed the opinion that forgetfulness might amount to wilful default. The case before him was, however, of a very different kind from the present. I confess I am more disposed to concur with Lord Bramwell’s observations on the term “wilful misconduct” in *Lewis v. The Great Western Railway Company* (37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195, 206). They are, in my opinion, quite consistent with Lord Bowen’s observations in *Re Young and Harston’s Contract* (*ubi sup.*), if it be borne in mind that Lord Bowen presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight. No doubt the statements contained in the fourth condition were deliberate, and to that extent “wilful”; but the misstatement was not “wilful.” It arose from the fact that, owing to the circumstance that the market-place had for years been one property, the necessity for verifying the statement never occurred to the vendors or their agents. I cannot hold that this omission was under the circumstances a “wilful default.” The conclusion thus arrived at is sufficient to dispose of this appeal. But the case is very near the line, and therefore I will add that the more closely the facts are investigated the more reason there is for coming to the conclusion that the real cause of the delay in completing the purchase was the inability of the purchaser to find the purchase money. The fact that he did not and could not complete the purchase for months after all difficulties in making out a title were cleared up throws a strong light on the purchaser’s alleged ability to complete on the day originally fixed for completion. The vendors’ default is seized on as justifying the delay. But I am not at all satisfied that that default was the real cause of the delay. Chitty, J. did not believe that it was; nor do I. The appeal must be dismissed with costs.

LOPES, L.J.—I do not propose to restate the facts which have been already sufficiently stated by Lindley, L.J. Conditions with regard to payment of interest are framed in different ways. They sometimes make interest payable if delay arises from any cause whatever, or if delay arises through the purchaser’s default, or if completion is delayed from any cause whatever, other than wilful default on the part of the vendor. It is the last form of condition which the court has to consider in this case. I am clearly of opinion that there was default by the vendors here. They made a positive and specific representation that the whole of the property was sold under a statutory power contained in a specified Act of Parlia-

OT. OF APP.] *Re A CONTRACT BETWEEN TUBBS & THE MAYOR, &C., OF LONDON.* [OT. OF APP.]

ment. This was not the fact, because one-tenth of the property sold was not comprised in that statutory title. This the vendors might have ascertained if they had verified by proper investigation the documents in their possession. It was reasonable in the circumstances that they should have done this; they omitted to do something which it was their duty to have done, having regard to the positive statement they undertook to make, and having regard to their relations with intending purchasers. There was, therefore, "default;" but it must be "wilful" and have caused delay in completion in order to exonerate the purchaser from payment of interest. Admittedly the default was not intentional; it was an oversight, an oversight easily accounted for, having regard to the fact that the vendors had been in possession of the whole property for many years, and that nine-tenths of it was included in the statutory title, and the whole passed under the name of, and was regarded as, the "Farringdon Market." It was an honest mistake, and unintentional. It seems to me a perversion of the word "wilful" to hold such a default "wilful." It was, as I have said, a default; but to describe it as "wilful" would be a misapplication of that qualifying epithet. There would be no distinction then between what was intentional and what was unintentional and accidental. Both would be visited with the same consequences. There are expressions in the judgment of Bowen, L.J. in *Re Young and Harston's Contract* (53 L. T. Rep. N. S. 837; 31 Ch. Div. 168) which are relied upon. The learned Lord Justice, speaking of wilful, said that "nothing blamable is denoted; it amounts to nothing more than this—that he knows what he is doing, and intends to do what he is doing, and is a free agent." I do not think the learned judge was contemplating an honest oversight. He was dealing with a different case, where, two days before the time fixed for completion, the vendor left England without having executed the conveyance which was ready for his execution on the afternoon of the day fixed. Sir James Hannen said: "Our judgment is, that where a man, knowing that some act has to be done by him on a particular day, goes away in disregard of that obligation, he is guilty of default; and, doing it intentionally, it is 'wilful' within the terms of a contract of this kind." What the vendor did there was not regarded as a mistake, much less an honest or unintentional oversight. That case, in my judgment, is distinguishable from the present, and expressions applicable to that case are inapplicable here. In *Lewis v. The Great Western Railway Company* (37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195, 206), Bramwell, L.J. said, defining "wilful" in connection with misconduct, "wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful." This, to my mind, is a more accurate definition of "wilful" than that given by Shadwell, V.C. in *Elliot v. Turner* (13 Sim. 477, 485), where he says: "In my opinion the word 'wilful' can have no other meaning than spontaneous; and, if the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could

have no control, I apprehend that the neglect or default was wilful." It is difficult to lay down any general definition of "wilful." The word is relative, and each case must depend on its own particular circumstances. I cannot think the default here was "wilful." But, even assuming there was wilful default, I am of opinion that the delay in the purchase was not fairly attributable to it. The delay arose from the fact that the purchaser was not ready with his purchase money, which is evidenced by the fact that he did not complete till long after the 29th Sept., and has paid interest for the interval between that day and the time of completion. The appeal must be dismissed, with costs.

KAY, L.J.—The question is as to the meaning of "wilful default" in the usual condition of sale that "if from any cause whatever, other than wilful default on the part of the vendors," the purchase money (excepting the deposit) should not be paid on the 24th June 1892, the day fixed for completion, interest thereon at 5 per cent. should be paid by the purchaser. The property was of great value, having a considerable frontage to Farringdon-street, in the city of London. [His Lordship referred to the fourth condition and continued:] At the sale on the 18th June 1892 Tubbs bought the property for 98,100l. under these conditions, and paid 9810l. deposit, leaving 88,290l. the remainder of the purchase money, to be paid on completion. Interest is claimed upon this sum from the 24th June 1892 to the 29th Sept. 1892, amounting to more than 1100l. The purchaser contends that he should not be compelled to pay this interest, because the delay during that period was occasioned by the vendor's "wilful default." The purchaser did not inspect the Act 5 Geo. 4, c. 151, before the sale. On the 22nd March 1892 a copy of the Act was sent to his solicitors, but without any copy of the plan referred to in it. On the 9th April 1892 the purchaser sent in requisitions, including a requisition for a copy of the plan. On the 28th April this was answered by an offer to allow inspection of the plan, but no copy was sent. On the 7th May the purchaser's solicitors asked when the plan might be seen, and were told on the 12th that it might be inspected at any time on giving one day's previous notice. Some delay took place about obtaining a faculty enabling the removal of human remains from a portion of the land which had been formerly a burial ground. This faculty was obtained on the 23rd June. In the meantime, on the 16th June, the purchaser's solicitors inspected the plan, and found that a most important and essential part of the property, fronting to Farringdon-street, was not acquired by the vendors under the Act of 1824. It appeared on subsequent inquiry that this part of the property was acquired under the Holborn Valley Act 1864, and that the vendors had not had possession of it for thirty years at the date of the sale. This, it is said, prevented the completion of the sale on the 24th June. The next day, the 25th, a further abstract was delivered, relating to this portion of the frontage. Requisitions on this abstract were delivered on the 28th July. There was some difficulty about producing the title deeds, and the title was not accepted till the 29th Sept. From that date the purchaser has paid interest. In this state of circumstances the vendors contend that there was

CHAN. DIV.]

Re ALDRIDGE; ALDRIDGE v. ALDRIDGE.

[CHAN. DIV.]

no "wilful default" on their part. The misstatement, they say, was made by inadvertence; it was not a "wilful" misstatement. The purchaser answers, the default was not the misstatement, but the omitting to examine the Act and plan before making the statement, the Act and plan being all the time in the vendors' possession. This, the purchaser urges, was "wilful." If the vendors had examined the plan, and had omitted to observe that the Act did not include the frontage, that might have been inadvertence, not "wilful default." But no examination whatever was made. The vendors, making such a statement, had a duty to the purchaser to take care, by examining the plan, which was in their own possession, to avoid an inaccuracy. Instead of this, whoever framed these conditions trusted to his general idea of what the vendors' title was, and neglected to make a search to verify it. The purchaser urges that this neglect was the default, and that such default was "wilful," because the person who made it willed not to make the search, which it was his duty to the purchaser to make, before making the positive statement in the conditions. I am not able to find an answer to this argument which is satisfactory to my mind. If the vendors had not made the positive statement as to all the land being held under the statute referred to, or if, having made it, they or their agent had taken some steps to verify it, and had in so doing committed a *bonâ fide* mistake, their case might be different. But, according to the evidence, no attempt to verify the statement was made, and the omission to do this was not only a "default," but was a "wilful default," because it was a deliberate neglect of a duty to the purchaser which the vendors, by making the positive statement, voluntarily assumed. But did this occasion the delay? Assuming that the vendors were in default, the purchaser voluntarily delayed from the 7th May till the 16th June to examine the plan, and again, after the further abstract was delivered on the 25th June, he sent in no requisitions until the 28th July. There is no excuse for those delays, and the learned judge found that the reason was a difficulty in obtaining the purchase money. On this ground I am prepared to concur in his decision.

Appeal dismissed.

Solicitors for the appellant, *Chapple, Welch, and Chapple.*

Solicitor for the respondents, *H. H. Crawford*, City Solicitor.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, March 13.

(Before NORTH, J.)

Re ALDRIDGE; ALDRIDGE v. ALDRIDGE. (a)

Partnership—Business carried on for benefit of firm by surviving partner at a loss—Remuneration for services in carrying it on—Loss of capital.

Two brothers carried on a business in partnership, the elder supplying the capital, and the younger managing the business, but having no capital therein. The elder brother died, and with the

approval of his executors, the surviving brother continued to carry on the business with a view to its sale as a going concern. The business, however, proved unsaleable; and consequently at the end of nearly two years, the survivor who had been carrying it on at a loss, discontinued to do so, and the assets were realised by the executors of the elder brother, but did not produce sufficient to pay the capital supplied by him. On a summons being taken out by the executors of the elder brother for the determination of the questions how the loss was to be borne, and whether the survivor was entitled to any remuneration for carrying on the business at a loss with a view to its sale as a going concern:

Held, that the loss of the capital must be borne by the estate of the elder brother who advanced it, and that the survivor was not entitled to any remuneration for his services in carrying on the business, since he had earned no profits thereby.

Two brothers, Thomas Aldridge and William Aldridge, carried on business in partnership. The whole capital of the business amounting to 5000*l.* was advanced by Thomas Aldridge, on the security of a charge on the leases, stock-in-trade, and property of the business, which property was by the articles of partnership made the partnership assets subject to the charge in favour of Thomas Aldridge. William Aldridge was bound to devote himself entirely to the management of the business, and was entitled to 3*l.* a week out of the profits as the remuneration for his services. Any losses incurred in carrying on the business were to be borne by the partners equally.

In Nov. 1890 Thomas Aldridge died, and, with the approval of his executors, William Aldridge continued to carry on the business with a view to its sale as a going concern. The executors, however, were unable to dispose of it as a going concern, and in Oct. 1892 William Aldridge, who had been carrying on the business at a loss, withdrew. The assets were realised by the executors, but did not produce sufficient to pay the 5000*l.* advanced by Thomas Aldridge. William Aldridge claimed remuneration for his services in carrying on the business subsequently to the death of his brother.

This was a summons taken out by the executors of Thomas Aldridge, for the determination of the questions whether William Aldridge was liable to make good a moiety of the amount of capital lost, and whether he was entitled to any remuneration for his services in carrying on the business subsequently to the death of Thomas Aldridge, the business having been carried on by him at a loss.

Swinfen Eady, Q.C. and Gatey for the executors.—Under the articles losses incurred in carrying on the business were to be borne by both partners equally, and therefore William is bound to make good a moiety of the capital lost. As the business was carried on by him at a loss after the death of Thomas Aldridge, he is not entitled to any remuneration for his services.

Oswald, Q.C. and Pochin for William Aldridge.—The loss of part of the 5000*l.* advanced by Thomas Aldridge on the security of a charge on the partnership assets is not a loss to which William Aldridge is bound to contribute half. They referred to

Wood v. Scoles, 14 L. T. Rep. N. S. 470; L. Rep. 1 Ch. App. 369.

(a) Reported by J. TRISTRAM, Esq., Barrister-at-Law.

William is entitled to remuneration for carrying on the business after his brother's death with a view of its sale by his brother's executors as a going concern. They referred to

Featherstonhaugh v. Turner, 25 Beav. 382;

Cook v. Collingridge, Jac. p. 623;

Burden v. Burden, 1 Ves. & B. 176;

Mellersh v. Keen, 27 Beav. 242.

Swinfen Eady, Q.C. in reply.—The cases cited by the defendants do not apply here, as they are all cases in which profits were made.

NORTH, J.—In this case the whole capital of the partnership amounting to 5000*l.* was contributed by Thomas Aldridge, on the security of a charge on the leases, stock-in-trade, and property of the firm, which, subject to that charge, became under the articles of partnership part of the partnership property. William Aldridge continued for about two years after the death of his brother, to carry on the business at a loss with a view to its sale by his brother's executors as a going concern, which they were unable to do. When he withdrew, and the assets were realised by the executors of Thomas Aldridge, they did not produce a sum sufficient to repay the 5000*l.*, and the question is how the loss must be borne. According to the decision in *Wood v. Scoles* (*ubi sup.*) I think that the loss must be borne by the estate of Thomas Aldridge. The general rule is laid down in *Lindley on Partnership*, 6th edit., at p. 601, but this may be altered by the agreement between the partners as in *Wood v. Scoles* (*ubi sup.*). On the dissolution of the partnership, the partnership assets were to be sold and converted, and the produce after paying all debts and liabilities was to be divided between the partners. But the result was that there was not enough to repay the capital of 5000*l.* advanced by Thomas Aldridge. William Aldridge is not, however, bound to contribute a moiety of that loss. With respect to the remuneration claimed by William Aldridge for carrying on the business after the death of his brother, as the business was carried on at a loss and no profits were made, he is not entitled to any remuneration, since a surviving partner who carries on a partnership business for the benefit of the firm has no right to remuneration for his services in so doing, unless he has earned profits thereby: (*Lindley on Partnership*, 6th edit., p. 394.)

Solicitors: *Bull and Bull; Finch and Turner.*

Thursday, April 26.

(Before NORTH, J.)

Re GOUGH; LLOYD v. GOUGH. (a)

Costs—Solicitor's lien—Title deeds held personally—Costs of firm.

A solicitor practising in partnership with another solicitor, acted as the solicitor of a purchaser of property, in carrying out the purchase, and, at the request of the purchaser, the property was conveyed to the solicitor as if he were the sub-purchaser thereof. The title deeds of the property were handed over to the solicitor, and continued to remain in his possession. Three years afterwards the partnership between the solicitor and his partner was dissolved, but the solicitor retained

the title deeds in his possession. The purchaser died within six years of the date of the purchase. An action was brought for the administration of the purchaser's estate, and the solicitor on behalf of the old firm and himself claimed against the purchaser's estate a considerable sum for general costs, some of which were incurred previously to the purchase. The chief clerk, however, allowed only the sum claimed for costs incurred within six years of the purchaser's death, the remainder being barred by the Statute of Limitations. The solicitor, when asked to deliver up the title deeds, claimed to have a lien on them for the amount of costs disallowed by the chief clerk as statute-barred. On a summons for the determination of the right of the solicitor to the lien he claimed:

Held, that he was not entitled to the lien, as the costs of the purchase of the property had been allowed by the chief clerk, and the solicitor, to whom the property had been conveyed, was not entitled to a lien on the title deeds handed to and retained by him personally for the general costs of the old firm.

FROM 1873 to Dec. 1883 Joseph Richard Cobb practised as a solicitor, at Brecon, in partnership with John Tudor, under the style of Cobb and Tudor. During that period, as also for some years previously to the formation of the partnership, Cobb acted as solicitor to Richard Douglas Gough, and personally attended to Gough's legal business.

In 1881 Gough purchased, at a sale by auction, a moiety of a farm called Penrhos, in the county of Brecon. Cobb acted as his solicitor in carrying out the purchase, and, at Gough's request, the property was conveyed to Cobb as if he were the sub-purchaser thereof. The title deeds of the property were handed over to Cobb, and remained in his possession, with other title deeds relating to other property of Gough.

On the 31st Dec. 1883 the partnership between Cobb and Tudor was dissolved. Cobb retained in his possession the title deeds of the property purchased by Gough in 1881, together with other title deeds relating to other property of Gough, and gave Gough advice on legal matters occasionally without charge.

On the 3rd Dec. 1886 Gough died, having by his will appointed his son Fleming Gough his executor, who commenced an action for the administration of his father's estate.

One of the claims made in the action amounted to 81*l.* 15*s.* 8*d.* for bills of costs due from the testator, some of the bills being made out in the name of Joseph Richard Cobb alone, and others in the name of the firm Cobb and Tudor. Of that amount the chief clerk allowed only 100*l.* 4*s.* for work done within six years previously to the testator's death, which included the work done in connection with the purchase by the testator in 1881 of the moiety of the farm called Penrhos but disallowed the remainder of the items on the ground that the claim for them was barred by the Statute of Limitations.

On being requested to deliver up the title deeds relating to the testator's property, Cobb declined on the ground that he had a lien on such title deeds for the balance disallowed by the chief clerk of the sum of 81*l.* 15*s.* 8*d.*

This was a summons in the administration action, taken out for the determination of the

a) Reported by J. TRISTRAM, Esq., Barrister-at-Law.

CHAN. DIV.]

Re GOUGH; LLOYD v. GOUGH.

[CHAN. DIV.]

question whether Cobb was entitled to the lien he claimed on the title deeds relating to the moiety of the farm called Penrhos.

It was stated in Cobb's affidavit that, under his agreement with John Tudor, the latter was only entitled to a fixed salary, and that Cobb was entitled, subject to such salary, to the whole net profits, and was liable to the whole losses of the business of the partnership.

Everitt, Q.C. and *Dickinson* for the summons.—The property purchased in 1881 by the testator was conveyed to Cobb as trustee for the testator, although no reference to any trust appears on the deed, and the title deeds of the property were held by Cobb as trustee. He cannot claim on title deeds which he held as trustee a lien for costs due to the firm of which he was a partner. It appears from Cobb's affidavit that he received the deeds personally, and kept them personally, not as member of the firm of Cobb and Tudor, and therefore he cannot have a lien on the deeds for general costs due to them:

Re Forshaw, 16 Sim. 121.

A solicitor cannot claim a lien on deeds held by him as trustee for costs due to the firm of which he is a member:

Vaughan v. Vanderstegen; Annesley's case, 2 Drew. 409;

Re Rowland and Crankshaw, L. Rep. 1 Ch. App. 421;
Re Lawrance; Boncker v. Austin, 70 L. T. Rep. N. S. 91; (1894) 1 Ch. 556.

Swinfen Eady, Q.C. and *E. P. Hewett* for Joseph Richard Cobb.—It appears from Cobb's affidavit that although as regards third persons the business was carried on by the firm Cobb and Tudor, yet as between the partners themselves the partnership assets belonged to Cobb. A lien on deeds continues to exist notwithstanding successive alterations in the firm holding the deeds:

Pelly v. Wathen, 7 Hare, 351, 362.

A person acting both as trustee and solicitor may claim a lien on documents in his possession for his costs just as a person acting as town clerk and solicitor:

Re v. Sankey, 6 N. & M. 839; 5 A. & E. 423;

Re Walker; Meredith v. Walker, 68 L. T. Rep. N. S. 517, 519.

The case of *Re Forshaw* (*ubi sup.*) differs from the present because there the two solicitors who claimed the lien on the deeds never had them in their sole possession; but in the present case the one person who claims the lien has been in possession of the deeds. In *Vaughan v. Vanderstegen; Annesley's case* (*ubi sup.*) it was held that Annesley did not become possessed of the deeds as solicitor, but as mortgagee, and therefore had no lien on them for his costs as solicitor. In the present case, after the dissolution of the partnership the debt belonged to Cobb. The property purchased in 1881 was not conveyed to Cobb as trustee, but as the nominee of the testator.

Everitt, Q.C. in reply.—The possession of the deeds by Cobb personally is inconsistent with a claim to a lien on them for the general costs due to the firm of Cobb and Tudor. The case of *Newington Local Board v. Eldridge* (12 Ch. Div. 349) shows that a town clerk has no lien on papers of the corporation which he holds as town clerk, but only on papers of the corporation with respect to which he has done work as solicitor.

NORTH, J.—From the year 1873 to the end of the year 1883, Joseph Richard Cobb and John Tudor carried on business as solicitors in partnership, under the style of Cobb and Tudor, Cobb being the senior partner. Mr. Cobb acted as solicitor to Richard Douglas Gough, the testator in the action, for many years previous to 1873, and since 1873 most of Mr. Gough's business was done by Mr. Cobb personally. In 1881 Mr. Gough purchased at a sale by auction a moiety of a farm called Penrhos, in the county of Brecon, and the purchase was carried out by a conveyance of the moiety to Cobb, who acted as Gough's solicitor in the matter. It was recited in the conveyance that it was arranged that Cobb should become the purchaser instead of Gough. The purchase money is stated as paid by Cobb, and the conveyance contains a declaration that Cobb's widow should not be entitled to dower out of the moiety. No doubt there was some arrangement between Gough and Cobb, and the purchase money was provided by Gough. But on the face of the conveyance Cobb was absolute owner of the property, and not a trustee for Gough. The title deeds of the property passed into the hands of Cobb, and still remain in his possession. In Dec. 1883 the partnership between Cobb and Tudor was dissolved, and Cobb retained the title deeds, and continued to give advice to Gough until his death in 1886. An action was brought for administration of Gough's estate, and in that action Cobb claimed 818l. 15s. 8d. for general costs against the testator's estate; but the chief clerk allowed 100l. 4s. only, the remainder of the claim being barred by the Statute of Limitations. The title deeds of the moiety of the farm belonged to the testator's estate, and when Cobb is asked for them he claims to have a lien upon them for the general costs claimed by him which were disallowed by the chief clerk. In my opinion, he is not entitled to the lien he claims. The costs of the purchase of the moiety of the farm have been paid him, but he claims to have a general lien on the deeds for general costs of the firm. They are bills of the firm in respect of work done by the firm, and the title deeds are held by Mr. Cobb alone. In my opinion, when a solicitor who is one of a firm of solicitors has possession of title deeds as a trustee, he cannot set up a lien on those deeds for costs due to the firm. In the present case the costs are due to the firm, and it is clear, on the authority of *Vaughan v. Vanderstegen* (*ubi sup.*), that Mr. Cobb cannot set up a lien on the title deeds for general costs due to the firm. A distinction has been attempted to be drawn between that case and the present. It has been suggested that, as regards the partnership between Cobb and Tudor, Cobb was entitled to the whole assets of the partnership, and that Tudor was only entitled to a fixed salary. I do not know the particulars of the arrangement between the partners, but they transacted business as partners as far as third persons were concerned. That being so, the costs are due to the firm, and whether one partner took the profits and paid the other a salary is immaterial. It was an ordinary case of solicitors doing business in partnership.

Solicitors: *Tamplin, Tayler*, and *Joseph*, for *Stricks* and *Bellingham*, Swansea; *Preston, Stow*, and *Preston*, for *Cobb* and *Tudor*, Brecon.

Thursday, March 1.

(Before NORTH, J.)

Re L'HERMINIER; MOUNSEY v. BURTON. (a)

Settlement of personalty—Construction—Power of appointing income—Power to appoint capital.

By a settlement of personalty made on marriage the trustees were to stand possessed of the "dividends, interest, and income" of the trust funds in trust for such person or persons as the wife should by her will or codicil appoint, and subject to such appointment (if any) of "the said dividends, interest, and income," to stand possessed of "the said trust premises, and the dividends, interest, and income thereof," in trust for such person or persons as under the statutes of distribution would have become entitled thereto at the death of the wife if she had died possessed thereof intestate, and without having been married. The wife, by her will, appointed the trust funds in trust, as to the income, for her husband for life, and after his death upon trusts which disposed of the whole interest in the trust funds. She died first, and afterwards the husband. On a summons for the determination (inter alia) of the question whether the power of appointment given to the wife by the marriage settlement extended to the capital of the trust funds:

Held, that the power of appointment over the dividends, interest, and income of the trust funds, given her by the settlement, extended over the capital thereof.

By a settlement made in 1863 upon the marriage of Benedict Loys L'Herminier and Elizabeth Mounsey, certain personal estate was assigned to trustees upon trust to pay the income thereof to Elizabeth Mounsey for life, and after her death to stand possessed of "the dividends, interest, and income of the said trust funds," in trust for such person or persons as Elizabeth Mounsey should by her last will or any codicil direct, limit, or appoint, and subject to such appointment (if any) of the said dividends, interest, and income, to stand possessed of "the said trust premises, and the dividends, interest, and income thereof, in trust for such person or persons as under the statutes of distribution would have become entitled thereto at the death of the said Elizabeth Mounsey, had she died possessed thereof intestate, and without having been married."

By her will Elizabeth L'Herminier appointed the settled trust funds upon trust, as to the income thereof, for Benedict Loys L'Herminier for life, and after his death upon trusts which disposed of the whole interest in the settled trust funds. She died first, and afterwards her husband.

This was an originating summons taken out for the determination (inter alia) of the question whether by virtue of the provisions of the marriage settlement, Elizabeth L'Herminier had a power of appointment over the capital of the settled trust funds.

Stallard for the trustees of the settlement.

J. G. Butcher for some of the next of kin of Elizabeth L'Herminier.—The power of appointment given to Mrs. L'Herminier does not extend to the capital of the trust funds. There is no case exactly in point. The question is one of the construction of the provisions of the settlement which

make a distinction between income and capital. The gift over in the settlement is not in default of appointment, but subject to such appointment (if any) of income, from which it appears that something was to pass under the gift over even if an appointment was made by Mrs. L'Herminier. A power of appointment over income of settled personalty only extends to the period during which the law allows the income of property to be tied up, and does not apply to income in perpetuity. The rule of law which governs a gift of the income of land does not apply to a gift of the income of personalty, which depends entirely upon the construction of the provisions of the settlement under which the gift is made. He referred to

Adamson v. Armitage, 19 Ves. 416;

Mannox v. Greener, 27 L. T. Rep. N. S. 408; L. Rep. 14 Eq. 456.

Austen-Cartmell, Darley, Mulligan, and Stock, for persons taking under the appointment by Mrs. L'Herminier, were not called upon.

NORTH, J. stated the provisions of the settlement, and proceeded:—The question is, how far does the appointment stand? It is said that the testatrix could not appoint the capital but only the income of the trust funds, because there is a distinction between the trusts declared in respect of the income and in respect of the capital. For some reason I do not understand that distinction is made in the settlement. But, giving full effect to the words of the settlement, what does that come to? The words in terms give a power to appoint the income of the trust funds without any limit as to time. Why is not that good? Supposing an absolute owner of personalty gave the income of his property to a person, what does that person take? He has a right to receive the income for ever, and, having the right to the whole income, he has the right to dispose of the capital which produces that income. There is no difference in this respect between a disposal by a person having the absolute ownership of the income of a fund and the exercise of a power over the income of a fund. The power of appointing the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit. It is said that there was an intention to limit the power of appointment to the period for which the income might be appointed. If that is so, it is unfortunate that words have been used contrary to that intention. If the words are clear that the income may be appointed for ever, no intention to the contrary can be inferred without other words to show that the power is intended to be cut down. Here there is no suggestion of the existence of such words; the suggestion is, that the income may be given for so long only as the law will permit property to be tied up, and no longer; but there is nothing whatever to justify such suggestion. In my opinion the power authorises the disposal of the income for an unlimited time, and this carries the power to dispose of the capital.

Solicitors: *Gray, Mounsey, and Fuller*, for Mounsey and Son, Carlisle.

(a) Reported by J. TRISTRAM, Esq., Barrister-at-Law.

CHAN. DIV.]

Re GILSON; GILSON v. GILSON.

[CHAN. DIV.]

Friday, March 2.
(Before NORTH, J.)

Re GILSON; GILSON v. GILSON. (a)

Third-party notice—Action for accounts—Plaintiff beneficiary of testatrix—Defendants executors of testatrix—Order XVI., r. 48.

An action was brought by beneficiaries under a will for accounts, the defendants being the two executors of the will and other beneficiaries thereunder. The two defendant executors claimed to be entitled to an indemnity out of the estate of the late tenant for life under the will in respect of losses arising out of certain investments of trust moneys under the will, and before delivering their defence moved, on appeal from an order made in chambers, for leave to issue a third-party notice under Order XVI., r. 48, against one of the plaintiffs, and a stranger, as co-executors with one of the two defendant executors of the late tenant for life under the will, in order to raise the claim of the defendant executors to an indemnity out of the estate of the late tenant for life; but it was not proposed to serve the defendant executor, who was also the third executor of the late tenant for life, with the third-party notice.

Held, that the motion was premature, being before delivery of any defence in the action; and that the case did not come within Order XVI., r. 48; and the motion was dismissed with costs.

MOTION.

The action was brought by Marianne Gilson, widow of Edward Rowell Gilson, who was entitled during her life so long as she remained his widow to the income of one-third part, of which Edward Rowell Gilson had been tenant for life, of the residuary estate under the will of Ann Gilson, who died in 1881, and by the four infant children of Edward Rowell Gilson and Marianne Gilson (by their mother as next friend), who were entitled in remainder to the same one-third part subject to the life interest of their mother, against Robert Andrews Gilson and Frederick Cheesewright, as the executors and trustees of the will of Ann Gilson, and against other persons entitled to the remaining two-third parts of the residuary estate under her will, including Robert Andrews Gilson.

Edward Rowell Gilson died in 1891, and his executors were the plaintiff Marianne Gilson, the defendant Robert Andrews Gilson, and Henry David Roberts, who was not a party to the action.

The action was brought for accounts of the estate of Ann Gilson, and the plaintiffs in their statement of claim alleged that the defendants Robert Andrews Gilson and Frederick Cheesewright had in breach of their duty as trustees invested a portion of the residuary estate of Ann Gilson in investments of an unauthorised and improper nature, whereby serious loss had been occasioned to her trust estate, and claimed an account of the trust funds and of the securities upon which the same were invested; an inquiry whether the investments of the trust funds were fit and proper; and, if it should be found that they were not fit and proper investments, an inquiry what loss had been occasioned to the trust estate by reason of the improper investments, and that the defendants Robert Andrews Gilson and

Frederick Cheesewright might be declared jointly and severally liable to make good the loss; and administration if necessary.

The defendants Robert Andrews Gilson and Frederick Cheesewright, who thought they were entitled to be indemnified out of the estate of Edward Rowell Gilson in respect of any loss occasioned through the investments complained of, did not deliver a defence, but in Feb. 1894 applied in chambers for leave to issue a notice under Order XVI., r. 48, and to serve the same together with a copy of the statement of claim, on the plaintiff Marianne Gilson and on Henry David Roberts.

In their affidavit made in support of the application, the defendants stated as follows:

We claim to be indemnified out of the estate of Edward Rowell Gilson against any liability in respect of the said purchases on the ground that the same were made by Edward Rowell Gilson on our behalf, with notice that the moneys so invested were subject to the trusts of the will of Ann Gilson, and upon the undertaking of Edward Rowell Gilson that the investments so made by him were proper investments to be made by us out of those trust funds. In the alternative we claim to be so indemnified out of the estate of Edward Rowell Gilson to the extent of the income subsequently received by him under the trusts of the will of Ann Gilson, and out of her estate, or in any event to the extent of the income received by him under the trusts of the said will out of the dividends received in respect of the said stock and shares. In the further alternative we claim to be entitled to contribution from the estate of Edward Rowell Gilson to the extent of one-third of any sum for which we may be declared liable in the action by reason of the said purchases, or either of them, on the ground that Edward Rowell Gilson, in making the said purchases out of the said trust funds, with notice of the trusts affecting the same, is liable as a constructive co-trustee with us of the trust funds so dealt with by him. We are advised, and believe, that we have a just and true cause of action against the estate of Edward Rowell Gilson.

The application in chambers was refused by North, J. on the 12th Feb. 1894, and the applicants now moved that the order of the 12th Feb. 1894 made in chambers might be discharged, and that they might have leave to issue and serve on the plaintiff Marianne Gilson, and on Henry David Roberts, a notice under Order XVI., r. 48.

H. Terrell for the motion.—The applicants are entitled to issue and serve a third-party notice on Henry David Roberts, who is not a party to the action, and also on the plaintiff Marianne Gilson, in her character as executrix of Edward Rowell Gilson, in order to enforce our right to indemnity out of the estate of Edward Rowell Gilson, who made the investments complained of, as the plaintiff is suing only in her character as beneficiary. They cannot make a counter-claim against her in the action in which she is plaintiff in her personal capacity only. He referred to

Macdonald v. Carrington, 39 L. T. Rep. N. S. 426:

4 C. P. Div. 28;

Padwick v. Scott, 2 Ch. Div. 736.

They ought not to be compelled to bring a fresh action in order to enforce their claim to indemnity out of the estate of Edward Rowell Gilson. The application is rightly made before the statement of defence is delivered, so that we may deliver the third-party notice with the defence. [NORTH, J.—How can I give leave when I do not know what the issue between the partes is, as no defence

(a) Reported by J. TRUSTAM, Esq., Barrister-at-Law.

CHAN. DIV.]

HEATH AND OTHERS v. OVERSEERS OF WEAVERHAM.

[Q.B. DIV.]

has been delivered? In the cases referred to the court had the counter-claim before it.] The affidavit of the applicants shows the nature of their claim.

W. M. Cann for the plaintiffs.—The plaintiff Marianne Gilson is a party to the action, and therefore rule 48 is not applicable. If Marianne Gilson is not a party the defendant Robert Andrews Gilson is also not a party, and ought to be served with the third-party notice. Both, however, are parties to the action: (Judicature Act 1873, s. 100.) Service of the third-party notice on the plaintiff Marianne Gilson would place her in the position of both plaintiff and defendant. If the notice is served at all, it ought to be served on all the executors of Edward Rowell Gilson, but it is not proposed to serve it on Robert Andrews Gilson, who is the third executor. There is nothing to show that the claim of the applicants could be conveniently disposed of by means of a third-party notice. The court has a discretion not to allow issue and service of a third-party notice, and may refuse its leave when the notice would be embarrassing. The applicants' affidavit does not show a sufficient *prima facie* case for the application.

H. Terrell in reply.—The applicants' affidavit shows the case they propose to make out. In the case of a fresh action, the two executors would be the only defendants.

NORTH, J.—This application must fail on several grounds. In the first place, the application is premature, as it is made before the defendants have delivered their defence stating what their case is. The affidavit which the applicants have made does not meet the difficulty. The defence might possibly show that there is a question to be tried which could not properly be tried by means of a third-party notice. In the next place, I do not think this case comes within rule 48. [His Lordship read the rule, and continued:] Here it is sought to serve the notice upon the adult plaintiff, who is one of the three executors of her deceased husband Edward Rowell Gilson, and on Henry David Roberts, who is another of his executors, and who is not a party to the action. How can one of the plaintiffs be "a person not a party to the action?" It is alleged that the estate of Edward Rowell Gilson is liable to indemnify the appellants against the claim of the plaintiffs. The third executor of Edward Rowell Gilson is himself one of the applicants, and is a defendant to the action. I cannot see how it would be right to allow a notice to be served on two of the executors without serving the third, the very object of the notice being to administer the estate of Edward Rowell Gilson. In the third place, I am not satisfied by the evidence that the third executor ought to be brought before the court in this manner. For these reasons I do not, in the exercise of my discretion, think it right to give leave to serve the notice. I refuse the motion with costs.

Solicitors for the applicants, *Tippett* and *Son*.

Solicitor for the defendants (the plaintiffs in the action), *Claude Ormerod*, Croydon.

QUEEN'S BENCH DIVISION.

Friday, April 13.

(Before CHARLES and COLLINS, JJ.)

HEATH AND OTHERS v. OVERSEERS OF WEAVERHAM. (a)

Highway—Property exempt from payment of highway rate—Liability to repair ratione tenuræ—Determination of liability—Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 33.

The Highway Act 1835, s. 33, confers an exemption from the payment of the highway rate imposed by that Act, upon property which was previously to the passing of the Act legally exempt from the payment of highway rate.

Held, that the exemption no longer continues when the grounds upon which the exemption rested prior to the Act have since the Act ceased to exist.

SPECIAL CASE stated by consent and by order of Grantham, J., pursuant to the provisions of sect. 11 of 12 & 13 Vict. c. 45, in appeals to the quarter sessions for the county of Chester, by the appellants against a certain poor rate made by the respondents for the township of Weaverham in the highway district of the western division of the hundred of Eddisbury in the said county, on the 2nd May 1893.

1. The township of Weaverham is one of several townships which constitute the parish of Weaverham, and is a place separately maintaining its own poor, and for which two overseers are annually appointed under the statute 43 Eliz. c. 2, s. 1.

2. The hamlet of Gorstage is situate within the township of Weaverham, but had from time immemorial maintained its own highways separately from the rest of that township, and a surveyor of highways was annually appointed for such hamlet until the date of the order of the sessions hereinafter referred to. Gorstage was not a place separately maintaining its own poor, but has always been assessed to the poor rate made for the township of Weaverham.

3. The appellant Robert Heath is the owner in fee simple of a mansion-house, farms, and lands situate in the hamlet of Gorstage, called Hefferston Grange, which were formerly part of the dissolved monastery of Vale Royal. The said mansion-house, farms, and lands are now occupied by the appellants, Robert Heath, Samuel Artingstall, and William Rigby.

4. From time immemorial the owners and occupiers of Hefferston Grange have been liable to repair, and until the passing of the Act of 22 Geo. 3 hereinafter in the 7th paragraph referred to have repaired at their sole expense a road or highway known as Grange-lane, in the hamlet of Gorstage, leading from Acton Bridge to Tarporley, both in the county of Chester, and have, in consequence of such liability, been exempt from repairing or contributing to the repairs of, and have never repaired or contributed to the repairs of the other highways in the hamlet of Gorstage. The occupiers of Hefferston Grange have always been rated in respect of the same to the relief of the poor of the township of Weaverham.

5. At a quarter sessions holden in and for the said county of Chester, on the 21st Oct. 1864, the said appellant Robert Heath and other occupiers of Hefferston Grange aforesaid, appealed

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q.B. Div.]

HEATH AND OTHERS v. OVERSEERS OF WEAVERHAM.

[Q.B. Div.]

against a certain poor rate made on them as such occupiers by the overseers of the said township of Weaverham, which said poor rate was made in order to enable the said overseers, amongst other things, to pay to the highway board of the said highway district certain moneys required by such board for repairing the highways in the said township of Weaverham, including the said hamlet of Gorstage. Upon the hearing of such appeal the sessions confirmed the said rate subject to a case stated for the opinion of the Court of Queen's Bench, which court, after hearing the parties, quashed the order of the sessions confirming the said rate, and ordered such rate to be amended by reducing the assessment upon the appellants to the amount required by the overseers for purposes other than that of paying the said moneys to the said highway board on the grounds appearing from the following reports: L. Rep. 1 Q. B. 218; 35 L. J., 113 M. C. and 13 L. T. Rep. N. S. 669.

6. An order of quarter sessions for the county of Chester was on the 4th March 1863 made under the statute 25 & 26 Vict. c. 61, by which the township of Weaverham was, with certain other places, formed into the highway district of the western division of the hundred of Eddisbury. Since the making of the said order of sessions no surveyor of highways has been appointed nor any separate highway rate made for Gorstage, but the highways therein, which were formerly repaired by that hamlet, have been repaired by the highway board at the expense of the township of Weaverham (exclusive of Hefferston Grange), and since the 25th March 1879 at the expense of their said district (exclusive as aforesaid).

7. By an Act 22 Geo. 3, c. 106, entitled, "An Act for repairing and widening the road from Tarporley in the County Palatine of Chester to Acton Bridge, near Weaverham, in the same county" (a copy of which Act accompanies and forms part of this case), certain trustees were appointed for amending and keeping in repair the said road and constituting it a turnpike road.

The road or highway hereinbefore referred to and known as Grange-lane is part of the turnpike road so constituted.

8. The said trustees were by sect. 28 of the said Act authorised to widen, divert, turn, or alter the said road, and by sect. 48 of the said Act it was enacted that the said road should be deemed a turnpike road within the meaning of the General Turnpike Act (13 Geo. 3), and of the several Acts made for the purpose of explaining, amending, or repealing the same, and that all the clauses and provisions in such Acts should be in full force with regard to the said road.

9. By an Act 29 Geo. 3, c. 99, the powers contained in the last-mentioned Act were enlarged, but not so as in any way to affect this case.

10. By an Act 4 Geo. 4, c. lxxxii., the said Acts 22 Geo. 3, c. 106, and 29 Geo. 3, c. 99, were repealed, and it was thereby enacted that the Act now in reference should take effect in lieu thereof, and the provisions of the General Turnpike Act (3 Geo. 4, c. 126) were incorporated with the said Act. The said Act accompanies and forms part of this case.

11. The said trustees during the continuance of the said Acts, altered the said road known as Grange-lane to a considerable extent; it having been a narrow paved road, they widened it, took up the paving stones, stopped and diverted

portions of it, and made it into a macadamised road.

12. In the year 1862 the said turnpike trust expired, and the appellants then resumed repairing the said road.

13. In the year 1890 the appellants applied to the County Council of the county of Chester to declare the said road to be a main road, and they then contended that in consequence of the said turnpike trustees having widened and diverted the said road, and altered the character thereof, they (the appellants) were no longer liable to repair the said road.

The said county council in the year 1892 declared the said road to be a main road, and the appellants thereupon ceased to repair the same.

14. The overseers of the township of Weaverham made, and the justices on the 2nd May 1893 allowed, upon each occupier in the said township, including the appellants, the said poor rate at the rate of 1s. in the pound, of which sum 3d. in the pound is the portion charged for raising the contribution required by the said highway board from the said township, under the Highway Act, for the expense of repairing the highways.

15. The appellants appealed to the assessment committee of the Northwich Union, when the committee held that they had no jurisdiction, as the matter was not of value but of liability to a rate, and they declined to interfere.

16. The appellants, on the 30th Aug. 1893, gave notice of appeal to the respondents against the said rate.

17. After the said notices of appeal were given the appellants and the respondents consented to state the facts of the case in the form of a special case for the opinion of the Queen's Bench Division of the High Court of Justice, and agreed that a judgment in conformity with the decision of such court should be entered upon motion by either party at the sessions as hereinafter mentioned.

18. The appellants contend: 1. That the exemption of their said premises from highway rates and from such portion of the poor or other rates as may be levied for the purposes of the Highway Acts or the maintenance of highways was duly established by a court of competent jurisdiction as aforesaid, and that it is not competent to the respondents to dispute such exemption in this appeal. 2. That, under the circumstances hereinbefore set out, they are exempt from such rates and are not liable to pay that portion of the said poor rate which is levied in respect of their said premises for raising the contributions required by the said highway board towards the expense of repairing highways.

19. The respondents contend: 1. That the point now raised for the consideration of the court was not submitted to or considered by the Court of Queen's Bench upon the occasion referred to by the appellants, and that the judgment of the said court was based upon the assumption that the occupiers of the said premises were liable to repair the said Grange-lane, and that it is competent to the respondents to dispute the appellants' exemption in this appeal. 2. That the ground upon which the appellants were formerly exempt from contributing towards the expense of repairing the said highways in the said township was their liability to repair the said road or highway known

Q.B. Div.]

HEATH AND OTHERS v. OCCUPIERS OF WEAVERHAM.

[Q.B. Div.]

as Grange-lane; that that liability has ceased by reason of the widening, stopping up, diverting, and altering of the said road by the said trustees, and that consequently the appellants are no longer exempt from such contribution, but are liable to be rated as occupiers for their contribution towards the expense of repairing the highways in the said township.

20. The question for the opinion of the court is, whether the appellants are or are not liable to be rated by the respondents in respect of their said premises for raising contributions required by the said highway board towards the expense of repairing highways.

If the court should be of opinion that the appellants ought not to be assessed in respect of the contributions required by the said highway board, then the sum assessed upon them is to be at the rate of 9d. instead of 1s. in the 1l., and the said rate of the 2nd May 1893 is to be amended and reduced accordingly; otherwise it is to stand confirmed.

The Highway Act 1835, s. 33, enacts that,

Where property, or the owner or occupier in respect thereof has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners and occupiers thereof shall be exempt from the payment of the rate hereby imposed.

Poland, Q.C. and *A. Glen* for the appellants.—The appellants are not liable to contribute to this highway rate. The owners of Hefferston Grange have from time immemorial been liable *ratione tenuræ* to repair Grange-lane, and have also been exempt from the liability of contributing to the general highway rate. It is true that the result of the alterations made in the road by the turnpike trustees has been to free the appellants from their liability to repair *ratione tenuræ* (*Reg. v. Barker*, 62 L. T. Rep. N. S. 578; 25 Q. B. Div. 213); but nothing has happened to deprive them of the exemption. How has it been taken away? It is said that the liability to repair *ratione tenuræ* and the exemption are correlative. That is not so; they are entirely distinct and independent. Secondly, the matter is *res judicata*, for the same question between the same parties was before the court in

Reg. v. Heath, 13 L. T. Rep. N. S. 669; L. Rep. 1 Q. B. 218.

The point decided in that case was, that the exemption was not taken away by the formation of the highway board in 1862; but still continued to exist. That case is therefore a decisive authority in favour of the appellants. They also referred to

Reg. v. Inhabitants of Wick St. Lawrence, 5 B. & A. 526;

Reg. v. Hutchins, 44 L. T. Rep. N. S. 364; 6 Q. B. Div. 300.

Marshall, Q.C. and *Honoratus Lloyd* for the respondents.—It is clear from *Reg. v. Barker* (*ubi sup.*) that the appellants are no longer liable to repair this road *ratione tenuræ*; the exemption from liability to contribute to the general highway rate is therefore gone also, for the one depended on the other. That that is so is obvious from sect. 33 of the Highway Act 1835, which continued previously existing exemptions. Under that section a toll-house is exempt, but it could not be

contended that a building which had once been a toll-house would, after it had ceased to be so, continue for ever to be exempt:

Rollett v. Corringham, 32 L. T. Rep. N. S. 769;

L. Rep. 10 Q. B. 469;

Reg. v. Freeman, 33 L. T. Rep. O. S. 220;

Freeman v. Read, 4 B. & S. 174.

As to *Reg. v. Heath* (*ubi sup.*) that case is not decisive of the present; for the facts on which the court there based their judgments were not the same as here. It was assumed in *Reg. v. Heath* (*ubi sup.*) that the appellants were still liable to repair Grange-lane *ratione tenuræ*, and they were then repairing it. That liability has now ceased, and under the altered circumstances *Reg. v. Heath* (*ubi sup.*) is not an authority binding upon the court in this case.

Poland, Q.C. replied.

CHARLES, J.—The question for the opinion of the court in this case is, whether the appellants are or are not liable to be rated by the respondents in respect of certain premises called Hefferston Grange for raising contributions required by the highway board towards the expense of repairing highways. It appears from the special case that the appellants are the occupiers of Hefferston Grange, and are liable *ratione tenuræ* to repair Grange-lane, and did so up to a certain time. The statements in the case further show that, although that liability did formerly exist with regard to Grange-lane, it no longer exists. In 1782 an Act (22 Geo. 3, c. 106), was passed for the purpose of repairing and widening Grange-lane, and between that date and 1862 Grange-lane was so altered in character that, according to the law declared in *Reg. v. Barker* (*ubi sup.*), the legal liability of the appellants to repair it came to an end, and although after 1862 the appellants did again repair the road, nevertheless they were under no liability to do so. The question, therefore, is whether the appellants are now exempt from paying the highway rate by reason of the fact that they were at one time exempt because of their liability to repair Grange-lane *ratione tenuræ*. The question seems to me to turn on sect. 33 of the Highway Act 1835. It is clear that nothing has happened since 1862 to alter or modify the exemption conferred on the appellants by that section, and it may be assumed that there is nothing in recent Acts of Parliament which affects this question, or our attention would have been called to it. Sect. 33 of the Highway Act 1835 is in these terms: "Where property, or the owner or occupier in respect thereof, has previous to the passing of this Act been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of any highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed." A mere exemption is not sufficient. In order to bring the case within that section the property must be "legally exempt." The ground of the exemption in this case was the liability of the appellants to repair Grange-lane, and no doubt, as was pointed out by *Crompton, J.* in *Great Western Railway Company v. Denchworth* (25 J. P. 342), a liability to repair *ratione tenuræ* is a legal exemption. This is also shown by *Reg. v. Freeman* (*ubi sup.*), followed by *Freeman v. Read* (*ubi sup.*). There is

Q.B. Div.]

HEATH AND OTHERS v. OVERSEERS OF WEAVERHAM.

[Q.B. Div.]

no doubt that that exemption did formerly exist in this case, and the appellants contend that, having once existed, it must continue to exist. I do not think that that is the true construction of the section. I think the words "the said property" mean property which is legally exempt, and that the property is exempt only so long as it continues to render the owner liable to perform the duty in respect of which the exemption continues. Take the case of a chapel which is legally exempt from contributing to the highway rates. If it were turned into a house or a shop could the occupier still claim the exemption? I think not. I think that the property, in order to claim the exemption, must remain in the condition that makes it legally exempt. In the present case that condition no longer continues, for the appellants are not now liable to repair Grange-lane *ratione tenuræ*, and do not repair it. It seems to me that the maxim *Cessante ratione cessat ipsa lex* applies. The reason for the exemption has disappeared, and therefore the exemption disappears also. We are asked to say that the case of *Reg. v. Heath (ubi sup.)*, which was a case between the same parties, is decisive of the point, and that the matter is *res judicata*. In order to discover if that is so, it is necessary to ascertain what the court decided in that case, and on what materials the decision was based. The decision of the court in that case was, that the legislation of 1862 had made no alteration in the law with reference to the maintenance of highways. Lush, J., in the course of his judgment, said: "That Act" (i.e., the Highway Act of 1835) "is still in force, and by the 42nd section of the recent Act it is to be construed as one with the latter Act, so far as the provisions of the one are consistent with those of the other. Is there, then, anything in the recent Act inconsistent with the provision here made for continuing the exemption to which the property had before been entitled?" and the learned judge then goes on to show that nothing in the Act of 1862 had altered the effect of sect. 33 of the Highway Act 1835. It is clear that *Reg. v. Heath (ubi sup.)* was decided on the basis that in 1866 matters were in the same position with regard to this property as they were in 1835. Whether or not that was so I do not know, but it is clear that the decision of the court was based upon that assumption. The case there said that, after the turnpike trust expired in 1862, the appellants did as a matter of fact repair Grange-lane, and therefore the court assumed that there was a legal duty to repair, and that the legal exemption consequently still existed. Now, does that decision make the matter *res judicata*? I cannot think that it does. It cannot prevent us from inquiring whether any new facts have arisen since that case. In considering the effect of *Reg. v. Heath (ubi sup.)* we must have regard to the state of things which was then before the court. We have before us a fact which was not before them, namely, the fact that the legal liability of the appellants to repair Grange-lane *ratione tenuræ* has disappeared. In my opinion, therefore, *Reg. v. Heath (ubi sup.)* is not decisive of the present case, and this appeal must be dismissed.

COLLINS, J.—I am of the same opinion. As my learned brother has said, the question turns on the true construction of sect. 33 of the Highway Act 1835. The appellants claim an immunity from contribution to this rate, first, by virtue of

that section, and, secondly, on the ground that, whether or no that section gives them immunity, the case of *Reg. v. Heath (ubi sup.)*, decided in 1866, constitutes an estoppel. As to sect. 33, it is clear law that, if at the date of the passing of the Highway Act 1835 there was some person liable *ratione tenuræ* to repair a particular road, that person was relieved from the liability to contribute to the general highway rate. In that state of the law sect. 33 was passed, which is the only section in the Act which dealt with existing exemptions. [His Lordship read the section.] If, therefore, exemption is claimed for any particular property, it must be under that section; and if the particular property is exempt by reason of a liability to repair *ratione tenuræ*, it must come under the general words of the section. I therefore substitute for the general words in the section the words "property subject to a liability to repair *ratione tenuræ*," and if the section is read in that way it is obvious that the exemption only continues so long as the liability to repair *ratione tenuræ* exists. The moment the property ceases to be liable to repair *ratione tenuræ* the exemption given by the section ceases. The particular property in this case was at one time liable to repair *ratione tenuræ*, and therefore the exemption existed. But does it at the present time fulfil the condition of exemption? It is found as a fact that the road has been so altered in character that the obligation to repair *ratione tenuræ* is gone. The law on that point is declared in *Reg. v. Barker (ubi sup.)*, in which case it was held that where a highway repairable *ratione tenuræ* is under statutory powers so altered in its nature and course as to be practically destroyed, the liability to repair *ratione tenuræ* ceases. On the first part, therefore, I hold that the exemption is not maintainable, because the property has now ceased to be subject to a liability to repair *ratione tenuræ*. Take by way of illustration the case of a church or chapel. If an exemption is claimed in respect of a church or chapel it must be under this sect. 33. But suppose that the chapel is changed into a grocer's shop, according to Mr. Poland's contention, it is still within the section. It was once exempt, and therefore, according to his argument, it is exempt for all time. But the words "said property" in sect. 33 must mean property exempt at the time of the passing of the Act. A chapel is exempt while it remains a chapel, but not when it is no longer a chapel, for then the words "said property" no longer apply to it. I am therefore clearly of opinion that the section is incapable of bearing the construction which Mr. Poland claimed to put upon it. Then it is contended that *Reg. v. Heath (ubi sup.)* is conclusive of this case. I think that contention is wrong. In order to support it, it is not sufficient to take the mere decision of the court. Mr. Poland has to go behind it to support his estoppel. But if he does he cannot stop short; he must look at the whole facts, and the facts show that the persons then claiming exemption were still repairing Grange-lane *ratione tenuræ*. All that the court decided in that case was that, if the occupiers were still repairing *ratione tenuræ*, there was nothing in the legislation subsequent to the Act of 1835 to deprive them of the exemption. The property does not now fulfil the conditions of sect. 33, and in my opinion we are not estopped by the decision

Q.B. Div.]

PHARMACEUTICAL SOCIETY v. ARMSON.

[Q.B. Div.]

in *Reg. v. Heath* (*ubi sup.*) from inquiring whether the appellants are or are not now liable to repair *Grange-lane ratione tenuræ*. Upon the facts now before us I come to the conclusion that the appellants are not persons who can claim an exemption under sect. 33.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Ashton and Woods*, Warrington.

Solicitors for the respondents, *Taylor, Hoare, and Taylor*, for *A. and J. E. Fletcher*, Northwich.

Thursday, April 26.

(Before CHARLES and BRUCE, JJ.)

PHARMACEUTICAL SOCIETY v. ARMSON. (a)

Pharmacy Acts — Sale of poisons — Compound containing scheduled poison — Pharmacy Act 1868 (31 & 32 Vict. c. 121), ss. 1, 15.

In an action for a penalty under the Pharmacy Act 1868 against the vendor of a compound containing as one of its ingredients a scheduled poison, the question for the court is not simply whether the compound contained a scheduled poison, but whether it contains it in such a quantity as to make the compound in its entirety a poison within the Act.

The defendant, a grocer, sold a compound which contained as one of its ingredients one-tenth of a grain of morphine, a scheduled poison, in one ounce of liquid. Directions for use were affixed to the bottle stating the proper dose to be taken respectively by adults, children, and infants. Evidence was given that a bottle of the compound if taken at one time by a child or infant, would certainly be injurious, and might be fatal, but not in the case of an adult, except under special circumstances of ill-health.

Held, that there was evidence to support the finding of the County Court judge that the compound was, in its entirety, a poison within the Pharmacy Act 1868.

APPEAL of the defendant from a decision of the judge of the County Court of Derby.

The action was brought by the Pharmaceutical Society to recover a penalty incurred by the defendant "for keeping open shop for the retailing, dispensing, or compounding of poisons, to wit, morphine, or a preparation of morphine, being poisons within the Pharmacy Act 1868, contained in and forming part of the ingredients in a compound called Powell's Balsam of Aniseed, contrary to the provisions of the statute."

A bottle of the compound was bought at the shop of the defendant, who was a grocer. The bottle contained one ounce of liquid, and a label was affixed to it on which were printed "directions for use," prescribing as the proper dose to be taken by an adult one teaspoonful, and a lesser amount for children and infants. The contents of the bottle were found upon analysis to contain amongst other ingredients one-tenth of a grain of morphine.

It was not disputed by the defendant that morphine is a poison within the Pharmacy Act. The learned County Court judge held, on the authority of *Pharmaceutical Society v. Piper* (68 L. T. Rep. N. S. 490; (1893) 1 Q. B. 686); and

Pharmaceutical Society v. Delves (70 L. T. Rep. N. S. 139; (1894) 1 Q. B. 71), that the question was not simply whether the compound contained a scheduled poison, but whether it contained a scheduled poison in sufficient quantity to make the thing sold a poison within the Act. Evidence was given on behalf of the plaintiffs as to the probable or possible injurious effects of the compound. The learned County Court judge did not think that the evidence established that the whole contents of a bottle, if taken at one time, would be fatal to an adult, except under certain special circumstances of ill-health, but there was uncontradicted evidence that, if the whole contents of a bottle were taken at once by a child in ordinary health, it would certainly prove injurious, and might be fatal, and in the case of an infant would very probably be fatal. The directions for use attached to the bottle showed that the compound was intended for the use of children and infants. The learned County Court judge held on the evidence that the compound was itself a poison within the Pharmacy Act 1868, and gave judgment for the plaintiffs for the amount of the penalty.

The defendant appealed.

By sect. 1 of the Pharmacy Act 1868 it is made unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons unless he is a pharmaceutical chemist, or a chemist and druggist within the meaning of the Act, and is registered under the Act.

By sect. 15 a penalty of 5*l.* is imposed for every offence, recoverable in the manner provided by the Pharmacy Act 1852.

Bonsey for the defendant.—There was no evidence to support the finding of the County Court judge that this compound was in itself a poison. The evidence only went to show that the contents of a bottle of the compound would be injurious to a child or infant if taken all at once. That is not a proper test as to what constitutes a poison; and in the present case the directions for use state what is the proper amount of a dose. He referred to

Pharmaceutical Society v. Piper, 68 L. T. Rep. N. S. 490; (1893) 1 Q. B. 686;

Pharmaceutical Society v. Delves, 70 L. T. Rep. N. S. 139; (1894) 1 Q. B. 71.

Crump, Q.C. and *T. R. Grey*, for the plaintiffs, were not called upon.

CHARLES, J.—The view which I take of this case is, that the question is really decided by the *Pharmaceutical Society v. Piper* and *Pharmaceutical Society v. Delves*. In the latter of these cases it was held that it is not enough simply to prove that a compound medicine contains an infinitesimal quantity of poison in order to bring it within the Act, and the former case decided that a compound medicine may be within the Act if it contains as an ingredient a poison which is within the Act, and if the compound itself is a poison. In the present case the County Court judge has accurately appreciated the effect of those two decisions. He says in his judgment that they show that, "the question is not simply whether the compound contains a scheduled poison, but whether it contains a scheduled poison in sufficient quantity to make the thing sold in its entirety a poison." The County Court judge has found as a fact that this compound medicine is in its entirety a poison, and the

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q.B. Div.] VESTRY OF ST. GILES, CAMBERWELL, v. LONDON CEMETERY COMPANY. [Q.B. Div.]

question for us is, whether there is any evidence to warrant that finding. The evidence shows that each bottle of this mixture contains one-tenth of a grain of morphine, and although the County Court judge has found in favour of the defendant on one point, viz., as to the effect which would be produced upon an adult if a whole bottle of the compound were taken at once, yet the County Court judge has also found, and his finding on this point is amply supported by the evidence, that in the case of children the result of taking a bottle at one time would certainly be injurious and might be fatal. The effect of that finding is that, if the whole of the compound were taken at one time by one of the classes for whom it is intended, it is in its entirety a poison. Mr. Bonsey has argued, as he was bound to do, that there is no evidence to support that finding, and points to the fact that the directions for use prescribe the amount of a dose which would not be injurious to a child or infant. I am unable to follow that argument. The question is, whether this thing is in its entirety a poisonous thing. The answer is, Yes, if the whole bottle is taken. It is no answer to say that the compound is not necessarily injurious if taken in accordance with the directions. I cannot say that there is no evidence to warrant the finding of the County Court judge, and this appeal must therefore be dismissed.

BRUCE, J.—I am of the same opinion. I think the question was one of fact for the County Court judge, and that there was abundant evidence to support the conclusions at which he arrived.

Appeal dismissed; leave to appeal.

Solicitors for the plaintiffs, *Flux, Son, and Co.*
Solicitors for the defendant, *Neve and Beck.*

Monday, Feb. 12.

(Before MATHEW and COLLINS, JJ.)

VESTRY OF ST. GILES, CAMBERWELL, v.
LONDON CEMETERY COMPANY. (a)

Metropolis Management Acts — Paving rate—Owners of land—Land consecrated for purposes of Christian burial—18 & 19 Vict. c. 120, s. 250.

A cemetery company bought some land, and a part of this land was consecrated for purposes of burial. By 6 & 7 Will. 4, c. 136, the company are prohibited from selling or disposing of the land so consecrated. On a claim being made on the company for contribution to a paving rate in respect of the land they had bought, they resisted the claim on the ground that so much of the land as had been consecrated was extra commercium, and that they were not the owners of it within the meaning of sect. 250 of 18 & 19 Vict. c. 120.

Held, that the company were the owners of the land within the meaning of the section, and were therefore liable to contribute to the rate.

THIS was a case stated by one of the metropolitan police magistrates in the following terms:

1. On the 3rd Oct. 1893 the Camberwell Vestry (hereinafter called the appellants) summoned the London Cemetery Company, being a company incorporated under the Act 6 & 7 Will. 4, c. 136 (hereinafter called the respondents), who refused to pay on demand a sum duly apportioned under

18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, as their share of the estimated expense to be incurred in paving a portion of Limesford-road, Nunhead, in the parish of St. Giles, Camberwell. After hearing the evidence I dismissed the said summons, and the said appellants, alleging they are dissatisfied with the said determination as being erroneous in point of law, did apply to me to state and sign a case, setting forth the facts and grounds of such determination for the opinion thereon of the Court of Queen's Bench. Whereupon I, in compliance with the said request, do hereby state and sign the following case:

2. Upon the hearing of the said summons it was proved before me that Limesford-road was a new street within the meaning of 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102; that the appellants were the vestry of the parish in which the said road was situate; that the said road was not paved to the satisfaction of the said appellants; that the said appellants deemed it necessary that the said road should be so paved; that land belonging to the said respondents, to wit the Nunhead Cemetery, bounded and abutted on the said Limesford-road; that the said appellants, in pursuance of sect. 105 of 18 & 19 Vict. c. 120, and sect. 77 of 25 & 26 Vict. c. 102, had paved, or were about to pave, the said street, and had demanded from the said respondents their share of the estimated expenses of the said paving duly apportioned under the said Acts, and that the said respondents had refused to pay the same.

3. It was proved before me the respondents' proportion of the said expenses amounted to 743l. 0s. 7d.

4. By the respondents it was proved that they, the London Cemetery Company, were duly incorporated under the provisions of 6 & 7 Will. 4, c. 136, and under that Act had purchased and still held a plot of ground known as the Nunhead Cemetery.

5. It was also proved that the portion of the said cemetery which abutted throughout its length on the said Limesford-road had been consecrated for the purposes of Christian burial.

6. It was contended by the said respondents that by sects. 4 and 44 of 6 & 7 Will. 4, c. 136, it was not lawful for the said company to sell or dispose of any land which had been consecrated for the burial of the dead, and that such land was therefore placed *extra commercium*, and was not land of which they were the owners within the meaning of sect. 250 of 18 & 19 Vict. c. 120. And they cited in support of their contention the case of *Wright v. Ingle* (54 L. T. Rep. N. S. 511; 16 Q. B. Div. 379).

7. For the appellants it was contended that the said respondents were a company formed to carry on a business at a profit, that the said company had power to purchase, hold, and sell lands, and were the owners of the said land in fact, and within the meaning of sect. 250 of 18 & 19 Vict. c. 102, and were liable for the expenses of the aforesaid apportionment.

8. I was of opinion that the said land, owing to the fact of the consecration of that portion of it which abuts on the said Limesford-road, and the restrictions of the said Act 6 & 7 Will. 4, c. 136, was placed *extra commercium*, and therefore the respondents were not the owners of the said land within the meaning of sect. 250 of 18 & 19 Vict. c. 120, and dismissed the summons.

(a) Reported by MERVYN LL. PREL, Esq., Barrister-at-Law.

Q.B. Div.] VESTRY OF ST. GILES, CAMBERWELL, v. LONDON CEMETERY COMPANY. [Q.B. Div.]

The question for the court is whether I was right in so doing.

A. A. HOPKINS.

By sect. 110 of 25 & 26 Vict. c. 102, it is enacted that this Act and 18 & 19 Vict. c. 120, shall be construed together as one Act.

Sect. 105 of 18 & 19 Vict. c. 120, provides that:

In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry . . . of the parish . . . in which such street is situate, be desirous of having the same paved, or if such vestry . . . deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry . . . shall well and sufficiently pave the same . . . and the owners of the houses forming such street shall, on demand, pay to such vestry . . . the amount of the estimated expenses of providing and laying such pavement.

By sect. 77 of 25 & 26 Vict. c. 102, where any vestry shall have paved or be about to pave any new street under the powers given in 18 & 19 Vict. c. 120, sect. 105:

The owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of the houses therein.

By sect. 250 of 18 & 19 Vict. c. 120:

The word "owner" shall . . . mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent.

Biron (Channell, Q.C. with him) for the appellants.—The contention of the respondents is that portions of their land have been consecrated for purposes of Christian burial, and are therefore *extra commercium*, and that they could not therefore receive rack-rent in respect of those portions, and so are not the owners within the definition in the Act. The answer to this is simply that from those very portions of land they are receiving considerable profits, so that there is really nothing to take them out of their liability under the Act. Before the learned magistrate *Wright v. Ingle* (54 L. T. Rep. N. S. 511; 16 Q. B. Div. 379) was quoted; but in that case the Court of Appeal only decided that a Methodist chapel was a house within the meaning of 18 & 19 Vict. c. 120, and that it was not in the same position as a church for the purposes of that Act. [He was stopped.]

Poland, Q.C. (Broxholm with him) for the respondents.—The respondents are not the owners within sect. 250. Sect. 4 of 6 & 7 Will. 4, c. 136, provides that burial grounds consecrated for the interment of the dead according to the rites of the Established Church, "shall for ever thereafter be set apart, and be used and applied exclusively for the purposes of Christian burial." Sect. 5 provides that burial grounds set apart for the Christian burial of persons not members of the Established Church, "shall be for ever set apart and appropriated, and exclusively used for the interment of the dead." By sects. 7 and 8 the owners of such burial grounds are empowered to build chapels for the performance of burial services. The effect of these provisions is, that the land so consecrated or set apart is put by statute in exactly the same position as a church

and the burial ground attached to it occupies by common law. Then by sect. 44 the owners of any land which shall have been consecrated, or set apart, or used for the burial of the dead are expressly prohibited from selling or disposing of it. It is true that by sect. 10 they may sell certain exclusive rights of burial within such land, but this is a very different thing from the right to sell or let the land itself. Looking at the whole effect of the enactment, it is impossible to say that the land could ever be let at a rack-rent, or that the company are the owners of it. It is true that in *Wright v. Ingle* (*ubi sup.*), the question raised in this case is not directly decided, but the language used in the judgments as to the position of a parish church under the Act leaves no doubt what the decision would have been had the question been before the court. The payments made to the company make no difference to their position in this respect. They are made only in respect of the right to be buried in a particular part of the cemetery. In the same way payment may be made by a parishioner for the right to be buried in a particular part of the parish churchyard. If any authority beyond that which is contained in *Wright v. Ingle* (*ubi sup.*) is needed for the proposition that a church does not come within the meaning of 18 & 19 Vict. c. 120, s. 105, or of 25 & 26 Vict. c. 102, s. 77, it is to be found in *Angell v. Vestry of Paddington* (3 L. Rep. Q. B. 714; 37 L. J. 171, M. C.). Similarly *Plumstead Board of Works v. British Land Company* (32 L. T. Rep. N. S. 94; 10 L. Rep. Q. B. 203; 44 L. J. 38 Q. B.), decides that the owners of the soil of a road dedicated to the public are not "owners of land" within the meaning of these sections. The reasoning by which these decisions were arrived at applies equally to the present case.

Channell, Q.C. in reply—It is clear that the Cemetery Company would be liable to be rated to the relief of the poor:

Reg. v. Abney Park Cemetery Company, 29 L. T. Rep. N. S. 174; 8 L. Rep. Q. B. 515; 42 L. J. 124, M. C.

In that case, as in this, it was contended, and in a sense truly contended, that the Cemetery Company was not in receipt of rent; but that is not enough in this case to give them any exemption from the paving rate, any more than it was in that case to excuse them from the poor rate. It is clear that the observations made by the judges in *Wright v. Ingle* (*ubi sup.*) were meant to apply only to cases in which the law made it impossible for the owner to receive profits at all. Further, in the present case there is nothing to prevent the Cemetery Company from receiving an actual rent. They might lease out to some person for an annual payment the rights which they have under their Act of receiving payments. They therefore are clearly "owners" within the meaning of sect. 250, since they might receive a rack-rent in respect of the land, and are actually in receipt of profits from it.

MATHEW, J.—Our judgment here must be for the appellants. I think that the land in question is properly charged with a proportion of the expenses of making-up the road on which it abuts. A decision of the Court of Appeal in the case of *Wright v. Ingle* (*ubi sup.*) has been referred to. Apart from that decision, I do not see how there

Q.B. Div.]

Re HENRY LANGTRY; *Ex parte* THE BOARD OF TRADE.

[IN BANK.]

could be any doubt about the present case. Mr. Poland has argued that the respondents' land has been appropriated to a certain purpose, namely, to the burial of the dead, and that being so appropriated, it does not come within the meaning of sect. 250 of the Metropolis Management Act 1855; and in support of this contention he has cited some dicta of the Master of the Rolls in *Wright v. Ingle* (*ubi sup.*). The sole question in that case, however, was whether a building used only for purposes of religious worship was a house within the meaning of the statute, so as to make its owners chargeable for purposes of this description. The Lord Justices came to the conclusion that the building was a house within the meaning of the statute, and that, notwithstanding the purposes for which it was set apart, the owners were properly chargeable. The court, however, distinguished the case from that of a church on the ground that in the latter case the status of the building is altered by consecration, and it can never again be used for human habitation. But the argument here goes much further. If the contention here is right, any land set apart for a special purpose would cease to be chargeable. There is nothing of this in the judgments. What is the case here? Of the land fronting on the road which is owned by the Cemetery Company, part is consecrated part is not. It cannot, unless by Act of Parliament, be used for any other purposes than those of burial. It is land, however, which was purchased by the company obviously for purposes of profit, and subject to the provisions of their Act, which prohibit them from absolutely disposing of the land, they can let or sell their rights in it. Is there anything then in the section to take them out of their liability to contribute to the paving of this road? [The learned Judge read sect. 250 of 18 & 19 Vict. c. 120.] The case seems to me to come distinctly within that. I think the company are in a position to let for burial purposes the whole or part of their land at a rack-rent, and that they are therefore the owners of it within sect. 250. I cannot see that there is any analogy, as was suggested during the argument, between the case of a parish church and churchyard and a case like the present of a cemetery used for purposes of profit. No doubt portions of one of the judgments in the case of *Wright v. Ingle* (*ubi sup.*), which has been quoted, go beyond what was necessary for the decision of the case; they do not call for comment from us. The decision itself does not govern this case, which is entirely distinguishable. I am of opinion that the company are owners of the land within the meaning of the section, and they are therefore liable to contribute to the paving of this road.

COLLINS, J.—I am of the same opinion. The question is whether the Cemetery Company are owners of land so as to come sect. within 250 of the Metropolis Management Act 1855. [The learned Judge read the section.] It has been contended by Mr. Poland that the company are not within this definition, because they are not in receipt of the rack-rent of the land in question, and would not receive the rack-rent if the land were let at a rack-rent, and in support of this he relies on *Wright v. Ingle* (*ubi sup.*). Now, in the first place, that case does not go so far as Mr. Poland contends. As far as it is in his favour at all, it only decides that a church is not a house.

Certain expressions in the judgments no doubt go further, but I do not think that they form part of the decision. In the case before us the company have acquired land for a cemetery under their Act of Parliament. The only fetter on their free employment of this land is contained in sects. 4 and 5 of this Act, which require that the land shall be used exclusively for the burial of the dead. But by a later part of the enactment they are authorised to sell certain exclusive rights of burial. Now these powers, it is true, are not powers to let at a rack-rent, but only to sell the rights to which they relate for a lump sum; and some of the observations of the Master of the Rolls in *Wright v. Ingle* (*ubi sup.*) seem to apply exclusively to lands let at a rack-rent. But on looking at the point to which his attention was directed, it becomes clear that he did not mean to draw any distinction between the case of lands let at a rack-rent and such a case as this. The point which he did intend to deal with is that which Lord Watson treated in this way in *Great Eastern Railway v. Hackney District Board of Works* (49 L. T. Rep. N. S. 509; 8 App. Cas. 687): "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not the owner of land within the meaning of the 77th section of the Act of 1862." That exactly limits the principle. In order to be exempt the land must be *extra commercium*. Clearly then where profits are received from the land in the form of a lump sum, which is equivalent to rack-rent, it would be a very technical decision which would draw a distinction between the two, and say that the owners are outside the definition given in the statute. I think then that there are no cases which bind us on this point, and that the dicta will not bear the meaning which it has been attempted to put upon them. The company can sell certain rights in their land either in perpetuity or for a time. That is sufficient to bring their land *intra commercium*. Further, there does not seem to be any reason, as far as their Act is concerned, why the company should not let their land at a rack-rent or otherwise to any other company or person, subject only to the condition that it shall be used only for purposes of burial. For these reasons I think that our decision must be for the appellants.

Appeal allowed.

Solicitors: for the appellants, *Marsden and Son*; for the respondents, *A. E. Marshall*.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Tuesday, April 17.

(Before WILLIAMS and KENNEDY, JJ.)

Re HENRY LANGTRY; *Ex parte* THE BOARD OF TRADE. (a)

Bankruptcy — Appeal — "Person aggrieved" — Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 104 — Bankruptcy Rules 1886, rr. 227, 229.

By the Bankruptcy Act 1883, sect. 104, "Orders in

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

IN BANK.]

Re HENRY LANGTRY; *Ex parte* THE BOARD OF TRADE.

[IN BANK.]

bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal.
A person wishing to appeal as a "person aggrieved" need not first prove his debt; all that he must do is to satisfy the court that the proposed order is one that will take away some advantage from him or impose some onus on him.

THIS was an appeal by a person aggrieved from the decision of the County Court judge of Leicester approving of a scheme of arrangement proposed by the debtor.

On the 28th Dec. 1893 a receiving order was made against the debtor on a creditors' petition, a scheme of arrangement was proposed and accepted by the creditors, and application was made on the 26th June 1894 to the County Court judge of Leicester to approve of it. The appellant prior to the receiving order had obtained judgment against the debtor, she did not appear in the County Court when the County Court judge's approval was applied for, and only put in a proof for her debt on the 14th Feb., the last day for appealing from his decision, on which day she gave notice of appeal. Her debt appeared in the sworn statement of affairs, and was an admitted debt.

Toller, for the respondents, took the objection that the appellant was not a person aggrieved within the meaning of sect. 104 of the Bankruptcy Act 1883, and so could not appeal. First of all, by the Bankruptcy Act 1890, sect. 3, sub-sect. 6, "The application (to approve a composition or scheme) shall not be heard until after the conclusion of the public examination of the debtor. Any creditor who has proved may be heard by the court in opposition to the application, notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal." The appellant did not appear in the court below, and had not then proved. She cannot by subsequently tendering a proof put herself in the position of a person aggrieved. In *Ex parte Ditton*; *Re Woods* (40 L. T. Rep. N. S. 297; 11 Ch. Div. 56), a person claiming to be a creditor, but who had not tendered a proof, was held not to be a person aggrieved. And in *Ex parte Sidebotham* (42 L. T. Rep. N. S. 783; 14 Ch. Div. 458, 463, James, L.J. said: "The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man . . . against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." She has not appeared in court or put in a proof. Next she is not a creditor, and the appeal section 104 only applies to creditors. By rule 227 of the Bankruptcy Rules 1886, "Subject to the power of the court to extend the time, the official receiver as trustee, not later than seven days from the latest date specified in the notice of his intention to declare a dividend as the time within which such proofs must be lodged, shall, in writing, either admit or reject wholly or in part every proof lodged with him, or require further evidence in support thereof." And by rule 229, "Where a creditor's proof has been admitted the notice of dividend shall be sufficient notification to such creditor of such admission." To make her a creditor her proof must have been admitted and she

cannot by merely tendering a proof make herself a creditor, because the trustee can reject it at any time. She has not had a notice of dividend here or any notice of admission of proof, and she ought not to be allowed to appear here.

Muir Mackenzie for the appellant.—The appellant is a "person aggrieved" and can appeal here; there is nothing in sect. 104 which requires her to prove before she can appeal "as a person aggrieved," and in any event she has in fact put in her proof and it appears in the statement of affairs. Next, she is a creditor. All she has to show is that the proposed order will take away some advantage or impose some onus on her, and she has done this, and it is not necessary that her proof should have been admitted.

Toller in reply.

Arnold White watched the case on behalf of the Board of Trade.

WILLIAMS, J.—We think that this objection ought not to prevail. Sect. 104 says that orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal; and objection is taken here that the person appealing is not a person aggrieved, and that objection is raised in two ways: first, it was said that by sect. 3, sub-sect. 6, of the Bankruptcy Act 1890, "the application [to approve a composition or scheme] shall not be heard until after the conclusion of the public examination of the debtor. Any creditor who has proved may be heard by the court in opposition to the application, notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal;" and we are asked to say that no one can appeal as an aggrieved person unless he has, by proving, put himself in a position to appear before the court. I do not assent to that proposition. There is nothing in sect. 104 that introduces any such qualification of the words "person aggrieved," or throws on a person aggrieved any such condition, and therefore it is no ground for preventing an appeal that this person had not when the application came on put herself in a position to appeal by proving her debt. It was then said that this particular appellant could not appeal as a person aggrieved as she was not a creditor, and the section only affects creditors. In my opinion she is a creditor. It was said that she was not a creditor because her proof had not been admitted; but, as I understand the words "person aggrieved," it is not essential that the proof should have been admitted, all that is necessary is that the person should satisfy the court that the proposed order is one that will take away some advantage or impose some onus on her. Has this person satisfied us that she will suffer in this way? She sent in her proof, and she has done all that is required by the schedule; she has sent by a prepaid letter an affidavit verifying the debt to the official receiver; under these circumstances the appellant is entitled to appeal as a person aggrieved. The only difficulty I had, was the argument based on the observation of James, L.J. in *Ex parte Ditton*; *Re Woods*. It was there said that the line must be drawn somewhere, and in that case the Lord Justice thought the application came "a great deal too late." I think the line is that drawn by the statute, and I therefore think that, this lady having sent in her affidavit of proof and that not having been

PRIV. CO.] GOVERNORS OF SWANSEA GRAMMAR SCHOOL v. CHARITY COMMS. [PRIV. CO.]

rejected, she is in the position of a person aggrieved. It would be quite impossible to work the statute if we were to say that the only persons entitled to appeal as "persons aggrieved" were those whose proofs have been admitted.

KENNEDY, J.—I am of the same opinion. The case of *Ex parte Ditton*; *Re Woods*, in no way concludes us. That was a decision on the facts; for nearly four years the appellant in that case had taken no steps. That is not the case here; the appellant was not only treated by the debtor as a person who had an indisputable claim, but she had done all she could to assert her right on oath in the usual form. That distinguishes this case from *Ex parte Ditton*; that case does not mean that nobody can be treated as a person aggrieved unless he has proved his debt and the proof has been admitted. It always depends on the circumstances. This objection fails.

Objection disallowed.

The appeal was then heard on the merits and dismissed.

Solicitors for the appellant, *Smith, Fawdon, and Low*.

Solicitors for the respondent, *Sir Thomas Wright and Son, Leicester*.

Judicial Committee of the Privy Council.

Wednesday, April 25.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords HOBHOUSE, ASHBOURNE, and MACNAGHTEN.)

GOVERNORS OF SWANSEA GRAMMAR SCHOOL v. CHARITY COMMISSIONERS. (a)

Endowed Schools Act 1869 (32 & 33 Vict. c. 56), ss. 19, 25 — Welsh Intermediate Education Act 1889 (52 & 53 Vict. c. 40), s. 13—Instruction according to doctrines of particular denomination—Modern endowment so mixed with old endowment that it cannot conveniently be separated—Fitting up of chapel.

The fact that the scholars of an endowed school have for a long period, under the bye-laws or regulations from time to time in force, been instructed according to the doctrines or formularies of a particular church, does not lead to the necessary inference, in the absence of further evidence, that such practice had its origin in some express regulations made by the founder, so as to bring the case within sect. 19 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56).

Re St. Leonard's, Shoreditch, Schools (51 L. T. Rep. N. S. 305; 10 App. Cas. 304) approved.

A "modern endowment" consisting of a fund raised by subscription and applied in fitting up part of the school buildings as a chapel considered as so mixed with the old endowment that it could not conveniently be separated from it within sect. 25 of the Endowed Schools Act 1869.

PETITION.

This was a petition presented under sect. 39 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56) by the governing body of the Free Grammar School at Swansea, against a scheme framed by the

Charity Commissioners under the Welsh Intermediate Education Act 1889 (52 & 53 Vict. c. 40).

In 1682 Hugh Gore, D.D., Bishop of Waterford and Lismore, erected and endowed a free grammar school and school-house upon the ground of Mr. Bussey Mansel, situate in Goat-street, in the town of Swansea. The bishop conveyed to Mr. Bussey Mansel, his heirs and assigns, certain lands in the county of Glamorgan, upon the special trust that Mr. Bussey Mansel, his heirs and assigns, would from time to time for ever nominate and appoint the schoolmaster of the Free Grammar School, who was to instruct the children attending the school in Greek and Latin, and in case the schoolmaster's place should fall void during the infancy of the heir-at-law of Mr. Bussey Mansel, that the bishop of St. David's for the time being should appoint the schoolmaster, and that the schoolmasters of the Free Grammar School should receive for their own use the profits of these lands for their salary. The petition stated that by regulations made by the Bishop of Waterford and Lismore, or under his authority in his lifetime or within fifty years after his death, the scholars to be educated by the endowment were instructed according to the doctrines of the Church of England, and they had continued to be so instructed until the present time. In 1850 it was found necessary to erect a new school-house, and subsequently the present school-house was built on a piece of ground at Belle Vue, near Swansea. Between Aug. 1872 and Dec. 1876, 1013*l.* was raised by subscription and applied in converting the crypt under the dining-hall of the Free Grammar School into a chapel, and that chapel had been continuously used for Divine service according to the rites of the Church of England by the head master, who holds the licence of the bishop of the diocese to perform the service. The scheme to which the governing body of the Free Grammar School objected was one framed by the Charity Commissioners to carry into effect proposals submitted to the Commissioners by the joint education committee for the county borough of Swansea. By the scheme the income of the school endowment, together with the sums provided by the council of the borough under sect. 3, sub-sect. 2, of the Act of 1889, and under the Local Taxation (Customs and Excise) Act 1890, and the Treasury grant payable under sect. 9 of the Act of 1889, were to be applied in maintaining in the grammar school buildings enlarged for the purpose a day school of intermediate and technical education for not less than 200 boys, and also a day school for girls under a new governing body, who would appoint the head master. The scheme made provision for religious instruction and religious exemptions in accordance with sect. 15 of the Endowed Schools Act 1869, and sect. 4, sub-sect. 3, of the Act of 1889. The scheme also provided for scholarships and exhibitions. The petitioners contended that the endowments of the grammar school ought not to be used for the purpose of the scheme and thus be diverted to the purposes of an intermediate or technical school from those of a grammar school for boys to which they were at present appropriated, and they also contended that the inclusion of the grammar school in the scheme would prevent day scholars belonging to the Church of England from obtaining instruction in the doctrines of their own church. The scheme was

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

approved by the Committee of Council on Education on the 1st March 1893. The petitioners contended that the scheme was not made in conformity with the Endowed Schools Act 1869, because the scheme interfered with part of the endowment originally given for the purposes of the Free Grammar School less than fifty years before the commencement of that Act, and the assent of the governing body of such endowment to the scheme had not been obtained; that the school was excepted, by sect. 19 of the Endowed Schools Act 1869, from the provisions therein contained respecting religious instruction and the attendance at religious worship, and that the scheme did not make provision respecting the religious instruction or attendance at religious worship of the scholars, and respecting the religious opinions of the governing body or masters, and that the scheme contained no provision for saving and made no compensation for the vested interests of the persons for the time being heirs-at-law of Mr. Bussy Mansel; that the heiresses-at-law at the present time of Mr. Bussy Mansel objected to the scheme, and that the scheme was not in other respects made in conformity with the Endowed Schools Act 1869.

Finlay, Q.C. and Ingpen, for the petitioners, referred to

Re St. Leonard's, Shoreditch, 51 L. T. Rep. N. S. 305; 10 App. Cas. 304; and

Re Christ's Hospital, 62 L. T. Rep. N. S. 10; 15 App. Cas. 172.

The *Solicitor-General* (Sir J. Rigby, Q.C.) and *Vaughan Hawkins*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the petitioners their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell).—The petition before their Lordships relates to a scheme which has been framed by the Charity Commissioners under the Welsh Intermediate Education Act 1889 (52 & 53 Vict. c. 40). That Act provides that "It shall be the duty of the joint education committee . . . of every county in Wales, and of the county of Monmouth, to submit to the Charity Commissioners a scheme or schemes for the intermediate and technical education of the inhabitants of their county . . . specifying in each scheme the educational endowments within their county which in their opinion ought to be used for the purpose of such scheme." Instead of submitting a scheme the joint education committee may submit to the Charity Commissioners proposals for a scheme. Proposals for a scheme were submitted by the committee, specifying the endowments of the Swansea Free Grammar School as endowments which, in the opinion of the committee, ought to be used for the purpose of the scheme, and the scheme under consideration was framed by the Charity Commissioners accordingly. By sect. 12 of the Act of 1889, "An educational endowment within the county of a joint education committee means any educational endowment which is applied in the county or is appropriated for the benefit of the natives or inhabitants of the county, or of some of such natives or inhabitants, or their children." It is not disputed that the Swansea Free Grammar School was "an educational

endowment" within the definition of sect. 12, and therefore one with which it was competent to deal in a scheme of this description. The petitioners appeal to Her Majesty in Council against the scheme, as they are empowered to do, under sect. 39 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56), which applies to schemes framed under the Welsh Intermediate Education Act. That section specifies certain grounds of objection to a scheme, which may be the subject of appeal to Her Majesty in Council, and it is not within the power of their Lordships to entertain an appeal upon any other than those grounds. It is entirely beyond the scope of their duty to consider the policy of the scheme, and they have no power to determine that any modifications should be made in it, unless it is established to their satisfaction that the scheme is one which was not within the legal powers of its framers. Three objections to the scheme have been taken by the petitioners. They say, in the first place, that the scheme ought to have provided for the instruction of children in religion according to the doctrine and formularies of the Established Church. That contention was not very strongly urged upon their Lordships, but so far as it has any foundation it must be rested upon the provisions of the 19th section of the Endowed Schools Act 1869. The second sub-section of that section provides that there is excepted from the provisions respecting religious instruction contained in the earlier part of the Act "any educational endowment, the scholars educated by which are, in the opinion of the commissioners (subject to appeal to Her Majesty in Council as mentioned in this Act), required by the express terms of the original instrument of foundation or of the statutes or regulations made by the founder or under his authority, in his lifetime or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination." The present case does not come within the words of this section. There is no such direction in the original instrument of foundation, nor have any statutes or regulations been put in evidence, made by the founder or under his authority in his lifetime or within fifty years after his death. Reliance was placed, and could only be placed, on the fact that at a comparatively recent period, namely in 1862, there was a bye-law or regulation of the school which required such instruction to be given to the scholars, and the suggestion was that, inasmuch as this had been the practice for many years past, it might be assumed that it had been the practice from the outset, having its origin in some regulation made by or with the authority of the founder. In reference to that contention it is not necessary to do more than repeat that which was said by the Earl of Selborne, L.C. when delivering the judgment of their Lordships in the case of the *St. Leonard's, Shoreditch, Parochial Schools* (51 L. T. Rep. N. S. 305; 10 App. Cas. 304). His Lordship there said: "It is impossible to read the 19th clause of the Act of 1869 without being struck by the care and anxiety which the Legislature has exhibited there to prevent denominational restrictions from being applied to any school as to which there was not demonstrative evidence that the original founders of the school had not only

PRIV. CO.] GOVERNORS OF SWANSEA GRAMMAR SCHOOL v. CHARITY COMMS. [PRIV. CO.]

formed, but expressed, an intention that the children should be instructed according to the doctrines or formularies of a particular church, sect, or denomination; or, in the added words of the later Act, should be members of a particular church, sect, or denomination. It is impossible not to be struck by the anxiety which the Legislature has displayed to exclude, not only every uncertain, but also every merely probable, implication from practice alone of such an intention." In that case the evidence of the practice went back to a much earlier date than in the present case, to a period of time much nearer the date of the gift, but their Lordships held that it was impossible properly to infer from any such practice the existence of an express direction, where there was no direct evidence of any document having existed containing such direction. That disposes of the first point. The next objection taken was, that the scheme was not in conformity with the Act of 1869, inasmuch as the commissioners had not properly regarded the right of patronage of the Misses Talbot, the representatives of Mr. Bussey Mansel, who gave the site upon which the school was built. This right of patronage was vested by the terms of the original gift in Mr. Bussey Mansel, in consideration of his having provided the site; and it was thereby provided that he was to appoint the schoolmaster, but that in case of a minority of any heir of his, the schoolmaster was to be appointed by the Bishop of St. David's. But the concluding words of sect. 13 of the Act of 1869 only apply to "rights of patronage which may be at the passing of this Act exercised by any member of the governing body of such school in consequence of any gift or donation made by him." The present case appears to their Lordships to be clearly not within those words. The ladies in whom the right of patronage was vested were not members of the governing body, and such right of patronage as they possessed was not in consequence of a gift or donation made by them. The only question which remains relates to the fact that between the years 1872 and 1876, as stated in the affidavit of Mr. Morris, a sum of money amounting to 1013*l.* was raised by subscription, and applied in converting the crypt under the dining-hall of the school into a chapel; and that the chapel was completed in 1874, and has since been continually used for Divine service according to the rites of the Church of England by the head master, who holds the licence of the bishop of the diocese to perform such service. It was argued that the sum thus given was a modern endowment within the meaning of the Act of 1869. Sect. 25 of the Act of 1869 provides as follows: "Where an endowment, or part of an endowment, originally given to charitable uses less than fifty years before the commencement of this Act has, by reason of having been spent on school buildings or teachers' residences, or playground or gardens attached to such buildings or residences, become so mixed with an old endowment given more than fifty years before the passing of this Act, that in the opinion of the commissioners (subject to appeal to Her Majesty in Council) it cannot conveniently be separated from such old endowment, then the whole endowment shall, for the purposes of this Act, be deemed to be an endowment originally given to charitable uses more than fifty years before the commencement

of this Act." The dividing line taken by the Act of 1869 between old and new endowments, the former being within and the other, speaking generally, being without the jurisdiction of the Charity Commissioners, was fifty years before the commencement of the Act. By the Welsh Intermediate Education Act, sect. 13, the dividing line is made the date of the passing of the Act of 1869, and it is only endowments subsequent to the passing of that Act which are not to be interfered with. The section provides further that the 25th and 26th sections of the Act of 1869 shall, for the purpose of a scheme under the Welsh Act, apply "as if the same . . . were respectively in the said sections substituted for an endowment, or part of an endowment, originally given to charitable uses less or more than fifty years before the commencement of the said Act." Therefore, in order to make the gift in question a modern endowment, it has to be shown that it was given since the Act of 1869. If it was so given, then the same question has to be considered under sect. 25 of the Act of 1869, as would have to be considered in the case of an endowment given within fifty years before the commencement of that Act. The information which their Lordships have before them on the subject of the endowment in question is very meagre. Mr. Morris' affidavit only states that between Aug. 1872 and Dec. 1876, 1013*l.* was raised by subscription, and applied to convert the crypt into a chapel. It is not stated that the subscriptions were given for that specific purpose, and there is nothing to show precisely how the money was applied in converting the crypt into a chapel. But what their Lordships have to consider is whether this money, taking it to be a modern endowment, has become so mixed with the old endowment that it cannot conveniently be separated from it. Now, the modern endowment has simply been applied in fitting up a room under the school building, namely the crypt, as a chapel. No practical suggestion has been made to their Lordships, showing how it would be possible to separate this endowment from the old endowment. It is admitted that it was competent for the scheme to deal with the old endowment, consisting of the old building, including the crypt. How could the endowment, which consisted merely of fitting up that crypt in a manner suitable for a chapel, even supposing it were shown to have been given specifically for that purpose, be conveniently separated from the old endowment? In this case, surely, if in any, the new endowment has become so mixed with the old endowment that it cannot be conveniently separated therefrom. For these reasons their Lordships will humbly advise Her Majesty that the petition be dismissed, but without costs.

Solicitor for the petitioners, *E. T. Turner*, for *C. Norton*, Swansea.

Solicitors for the respondents, *Farrer and Co.*

CT. OF APP.] HOYLE AND OTHERS v. ASSESSMENT COM. OF OLDHAM UNION. [CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Feb. 26.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

HOYLE AND OTHERS (apps.) v. THE ASSESSMENT COMMITTEE OF THE OLDHAM UNION (resps.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Rateable value—Cotton-mills—Stoppage owing to strike—Union Assessment Act 1862 (25 & 26 Vict. c. 103), s. 15.

On the 7th Nov. certain cotton-mills were assessed to a poor rate for the ensuing year, according to the valuation list then in force, as going and working concerns, no allowance being made in respect of a strike, through which, on the 5th Nov. the mills ceased working, and did not resume work until the 25th March when the strike ceased. During this period they were only occupied for the purpose of keeping the machinery in good working order and condition. In June the occupiers appealed to the assessment committee, but obtained no relief; and on appeal to quarter sessions a special case was stated.

Held (affirming the decision of the Queen's Bench Division), that the assessment committee were right in disregarding the possibility or probability of a continuance of the stoppage of the mills on account of the strike; and that no deduction or allowance could be made in respect of a stoppage occurring after the rate was made.

APPEAL by Hoyle and others from the decision of the Divisional Court (Day and Lawrance, JJ.) upon a special case stated on appeal to quarter sessions against a valuation list and rate.

The appellants were occupiers of certain cotton-mills and factories, and were assessed to a poor rate made on the 7th Nov. 1892 according to the valuation list then in force. The rate was made for the ensuing year.

The appellants gave notice of appeal against the valuation list, and their appeal was heard by the assessment committee on the 12th June 1893. The appellants, not having obtained any relief, gave notice of appeal to quarter sessions. Pending this appeal a special case was stated for the opinion of the High Court pursuant to sect. 11 of 12 & 13 Vict. c. 45.

The special case stated the following facts and contentions:—

The grounds of appeal were that: (a) the valuation list and rate were unusual and unfair, because the appellants were over-assessed in respect of the yearly value of the mills and factories occupied by them; (b) the valuation list and rate were unfair and incorrect with regard to the assessments of the mills and factories, because such assessments were not made upon an estimate of the rents at which the mills and factories respectively might reasonably be expected to let from year to year free from all tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable annual cost of repairs, insurance, and

other expenses necessary to maintain the mills and factories in a state to command such respective rents; (c) in assessing the mills and factories no account had been taken of, and no allowance or deduction had been made for, the possibility or probability of the stoppage of the mills and factories in consequence of strikes, lock-outs, or bad trade; (d) the mills and factories were not working from the 7th Nov. 1892 to the 25th March 1893, and were assessable during that period only as warehousing for machinery, and not as going or working concerns; (e) the valuation list and rate were unequal, unfair, and incorrect, in the several hereditaments included therein.

The mills and factories were respectively assessed to the rate according to the values shown in the valuation list without regard to the fact that they were not then, nor until the 25th March 1893, in full work and operation, and were occupied only for the purpose of keeping the machinery in good working order and condition.

The mills and factories ceased working on the 5th Nov. 1892 owing to a strike, and did not resume work until the 25th March 1893 when the strike ceased.

It was admitted that, assuming there had not been and would not be any stoppage, the respective assessments were fair and reasonable.

The appellants contended that the mills and factories were assessable during the period of stoppage as warehouses for storing machinery only, and not as going or working concerns; that the nature of the occupation of the mills and factories had changed from a working occupation to a non-working occupation; and that in assessing the same the respondents ought to have taken into account and made some allowance or deduction in respect of the possibility or probability of the stoppage thereof in consequence of strikes, lock-outs, or bad trade.

The respondents contended that all assessments to the poor rate should be made upon the basis of the yearly letting value of the premises to a tenant from year to year, and not upon the basis of the variable letting values during several portions of a year; and that it was not their duty to make any reduction in the assessments of the mills or factories, or any allowance or deductions from the rate, by reason of a temporary stoppage of the mills and factories; and that they could not, at the date of the objection made to them, reduce the assessments of the mills or factories to their respective values as warehouses for machinery, as the mills and factories were then in full work and operation.

The questions for the opinion of the court were: (1) whether, under the circumstances stated in the case, the appellants were entitled to have the assessments of the mills and factories reduced in respect of the stoppage of work, and to have the mills and factories assessed as warehouses for storing machinery only, during the period of stoppage; and (2) whether, under the circumstances, the appellants had on the 12th June 1893, or have now, any power to make such a reduction.

The Divisional Court (Day and Lawrance, JJ.) gave judgment in favour of the respondents.

The appellants appealed.

Marshall, Q.C. and Montague Lush for the appellants.—The respondents ought to have made an allowance for prospective or possible strikes,

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

CT. OF APP.] HULL DOCKS COMPANY v. GUARDIANS OF SCULCOATES UNION. [CT. OF APP.]

or ought to have subsequently made a deduction in respect of the period during which the mills were not working. The matter is to be considered as at the time the rate was made on the 7th Nov.; at that time the strike had commenced, and an allowance ought to have been made in the valuations by reason of the probability of the continuance of that strike:

Staley v. Castleton Overseers, 10 L. T. Rep. N. S. 606; 5 B. & S. 505.

Macmorran and Frank H. Mellor, for the respondents, were not heard.

LORD ESHER, M.R.—It seems to me that a clearer case never was brought before this court. The assessment committee had to assess a rate upon the occupiers of a mill for the coming year, and had to say what a hypothetical tenant would give as rent for the mill during that year. At that time the mill was fully working, but two days before a strike had taken place and the workmen had gone out. It is argued that the assessment committee were bound to suppose that the hypothetical tenant would have taken that strike into account and would have given less rent for the mill, and that the assessment committee ought therefore to have taken that strike into account and to have lessened the assessment, because the strike would possibly or probably last so long as to affect the hypothetical tenant. It is absurd to suggest that the assessment committee should appreciate the probability of a strike. How could they? They did not in fact do so. There is nothing to show that the assessment committee did not assess these mills upon ordinary principles and in the ordinary way. Then a second point was taken which is even worse than the first. That point is that, assuming that the rate was rightly made upon a proper assessment at the time when it was made, yet after the mills were so rated there was during the course of the year a strike which affected the value of the mills. The appellants, however, occupied the mills by their servants, in order to keep the machinery in order, all the time. It is said that the overseers, although they could not alter the rate, ought to say that the mills were occupied only as warehouses, and on that account make an allowance or deduction from the rate. There is no authority whatever for such a proposition, and no ground upon which to establish it. The case of *Staley v. Castleton Overseers* (*ubi sup.*) is not in any way applicable to this case. The decision of the Divisional Court was right, and this appeal must be dismissed.

LOPES, L.J.—I agree, and have nothing to add.

DAVEY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Chester, Mayhew, Broome, and Griffiths*, for *Hesketh Booth*, Oldham. Solicitors for the respondents, *Maudes and Tunnicliffe*, for *J. W. Mellor*, Oldham.

Dec. 14, 15, 18, 1893, and March 19, 1894.

(Before Lord HALSBURY, LOPES and KAY, L.JJ.)

THE HULL DOCKS COMPANY (apps.) v. THE GUARDIANS OF THE SCULCOATES UNION (resps.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Assessment—Docks—Docks in several parishes—"Parochial principle"—Dock railway—Statutory prohibition against letting—Hypothetical tenant.

The Hull Dock Company owned and occupied various docks, with wharves and warehouses, all forming one system of docks under one management, but situate in several parishes in the respondent union. Accounts were kept by the company which showed the expenses and earnings attributable to the part of the property situate in each parish. The rateable value of the property in each parish was ascertained by taking the value of the whole of the property and apportioning it among the several parishes according to the water area of the docks in each parish. The dock company appealed against that mode of assessment.

Held, that the rateable value of the property in each parish ought to be ascertained upon what is called the "parochial principle" by ascertaining the profit-earning capacity of the property in each parish.

Upon the dock company's property there were railway and tramway lines, in respect of which the company was by statute prevented from taking tolls and from letting.

Held (by Lopes and Kay, L.JJ.), that the rent which a tenant might reasonably be expected to give for the lines, if the company could let them, ought to be taken into account in determining the rateable value of the property.

Reg. v. Hull Dock Company (18 Q. B. 325) considered.

THIS was an appeal by the guardians of the Sculcoates Union from the decision of the Divisional Court (Mathew and Collins, JJ.) upon a special case stated on appeal to quarter sessions.

The property of the Hull Dock Company was assessed in the Sculcoates Union, and certain poor rates were made, upon that assessment, in four parishes in the Sculcoates Union.

The Hull Dock Company appealed to quarter sessions against the assessment and the rates, and by consent and by order of quarter sessions the matters of the appeal were referred to an arbitrator to state a special case for the opinion of the Queen's Bench Division.

SPECIAL CASE.

1. By the 14 Geo. 3, c. lvi., certain persons were incorporated by the name of the Dock Company, at Kingston-upon-Hull, and power was given to them to construct a basin or dock near the river Hull for the reception of ships and vessels, with a quay or wharf and other necessary works, for the benefit of the shipping and trade of the port. The said dock and works were to be vested in the dock company, who were to keep the same at all times thereafter in good and sufficient repair. By sect. 39 of the said Act, in consideration of the charges and expenses that would be incurred by the making and re-

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

pairing of such dock, quay, or wharf and other works, it was enacted that there should be payable and paid to the dock company for every ship or vessel (except vessels employed in His Majesty's service) coming into or going out of the said harbour, basin, or docks within the port of Kingston-upon-Hull, or unloading, or putting on shore, or loading or taking on board, any of their cargo, or any goods, wares, or merchandise within the said port, by the master or commander, owner or owners, of every such ship or vessel, the several rates or duties of tonnage therein particularly described, and the section then proceeds:

Which rates or duties shall be and are hereby vested in the said dock company as their own proper moneys, and to and for their own proper use and behoof for the purposes aforesaid, and shall be paid at the time of such ships' or vessels' entry inwards, or clearance or discharge outwards, or, in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port, so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage, both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandise.

By sect. 42 of the said Act, all goods, wares, and merchandise which should be landed or discharged upon any of the quays or wharves which should be erected by virtue of the Act were to be liable to pay the like rates of wharfage and payments as were usually taken for any goods, wares, or merchandise loaded or discharged upon any quays or wharves in the port of London, which were to be paid to the respective company and owners of the said quays or wharves in like manner as the rates and duties established by the Act were thereby directed to be paid.

2. The dock in the said Act referred to was made in or about the year 1775. It was formerly called the Old Dock, but is now called the Queen's Dock.

3. The 42 Geo. 3, c. xci., authorised the making of a second dock, to be called the Humber Dock, at the port of Kingston-upon-Hull, and a basin thereto, with wharves and such other works as might be necessary. By sect. 2 the rates and duties leviable by the 14 Geo. 3, c. 56, were declared to be in full force in regard to the said additional dock. By sect. 58, when the ships resorting to the port had reached a certain limit of numbers therein defined, the dock company were required to make a third dock, to communicate with the said two other docks. The said third dock is now called the Prince's Dock.

4. By the 7 & 8 Vict. c. ciii., power was given to the dock company to construct, repair, and maintain a dock on the east of the citadel, now called the Victoria Dock, and a branch dock (now called the Railway Dock) at the west of the Humber Dock and north of the railway terminus, together with such basins and cuts, quays, wharves, warehouses, workshops, and other works as they might deem expedient, which said docks and works were to be part of the port of Hull. By sect. 197 power was given to the company to levy certain specified rates of wharfage for goods, wares, and merchandise loaded or delivered from the company's quays or wharves, in addition to the rates of wharfage already granted for goods

landed or discharged upon the said quays or wharves. By sect. 202 a vessel proceeding from the port of Hull to any other port or place and returning from such port or place to Hull, and a vessel first proceeding from any other port or place to Hull and returning to such other port or place, is to be considered as performing the same voyage.

5. By 17 Vict. c. xiii., s. 50, nothing contained in the dock company's Acts was to empower the company to levy the tonnage rates imposed by the said Acts in respect of any vessel which should pass up or down the river Humber without entering any of the docks, basins, or harbours at Kingston-upon-Hull, unless some part of the cargo of such vessel should have been loaded and taken on board from or discharged or landed upon any part of the shore of the river Humber which is within the port of Hull, in which event such tonnage rates should be payable only in respect of the quantity of goods so loaded or discharged.

6. By the 24 & 25 Vict. c. lxxix., the dock company were empowered to construct the western dock (now called the Albert Dock), with the necessary works, and to make, maintain, and use tramways or railways on any of their quays for facilitating the carriage of goods. By sect. 5 (incorporating the provisions of the Harbours and Piers Clauses Act 1847 with respect to the appointment and duties of harbour masters, dock masters, and pier masters) the dock company may appoint such harbour masters, dock masters, and pier masters as they think necessary, and the harbour master may give directions for regulating the time at which, and the manner in which, any vessel shall go into, go out of, or lie in or at the harbour, dock, or pier, and its position, mooring and unmooring, placing and removing whilst therein. By sect. 53 the junctions between the dock railways and the Hull and Selby or North-Eastern Railway were to be made at the expense of the dock company, and no tolls are to be taken by the dock company for the use of those dock railways, or of the tramways of the dock company in connection therewith. By sect. 110, where any vessel using the docks, and whether or not any tonnage rates have previously been paid or are payable in respect of such vessel, remains in any of the docks or basins of the company more than six months after the time of going into any of the docks or basins, there is to be payable a further rate of one penny a ton for every week or fraction of a week during which the vessel remains in any of the docks beyond the six months in addition to the said tonnage rates. By sect. 111, where any loaded barge or lighter using the docks remains in any of the docks or basins of the company without their permission, or without being duly authorised to do so by the said Act, more than seven days after the time of going into any of the docks or basins, there is to be payable a rate of one penny a ton for every seven days or fraction of seven days during which the barge or lighter remains in any of the basins or docks beyond the first seven days. By sect. 112 the company may from time to time demand and take, in respect of all vessels going into or using any of their graving docks, such reasonable rates as the company may appoint. By the 40 Vict. c. 25, s. 28, the period of six months referred to in sect. 110 of the last-mentioned Act was reduced to three months.

CT. OF APP.] HULL DOCKS COMPANY v. GUARDIANS OF SCULCOATES UNION. [CT. OF APP.]

7. The said Albert Dock was constructed in the year 1869.

9. Under the powers contained in some of the said Acts, in addition to the docks hereinbefore mentioned, the company constructed the Sir William Wright Dock in the year 1880, and the St. Andrew's Dock in the year 1883. A plan of the whole of the said docks with their connections accompanies and forms part of this case.

10. The Queen's Dock, Prince's Dock, Humber Dock, and Railway Dock, communicate directly with each other and with the river Humber, and also, by means of crossing the river Hull, with the Dry Pool Basin and the Victoria Dock. The Albert Dock and the William Wright Dock communicate with each other, but with no other dock save by means of vessels from the said docks passing out into the river Humber. The St. Andrew's Dock communicates with none of the other docks, except by way of the river Humber.

11. The St. Andrew's Dock is used almost exclusively for fishing vessels. A large covered platform has been erected on the north side with special fittings and conveniences for the unloading packing, and despatch of fish, and with offices both fixed and movable where the business of the fish importer and salesman is conducted. Behind this platform is a railway siding connected with the North-Eastern Railway system, into which waggons are from time to time shunted, and in these waggons the boxes of fish when packed are placed, and so are immediately conveyed to the various fish markets of the country. Ice houses have also been erected on the same side of the dock for the accommodation of the trade, while at other parts of the quays adjoining the same dock are repairing and fitting workshops, which with the graving dock at the west end are used in connection with the repair of the fishing vessels.

12. At the Victoria Dock the trade is almost entirely in timber, for which special facilities have been provided in the way of timber ponds and deal yards adjoining the dock. The timber is imported chiefly from the Baltic, and there is scarcely any timber export trade. The other trade carried on at the same dock is a small trade in guano, nitrate of soda, and grain.

13. The Queen's Dock, so far as it lies in Sculcoates parish, is also mainly a timber dock.

14. The tonnage rates or dock dues payable on vessels using the company's docks are charged in the following way: A ship entering any dock and there discharging pays dock dues upon her net registered tonnage, according to the port from which she comes, and a ship loading at any dock pays dock dues upon her registered tonnage according to the port for which she clears; but no ship has to pay dues for both the outward and inward voyage, and each vessel, therefore, pays only the higher of the two sets of dues, whether outgoing or incoming, for which she is liable.

15. The dues are all collected at the Custom-house. The payment of one set of dock dues entitles a vessel to the use of any of the docks, though, as already stated, for reasons of convenience to both the shipowners and the dock company, particular docks are in practice used by particular trades. A fishing vessel, for instance, which, in the ordinary course would go to St. Andrew's Dock, could, if her owner or master thought fit, go to the Albert Dock, and would pay

precisely the same dock dues as if it went to St. Andrew's Dock.

16. The removal of vessels from one dock to another while staying in port takes place chiefly when, having discharged a cargo of one description, they proceed to another dock for the purpose of loading a cargo of a different kind. Vessels bringing timber to the Victoria or Queen's Dock, for instance, frequently take back coal, and go to the Albert or some other dock to load. In the year 1891 seventy-five vessels so left the Victoria Dock to load elsewhere, being rather less than one-sixth of the whole of the vessels using the Victoria Dock, reckoning by the amount of dues received; while eighty-five vessels which had discharged elsewhere loaded in the Victoria Dock. In the same year twenty-eight vessels loaded with timber, twenty-six sailing vessels, and ninety-three steamers which had discharged at the Queen's Dock proceeded to other docks to load, representing somewhat less than one-third of the whole dues for vessels discharged at that dock, while no vessels which had discharged elsewhere were loaded at the Queen's Dock. And in the same year eighteen vessels which had discharged at St. Andrew's Dock, being about one-thirtieth part of the whole, left that dock to load elsewhere, while no vessels which had discharged in other docks came to St. Andrew's Dock to load.

17. A record is kept of all the vessels entering the docks, and of the particular docks in which they respectively discharge and load, from which the appellants were able to compile lists of the vessels discharging and unloading in each of the three docks in the respondent parishes, and, with comparatively few exceptions, to say in what parts of those docks parochially they were so discharged or loaded. No account is kept of the docks and basins through which the vessels merely pass, and no receipts were credited to the respondents by the appellants in this appeal in respect of any such passing through, on the ground that no dock dues are payable or paid therefor.

18. The mode in which the appellants' accounts of receipts are kept with reference to their separation between the various docks and parishes appears in the statement hereinafter made as to the way in which their schedules of receipts were presented in this appeal.

19. The expenditure by the appellants for salaries and wages (other than labourage) is carried by them to a general account without distinguishing between the particular docks in respect of which such sums are expended, though the wages of men locally employed, such as gate-men, could be so distinguished. The expenditure upon labour and materials for the maintenance and repair of the docks is also carried to a general account, except as to some of the smaller items such as the repairs of pumping stations. The account for labourage (which amounts to more than a fourth of the whole receipts) is so kept that the receipts and outgoings under this head in each parish can be ascertained with proximate accuracy. The word "labourage" was used as meaning the sums received by the dock company from shipowners and merchants and paid by the company to the men employed for labour on and about the quays.

20. The appellants dredge the various docks and the parts immediately outside the approaches to

CT. OF APP.] HULL DOCKS COMPANY v. GUARDIANS OF SCULCOATES UNION. [CT. OF APP.]

the same, but they do not dredge any part of the channel of the river Humber. The Corporation of Hull dredge the old harbour, and a periodical payment is made to them in respect thereof by the appellants. The appellants also make a payment of 700*l.* a year, which is fixed by statute, to the Humber Conservancy, for supervising the deposit of mud in the Humber at the various states of the tide.

21. There is a pumping station on the appellants' property at the entrance to Victoria Dock, from which all the gates, bridges, cranes, and similar appliances at that dock only are worked by hydraulic power.

22. At the Queen's Dock the hydraulic power for working the cranes on the south side is hired from a separate company, but this is wholly outside the respondents' union. The gates are worked by manual power.

23. There is a pumping station (No. 1) at the entrance to the Albert Dock, and another (No. 2) at St. Andrew's Dock, which work in conjunction to supply the hydraulic power for St. Andrew's, the Albert, and the William Wright Docks, and also the cranes at the Humber Dock. The appellants allocated a tenth of the cost of working this pumping station to Newington parish, which is a fair apportionment as far as the same can be fixed by estimate.

24. For the purpose of arriving at the rateable value, the receipts and expenditure connected with the docks, so far as material to this case, were respectively treated by the appellants and respondents in the following way:

25. The appellants prepared separate accounts for each of the respondent parishes.

26. The dock dues were credited by the appellants to the dock in which the vessel discharged, each vessel that had gone into dock being traced for the purpose from the company's accounts. In the case of the Queen's Dock, which is partly in the parish of Sculcoates and partly outside the respondents' union, the dock dues for vessels which had discharged within the parish were all credited to the parish. In the case of the Victoria Dock, which is partly within the parish of Drypool and partly in the parish of Garrison Side, the vessels engaged in foreign trade, which represent 92 per cent of the whole, were similarly traced and accounted for to each parish; while as to the remaining 8 per cent., which represent the vessels engaged in the coasting trade, they were divided between the two parishes in the proportion of the lineal yardage in each parish of available quay berthage space, or, in other words, of quay frontage, in the dock. The receipts for dock dues were similarly treated as to Drypool Basin, where the foreign vessels are to the coasting vessels in the proportion of 84 and 16 per cent. Where a vessel discharged in a dock situate in one of the respondent parishes and left to load elsewhere, one moiety only of the dock dues received in respect of such vessel was credited to such docks; and similarly with vessels which had discharged in other docks, and afterwards used the Queen's or the Victoria, or the St. Andrew's Dock for loading.

27. The dock rent on vessels, being the charge made for vessels remaining more than three months in dock, was credited by the appellants to the parish in which the vessel lay while earning the rent, the practice being for a vessel to remain

in the same dock when laying up, though such rent would be equally payable whether the vessel remained in one dock during the whole period for which it was charged or in several docks successively.

28. The dock rent on craft, being the sums received for craft which remained more than seven days in dock, was credited by the appellants to the dock where the craft were when earning the rent, but, as to the Queen's Dock and the Victoria Dock, it was further divided between the parishes in which those docks are situated in the proportion of quay berthage in each. The whole amount received for dock rent on craft was comparatively small.

29. The account of receipts for inward wharfage (which is payable for goods landed or discharged upon the respective wharves or quays) is kept separate by the appellants for each of the parishes of Sculcoates and Newington, and such receipts were credited to the parish where the goods were so landed on the quays. In the case of the Victoria Dock, the receipts under this head, which were also the actual receipts for goods landed at that dock, were apportioned between Drypool and Garrison Side parishes on the same principle as the dock dues.

30. The amounts received for outward wharfage, except as to certain sums which were so small as not to affect the principle, were credited by the appellants to the parishes in respect of which they were received; and quay rentals, yard rentals, and warehouse rentals, and the sums received for labourage and crane, hoist, and bogey hire were similarly dealt with.

31. With reference to expenditure, the appellants allocated to each parish such proportion of the total wages (other than labourage), cost of quay, and road lighting and general management expenses as the gross receipts in that parish bore to the gross receipts of the whole undertaking. The repairs of tenants' working plant were taken in the proportion which the tenants' working plant in the particular parish bore to the whole of such plant, and similarly with the repairs to the "landlord's capital," such as brick buildings, wharf and quay walls, and other property fixed to the freehold. The expenses of dredging (including the working and repairs of dredgers, the said fixed payment of 700*l.* a year to the Humber Conservancy Board, and the said payment to the Hull Corporation) were taken in each parish in proportion to the quantity of mud dredged in such parish, but in the case of the Queen's Dock 40 per cent. of the mud dredged in the whole dock was taken for the parish of Sculcoates as being the proportion of water area of the dock in that parish. The cost of working the hydraulic machinery at the Victoria Dock was apportioned between the Drypool and Garrison Side parishes in the ratio of the gross receipts, while in Newington parish a tenth of the whole cost of working the machinery there was allocated to the parish as hereinbefore stated. The cost of labourage was proximately the actual cost in each parish.

32. As to the items making up the landlord's capital, a value was put by the appellants upon each of the buildings and other structures as they stood in each parish, except the fixed machinery at pumping stations, which was apportioned among the parishes in the ratio of the gross

CT. OF APP.] HULL DOCKS COMPANY v. GUARDIANS OF SCULCOATES UNION. [CT. OF APP.]

receipts. With reference to the items making up the tenants' plant, certain things, such as keel blocks, timber bogeys, and movable cranes, are used in particular parishes only, and were put in the accounts for those parishes respectively. The dredging plant was apportioned according to the quantity of mud raised in each parish. The remainder of the tenants' plant was apportioned in the ratio of gross receipts.

33. The respondents, on the other hand, first obtained a rateable value for the entire estate by taking the whole receipts and expenditure from the dock company's accounts for the year 1891, and making the usual allowance for tenants' profits and statutable deductions by taking percentages upon the estimated value of the tenants' plant and landlord's capital respectively. Repairs were allowed at the figures at which they stood in the appellants' books for the year 1891, less certain items which were considered to be in fact renewals. From the rateable value so ascertained for the entire estate the respondents deducted the rateable value of all the warehouses, dock offices, graving docks, sheds, yards, and cattle depôt on the appellants' estate as being indirectly productive, taking the remainder as representing the rateable value of the docks only, and this remainder they allocated to each parish in proportion to the water area of the docks and basins in that parish. The rateable value of the whole of the appellants' property in any one parish was made up of the rateable value of the dock therein so obtained, added to the rateable value of the particular warehouses or other indirectly productive property actually in that parish.

34. The items of receipts so included by the respondents in the account for the entire estate comprised dock dues, labourage, warehouse and quay rents, receipts from two graving docks, lamp rentals, receipts from Queen's Dock Ferry (which crosses the Queen's Dock), inward and outward wharfage, and receipts from the foreign cattle depôt.

35. On and about various parts of the Hull Dock estate are a number of railway and tramway lines, belonging wholly or jointly to the appellants, which have been used by the North-Eastern Railway Company for several years, and continue to be so used for the passing of traffic between the docks and their railway system. The North-Eastern is the only railway system having access to the docks. For such uses the North-Eastern Railway Company paid the appellants a sum of 5000*l.* a year in each of the five years ending Dec. 1890. In the year 1891, although the user continued the same as before, they only paid a sum of 350*l.*, which was paid for the use of certain lines laid under special agreement wholly in the parish of Garrison Side, and which sum of 350*l.* has been included in the appellants' receipts for arriving at the rateable value of the appellants' property in that parish. In the Parliamentary session of 1892, and again in 1893, a Bill was introduced by the North-Eastern Railway Company for the purchase of the whole undertaking of the appellants, the object of the Bill being to amalgamate the dock estate with that of the North-Eastern Railway Company.

36. It was contended on behalf of the respondents that the method which they had adopted of finding a rateable value of the dock portion of the appellants' undertaking, and apportioning the

same according to the water area of the respective docks, was the proper method of arriving at a valuation of the said dock property for the purposes of the poor rate.

37. For the appellants it was contended that such rateable value ought not to be apportioned by water area, but ought to be ascertained by attributing to each parish the receipts and expenditure in the way the appellants adopted.

38. It was further contended for the respondents that the rent which a tenant might be reasonably expected to give for the whole of the railway and tramway lines used by the North-Eastern Railway Company in the respondent parishes ought to be taken into consideration in determining the rateable value of the appellants' property therein, having regard to the fact that the said company paid a rent for the same until the end of the year 1890, and discontinued such payment only when introducing a Bill for amalgamation into Parliament; and further, because the appellants have to bear the expense of repairing and maintaining the said lines, which expense is one of the outgoings included in the valuation of the appellants' property for rating purposes.

39. For the appellants it was contended that such rent ought to be excluded from consideration in determining such rateable value, save as to the 350*l.* which the North-Eastern Railway Company still pay, because by the 53rd section of 24 & 25 Vict. c. lxxix. no tolls are to be taken by the appellants for the use of the said lines, and because no rent was in fact paid in the year immediately preceding the making of the rates which are the subject of appeal, or has been paid since Dec. 1890.

40. With reference to this contention I find as a fact that the North-Eastern Railway Company or some other tenant could be found who would pay a rent for the said lines beyond the said 350*l.* a year, if such rent can be legally exacted by the appellants in view of the section referred to.

41. The questions for the opinion of this court are whether the said respective contentions of the appellants or of the respondents are right.

42. If the court shall be of opinion that the method adopted by the respondents of ascertaining the rateable value of the appellants' property in the four respondent parishes is right (whether the rent which a tenant would pay for the said railway and tram lines in the respondent parishes ought to be included or excluded for the purpose of arriving at such rateable value), then the figures appearing in the valuation list for the said respective parishes are to stand, save that as to the foreign cattle depôt, in the parish of Garrison Side, the gross estimated rental is to be 600*l.* and the rateable value 500*l.* instead of 1000*l.* and 800*l.* respectively; and in that event I further award and direct that the appellants do pay to the respondents their costs of and incidental to the said appeal, and of and incidental to the preparation of this my award, and of the said judge's order, and of the reference and award, as well as of and incidental to the hearing of the said evidence and the proceedings before me as aforesaid, and the appellants do bear their own costs of the same.

43. If the court should be of opinion that the method adopted by the appellants of ascertaining the rateable value of their said property is right,

and that the rent which a tenant would pay for the said rail and tram lines in the respondent parishes ought not be taken into consideration for the purpose of arriving at the said rateable value, then the figures in the said valuation list as to Sculcoates parish are to stand, but the remaining figures in the said valuation list are to be struck out, and the following figures respectively substituted. And in that event I further award and direct that the respondents do pay to the appellants their costs of and incidental to the said appeal, and of and incidental to the preparation of this my award and of the said judge's order, and of the reference and award, as well as of and incidental to the hearing of the said evidence and the proceedings before me as aforesaid, and that the respondents do bear their own costs of the same.

44. If the court should be of opinion that the method adopted by the appellants of ascertaining the rateable value of their said property is right, but that the rent which a tenant would pay for the said rail and tram lines in the respondent parishes ought to be taken into consideration for the purpose of arriving at the said rateable value, then the figures in the said valuation list as to Sculcoates parish are to stand, but the remaining figures in the said valuation list are to be struck out and the following figures respectively substituted. And in that event I further award and direct that the respondents do pay to the appellants their costs of and incidental to the said appeal, and of and incidental to the preparation of this my award and of the said judge's order, and of the reference and award, as well as of and incidental to the hearing of the said evidence and the proceedings before me as aforesaid, and that the respondents do bear their own costs of the same.

The Divisional Court (Mathew and Collins, JJ.) decided in favour of the Hull Dock Company, and the guardians of the Sculcoates Union appealed.

Lawson Walton, Q.C. and R. Cunningham Glen for the appellants.

Bosanquet, Q.C. and J. B. Marchant for the respondents.

Cur. adv. vult.

LORD HALSBURY.—I think there can be no doubt but that the rate is bad. Bayley, J., in the case of *Reg. v. Kingwinford* (7 B. & C. 236, 242), explains very clearly the principle upon which rates should be assessed upon one profit-earning undertaking which extends into different parishes. The learned judge was there dealing with a canal, but analogous considerations arose there as here. "I am of opinion," said he, "that the company ought to be rated in each particular parish in proportion to the profit which they derive from the land there used by them for the purpose of the canal. If the canal runs through six different parishes, and there is the same traffic through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. But it may happen that in that part of the canal situate in one parish there may be double or treble the traffic which there is in any other of the six. Why are the other parishes to have any part of the tolls earned in that parish? The land in those parishes contributes nothing towards earning the sum derived in the other parish from the use of the land there. The true principle is this: a canal company is to contribute to the relief of the

poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish. If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion." That principle, obviously just, considering the parish as one area of rateability, and having to discharge its own burdens and deriving its means of discharging them from its own area of rateability, has been adopted and followed ever since, and, even if it were not so equitable or right as I think it is, it would be a serious thing to disturb it after nearly seventy years of undisturbed acquiescence by all courts. In saying that it has been uniformly followed I do not except the case so much relied upon, *Reg. v. Hull Dock Company* (*ubi sup.*), inasmuch as the cardinal fact relied on in that case was that the vessels using the whole or any one dock paid but one toll, which made the vessel free of all: see the observations of Erle, J., at p. 338, and of Lord Campbell, at p. 339, where he says: "If the company had docks in the Humber and Tyne, and took one toll for the use of both, would not each dock be the meritorious cause?" Apart, therefore, from the change which has taken place in the construction of these docks, the findings of the special case which were there being discussed compelled the court to treat the hypotheses of fact upon which they were to give judgment that it was one great dock, the "meritorious cause" of profit being equally distributed over the whole, and, as Blackburn, J. explains in *Mersey Docks v. Liverpool* (*ubi sup.*), the court thought in deciding the matter that the different docks formed one indivisible dock, and that there was no way of applying the parochial principle except by saying, "Here is the one entire rent which a man will give for the whole dock, and each parish must have a portion of the earnings, according to the acreage principle." The findings in the case before us are altogether different. The accounts, which appear to have been kept with great care and precision, show that there is no difficulty in appropriating what has been called the meritorious cause to each parish, and it is therefore quite clear that the *ratio decidendi* of the case relied on by the respondents makes it an authority against them. The rate must therefore be amended. With respect to the railways and tramways. The statements of fact in paragraphs 35, 38, 39, and 40 are somewhat obscured by mixing up the facts themselves with the contentions made in respect of them; but, if I rightly understand the paragraphs in question, they amount to this: that in and about various parts of the Hull Docks there are lines of rails and trams laid down on land belonging to the dock company and included in their undertaking; their principal, if not exclusive use, was to convey goods to and from the North-Eastern Railway in connection with their trade as a dock company, and for the land so used, enhanced in value as it was by the use to which it was put quite apart from the arrangement by which the North-Eastern Railway paid them 5000*l.* a year, they were and are clearly rateable. It is not here, however, a question of rateability or non-rateability, but of quantum, and in order to determine that question, one must look at what are the sources of profit of which the subject of rating under dispute is susceptible. By the Hull Dock Act (24 & 25 Vict. c. lxxix.), it is enacted that the

junctions between the dock railway and the Hull and Selby or North-Eastern Railway shall be made under the direction, and to the reasonable satisfaction, of the engineer for the time being of the North-Eastern Railway Company, and at the expense of the company, and no tolls shall be taken by the company (i.e., the dock company) for the use of those dock railways, or of the tramways of the company in connection therewith. How the North-Eastern Railway Company came to pay 5000*l.* a year with that section before them is not explained, but it is enough for my purpose to say that no such source of profit is by the law open to the dock company, and the arbitrator has made his finding, that a tenant might be found willing to pay some such sum, dependent upon the question whether "such rent" can be legally exacted. It seems to me that no toll or rent in lieu of toll can be legally exacted for the use of the dock railways and the tramways, and that no such source of profit is to be attributed to the possession of all the railways and tramways belonging to the dock company. I somewhat lament the loose mode in which the paragraphs are drawn. The phrase "to be taken into consideration" is misleading. Of course the rails and trams are to be taken into consideration, so far as forming part of the machinery by which the dock company carry on their business. What was probably meant was, whether, apart from their functions in adding to the value of the dock as a dock, some other railway would give a larger sum for the privilege of access to and user of the dock lines and tramways if no such statutory provision had prohibited it as a source of profit. Another source of confusion has been introduced by mixing up "the lines" laid in Garrison Side under a special agreement and upon a bargain that 350*l.* should be annually paid for it, with the lines and trams to which the Act applied. I assume, for the purpose of what I am saying, that the Garrison Side lines are not within the prohibition of the statute. A particular construction under a special bargain is made, and no question is raised in the case that for this special construction any more could properly be assessed than the sum which the dock company receive for it. Here again I have to lament the looseness of the phraseology: "The said lines," "the said rail and tram lines," mean alternatively the lines other than those in Garrison Side which I have described as a special construction, and all the lines and tramways including the special constructions. The question, if I have rightly understood it, is the same as if it were sought to charge a railway with an enhanced value of its line by reason of some other railways having running powers over it, though it has no power to charge anything for such other railway, because a tenant might be found to give a great deal for such running powers if the statutory restrictions were removed. This is not, as I have said, a question of rateability or non-rateability, but of how much; and I think the observations of the Lord Chancellor in the case of *London County Council v. Churchwardens of West Ham* (*ubi sup.*) exactly point to the sort of case with which I am dealing. The Lord Chancellor says: "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of

gasworks, waterworks, and other industrial undertakings, where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered." What his Lordship was then considering was the limit placed by the Legislature on price or profit in respect of the undertakings to which the Legislature has granted certain privileges; but it seems to me that the observations are strictly applicable both in their principle and within the language in which the principle is expressed. To put it in plain terms, the Legislature has prohibited letting these railways and trams for profit, and though this does not shield the dock from rateability, it does not justify taking into account as one source of profit that which the Legislature has said shall not be a source of profit. I am therefore of opinion that no additional value should be attributed to these rails and lines in respect of a hypothetical tenant hiring them.

LOPES, L.J.—The main question in this case is, how the docks are to be assessed to the poor rate. Are they to be assessed on what is called the water area principle, or on the parochial principle? There is a minor question with regard to the rating of the railways and the trams which feed the docks. I am of opinion that the docks must be rated on the parochial system. The defendants rely upon what is called the old *Hull Docks* case (18 Q. B. 325). In that case it was held that the poor rate upon so much of the docks as are in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of the docks within the parish bore to the entire area of the docks; for that in such a case an assessment on the acreage principle was unavoidable, though an assessment on the basis of earnings within the parish is preferable when the nature of the case permits it. In the *Mersey Docks and Harbour Board v. Overseers of Liverpool* (*ubi sup.*) the principle of the decision in the old *Hull Docks* case was explained, and it was held that, in rating to the poor rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side, but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side. Blackburn, J. says, at p. 651: "What the court, in deciding the old *Hull Docks* case, thought was, that the Victoria Dock and the other docks formed one indivisible dock, and as there was one payment made for entering into this one dock, although there were in fact several docks leading into each other, yet there was no way of applying the parochial system except by saying, Here is the entire rent which a man will give for the whole dock, and each parish must have a portion of the earnings according to the acreage principle. But we must follow the parochial system wherever it is possible." Whether the facts in the old *Hull Docks* case justified the conclusion that the several docks were one indivisible dock is a question with which I am not concerned. It is clear that such was the principle of the decision, the court thinking it impossible in that case to apportion to each parish the earnings

accruing in such parish. The court, however, expressed a unanimous opinion that the acreage principle was only to be applied where the parochial principle was inapplicable, and they applied the latter principle in the case then before them. The assessment by water area which the assessment committee have adopted in this case would be likely to produce great injustice. A parish might have a large water area with little profits; another parish a small water area with great profits. It would be highly inequitable that, in the parish where little profits were made, higher rates should be levied than in the parish where large profits were realised; but this would follow in many cases if the acreage principle were adopted. If the acreage principle were adopted in the case, a difficulty would arise with regard to the wharfage dues, which are payable not in respect of the water, but in respect of the lands by the side of the docks, and I am at a loss to see how these could be apportioned according to the water area between several parishes. The docks with which we have to deal in this case cannot be said to be one indivisible dock. There are separate and distinct docks, which did not exist at the time of the decision in the old *Hull Docks* case. Modern experience, too, has made it plain that the principle of local assessment is not impracticable in cases like that now before us. This case, in my judgment, is governed by the later cases of *The Mersey Docks and Harbour Board v. The Overseers of Liverpool* (*ubi sup.*) and *The Mersey Docks and Harbour Board v. Overseers of Birkenhead* (*ubi sup.*), and for the reasons which I have given is distinguishable from the old *Hull Docks* case. That the parochial principle is the right one to adopt I entertain no doubt. With regard to the rating of the railway and tramway lines used by the North-Eastern Railway Company, it is contended by the respondents that the rent which a tenant might be reasonably expected to give for the whole of the railway and tramway lines ought to be taken into consideration in determining the rateable value of the appellants' property; it was contended, on the other hand, by the appellants that such rent ought to be excluded from consideration in determining such rateable value, save as to the 350*l.* which the North-Eastern Railway still pay, because, by the 53rd section of the 24 & 25 Vict. c. lxxix., no tolls are to be taken by the appellants for the use of the said lines, and because no rent was in fact paid in the year immediately preceding the making of the rates which are the subject of appeal, or has been paid since Dec. 1890. Previously to Dec. 1890 the North-Eastern Railway Company had paid the sum of 5000*l.* a year in each of the five years ending Dec. 1890. In the year 1891, although the user continued the same as before, they only paid a sum of 350*l.*, which was paid under special agreement for the use of certain lines wholly in the parish of Garrison Side, and which sum of 350*l.* has been included in the appellants' receipts for arriving at the rateable value of the appellants' property in that parish. With reference to this contention it is found in the special case as a fact that the North-Eastern Railway Company, or some other tenant, could be found who would pay a rent for the said lines beyond the said 350*l.* a year if such rent can be legally exacted by the appellants in view of the section above referred to. The ques-

tion is, whether the rent which a tenant would pay for the said railway and tram lines ought to be included or excluded for the purpose of arriving at the rateable value. Previously to the recent case in the House of Lords of *London County Council v. Churchwardens of West Ham* (*ubi sup.*) and *London County Council v. Churchwardens of Erith* (1893) App. Cas. 562 I should have thought the contention of the appellants maintainable, because they are precluded from taking any tolls for the use of the said lines by the 53rd section of 24 & 25 Vict. c. lxxix., and there could therefore be no beneficial occupation in the sense of deriving any profit; but the last-named cases have worked a revolution in the law of rating. It has been held that the true test of beneficial occupation is not whether a profit can be made, but whether the occupation is of value, and that the owner is to be regarded as one of the possible tenants in considering what rent may be reasonably expected, whether he has power to let the premises or not. Lord Herschell says, at p. 596: "If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although as a matter of fact it could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so." The arbitrator has found as a fact that the North-Eastern Railway Company, or some other tenant, could be found who would pay a rent for the said lines beyond the said 350*l.* a year if the appellants could let the said lines. It seems to me in these circumstances impossible to say that the occupation of the said lines by the appellants is not of value, nor can it be said that their incapacity to take tolls exonerates them from liability to be assessed as the hypothetical tenant of the lines. It was contended that the dock company was indirectly rated in respect of these lines by the increased receipts arising from the traffic brought by these lines; but I understand the arbitrator to have found that a rent beyond the 350*l.* could be obtained in addition to all the profits obtained by the dock company by means of the said lines, and I understand that the 5000*l.* a year formerly paid by the company was beyond and independent of such profits. I am of opinion that the rent which a tenant might be reasonably expected to give for the whole of the railway and tramway lines used by the North-Eastern Railway Company in the respondent parishes ought to be taken into consideration in determining the rateable value of the appellants' property.

KAY, L.J.—The first question raised by the special case submitted by the arbitrator is as to the principle on which the Hull Docks should be assessed for the poor rate. The assessment committee, who appear in the name of the guardians, have found a rateable value of the dock portion of the company's undertaking and have apportioned the same among the various parishes in which the several docks are situated according to the water area of the docks in each of such parishes. The dock company contend that "such rateable value ought not to be apportioned by water area, but ought to be ascertained by attributing to each parish the receipts and expenditure" in each, apportioning among them certain matters which are common to several parishes. There is a subsidiary question as to the rating of the railways

[CT. OF APP.] HULL DOCKS COMPANY v. GUARDIANS OF SCULCOATES UNION. [CT. OF APP.]

communicating with the docks, which I will deal with later. The system of assessment advocated by the dock company is what may be called shortly the parochial system; that is, making a separate valuation of the property in each parish so far as possible. Where a large undertaking like a railway or a system of docks extends into several parishes there are receipts and expenses which are common to the whole undertaking, like, for instance, the terminal charges upon a railway, and these must be apportioned whatever principle of rating is adopted. But the tendency of modern decisions has been to adhere as closely as practicable to the parochial system of valuation. The Hull Docks are situate on the side of the river Humber, where it is joined by the river Hull; some of these docks communicate with one another and with the river Humber at one end, and with the river Hull at the other end of three connected docks. There are others which are separate and have no connection except with the river Humber. One of these separate docks, called St. Andrew's, is used almost exclusively for fishing vessels; other docks, the Victoria and Queen's Docks, are used mainly for timber. The dock dues are all collected at the Custom-house. The payment of one set of dock dues entitles a vessel to the use of any of the docks. There are hydraulic appliances common to several of the docks. The special case, in paragraphs 25 to 32 inclusive, states how the dock company proposed to apply the parochial system of rating to those docks. I do not understand that any objection is made to the mode of applying this principle if it is adopted. The argument before us has been upon the question whether this principle should be adopted or not. It is obvious that the apportionment by water area, which the assessment committee have approved, is a very rough mode of adjustment. One parish may have a considerable water area of dock which may be comparatively little used, while another with a much smaller water area may have a larger and more lucrative shipping traffic. To value both together and then apportion the value between those two according to the water area in each might in such a case impose the heavier rate upon the parish which made least profit from the dock within it. Again, there are wharfage dues payable in respect, not of the water area, but of the wharves on the land by the side of the docks, and on no conceivable principle can these be apportioned between several parishes according to the water area. But it is suggested that the assessment committee were bound, by an authoritative decision of the Court of Queen's Bench, to follow the course of rating which they have adopted. In 1851 the docks which then existed at Hull were rated by valuing them all together and then apportioning the rate among the several parishes in which they were situated, and the Court of Queen's Bench in *Reg. v. Hull Dock Company* (*ubi sup.*), treating the whole of the docks then existing as one connected system, approved the principle of a valuation of all of them together, and an apportionment of the total value according to the water area of dock in each parish. Since that decision several new docks have been constructed; the Albert Dock in 1869, the Sir William Wright Dock in 1880, and the St. Andrew's Dock in 1883. Of these the Albert and William Wright Docks communicate with one

another, but not with any other dock except by the river Humber; the St. Andrew's Dock communicates with none of the other docks except by way of the river Humber. These alterations bring the case into a nearer resemblance to the later authorities of *The Mersey Docks v. Overseers of Liverpool* (*ubi sup.*) and *The Mersey Docks v. Birkenhead Overseers* (*ubi sup.*), where an attempt was made to apply *Reg. v. Hull Docks* (*ubi sup.*) to the docks at Liverpool and Birkenhead on opposite sides of and only connected by the river Mersey, which was more than a mile wide between the two. The courts there applied the parochial system of rating, and explained the decision in *Reg. v. Hull Docks* (*ubi sup.*) by saying that the docks in that case were treated as one indivisible dock. If that was the case in 1857 it certainly is not so now, and, in my opinion, we are bound by the course of authority to hold that in this case the parochial system of rating should be applied as far as possible. The question as to the railways raises a different point. In paragraph 35 of the case it is stated that there are a number of railway and tram lines belonging wholly or jointly to the dock company and in connection with the North-Eastern Railway, which is the only railway system having access to the docks for the user of these lines. The North-Eastern Railway paid the dock company 5000*l.* a year in each of the five years ending Dec. 1890. Since then they have only paid 350*l.* a year, which sum has been taken into calculation for arriving at the rateable value of the dock company's property in the parish of Garrison Side, it being a payment for the use of certain lines in the parish under a special agreement. It seems to be admitted that the 5000*l.* a year could not legally be exacted, and that there is no power in the dock company to recover anything from any railway company for the use of these lines beyond the 350*l.* The arbitrator finds (paragraph 40) that a tenant could be found who would pay a rent for the lines beyond 350*l.* a year, if the dock company could let them. But they have no power to let the railways, and by sect. 53 of 24 & 25 Vict. c. lxxix., no tolls for the use of these lines can be taken by the dock company. It is argued, however, that the effect of the recent decision in the House of Lords in *London County Council v. Overseers of West Ham* (*ubi sup.*) is that the rent which would or might be given by a hypothetical tenant could be taken into account, although there can be no tenant by reason of the inability of the owner to let. The award given is, that the railways are a part of the dock system, and bring to the dock company indirectly a quantity of dock dues and wharfage which are taken into account in valuing the dock property for rating, and thus the dock company do pay for the railways indirectly to the full extent of any advantage they derive or can derive from them. When it is a question whether any rate or none should be paid, the rent which would be given by a hypothetical tenant may be a proper criterion. But to add such a rent in this case, it is argued, would be to make the dock company pay not only for the actual value which the railways are to them, but for an additional hypothetical rent which they cannot possibly obtain. This would be, it is argued, an unreasonable application of the decision of the House of Lords. The hypothetical tenant referred to in the Rating Act (6 & 7 Will. 4, c. 96), s. 1, is the tenant of at least the

CT. OF APP.]

Re CLARK; *Ex parte* BEARDMORE.

[CT. OF APP.]

whole undertaking in the particular parish. Such a tenant would include the advantage of the railway connection in the rent he would give; that is, he would pay a larger rent by reason of the railway accommodation which would facilitate the traffic to and from the dock. This possible rent, it is said, is really accounted for. But the claim assumes an additional rent not for the railway in that particular parish, but for all the dock railways, a rent obtainable from a railway company desirous of monopolising the traffic to and from all the docks. This rent is not obtainable under the present state of circumstances. Possibly the North-Eastern Railway Company might be inclined to give it to maintain their present monopoly, which, however, cannot be interfered with without connection being made with some other line such as the Hull and Barnsley Railway, which is suggested. The argument is, that the hypothetical tenant must be for the docks as they are, that is, with the railway communication as it exists, which the dock company are powerless to alter. On the other hand, the rent which the arbitrator finds could be obtained if the lines could be let would be an addition to all the profit obtained by the dock company directly or indirectly for these railway lines. For example, the 5000*l.* a year which the North-Eastern Railway Company actually paid for some years was such an addition. The statute 6 & 7 Will. 4, c. 96, s. 1, makes the rent that might be obtained from a tenant from year to year the criterion of value of such property, and the House of Lords have decided that it is none the less a criterion because the company have no power to let. In short, tried by that test, the dock company are occupiers of railway and tram lines, which have a value for which at present they are not rated. I think that this hypothetical rent ought to be taken into consideration, and that the rateable value of the lines should be that given in clause 44 of the special case.

Order varied.

Solicitors for the appellants, *Chester, Mayhew, Broome, and Griffiths*, for *Thomas Holden, Hull*.

Solicitors for the respondents, *J. W. Sykes*, for *J. P. Chatham, Hull*.

Friday, May 4.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

Re CLARK; *Ex parte* BEARDMORE. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy — Undischarged bankrupt — After-acquired property — Trading without knowledge or consent of trustee — Second bankruptcy — Rights of trustee in first bankruptcy — Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 44 and 54.

The debtor was adjudicated a bankrupt in 1884, and did not obtain his discharge. Without the knowledge or consent of the trustee or creditors he carried on business and thereby acquired property and incurred liabilities. He executed an assignment of all his property to a trustee for the benefit of his creditors, and was adjudicated a bankrupt upon that act of bankruptcy.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Held (reversing the decision of the Divisional Court), that the trustee in the first bankruptcy was entitled to all the property acquired by the bankrupt since the first bankruptcy, without any obligation to satisfy any of the liabilities incurred by the bankrupt since the first bankruptcy.

THIS was an appeal by Beardmore from the decision of the Divisional Court (Williams and Wright, JJ.), sitting in bankruptcy, reversing the decision of the judge of the Hanley County Court.

The debtor was adjudicated a bankrupt in May 1884. A trustee was appointed, who was released in 1887, and thereupon the official receiver became the trustee. No dividend was paid in the bankruptcy, and the bankrupt did not obtain his discharge.

The debtor, after 1884, without the knowledge or consent of the trustee in bankruptcy or of the creditors, carried on business as a building contractor, and acquired considerable property.

In May 1893 the debtor executed a deed of assignment of all his property for the benefit of his creditors.

A bankruptcy petition was presented against him founded upon the act of bankruptcy committed by the execution of that deed of assignment; and in June 1893 a receiving order was made against him, and he was adjudicated a bankrupt. The official receiver became the trustee in that bankruptcy.

The official receiver applied to the judge of the Hanley County Court for directions as to the way in which a sum of over 500*l.*, representing the debtor's assets at the time of the second adjudication, was to be administered.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 44. The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

Sect. 54. Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately upon a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee.

The County Court judge directed the official receiver to apply the money first towards discharging the debtor's liabilities in the first bankruptcy, and then to apply any surplus in discharging the debtor's liabilities in the second bankruptcy.

A creditor in the second bankruptcy appealed against that decision, and the Divisional Court, sitting in bankruptcy (Williams and Wright, JJ.), reversed the decision of the County Court judge (70 L. T. Rep. N. S. 284, *sub nom. Re Clark; Ex parte Kennedy*).

Beardmore, a creditor in the first bankruptcy, appealed.

Muir Mackenzie and Ringwood for the appellant.—The question is whether, when an undischarged bankrupt trades without the knowledge or permission of the trustee, and thereby acquires property, and then is made a bankrupt for the second time, such property belongs to the trustee in the first bankruptcy or to the trustee in the

CT. OF APP.]

Re CLARK; *Ex parte* BEARDMORE.

[CT. OF APP.]

second bankruptcy. By virtue of the express provisions of sect. 44 of the Bankruptcy Act 1883, all property which the bankrupt acquires before he obtains his discharge vests in his trustee in bankruptcy, and cannot, therefore, vest in the trustee in a subsequent bankruptcy. The case of *Ex parte Ford*; *Re Caughey* (34 L. T. Rep. N. S. 634; 1 Ch. Div. 521) is directly in point. In that case the debtor filed a liquidation petition under the Bankruptcy Act of 1869, and the creditors resolved that he should be discharged when they had received 2s. in the pound. That composition was not paid; but the debtor, without the knowledge of the trustee or creditors, traded and acquired property and incurred debts. He afterwards filed a second liquidation petition, and the Court of Appeal (affirming the decision of Bacon, C.J.), held that the creditors under the first liquidation were entitled to the after-acquired property in priority to the creditors in the second liquidation. There is no difference between a liquidation under the Act of 1869 and a bankruptcy under the Act of 1883. A second adjudication of bankruptcy can be made against an undischarged bankrupt, and if he has acquired property by trading while undischarged with the knowledge and permission of the trustee in the first bankruptcy, the trustee in the second bankruptcy takes such property:

Ex parte Watson; *Re Roberts*, 12 Ch. Div. 380.

The trustee in the second bankruptcy is not, however, in the same position as a third person who has dealt with an undischarged bankrupt *bonâ fide* and for value, who acquires a good title against the trustee in the first bankruptcy, as in

Morgan v. Knight, 9 L. T. Rep. N. S. 803; 15 C. B. N. S. 669;

Cohen v. Mitchell, 63 L. T. Rep. N. S. 206; 25 Q. B. Div. 262.

That right is strictly limited to such cases as come within those decisions:

Re New Land Development Association, 66 L. T. Rep. N. S. 404; (1892) 2 Ch. 138.

In the case of *Re Rogers* (8 Morr. 236) Cave, J. says: "The case of *Cohen v. Mitchell* . . . was obviously meant to relate to cases in which the bankrupt was carrying on a business without any interference by the trustee, and to protect persons who deal with him in the ordinary way and give him credit, and are paid with money which he thus acquires by carrying on that business." The judgment of the Divisional Court in this case is based upon the assumption that the trustee in the second bankruptcy is in the same position as a *bonâ fide* purchaser for value; but the cases cited do not justify that conclusion, which is contrary to *Ex parte Ford* (*ubi sup.*). The case of *Ex parte Ford* (*ubi sup.*) was adopted and confirmed in *Meggy v. Imperial Discount Company* (38 L. T. Rep. N. S. 309; 3 Q. B. Div. 711). Upon the second adjudication the assignment by the debtor for the benefit of his creditors became absolutely null and void, and the trustee in the second bankruptcy could not rely upon it:

Doe d. Lloyd v. Powell, 5 B. & C. 308.

Edward Clayton (*Herbert Reed*, Q.C. with him) for the respondent.—The assignment by the debtor of all his property to a trustee for the benefit of his creditors was a dealing with the trustee *bonâ fide* and for value within the rule

laid down in *Cohen v. Mitchell* (*ubi sup.*). In consideration of that assignment the creditors released the debtor. That assignment, therefore, was a disposition of this after-acquired property by the bankrupt, which destroyed the title of the trustee in the first bankruptcy. Under the provisions of sect. 44 of the Bankruptcy Act 1883 there is a difference between property which belongs to the bankrupt at the commencement of the bankruptcy and property which he acquires afterwards. The latter kind of property when it is acquired vests in the bankrupt, and until the trustee intervenes the bankrupt can deal with it and dispose of it. The assignment was executed before the trustee intervened, and disposed of the property so as to destroy the title of the trustee. Upon the second bankruptcy that assignment became void only as against the trustee in the second bankruptcy, but remained good as against all other persons, including the trustee in the first bankruptcy. The case of *Butterfield v. Heath* (15 Beav. 408) shows that the trustee under a creditor's deed is a purchaser for value. In *Morgan v. Knight* (*ubi sup.*) the trustee in the first bankruptcy does not appear to have had any knowledge that the bankrupt was carrying on the business which resulted in the second bankruptcy, and it was held that the second adjudication was valid, and that the after-acquired property vested in the trustee in the second bankruptcy. A large part of the liabilities in the second bankruptcy in this case was incurred to creditors who supplied the goods and materials which made the property now in question, and those liabilities ought to be discharged out of that property before the creditors in the first bankruptcy take any part of it. In bankruptcy the rules are more elastic, and the court will compel its officers to do what is just and right:

Ex parte Simmonds; *Re Carnac*, 54 L. T. Rep. N. S. 439; 16 Q. B. Div. 308;

Re Clark, 60 L. T. Rep. N. S. 335; 6 Morr. 42.

The court should direct the trustee to pay the liabilities of the business by which this property was acquired before applying the property to payment of the liabilities in the first bankruptcy. When an undischarged bankrupt carries on business he acts as agent for the trustee, and the trustee must discharge the liabilities of the business out of the assets of the business:

Herbert v. Sayer, 5 Q. B. 965;

Jameson v. Brick and Stone Company, 39 L. T. Rep. N. S. 594; 4 Q. B. Div. 208;

Ex parte Vaughan; *Re Riddeough*, 14 Q. B. Div. 25.

Arthur Russell, for the official receiver, did not argue.

Lord ESHER, M.R.—In this case the debtor was adjudicated a bankrupt in 1884, and the official receiver subsequently became the trustee in bankruptcy. Certain creditors in that bankruptcy now claim to have certain property dealt with as assets in that bankruptcy. On the other side it is said that, after that adjudication of bankruptcy, and while the official receiver was the trustee, the bankrupt carried on a business and incurred debts and had creditors in that business, and that he then assigned all his property to a trustee for the benefit of his creditors. That assignment was an act of bankruptcy, and thereupon there was a bankruptcy petition and an adjudication, and the debtor was adjudicated a

bankrupt for the second time, and the official receiver became the trustee in the second bankruptcy also. Then a dispute arose as to the bankruptcy in which the official receiver was to administer the property acquired by the debtor while he was an undischarged bankrupt. The Divisional Court held that the trustee in the second bankruptcy ought to have the administration of that property, but declined to determine the rights of the creditors in the first bankruptcy. The question is, what are the rights of the trustee in the first bankruptcy, which has not come to an end because the debtor is an undischarged bankrupt. The rights of the trustee in bankruptcy are determined by the Bankruptcy Act 1883. Sect. 44 of that Act provides that, "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." That is the property which is divisible by the trustee in bankruptcy. At the commencement of the bankruptcy there may be property for which the debtor has not paid. If there is, the trustee takes that property because it belongs to the bankrupt, but he does not take it with the obligation to pay for it. Those who supplied that property, but were not paid for it, have to prove in the bankruptcy and take a dividend only. How does a bankrupt acquire property after the commencement of his bankruptcy? He acquires it largely by buying it, and upon credit. If the rights of the trustee of the first kind of property are as I have stated, it is difficult to say that he is not to take the after-acquired property in the same way without the obligation of paying for it. If, therefore, the Act stood alone I should say that such property could not be dealt with in any other way. The view of the Court of Appeal expressed in *Ex parte Ford* (*ubi sup.*) is the same, and is based upon the true construction of the Act. After that case came the case of *Cohen v. Mitchell* (*ubi sup.*). That was not a case between two trustees in two bankruptcies, or between the bankrupt and the trustee, but between the trustee in bankruptcy and a person who had dealt with the bankrupt after his bankruptcy. The court in that case, being actuated by a desire to protect such persons, said that in the particular circumstances the case was not governed by the strict interpretation of the Bankruptcy Act, but was taken out of the operation of sect. 44. Under those circumstances it was laid down that, "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." That was going a long way. Is this case within that rule? I cannot see how it can be, and for these reasons. The person here did not deal with the bankrupt for value within the meaning of that proposition, and this case, therefore, is governed by sect. 44, and is not within the exception established by *Cohen v. Mitchell* (*ubi sup.*). It is impossible to suppose that the judges who decided *Cohen v. Mitchell* (*ubi sup.*) intended to overrule the case of *Ex parte Ford* (*ubi sup.*) which was cited to them, and they therefore must have thought that

Cohen v. Mitchell (*ubi sup.*) was a different case from *Ex parte Ford* (*ubi sup.*). There are then two classes of cases: one the ordinary case, as in *Ex parte Ford* (*ubi sup.*); and the other the exceptional cases, as in *Cohen v. Mitchell* (*ubi sup.*). There is also another exceptional case, where the bankrupt trades with the knowledge and consent of the trustee. That is not this case. This case, therefore, is within the ordinary operation of sect. 44, according to the decision in *Ex parte Ford* (*ubi sup.*), and is not an exception within any rule which has yet been established. It has been suggested that a bankrupt when he trades is trading as the agent of the trustee, and that the trustee must, if he takes to the property, take it with all its burdens and obligations. For myself I cannot see how, according to the law of principal and agent, the bankrupt can be the agent of the trustee. If that proposition is true, then *Ex parte Ford* (*ubi sup.*) was wrongly decided. I am of opinion, therefore, that this case must be decided in the same way as *Ex parte Ford* (*ubi sup.*), and that we must reverse the decision of the Divisional Court and allow this appeal.

SMITH, L.J.—In this case Clark was adjudicated a bankrupt in 1884, and the official receiver ultimately became the trustee in that bankruptcy. Then Clark, without the knowledge or permission of the trustee or creditors, traded, and in 1893 was adjudicated a bankrupt for the second time, the act of bankruptcy being an assignment of all his property to a trustee for the benefit of his creditors generally. The question which now comes before us for decision is, whether the property amounting to over 500*l.*, which Clark acquired while so trading, is to be administered in the second bankruptcy or in the first bankruptcy. The judges in the Divisional Court held that it must be administered in the second bankruptcy, and we have to say whether that decision was correct. By the Bankruptcy Act 1883, which governs this case, it is enacted by sect. 54, subsect. 1, that "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately upon a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee;" and, by sect. 44, that "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Therefore, as has been pointed out by the Master of the Rolls, it appears from the Act, that all property belonging to the bankrupt at the commencement of the bankruptcy, and also all property acquired by him after the bankruptcy and before discharge, will be property belonging to the trustee in the first bankruptcy, and not to the trustee in the second bankruptcy. An exception has been grafted upon these sections, and a distinction drawn as to property belonging to the bankrupt at the commencement of the bankruptcy and property afterwards acquired by him. This was laid down in cases which held that, as to after-acquired property, until the trustee intervenes the bankrupt can deal with persons who deal with him *bonâ fide* and for valuable consideration. In *Cohen v. Mitchell* (*ubi sup.*) it was held that, where an undischarged bankrupt enters into

CT. OF APP.]

Re CLARK; *Ex parte* BEARDMORE.

[CT. OF APP.]

transactions in respect of property acquired by him after the bankruptcy, until the trustee intervenes all such transactions with any person dealing with the bankrupt *bonâ fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee. That was a case between the trustee and a person who had so dealt with the bankrupt. This dispute is between the trustee in the first bankruptcy and the trustee in the second bankruptcy, and the case of *Ex parte Ford* (*ubi sup.*) has been cited as an authority in point. That case was not prominently brought to the attention of the court below, and I think that that fact accounts for their decision being what it was. I cannot distinguish this case from *Ex parte Ford* (*ubi sup.*). That case, decided by the Court of Appeal, seems to me to be on all fours with this case. There a person, who was in effect an undischarged bankrupt, traded without the knowledge or consent of the trustee or creditors, and thereby acquired some property, and was then in effect made bankrupt a second time, and the question was, whether the trustee in the first bankruptcy or the trustee in the second bankruptcy was entitled to that property. That is the question in this case. I think, therefore, that *Ex parte Ford* (*ubi sup.*) is conclusive upon this point, that, if the trustee in the first bankruptcy has not permitted and known of the trading by the bankrupt, he is entitled to the after-acquired property. The case of *Ex parte Ford* (*ubi sup.*) was subsequently dealt with in *Meggy v. Imperial Discount Company* (*ubi sup.*), where Cotton, L.J. affirms the doctrine laid down in that case, and says: "The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by Jessel, M.R. in *Ex parte Ford* (*ubi sup.*). There are then two cases in the Court of Appeal which establish that doctrine. In my opinion, this case is not distinguishable from, and is governed by, *Ex parte Ford* (*ubi sup.*). The Divisional Court had not its attention properly called to *Ex parte Ford* (*ubi sup.*), and decided this case upon the principle laid down in *Cohen v. Mitchell* (*ubi sup.*), which I have already stated, and held that the trustee in the second bankruptcy was a person who had dealt with the bankrupt *bonâ fide* and for valuable consideration. In *Cohen v. Mitchell* (*ubi sup.*) the court was not deciding as to the rights of the trustee in the first bankruptcy and the trustee in the second bankruptcy, but as to the rights of a third person who had dealt with the bankrupt before the trustee intervened. It is then argued that, as held by Wright, J., because this property was assigned to a trustee for the benefit of creditors, that assignment was within the rule laid down in *Cohen v. Mitchell* (*ubi sup.*). I think that there is nothing in that argument. Then a third point was raised, that, if it is held that this property belongs to the trustee in the first bankruptcy, the result will be that, the subsequent creditors having really provided this property, their money will go to the creditors in the first bankruptcy and they will get nothing at all. It is urged that the trustee in the first bankruptcy, if he takes such after-acquired property of the bankrupt, must first pay the debts of the business. The Master of the Rolls has pointed out that such a contention is not in accordance with the rules of bankruptcy. All property belonging

to the bankrupt at the commencement of the bankruptcy vests absolutely in the trustee without any such liability to pay debts in respect of the property, and creditors must prove for their debts. The same rule must apply to property afterwards acquired by the bankrupt. I agree that this appeal must be allowed.

DAVEY, L.J.—I am of the same opinion. I think that this case is governed by authority, and I would add nothing if I were not differing from the judgment of the Divisional Court. We must first look at the words of the Bankruptcy Act itself. Sect. 44 of the Act says that "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . shall comprise . . . all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge;" and sect. 54 vests that property in the trustee in bankruptcy for the time being. Therefore, all property acquired by, or devolving upon, the bankrupt before his discharge vests in the trustee and is divisible amongst the creditors who are entitled to prove in the bankruptcy. Upon the literal words of the statute there can be no doubt, but we have been referred to cases in which the question has been considered how far a bankrupt dealing with a third person *bonâ fide* and for value can enable such third person to maintain his title against the trustee in bankruptcy. That was the only question in those cases. In *Morgan v. Knight* (*sup.*) Erle, C.J. says: "The result of the cases is, not only that he may acquire property, but that he may hold it against all the world, except his assignees, and may create rights to hold it against them, if they, expressly or impliedly, consent to such property being in his order and disposition at the time of a subsequent bankruptcy." In *Cohen v. Mitchell* (*ubi sup.*) the rule is thus stated: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." That lays down a beneficial and just rule with respect to the rights of third persons who have dealt with a bankrupt *bonâ fide* and for value. Nothing in those cases, however, affects the question as to the rights of the trustee in the first bankruptcy, in the circumstances of a case like the present, as against the trustee in the second bankruptcy. In my opinion, the question in the present case is conclusively settled by the decision in *Ex parte Ford* (*ubi sup.*), and I agree that the present case is not distinguishable from that case. I do not think that *Ex parte Ford* is in any way impeached by the decision in *Cohen v. Mitchell* (*ubi sup.*), and the former decision was confirmed in *Meggy v. Imperial Discount Company* (*ubi sup.*). In the court below, Williams, J. decided this case upon the authority of *Cohen v. Mitchell* (*ubi sup.*), and thought that the rule laid down in that case was to be extended to the case of the trustee in the second bankruptcy. I think that he cannot have adequately considered the case of *Ex parte Ford* (*ubi sup.*). I entirely dissent from the proposition that the trustee in the second bankruptcy is on the same footing as a *bonâ fide* assignee for value. A general assurance of property is very different

CHAN. DIV.]

Re SANDERS.

[CHAN. DIV.]

from an assignment of particular property, and I doubt whether a general assurance of property can come within the rule laid down in *Cohen v. Mitchell* (*ubi sup.*). The broad and general principle is, that the trustee in bankruptcy takes all property of the bankrupt with the same title as the bankrupt, unless he takes it by virtue of special provisions of the Bankruptcy Act. In the Divisional Court Wright, J. took another point. He said that there had been an assignment by Clark for the benefit of his creditors, and that placed the trustee in the first bankruptcy in a dilemma. I think that the short answer to that is, that *Cohen v. Mitchell* (*ubi sup.*) only decides that a person dealing with the bankrupt *bonâ fide* and for value has a good title against the trustee in bankruptcy, and that rule is established only in favour of persons who have so dealt. In this case the trustee in the second bankruptcy is not claiming under the assignment, and therefore the question does not arise. As to the last point which has been urged, that, if this property is taken away from the creditors in the second bankruptcy, it will be taking away property which has been created by means of the liabilities incurred to such creditors during the carrying on of the business, it has been pointed out that Tindal, C.J., in *Herbert v. Sayers* (*ubi sup.*) expresses the opinion that an undischarged bankrupt acquires property or contracts for the benefit of his trustee "in the nature of an agent;" and it is argued that the trustee is therefore bound to satisfy the liabilities incurred by the agent in such case. That might be reasonable and just, but the answer is, that the words of the statute make this property vest in the trustee in the first bankruptcy, and that the statute contains no words showing any intention either to bind or to permit the trustee to divert such property from the payment of all the debts of the bankrupt. That argument also cannot prevail against the decision in *Ex parte Ford* (*ubi sup.*). I agree, therefore, that this appeal must succeed.

Appeal allowed.

Solicitors for the appellant, *A. Godwin Hammack*, for Bennett and Baddeley, Hanley.

Solicitor for the respondent, *Charles Robinson and Co.*, for Hooper, Dudley.

Solicitor for the Official Receiver, *The Solicitor to the Board of Trade.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, May 5.

(Before NORTH, J.)

Re SANDERS. (a)

Practice—Costs—Lands Clauses Consolidation Act (8 Vict. c. 18), s. 69—*Investment of purchase money—Supplemental petition—Improvement—Settled Land Act 1882* (45 & 46 Vict. c. 48), s. 32.

In August 1893, an order was made on the petition of persons interested under a settlement, approving the investment of certain moneys paid into Court, for land compulsorily taken by the Metropolitan Board of Works in constructing sewers necessary

for developing the land taken as a building estate. The estimated cost of the proposed works was 3968l. When specifications and detailed plans were prepared, it was found necessary to alter the line of the proposed sewer, and tenders having been obtained for the work, as altered, the lowest tender was 4343l., 375l. above the estimate on which the former order was made. The petitioners now presented a supplemental petition, asking that the construction of the altered sewer might be approved as an investment, and the moneys raised out of the funds in court. No objection was made to the order, but the London County Council objected to pay the costs of both petitions, on the ground that the second petition was only made necessary by the blunder of the petitioners, and that the investment of the additional sum required, being only 375l. might have been obtained on summons under R. S. C. Order LV., r. 2 (7).

Held, that as the application was in effect to vary an order made on petition, it could not properly be made by summons, and the council must pay the costs of both petitions.

THE petitioners in this case were persons interested under the trusts of the marriage settlement and the will of Arthur Sanders, deceased, in freehold land, at Denmark Hill. Certain parts of this land had been taken by the Metropolitan Board of Works, under their Various Powers Act of 1886, which incorporated the Lands Clauses Acts. The purchase money had been paid into court and invested, and was now represented by 11,204l. 2s. 2d. Indian Three per Cent. Stock.

In July 1893 the petitioners presented a petition, stating that the land could be converted into building land, and that for effecting such conversion it was desirable to purchase a right of way giving improved access to the land, the price of which had been agreed at 516l. and certain costs, and to construct a new road with a sewer under it, and an extension sewer at an estimated cost of 3968l.; and asking that this purchase and investment might be approved as a proper investment of the funds in court. An order was made on the 5th Aug. 1893, approving the investment, and directing a sufficient sum not exceeding 5000l. to be raised out of the funds in court to carry it out.

When the plans and specifications for the proposed extension sewer were prepared, it was discovered that it could not be laid on the line proposed except at so great a depth as to require a second main sewer above it for part of the distance to give the necessary connections, and that it would entail for the sewer itself a greater expense than had been expected. Another line was therefore adopted and approved by the local authorities. Tenders for the works on this new line were procured, but the lowest was 4343l., or 375l. in excess of the amount of the estimate on which the former order was made.

The petitioners now presented a supplemental petition asking that the construction of the proposed substituted sewer might be authorised as a proper investment of a competent part of the funds in court in lieu of the extension sewer mentioned in the former order, and that a sum for this purpose and for the price of the right of way might be raised out of the funds in court, and that the London County Council might be ordered to pay the costs according to the Act.

(a) Reported by J. R. BROOKS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re KAY'S PATENT—Re RENDELL'S PATENT.

[CHAN. DIV.]

Gent., for the petitioners, asked that the county council should pay the costs of both petitions, and referred to

Re North Staffordshire Railway Company; Ex parte Vaudrey's Trusts, 4 L. T. Rep. N. S. 735; 3 Giff. 224.

Leake for infant respondents.

Gears for the London County Council.—The county council ought only to be ordered to pay the costs of one petition. The necessity for two (if any) arose entirely from the mistake of the applicants, but the second petition was not in fact necessary at all. The applicants only wanted an additional sum of 375*l.*; the order for the investment of that sum could have been made by summons.

NORTH, J.—I think the county council must pay the costs of both petitions. The plans for the first scheme were prepared by the petitioners, but they were submitted to the local authorities and approved by the court in their presence. It would be unfair to make the petitioners bear the whole cost of the mistake. Then as to Mr. *Gears*'s second point, I do not think the application could have been made by summons. It was not merely an application for the investment of an additional sum in works already approved by the court, but for the reversal of an order which had already been made on petition, and the substitution of another order. I think, therefore, that the parties were justified in proceeding by petition. The order made approved the investment, and directed a sum not exceeding 5400*l.* to be raised out of the fund in court and applied as prayed.

Solicitors: *Withall and Co.; W. A. Blaxland.*

Saturday, April 14.

(Before STIRLING, J.)

Re KAY'S PATENT. (a)

Practice—*Patent*—*Petition for revocation of—Service out of jurisdiction.*

A petition for revocation of a patent was served on two of three patentees, the third being abroad.

The petition was ordered to be put into the witness list, but not to come on for hearing without leave, unless the absent patentee appeared by counsel on notice to him of the presentation of the petition, following Re King and Company Limited (66 L. T. Rep. N. S. 489; (1892) 2 Ch. 462.

THIS was a petition presented by the Pharmaceutical Society of Great Britain, in relation to the sale of poisons, for revocation of a patent for a medicinal compound granted to Thomas Kay, George Arthur Shaw, and Kay Brothers Limited.

The petition now coming on for directions, it appeared that Thomas Kay had not been served with the petition, he being in North Africa, but it was stated that he was expected to return shortly.

Roger Wallace, for the petitioners, suggested that the petition should go into the witness list, and if Thomas Kay was not present when it came on for hearing it should stand over with liberty to apply. He referred to

Re La Compagnie Générale d'Eaux Minérales et des Bains de Mers Trade Mark, (1891) 3 Ch. 451; 60 L. J. 728, Ch.; 8 R. P. C. 446;

Re Drummond's Patent, 6 R. P. C. 576; 43 Ch. Div. 80; 59 L. J. 102, Ch.

Lawson for G. A. Shaw and Kay Brothers Limited.

STIRLING, J.—I will allow the petition to go into the witness list, but unless Thomas Kay appears by counsel on notice given to him that the petition has been presented (following the course adopted in *Re King and Company Limited (ubi sup.)*), the petition is not to come on for hearing without the leave of the judge. Liberty to either party to apply.

Solicitors: *Flux, Thompson, and Flux; Glaisyer and Porter; Burton, Yeates, Hart, and Co.*

Saturday, April 14.

(Before STIRLING J.)

Re RENDELL'S PATENT. (a)

Patent—Revocation—Petition—Revocation order consented to on special ground—Costs—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), ss. 26, 29 (6).

On a petition by the Pharmaceutical Society, with the leave of the Attorney-General, for revocation of a patent for a medicinal compound on certain grounds including absence of novelty, the respondent consented to an order of revocation, but solely for want of novelty. Stirling, J. made an order for revocation with costs of the petition.

THIS was a petition, by the Pharmaceutical Society of Great Britain, for revocation of a patent granted to Mary Rendell for a medicinal compound for the cure of cholera, dysentery, and similar ailments. The compound consisted of sal volatile, peppermint, spirits of camphor, and laudanum, in equal proportions.

In consequence of the decision in the case of *The Pharmaceutical Society v. Piper* (68 L. T. Rep. N. S. 490; (1893) 1 Q. B. 686), that patent medicines were not within 31 & 32 Vict. c. 121, providing for the sales of poisons, it appeared that patents for medicines containing poisons had been in some instances applied for for the purpose, as the petitioners believed, of evading the provisions of 31 & 32 Vict. c. 121. The petitioners considered it to be their duty, in such instances, to take proceedings for revocation of the patent, whenever they thought they could prove their case. They objected to the present patent on several grounds, including want of novelty. The fiat of the Attorney-General for the presentation of the petition had been obtained.

Roger Wallace for the petitioners.

Wright Taylor, for the respondent, denied that his patent had been obtained for the purpose of evading the operation of the law; but consented to revocation on the sole ground that the invention had not sufficient novelty to form a good subject-matter. On the question of costs he contended that the usual course was for the law officer to issue his fiat upon notice to all the parties concerned, and had that course been adopted here, the respondent would at once have consented to revocation. This fact, he submitted, should be taken into consideration in dealing with the costs.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

CHAN. DIV.] *Re ELLEN GILES AND THE FINES AND RECOVERIES ACT 1833.* [CHAN. DIV.]

Wallace.—The law officer can consent only to the petition being presented. He cannot revoke a patent. We need not serve the other side unless the law officer wishes them served.

STIRLING, J. said that he did not see how revocation could be obtained without presenting a petition. If the respondent had consented before the law officer and taken his patent off the register, that would not have been revocation. His Lordship, therefore, without dealing with the expenses incurred before the law officer, made an order for revocation of the patent with the cost of the petition, without reference to a certificate under sect. 29, sub-sect. 6, of the Patents, Designs, and Trade Marks Act 1883.

Solicitors for the petitioners, *Flux, Thompson, and Flux*.

Solicitors for the respondent, *Church, Rendell, Todd, and Co.*

Friday, April 20.

(Before STIRLING, J.)

Re ELLEN GILES AND THE FINES AND RECOVERIES ACT 1833. (a)

Practice—Husband and wife—Conveyance by wife—Application to dispense with concurrence of husband—Jurisdiction in Chancery Division—Fines and Recoveries Act 1833 (3 & 4 Will. 4, c. 74), s. 91; Judicature Act 1873 (36 & 37 Vict. c. 66), ss. 16, 34; Order in Council of the 16th Dec. 1880.

Under the existing arrangements for the distribution of the business of the courts, an order under sect. 91 of the Fines and Recoveries Act 1833 will not be made in the Chancery Division in an ordinary case, though there may be jurisdiction in the Chancery Division to make it, and a judge of that division might exercise such jurisdiction under special circumstances.

Re Mary Jane Hart and the Fines and Recoveries Act 1833 (W. N. 1882, p. 36) not followed.

THIS was a motion under sect. 91 of the Fines and Recoveries Act on behalf of a married woman, that she might be at liberty to convey and dispose of her estate and interest which she alone or her husband in her right might have in certain hereditaments, to such persons as she might think fit without the concurrence of her husband.

By sect. 91 of the Fines and Recoveries Act it was provided that, in the cases there mentioned, the Court of Common Pleas at Westminster might, by an order to be made in a summary way upon the application of the wife, dispense with the concurrence of the husband in any case in which his concurrence was required by that Act or otherwise.

The jurisdiction of the Court of Common Pleas has now, by sect. 16 of the Judicature Act 1873, been transferred to the High Court of Justice. Sect. 34 of the same Act provided that all matters which would have been within the exclusive cognisance of the Court of Common Pleas at Westminster if that Act had not passed should be assigned to the Common Pleas Division of the High Court. By an Order in Council of the 16th Dec. 1880 the Queen's Bench, Common Pleas, and Exchequer Divisions of the High

Court were reduced and consolidated into one division, namely, the Queen's Bench Division.

Edward Ford, for the motion, referred to *Re Mary Jane Hart and the Fines and Recoveries Act 1833* (W. N. 1882, p. 36), in which case an order was made by Hall, V.C., similar to that asked for on the present motion.

STIRLING, J. said that the application should have been made in the Queen's Bench Division. The Court of Common Pleas had been not abolished, but merged in that division. Though the Chancery Division might have full power to grant the application and might exercise that power under certain circumstances, yet, as arrangements had been made for the distribution of business between the several divisions of the High Court, his Lordship declined to make the order asked for, this not being a case for the exercise of his jurisdiction. He doubted whether in *Re Mary Jane Hart* the attention of Hall, V.C. had been called to the fact that the matter of the application was one specially assigned by the Act and the Order in Council to the Queen's Bench Division.

Solicitors: *Daubeny and Mead.*

Wednesday, May 9.

(Before STIRLING, J.)

J — v. S — No. 1. (a)

Partnership—Dissolution—Insanity—Possibility of recovery—Partnership Act 1890 (53 & 54 Vict. c. 39), s. 35 (a) (f).

In an action for dissolution of partnership against a lunatic not so found, the court refused to decree an immediate dissolution, the evidence showing that there was a possibility of the defendant's ultimate recovery, but directed the cause to stand over till after the Long Vacation, in order that a better conclusion might then be arrived at.

THE plaintiff and the defendant, a lunatic not so found, were partners in business.

The action was for dissolution of the partnership on the ground of the permanent insanity of the defendant. The evidence of the medical witness who had had the most experience of the defendant went to show that in the witness' opinion there was a possibility of the defendant's recovery.

Robertson-Macdonald and F. H. Willis for the plaintiff.—We ask for a dissolution of the partnership under sect. 35 (a) of the Partnership Act 1890, which gives power of dissolution when a partner is shown to the satisfaction of the court to be of permanently unsound mind. It is sufficient if we produce evidence that there is no reasonable ground of recovery, and this we have shown. See the judgment of Lord Truro, L.C., in *Leaf v. Coles; Re Coles* (1 De G. M. & G. at p. 171). If we fail under sect. 35 (a) then the court has jurisdiction to decree a dissolution under sect. 35 (f), where circumstances have arisen which in the opinion of the court render it just and equitable that the partnership be dissolved. Sub-sect. (f) is commented on in *Lindley's Law of Partnership*, 6th edit., pp. 574, 575.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

Ribton, for the guardian *ad litem* of the defendant, referred to

Waters v. Taylor, 2 V. & B. 303;
Sayer v. Bennett, 1 Cox, 107, 110;
Kerby v. Carr, 3 Y. & C. Exch. 184, 186;
Anon. 2 K. & J. 441.

The effect of those cases was that, though before the Act it was apparently necessary to show that the lunacy was of a permanent character yet, the question as to what was sufficient evidence of permanency turned, as far as could be inferred, on the absence of evidence that the lunatic would recover within a reasonable time. According to the authority of the cases before the Act it could not be contended that a doctor must pledge his oath, for though he might be in a position to say that a man is an incurable idiot, it would be very difficult to say that a man is an incurable lunatic.

Macdonald in reply.

STIRLING, J.—Lindley, L.J. (Law of Partnership, 6th edit., at p. 568), says: "In order to induce the court to order a dissolution on the ground of insanity of one of the partners, the court must be satisfied by clear evidence that the insanity exists, and is incurable. A temporary illness is not sufficient." I feel great difficulty at the present moment in saying that the defendant is incurable. I very much feel for the position in which the plaintiff is put, and also that in which the relatives of the defendant are. If the law be as it is laid down by the Act, permanent insanity must be proved, if the interpretation put upon the Act by the Lord Justice bears that out. I think it would be desirable to direct the cause to stand over for a time, until after the Long Vacation. Then probably one can come to a better conclusion. Either party to be at liberty to apply to restore it after the Long Vacation.

Solicitor for the plaintiff, *C. W. Inman*.

Solicitors for the guardian *ad litem* of the defendant, *Piesse and Son*.

Friday, June 1.

(Before STIRLING, J.)

J. — v. S — No. 2. (a)

Partnership—Action for dissolution—Interim injunction against interference in business—Insanity of partner—Jurisdiction.

The plaintiff in an action for dissolution of partnership against the defendant, a lunatic, not so found (which action had stood over that a better conclusion as to the defendant's prospects of recovering might be arrived at), moved to continue till trial or further order an interim injunction restraining the defendant from dealing with the partnership assets, or interfering with the business.

The Court, following the dictum of Lord Hatherley, L.C. in Anon. (2 K. & J. at p. 454), made the order asked for.

THE plaintiff and defendant in this action were partners in business. The action which was for dissolution of partnership on account of the unsoundness of mind of the defendant, had come on for hearing on the 9th May last, when Stirling, J., not being satisfied on the evidence that the defendant was permanently insane within

the meaning of sect. 35 (a) of the Partnership Act 1890, ordered the action to stand over until after the Long Vacation, that a better conclusion as to the defendant's prospects of recovery might then be formed. Since the hearing the defendant, who was under medical treatment, and in the care of an attendant, had contrived to go to the office of the partnership business, had interfered with the business, and drawn a cheque on the partnership banking account, which cheque had been honoured by the bank. The plaintiff thereupon on the 28th May obtained an interim injunction restraining the defendant from dealing with the partnership assets, from issuing bills or notes, or drawing cheques in the name of the firm, or from coming to or remaining on the business premises, or from in any way interfering with the partnership business. This injunction the plaintiff now moved to continue until judgment in the action or further order.

Graham Hastings, Q.C. and Robertson-Macdonald for the plaintiff, cited the dictum of Lord Hatherley, L.C., in *Anon.* (2 K. & J. at p. 454), to the effect that the court in that case, had it felt it right to come to an immediate conclusion upon the first hearing of the motion, would have concluded on the evidence as then presented that the defendant ought to be restrained from interfering in the partnership affairs. They also referred to the following cases:

Re B. (or Bathe.), 66 L. T. Rep. N. S. 38; (1892) 1 Ch. 459; 61 L. J. 446, Ch.;
Robinson v. Galland, W. N. (1889) 108; 5 Times L. Rep. 504.

Ribton for the guardian *ad litem* of the defendant.—The court cannot grant an injunction against a person of unsound mind, for if the order is made there is no way of enforcing it. The words of Lord Hatherley in the anonymous case cited, merely amount to a dictum. The point in question here was not argued or decided in that case. The defendant has recently been placed under stricter control.

STIRLING, J., in giving judgment, said:—This case is a somewhat remarkable one. It is an action by a partner against his co-partner, alleging that the defendant is of unsound mind, and, further, that he is permanently so, and claiming dissolution of the partnership. The action came before me for trial about three weeks ago, and I was then satisfied by the evidence that the defendant was of unsound mind, but, in consequence of what was stated by one of the medical witnesses, I was not satisfied that the defendant was permanently insane, but thought there was some hope of his recovery; I therefore directed that the case should stand over until after the Long Vacation. In the meantime the defendant has been under medical care and in charge of a keeper, but it appears that he has attempted to assert his rights as a partner by drawing cheques upon the partnership banking account, and by going to the business premises and claiming to take a part in the business in a manner which is injurious to the firm. It is in evidence that the defendant's medical attendant, so recently as the 28th May last, stated to the plaintiff, in answer to an inquiry, that in his opinion the defendant was not in a fit condition to be about. I am therefore entitled to infer that the defendant's condition has not improved since the hearing of the action, and

accordingly come to the conclusion that he is still of unsound mind. The question is whether under such circumstances the court can grant an injunction against the defendant. It is not absolutely certain that dissolution will be granted; it therefore comes to this—will the court interfere to restrain a partner from acting in such a way as to injure the partnership business if the defendant is of unsound mind? A person of unsound mind may be sued, and judgment can be recovered and an order made against him. Why, then, during the pendency of an action for dissolution, should not an order be made against such a person in order to prevent him from so acting as to injure the partnership business? An injunction may be granted although dissolution is not sought; it seems to me, therefore, that in a case of this kind the court may make an order against the defendant. On general principles the court ought to interfere. There is very little authority, but such as there is is deserving of the greatest respect—viz., an expression of opinion by Lord Hatherley in favour of the plaintiff's contention. It was suggested that if an injunction were granted the court would not be able to enforce it. There may be a difficulty, but it is not necessary now to go into it, because there are cases in which a remedy has been found. I am not persuaded that if the injunction be granted it will be ineffectual. The interim order has apparently already led to the useful result that the defendant has been placed under better restraint. The injunction has been properly granted, and will be continued until judgment in the action or further order.

Solicitor for the plaintiff, *C. W. Inman*.

Solicitors for the guardian *ad litem* of the defendant, *Piesse and Son*.

Friday, June 22.

(Before STIERLING, J.)

BOLTON v. CURRE AND OTHERS. (a)

Practice—Receiver—Real estate in Ireland—Discretion of English Court—Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict. c. 57), s. 75—Breach of trust instigated by tenant for life—Assignment of life interest—Equity in remaindermen to impound life interest—Trustee Act 1893 (56 & 57 Vict. c. 53), s. 45.

On an application for the appointment of a receiver of real estate in Ireland great weight ought to be given to the provisions of the Legislature for dealing with such matters under the Supreme Court of Judicature Act (Ireland) 1877, and sect. 57 thereof.

But where the applicants were willing that the present agent of the Irish estates, who had never experienced any difficulty in collecting the rents, should be appointed receiver, the court considering that the difficulties attending the appointment of a receiver of Irish estates by the English court were considerably modified by that circumstance, appointed him receiver.

The trustees of a marriage settlement dated the 25th July 1877, at the instigation of the husband and wife sold certain rentcharge stock representing property settled by the wife, and advanced the proceeds of such sale to the husband

*upon the security of an equitable mortgage of certain Irish estates, subject to other incumbrances, and thereby committed a breach of trust. The husband had brought into settlement a sum of 5000*l.* secured by mortgage of the said estates. By deed of the 12th Aug. 1893 the husband for value assigned his life interest under the settlement in the said mortgage debt to C. J. S. There was a remainderman under the settlement in existence. There was little evidence as to the circumstances of the assignment.*

*Held, that at the date of the assignment there was an equity in the remaindermen against the husband, which vested in the trustees on payment into court of 4000*l.* Rentcharge Stock. Apart from special circumstances which had not been shown, the assignment was subject to that equity. The appointment of the receiver must therefore extend to the interest of C. J. S. in the assignment till trial or further order.*

The doctrine of Raby v. Ridehalgh (25 L. T. Rep. O. S. 19; 7 De G. M. & G. 104) applied.

MOTION for the appointment of a receiver of real estate situate in Ireland.

By a settlement dated the 25th July 1877, and made upon the marriage of Neptune W. Blood and Constance R. Blood, N. W. Blood settled a sum of 5000*l.* secured by a mortgage of real estate situate in Ireland belonging to him, and Constance R. Blood settled a sum of 5000*l.*, being a legacy payable to her under her father's will. This last-mentioned 5000*l.* the trustees of the settlement invested in the purchase of 4000*l.* Great-Western Railway 5 per cent. Rentcharge Stock.

Under the settlement the husband and wife each took a life interest in the property respectively settled by them, and as to the wife without power of anticipation, with remainder to the survivor, followed by trusts for the issue of the marriage.

There was living one child entitled in remainder under the settlement. Of the trustees of the settlement, who were originally four in number, one had died insolvent, another had also died, and the plaintiff was his legal personal representative. The other two were surviving.

At the instigation of N. W. Blood and C. R. Blood the trustees of the settlement in the year 1885 sold the rentcharge stock, and advanced the proceeds of such sale to N. W. Blood upon the security of an equitable mortgage of the above-mentioned Irish estates. These estates were, in addition to the aforesaid mortgages, subject to various other incumbrances.

The settlement contained no power to invest on equitable or second mortgages.

By deed dated the 12th Aug. 1893, N. W. Blood assigned his life interest in the mortgage debt of 5000*l.* subject to the settlement to the defendant Catherine J. Studdert for 1500*l.*

It was alleged in the statement of claim in the action, but there was no evidence to prove that at the date of this assignment Mrs. Studdert had notice of the breach of trust.

The action was instituted by the legal personal representative of a deceased trustee of the settlement against the surviving trustees of the settlement, N. W. Blood and his wife C. R. Blood, and Catherine J. Studdert, asking for a declaration that on bringing into court 4000*l.* Rentcharge

Stock, the plaintiff and his co-trustees were entitled to a lien on the life interest of N. W. Blood under the settlement in priority to any claim by C. J. Studdert, and were also entitled to a lien upon the life interest of the wife, and a declaration that the plaintiff and the surviving trustees were entitled to a charge on the mortgage made to them by N. W. Blood in 1885 for all sums expended by them in replacing the 4000*l.* Great Western Railway Rentcharge Stock.

The plaintiff now asked for the appointment of a receiver of the Irish estates. The motion involved the question whether a receiver could be appointed of the interest of C. J. Studdert.

The claim as against the defendant C. R. Blood was not pressed on this motion.

Graham Hastings, Q.C. and *Frank L. Wright*, for the plaintiff, in support of the motion for a receiver, cited

Doering v. Doering, 42 Ch. Div. 203; 58 L. J. 553 Ch.; 37 W. E. 796.

Carson, Q.C. and *J. G. Butcher* for N. W. Blood and C. R. Blood.—The court will not, in the exercise of its discretion, appoint a receiver over estates in Ireland when, owing to the state of the country, such an appointment would be futile:

Mercantile Investment and General Trust Company v. River Plate Trust Loan and Agency Company, 66 L. T. Rep. N. S. 711; (1892) 2 Ch. 303; 61 L. J. 473, Ch.

The plaintiff admits that he cannot ask the court to make an order that the tenants should attorn. The Court of Chancery in Ireland never appoints a receiver in such cases as this. The Judicature Act (Ireland) 1877, s. 75, provides for an application to the land judges, and directs how moneys are to be dealt with. The Land Court has a number of officers all over Ireland. The district receivers are under a chief receiver, who goes round and inspects and brings the matter before the land judge if he thinks fit. An order not ordering the tenants to attorn to the receiver will be useless. The plaintiffs might have had every one of these questions decided in Ireland and a receiver appointed. How can this court carry out a sale? Eventually, finding the proceedings too expensive, the plaintiffs will go to the Land Court, and the whole matter will have to be gone into again. There may be cases in which this court might exercise its jurisdiction, *e.g.*, where house property in Dublin is in question. [STIRLING, J.—Is the appointment of a receiver by the Land Court a matter of course?] Not quite a matter of course, but very nearly so; if they cannot get paid without appointing a receiver, one will be appointed. If a tenant refuses to pay his rent application will have to be made here on matters which are not familiarly dealt with in chambers. These matters would have to be gone into, and probably another application would be rendered necessary.

Henry Fellows, for Catherine J. Studdert.—The proposition against my client is that a *bonâ fide* purchaser for value should, on an interlocutory application, be deprived of a substantial income. [STIRLING, J.—But you have not proved you are a purchaser for value.] According to *Raby v. Ridehalgh* (25 L. T. Rep. O. S. 19; 7 De G. M. & G. 104) the trustees of the marriage settlement making good the breach of trust may stand in the

place of the beneficiaries interested in remainder. But here the case is different. The trustees were at the date of assignment to my client in default. They had, therefore, no equity which could give them priority against the assignee, and any after-acquired equity will not assist them:

Stephens v. Venables, 30 Beav. 625

Doering v. Doering is entirely inapplicable here. That was a case of a defaulting trustee. He also referred to the Trustee Act 1893, s. 45.

J. R. Brooke, for the two surviving trustees, offered to pay into court their share of the trust property.

Hastings in reply.—The equity arises when a beneficiary puts part of the trust fund into his own pocket. The Trustee Act 1893 was not intended to apply only to a case where he has the money himself. *Stephens v. Venables* cannot be supported if it conflicts, as it does, with a decision of the Court of Appeal. [STIRLING, J. referred to *Re Knapman*; *Knapman v. Wreford* (45 L. T. Rep. N. S. 102; 18 Ch. Div. 300; 50 L. J. 629 Ch.)] You cannot take any part of the estate until you have made good your obligations. As to the appointment of the receiver, it merely happens that in this case one of the subjects of the trust is a foreign estate. There is no sufficient reason why part of the action should be transferred to another jurisdiction.

STIRLING, J., in delivering judgment, stated the facts of the case, and proceeded: I am asked that a receiver may be appointed of these estates in Ireland. The rents are at present received by Mr. Studdert, who is Mr. Blood's agent. What is desired by the appointment of a receiver is to intercept what remains, after keeping down prior incumbrances, for the benefit of the trustees. The question is, whether the court, in the exercise of its discretion, should accede to that application. I need not say that if the land were in England it would be almost a matter of course to grant it. But as to Ireland, it has been pointed out to me that, by the Supreme Court of Judicature Act (Ireland) 1877 the question of the appointment of receivers has been specifically dealt with. The jurisdiction has been taken away from the Court of Chancery in Ireland and vested in the land judges. That is a consideration of great weight, which must be carefully regarded before the court here makes any such appointment. But at the same time the jurisdiction of the court is not ousted. What is the state of things according to the affidavits before me? As far as appears, Mr. Studdert is in receipt of the rents, which are regularly paid. If there were any difficulty in that respect it might be proper for the court to exercise its discretion and refuse the appointment. But the plaintiff is willing that Mr. Studdert should be appointed. If that is done the objections to the appointment are at all events largely modified. I do not assume that difficulties may arise. Therefore the proper course is to appoint him. If difficulties should arise, then it will be easy for the court to discharge the receiver and for proceedings to be taken in Ireland. Meanwhile there is no reason why the present state of things should not continue. Mr. Studdert must therefore be appointed receiver. Now, as to the other point, part of the property brought into settlement consisted of 5000*l.* invested on mort-

gage of Irish estates. Mr. Blood, the tenant for life, was in receipt of the interest until Aug. 1893, when by deed he assigned his interest to Mrs. Studdert, the wife of Mr. Studdert. If he had not assigned, I conceive the trustees would have been entitled as against him, as he *prima facie* instigated this breach of trust, to keep back from him his life interest until the breach was made good. The doctrine on which this is founded is laid down in *Raby v. Ridehalgh* (25 L. T. Rep. O. S. 19; 7 De G. M. & G. 104; 3 W. R. 344). It appears to me that, according to the judgment of Turner, L.J. in that case, the trustees are entitled to stand in the place of the *cestuis que trust* in remainder for the purpose of recovering any benefit actually to be received by them. There is here an infant who would be entitled to enforce his rights, and the question is, whether on the materials before me I ought to come to the conclusion that this is a proper case for saying that the trustees shall take subject to that right. It is said that the trustees had no right at the date of the assignment. But there was a subsisting equity in the remaindermen to have the income which Mr. Blood receives applied to make good the breach of trust committed at his instigation. According to the doctrine laid down by Turner, L.J., on payment of the sum, the income required to replace the fund becomes vested in the trustees. It seems to me, therefore, that Mrs. Studdert took the assignment subject to the right of the remaindermen to have the income impounded, and that she must therefore also take it subject to this right in the hands of the trustees by reason of this payment into court. In these circumstances the appointment of a receiver ought to extend to the interest on this mortgage till trial or further order. The result is that, first, the action must be amended by making the remaindermen a party; secondly, the trustees must bring the stock into court by a fixed day; thirdly, the trustees will sell the security on which the proceeds of the stock were invested. The plaintiff will then be entitled to his receiver, who will be directed to keep down the interest on prior incumbrances. The interest on this mortgage of 5000*l.* and any surplus will be paid into court, and the interest of Mrs. Studdert will be carried to a separate account, without prejudice to any question that may arise.

Solicitors: for the plaintiff, *Paterson, Snow, Bloxam, and Kinder*, for *Wilson, Wright, and Wilsons*, Preston; for Mr. and Mrs. Blood, *Booty and Bayliffe*; for Mrs. Studdert, *Lattey and Hart*; for the surviving trustees, *Hugh Wharton*.

May 4 and 9.

(Before KEKEWICH, J.)

Re EATON; DAINES v. EATON. (a)

Will—Tenant for life—Remainderman—Investments—Risky securities—Trustees—Duty of—Conversion.

A testator gave the residue of his estate to his executors upon trust to permit his wife to receive and take the rents, issues, profits, and annual income thereof for her sole and separate use

during her life, and after her death testator declared that the trustees of his will should hold all his residuary estate and the investments or income thereof in trust for his nephew absolutely. There was no trust for conversion and no investment clause. Part of the estate consisted of stocks in a gas company. The question was raised whether the gas stock should be sold, and the proceeds invested in New Consols; and whether the testator's widow was entitled to retain the whole of the income of the testator's estate which she had actually received and any accruing income of the gas stock.

Held, that the tenant for life under a will could not take in specie the income of property which was of a perishable or wasting nature; in order to give the wife the income of the property as it stood, you must find something equivalent to a specific gift; there being no specific gift here, the rule in *Meyer v. Simonsen* (5 De G. & Sm. 723) applied, and the trustees should be required not to convert the stocks, but set a value upon them, and give the tenant for life 4 per cent. upon the value.

By his will, made the 8th Dec. 1886, John Eaton, after directing his executors to pay his debts, funeral and testamentary expenses, and making certain bequests, continued:

And as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, real and as well as personal, I give, devise, and bequeath the same unto my executors hereinafter named, upon trust to permit my said wife to receive and take the rents, issues, profits, and annual income thereof for her sole and separate use during her life,

and after her decease, subject to the payment of certain legacies and an annuity, testator continued:

I declare that the trustees of this my will shall hold all my residuary estate, and the investments or income thereof, in trust for my nephew the said Joseph Eaton absolutely.

And testator appointed his wife and his nephew Joseph Eaton executors and trustees of his will.

Testator died in March 1892.

On the 29th Sept. 1892 Emily Fanny Eaton, widow of the testator, retired from the trust, and the plaintiffs, William Thomas Oswald Daines and John Williams, were appointed trustees of the will with the said Joseph Eaton.

Joseph Eaton died on the 9th March 1893, and this summons was taken out by the surviving trustees of the will to determine, among others, the following questions: (3) Whether or not the sums of 4260*l.* consolidated stock of the Brentford Gas Company, and 600*l.* 5*l.* per cent. preference stock of the same company, forming part of the personal estate subject to the trusts of such will, should be sold by the plaintiffs and the proceeds of such sale invested in New Consols, and who is entitled to the custody of the certificates of such stock? (4) Whether or not the defendant Emily Fanny Eaton is entitled to retain the whole of the income of the testator's real and personal estate which she has actually received, and any accruing income of the said sums of stock in the Brentford Gas Company.

Since the death of the testator the defendant Emily Fanny Eaton had received the full annual income from the testator's said estate.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.] MEUX BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO. [CHAN. DIV.]

T. L. Wilkinson for the trustees.—Among other questions there is the question whether the gas stock should be sold :

Hove v. Lord Dartmouth, 7 Ves. 137.

Then, whether the testator's widow is entitled to retain the whole of the income of the estate which she has actually received, and any accruing income of the gas stock.

T. Ribton, for the widow, the tenant for life.—I am content that the investments should remain as they are.

E. Beaumont, for the General Reversionary and Investment Company, the mortgagees of Joseph Eaton, took the same view.

Stewart-Smith for the representatives of Joseph Eaton.—The gas stock is not an investment authorised by the will. The trustees should convert and re-invest in investments authorised by the Trustee Acts :

Pickup v. Atkinson, 4 Hare, 624 ;

Morgan v. Morgan, 14 Beav. 72 ;

Theobald on Wills, 3rd edit., 190.

Cur. adv. vult.

KEKEWICH, J.—The question I have to decide is, whether the testator so expressed himself as to give the income to his wife during her life of the funds constituting his residuary personal estate in the state in which those funds existed at the time of his death. The words of the will are : "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, real as well as personal, I give, devise, and bequeath the same unto my executors hereinafter named, upon trust to permit my said wife to receive and take the rents, issues, profits, and annual income thereof for her sole and separate use during her life ;" and then, after her decease, the testator gives legacies and gifts over. I suppose, if the reported decisions were all out of the way, no person acquainted with the ordinary thoughts of mankind would have any doubt that the testator meant his wife to take the income of the property as he left it, and to enjoy it as he left it. The other way is inconsistent with the ordinary opinion of mankind. But the authorities go the other way. It has long been decided that the tenant for life under a will cannot take in specie the income of property which is of a wasting and perishable nature. On the other hand, the court has from time to time striven to find expressions in the will which would enable the presumed intention of the testator to take effect notwithstanding the existing state of the law, and the question is, whether such expressions can be found in the present will. There is no direction for conversion and no investment clause, but there follows a gift over : "I declare that the trustees of this my will shall hold all my residuary estate and the investments or income thereof in trust for my nephew, the said Joseph Eaton, absolutely." In my opinion those words do indicate, cogently indicate, that Joseph Eaton should take the investments which were made at the testator's own discretion. It goes to show that the wife should enjoy the income during her life of the investments as they stand. But, looking at the cases, the law is settled that, in order to give the wife the income of the property as it stands, you must find something equivalent to a specific gift—to enjoyment in specie. But it is impossible for me here to say that there is a

specific gift or anything equivalent to it. It is clearly a general residuary gift, and not specific. The case of *Macdonald v. Irvine* (38 L. T. Rep. N. S. 155 ; 8 Ch. Div. 101) is very similar to the present case ; there Baggallay, L.J. differed, but his judgment, though instructive and interesting, does not overrule the other Lords Justices. That case has been followed in many other instances. Therefore this lady cannot take the income in specie of this class of property of a wasting and perishable nature. The property in question consists of gas stocks, a good class of security, but possibly risky. The case comes precisely within *Meyer v. Simonsen* (5 De G. & Sm. 723), an authority always cited, where the gift was of testator's real and personal estate to trustees upon trust to pay or permit his widow to receive the income and profits, and after her death he gave the capital over. In that case the rule was held to apply in this way : the trustees were not bound to convert the stocks but to set a value on them, and to give the tenant for life 4 per cent. upon the value, and to invest the residue of the surplus income, paying the income of these investments to the tenant for life, and appropriating the corpus to the remainderman. The same rule must be applied in this case.

Solicitors : *Atkinson and Dresser ; Woodbridge and Sons ; Shoubridge and May ; Nash, Field, and Co.*

April 12, 17, 18, and 19.

(Before KEKEWICH, J.)

MEUX BREWERY COMPANY LIMITED v. CITY OF LONDON ELECTRIC LIGHTING COMPANY LIMITED ; SHELFEY v. THE SAME. (a)

Nuisance—Electric lighting—Freeholder—Leaseholder—Noise and vibration—Structural damage—Injunction—Damages—Quia timet action—City of London Electric Lighting (Brush) Order 1890, s. 82—Electric Lighting Orders Confirmation (No. 15) Act 1890 (53 & 54 Vict. c. cccxxix.). s. 84—Electric Lighting Act 1882 (45 & 46 Vict. c. 56)—Electric Lighting Act 1888 (51 & 52 Vict. c. 12).

Two actions were brought by the freeholders and the leaseholder of a public-house respectively against an electric lighting company for an injunction to restrain the defendants from the use of any dynamo or other engine or machinery, so as by vibration or otherwise to injure the plaintiffs' premises, and as to the plaintiff, the leaseholder, from causing a nuisance by vibration or noise, and for damages.

Held, that power given by Act of Parliament to do a particular thing does not justify the undertakers so to do that thing as to commit a nuisance unless by express language or by necessary implication ; unless Parliament has so declared, the undertakers remain liable. As to sub-sect. 2 of sect. 12 of the Electric Lighting Act 1882, the express allowance to break up streets goes to show that other nuisances are not allowed. Sect. 17 of the same Act refers to the execution of works, not to the use of the works when executed.

Held, on the evidence, that the defendants were guilty of a nuisance, and had damaged the plaintiffs' premises so as to make them less com-

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.] MEUX BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO. [CHAN. DIV.]

fortable, so as to injure the structure, and so as to decrease the value. As to the leaseholder, damages were a fair compensation, and he would have the costs of his action. As to the freeholders, if the defendants by withdrawing the water had withdrawn the support, the freeholders had a right of action, and there must be an inquiry as to damages; but so far as the freeholders sought an injunction their action must be dismissed with costs.

THESE actions were brought by the plaintiffs, Meux Brewery Company Limited, the freeholders, and Shelfer, the leaseholder of the Waterman's Arms, a public-house situate at Bankside on the river Thames, against the defendants, the City of London Electric Lighting Company Limited, for an injunction to restrain them from the use of any dynamo or other engine or machinery, so as by vibration or otherwise to injure the plaintiffs' premises; and as to the plaintiff Shelfer, the leaseholder, from causing a nuisance by vibration or noise, and for damages.

In March 1893 Shelfer took from Meux Brewery Company Limited a lease of the Waterman's Arms for a term of twenty-one years at the yearly rent of 70*l.*; he also paid a premium. He had previously been a yearly tenant of the public-house. In 1891 Meux Brewery Company Limited had put the house and premises in thorough repair. At the end of 1891 the defendants acquired land adjacent to the public-house, and erected thereon sheds, engine-houses, a shaft, and all the buildings and machinery necessary for forming a large central station for the purpose of supplying electric light over a considerable area in the metropolis. Foundations for the works were sunk from twenty-five to thirty feet below the surface of the ground, and engines of 500 and 1000 horse-power were fixed in position and commenced to work. Numerous witnesses were called on behalf of the plaintiffs, and it appeared from the evidence that until October 1893 the noise and vibration arising from the working of the engines was not noticeable, but that in that month the working of the engines began to cause the rooms, furniture, and bedsteads to vibrate so as to interfere with the sleep, comfort, and health of the occupiers, two of the witnesses stating that the vibration caused actual sickness. A crack also appeared in the wall, which in March 1894 extended through two storeys, and measured two inches wide in some places, while a hearthstone in one of the upper rooms became displaced. It was found, too, that the house, which before had a list to the east, had now settled towards the west, the defendants' side of the premises. The defendants admitted that some noise arose from their exhausts, but undertook to abate it, but they denied that the crack was caused by their operations, and stated that the vibration was trivial.

Sect. 82 of the City of London Electric Lighting (Brush) Order 1890, confirmed by the Electric Lighting Orders Confirmation (No. 15) Act 1890 (53 & 54 Vict. c. cccxxxix.) sect. 84, is as follows:

Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance, in the event of any nuisance being caused by them.

Warmington, Q.C. and Badcock for Meux Brewery Company Limited; and Warmington, Q.C. and Waggett for Shelfer.—The plaintiffs

claim as owners and lessee respectively an injunction, and damages. The Waterman's Arms was in good repair and comfortable until the defendants began to work their engines. After that time the occupiers of the house have experienced great discomfort, loss of sleep and health, and there has been actual structural injury caused to the buildings. Sect. 82 of the Provisional Order confirmed by the private Act of 1890 (53 & 54 Vict. c. cccxxxix.), s. 84, under which the defendants carry on their undertaking, enacts that nothing in the order shall exonerate the undertakers from liability for nuisance:

Rapier v. The London Tramways Company, 68 L. T. Rep. N. S. 645.

Moulton, Q.C., Renshaw, Q.C., and W. C. Braithwaite for the defendants.—The defendants have done what has been done under statutory authority, and in the best possible manner. If any injury has been caused by subsidence, it has been caused by the drawing off water in the course of excavating the foundations, and the plaintiffs have no ground of action:

Popplewell v. Hodgkinson, 20 L. T. Rep. N. S. 578; L. Rep. 4 Ex. 248.

[*Warmington, Q.C.*—That case does not depend on grant.] As to the plaintiffs, Meux Brewery Company Limited, they are not affected by noise and vibration, they are only reversioners, and cannot maintain a *quia timet* action:

Jones v. Chappell, 20 Eq. 539;

Mott v. Shoolbred, 20 Eq. 22;

Simpson v. Savage, 1 C. B. N. S. 347;

Mumford v. Oxford Railway Company, 1 H. & N. 34.

[*KEKEWICH, J.*—*Mayfair Property Company v. Johnston*, 70 L. T. Rep. N. S. 485; (1894) 1 Ch. 508.]

Cooper v. Crabtree, 45 L. T. Rep. N. S. 587; 19 Ch. Div. 193;

Rust v. Victoria Graving Dock Company, 56 L. T. Rep. N. S. 216; 36 Ch. Div. 113.

In this case it does not follow that any nuisance will exist at the end of the term. As to Shelfer the nuisance, if any, caused by noise and vibration is trivial. There is no evidence that he has suffered any pecuniary loss. On the balance of convenience this is not a case for an injunction. As to statutory authority we rely on the Electric Lighting Act 1892, which rules all provisional orders. The undertakers are under obligatory duties as to supplying electric light. [They referred to sect. 3, sub-sect. 8, sects. 4, 6, 10, sect. 12, sub-sect. 2; sects. 13, 14, 17, and 32 of the Electric Lighting Act 1882.] We have a wide compensation clause, which shows the undertakers may do actionable damage. The Lands Clauses Consolidation Act 1845 and the Gasworks Clauses Act 1847 are incorporated. "Nothing in this order" means nothing apart from the provisions of the general Act shall increase our immunity. We have not been guilty of negligence, and are protected by the Act of 1882:

National Telephone Company v. Baker, 68 L. T. Rep. N. S. 283; (1893) 2 Ch. 186.

The plaintiffs are only entitled to compensation for damage caused by construction of the works, not for nuisance in working, on the analogy of railways.

KEKEWICH, J.—There is one point advanced on behalf of the defendants which it may be con-

CHAN. DIV.] MEUX BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO. [CHAN. DIV.]

venient for me at once to dispose of. On that point I am against them, and do not call on the plaintiffs. I speak in the plural, not expressing any opinion as to whether the reversioners have any title to maintain an action at all. I am not now dealing with injury to the building caused by the construction of the foundations of the engines, but only with the question whether, assuming there is noise and vibration in the Waterman's Arms, found to be the result of the defendants' operations as now conducted, the defendants are liable to an action on the score of nuisance. It is urged that they are careful to carry on their works in the best possible manner, and therefore cannot be charged with negligence. So far I am with them except as to the noise caused by the exhausts, and as they not only offer but are actually taking steps to abate this, any damages I might give in this respect would be merely nominal. The question is, however, assuming nuisance caused by the exhausts or by the working of the engines, are the defendants liable in law? In my opinion there is nothing to take them out of the common law liability to an action for nuisance. Mr. Moulton did not rely on the provisional order confirmed by Act of Parliament, which constitutes the defendants' immediate title, but that is in reality equal to an Act confirmed as it is by an Act of Parliament which recites that the provisional order has no validity or force until confirmed by Act of Parliament, and then confirms it. Here, therefore, is the charter of the company, depending no doubt on an earlier charter to which I will refer directly. That provides (*inter alia*) that the company shall be subject to certain liabilities, and then sect. 82 says, "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance, in the event of any nuisance being caused by them." Mr. Moulton accepts the view that "nothing in this order" means nothing in this order, and not nothing in this order or in any preceding Act. I agree it would be absurd to say that that expression incorporated the Electric Lighting Act of 1882, which is not part of the order but is paramount to it. He may be right in saying that the proviso cannot be construed literally—that the order directs things to be done which, if done, must create a nuisance; but this proviso does not deal with what does not come within the immediate purview of the order, and what the defendants are doing, which is complained of here, is not what comes within the order, but what comes within the general Act of 1882. Is there anything in that Act to relieve the defendant company from liability for nuisance? It is well settled law, and there are many cases on the point, that in the case for example of a railway company power to do a particular thing—to construct a railway—does not justify the undertakers so to do that thing as to commit a nuisance, unless by express language or by necessary implication that must be inferred. There are many cases in which that may be found. I thought in the case of the *National Telephone Company v. Baker* that the Leeds Tramway Company had power to do what must be necessarily an injury to their neighbour, the telephone company. On the other hand, in many cases that plea has been of no value at all. I quote an instance because it refers to another point of importance here. Railway companies are continually made, or attempted to

be made, liable for damages done by sparks from their engines. Now they are entitled to run engines, and may be bound to use the railway and use steam power in so doing; but the question always is, whether they are doing it reasonably. If they are not doing it reasonably, if they are not taking all possible precautions, they are liable to an action at common law, and not liable for compensation, because the Act of Parliament does not say, neither the general Act nor the special Act, that they are to be free from the liability to an action. In connection with that, the reason I refer to the particular class of instances is, that there is always a distinction to be made between the construction of the railway and the execution of their powers, and that distinction occurs to me to be worthy of notice here. Then, turning to the Electric Lighting Act of 1882, Mr. Moulton relies on those general points of view. In the first place they are authorised, and may be regarded as bound to supply electricity for the lighting of those parts of London within a certain area. There is nothing, according to the general principle to which I have referred, in such an obligation which can relieve them from liability for a nuisance. The Act does not say in so many words that they may or shall do that, notwithstanding that in so doing they create a nuisance to their neighbours, nor do I see the slightest ground for saying that this is a necessary implication. Then it is argued upon that, that the Act of Parliament cannot be taken to have intended so large an operation as this, introducing the advantages of electrical science to the metropolis, was to be hampered by actions for nuisance. That is what the argument comes to. It is entirely for Parliament to say whether it will do so or not. I have before me a general principle that, unless Parliament has so declared, the undertakers remain liable, and to that I must adhere. Then Mr. Moulton relies on certain powers, including more particularly one mentioned in sub-sect. 2 of sect. 12, in respect of the breaking up of streets. They are empowered to do certain things, powers to do which are also given by the Gasworks Clauses Act 1847. It is quite possible, although I am not now asked to determine that, that anything which is necessary, that is to say reasonably necessary, following from that may be done, notwithstanding that some nuisance may also be consequent on it. That may or may not be so. If it is so, which is the strongest view on behalf of the company, it seems to me to follow that other nuisances are not allowed. The express allowance of one nuisance would go far to show that no other was permissible. But at any rate it cannot go to show that any other is permissible, and that argument may be passed over in that way. Then Mr. Moulton relies on sect. 17, and that places the undertaking of the company under an obligation first to cause as little detriment and inconvenience, and do as little damage as may be; and, secondly, to make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers. He says the result is, that if the plaintiffs have any cause to complain under this head as well as others (I am not dealing with the others), they must ask compensation and can ask nothing more, and cannot bring an action for a common law nuisance. I see nothing in the words I have read

CHAN. DIV.] MEUX BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO. [CHAN. DIV.]

which justifies any such conclusion, reading them, as I conceive I am bound to do, according to the general principle to which I have already referred and which I will not repeat. But, beyond that, I find the section is introduced by and limited by the words "in the exercise of the powers in relation to the execution of works given them under this Act." Now what are the "works?" They are defined by sect. 32 of this Act. The expression "works" means and includes electric lines, also any building, machinery, engines, works, matters, or things of whatsoever description required to supply electricity, and to carry into effect the object of the undertakers under this Act. The works there are set out at length, but they are all governed by what is required to supply electricity, and the supply itself is not included. It would be foreign to the definition to include the supply itself. It seems to me, therefore, that when the complaint is made not of the erection of the engines, but of the working of the engines so as to make the supply, the case does not fall within the 17th section, and that this is not a case of the execution of the works, but only of the use of the works when executed. That distinction has been drawn over and over again in the Railway Acts, where it has been held that, though you can recover compensation because your house is injuriously affected by the construction of the railway, you can get no compensation for the damage, which may be great or greater, by the case which continually occurs, vibration caused by the trains passing through a tunnel as on the Metropolitan Railway. That is not a case in the execution of the works, but in the running of the trains, the use of the works when executed. That point seems to me to be one of considerable importance, but yet I do not desire to base my decision on that alone; I think it quite sufficient, and quite sound, to base it upon the other view that, unless you find an express relief from the ordinary liability of the subject, whether a company or an individual, to an action at common law for nuisance, that liability remains, and you can only construe the relief on the ground of compensation if you can see that the compensation itself on a fair construction covers the relief which is contended for. I see nothing here to show that—nothing which would lead to the conclusion, on a proper construction of the clause, that compensation is to be rendered for a nuisance. If the Legislature had thought fit to say, "If the company commit a nuisance, then compensation shall be made to the persons affected thereby," then, without in so many words legalising the nuisance, the language would go a long way to say that was the reasonable result. I see nothing here to show compensation for a nuisance was contemplated, and if it was not, the argument on the section seems to me to break down. On these grounds I think the company have entirely failed to exempt themselves from an action for nuisance in working their engines and electrical appliances for the supply of electricity within their defined area. On the rest of the case I must hear you, Mr. Warmington.

Warmington, Q.C. in reply.—It is not necessary for us to show on what particular occasions nuisance was committed:

Rapier v. London Tramways Company, 68 L. T. Rep. N. S. 645.

Then our house is over forty years old, and we are entitled to an easement of support:

Rigby v. Bennett, 48 L. T. Rep. N. S. 47; 21 Ch. Div. 559.

As to the right of the reversioners to bring an action, the injury to the structure here is permanent:

Simpson v. Savage, 1 C. B. N. S. 347.

Renshaw, Q.C.—The case of *Rigby v. Bennett* was one of grant: there is no implied grant here.

KEKEWICH, J.—[His Lordship commented on the evidence, and came to the conclusion that the defendants were guilty of a nuisance, and had damaged the plaintiffs' premises so as to make them less comfortable, so as to injure the structure, and so as to decrease their value. Dealing, however, first with the case of the plaintiff *Shelfer*, having regard to the fact that the profits of his business had not been interfered with, and that the nuisance was mainly confined to the upper floor of the house, and the possibility of some inconvenience in arranging for sleeping elsewhere, and contrasting that with the great inconvenience that would be caused by stopping a business like that of the defendants, he considered that damages were a fair compensation—the amount to be referred; and proceeded as follows:] Now, as regards the plaintiffs, *Meux Brewery Company*, of course after what I have said of Mr. *Shelfer* I shall not think of granting them any injunction, but I must deal with this point as regards their case. They are obviously not entitled to an injunction as regards the structure, because that is a thing of the past, but as regards the noise and vibration, and so forth, the cases which have been cited and the principles of law are conclusive against injunction. There is nothing here necessarily of a permanent character. They have no reversionary interest in what may happen some nineteen years hence, and on these authorities they cannot have an injunction to restrain what may be impossible at that time. Then are they entitled to any relief at all? None, I think, in respect of the noise, either by the steam or by the engines, or by the vibration from either cause. That really depends on the same principle of law. But it may be disposed of perhaps on more practical grounds. It is no disadvantage to them. Their lease is good, and their rent is well secured. They have no ground of complaint because their tenant is in an unfortunate position, even if they were good enough, which there seems to be no reason for their doing, to let him off some part of his rent, and take a less beneficial occupation. That would be a mere act of grace on their part, and they cannot have damages for any loss which does not follow from legal right. But as regards the structure it seems to me their position is somewhat different. This is a house—it is an old house, it is true—but it is a house which was put in order some years ago, a house for which they seemed to have no difficulty in finding a tenant, a house which is doing a good business, and is likely to do a good business for some time to come, and that house has been damaged. They have a house now—they have only the reversion to it—but they have a house now which is less substantial than it was, and they have a house which according to the evidence will be less sub-

CHAN. DIV.]

REG. v. MEAD, ESQ.; *Ex parte* ANTHONY.

[Q.B. DIV.]

stantial by reason of the damage at the expiration of the present tenancy. That seems to me to give a cause of action. It is impossible for me to say how much. I should guess that a small sum comparatively would compensate them, but I cannot see my way to saying they are not good plaintiffs. The case cited on this point is *Popplewell v. Hodgkinson* (20 L. T. Rep. N. S. 578; L. Rep. 4 Ex. 248), but, as was pointed out by Mr. Warrington, that case does not depend on grant. Here I have a case of grant; that is to say, I have a case of a statute right giving right by prescription equivalent to grant, and if the defendants being the adjoining owners have deprived Messrs. Meux of their support, Messrs. Meux can sue them on that ground, notwithstanding, as it seems to me, that they have withdrawn that support by withdrawing the water in the soil. There is no right of action against them for withdrawing the water which is only percolating through the soil, and does not run through a definite channel; Messrs. Meux could not claim on that ground. But, if by reason of doing that which is lawful, that is to say, withdrawing the water, they have done that which is unlawful, that is to say, withdrawn the support, then the right of action seems to follow. To that Mr. Renshaw answers that there was no right of support, and for this reason: It is in evidence, and I think must be taken to be proved, that the plaintiffs' house at first settled or listed to the east; then some years ago, say eighteen, a large substantial building was built on the east, and probably for that reason, or perhaps because the settlement had completed itself as settlements do, the list to the east ceased, and now, by reason perhaps to some extent of the great weight and solidarity of the defendants' premises, but also to some extent certainly by reason of these deep foundations of the engines going down into the moist soil, what was a list to the east has been converted into a list to the west, with the result I have just mentioned with regard to the crack and the splitting of the hearthstone. Mr. Renshaw says there was no support before; the position has been entirely altered; the plaintiffs are now claiming in respect of that which they had not forty years ago, but only a few years ago. I do not understand the right to support to depend entirely on the exact position of the two adjoining buildings or lands, because they are lands whether covered with buildings or not. The right to support is, I apprehend, enjoyed even though the support is of little practical use. The right to support comes from the adjacency, and not from the fact that support is actually given continuously. Be that as it may, though the list was to the east, it is impossible to say that this old house was not kept up by the lands and buildings on the west. No one has dared to say that, if there had not been the support on that side, the house would not have settled that way. I take it for granted that it would have done so, and that the support has been there to the house as it now stands, though the inclination of some of the walls has been altered. That defence not prevailing, I think the defendants are liable to Messrs. Meux and Co. on that ground, but on that ground only. I am afraid that matter also of damages must be inquired into. I am not sure it is great, and I would more willingly have settled the question to get rid of the whole action, but unfortunately I do

not see my way. As regards that I think I must grant an inquiry as to the damages occasioned to the plaintiffs, Messrs. Meux and Co., by the structural alteration of the house, and put in the words (so as to get a proper inquiry) "caused by the defendants' operations and the costs occasioned by that;" that is, subsequent costs must be reserved so that I may see whether there is anything serious in the matter. I think it is always desirable to reserve subsequent costs where you grant an inquiry. So far as the action seeks for an injunction, I think it must be dismissed with costs. I do not say anything about the general costs of the action, but I dismiss it with costs so far as it asks for an injunction, and I give the plaintiffs the costs so far as it asks damages, and I reserve subsequent costs. The other plaintiff has substantially succeeded in his whole case, and he must have the whole costs of his action.

Solicitors: *Hunter and Haynes; Parry and Gibson; Ashurst, Morris, Crisp, and Co.*

QUEEN'S BENCH DIVISION.

Saturday, April 14.

(Before CHARLES and COLLINS, JJ.)

REG. v. MEAD, ESQ.; *Ex parte* ANTHONY. (a)

Summary jurisdiction—Public health—Nuisance—Summons to unknown owner or occupier of premises—Form of—How to be served—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), ss. 117, 128, schedule.

Sect. 117, sub-sect. (1) of the Public Health (London) Act 1891, provides that summary proceedings under the Act may be prosecuted in manner directed by the Summary Jurisdiction Acts.

By sect. 128, sub-sect. (1), any "notice, order, or other document," required or authorised to be served under this Act may be served . . . where addressed to the owner or occupier of premises, by delivering the same, or a true copy thereof, to some person on the premises, or if there is no person on the premises who can be so served, then by fixing it on some conspicuous part of the premises. The third schedule to the Act contains a form of summons addressed "To A. B., of [or to the owner or occupier of] describe premises."

A sanitary authority having served a notice under sect. 4, sub-sect. (1) of the same Act, upon the owner or occupier of premises who was unknown, requiring him to abate a nuisance thereon, and the notice not having been complied with, made a complaint under sect. 5, by summons directed to the "owner or occupier," and served in the manner prescribed in sect. 128, for the service of any "notice, order, or other document."

Held, that the summons was sufficiently directed, and properly served.

RULE nisi to a metropolitan police magistrate to show cause why a mandamus should not issue directing him to hear and determine a complaint made by the surveyor of Poplar, on behalf of the sanitary authority, in respect of the non-compliance by the owner or occupier of certain premises with a notice requiring him to abate a nuisance thereon.

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. MEAD, Esq.; *Ex parte* ANTHONY.

[Q.B. Div.]

The Public Health (London) Act 1891, by sect. 4, sub-sect. (1), enacts as follows:

On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice.

By sub-sect. 4:

Where a notice has been served on a person under this section, and either (a) the nuisance arose from the wilful act or default of the said person; or (b) such person makes default in complying with any of the requisitions of the notice within the time specified, he shall be liable to a fine not exceeding 10*l.* for each offence.

By sect. 8:

Whenever it appears to the satisfaction of the petty sessional court that the person by whose act, default, or sufferance a nuisance liable to be dealt with summarily under this Act arises, or the owner or occupier of the premises is not known or cannot be found, then the nuisance order may be addressed to, and if so addressed shall be executed by, the sanitary authority.

By sect. 117, sub-sect. (1):

All offences, fines, penalties, forfeitures, costs, and expenses under this Act, or any bye-law made under this Act, directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts.

By sect. 120, sub-sect. (4):

Whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the "owner" or "occupier of such premises, without name or further description.

By sect. 128, sub-sect. (1):

Any notice, order, or other document required or authorised to be served under this Act may be served by delivering the same or a true copy thereof either to or at the usual or last known residence in England of the person to whom it is addressed, or, where addressed to the owner or occupier of premises, then to some person on the premises, or, if there is no person on the premises who can be so served, then by fixing the same or a true copy thereof on some conspicuous part of the premises.

The schedule to the Act contains a form of summons (B.) beginning "To A. B., of [or to the owner or occupier of] describe premises."

The appellant Anthony, a sanitary inspector on behalf of the Board of Works for the Poplar District, took out a summons directed to "the owner of the premises known as 15, Swaton-road, in the parish of Bromley St. Leonard, in the county of London, and within the metropolitan police district," under the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), requiring him to appear before the police magistrate (being a petty sessional court) to answer the complaint of the said Anthony that a nuisance (specified in the summons) existed on the said premises, and was caused by the act, default, or sufferance of the owner of the said premises. It was proved that the summons so directed was served by leaving a true copy thereof with some person for the said owner at No. 15, Swaton-road.

The defendant never appeared, although the hearing of the summons was adjourned several times to enable him to do so. No evidence was given or tendered as to the name or address of the said owner, nor was it proved that the said premises had ever been the place of abode of the said owner. Upon these facts the magistrate was of opinion: (1) That the intended defendant ought to have been identified in the said summons by name or some physical description, and that an address should have been given therein at which the intended defendant was known, or could have been found; and (2) that the said summons, even if properly directed, should have been proved to have been served "by delivering the same to the intended defendant personally, or by leaving the same for him at his last or most usual place of abode," in accordance with sect. 1 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43). He therefore declined to proceed *ex parte* to the hearing of the complaint or to adjudicate thereon, and dismissed the summons.

The complainant appealed.

Muir for the appellant.—The main object of the Act is to secure health in the metropolis by the suppression of nuisances. Another object is promptness of procedure. If all the steps contended for by the respondent had to be taken it would be difficult to reach a defaulting owner, where, for example, the house is let in tenements. The practice since 1891 has been to leave a summons for the "owner." The form of summons given in Schedule 3, Form B. to the Act, shows that the summons was to be directed to the owner without naming him. It cannot be intended that this summons should be served under *Jervis's Act*, because that Act contains no machinery for bringing an unknown or non-existent person before a tribunal, whereas this Act does. A nuisance order can be made against an unknown person, but there can be no possibility of his being fined until he can be found. It is admitted that the preliminary notices may be directed in this way, and there can be no meaning in sect. 120, sub-sect. (4), unless a summons may be treated in the same way. Sect. 128 includes a summons, which therefore may be served in the way there mentioned.

Sutton for the respondent.—The difficulty in the case is created by the schedule, which gives a form of summons directed to the owner without name. This is taken by a slip from the schedule to the Act, 18 & 19 Vict. c. 121, now repealed, under which summonses could, by sect. 31, be served in the manner described in sect. 128 of this Act, but which contained no provision for punishing the person as this Act does. Even supposing that the words "notice, order, or other document" can include a summons, still sub-sect. (3) shows that only a notice can be addressed to the "owner" without naming him.

CHARLES, J.—In this case the magistrate declined to hear and determine a summons which had been issued on the 6th Feb. on the grounds, first, that the summons itself was informal; and secondly, because there had been no proper service. The question whether these grounds can be sustained depends upon the construction of certain sections in the Public Health Act (London) 1891. I own my first impression was, that there had been an informality in the service. But I am indebted

[Q.B. Div.]

REG. v. MEAD, Esq.; *Ex parte* ANTHONY.

[Q.B. Div.]

to the argument which we have heard for convincing me that my first impression was hasty, and it has brought me to the conclusion that this rule should be made absolute. The objection taken to the summons itself is, that it designates no person by name, but is addressed simply to the owner of the premises. The justification for doing that, however, is to be found in the Act itself, and the schedule of forms. Sect. 120, sub-sect. (4), provides that, in nuisance proceedings under the Act, whenever it becomes necessary to mention the owner or occupier of any premises, it shall be sufficient to designate him as the "owner" or "occupier" without name or further description. Now that is what was done here, and therefore there appears to be no informality in the summons. But further, on turning to the forms, I find that a form of summons is given which contemplates on the face of it that it is either to be addressed to the person by name, or to the owner or occupier. In my opinion, therefore, the summons itself is not informal, and the objection to it fails. Then comes the question whether this summons has been duly served. Now sect. 117 provides that offences, fines, &c., under this Act which are to be prosecuted summarily, are to be prosecuted, unless otherwise provided for, in the manner directed by the Summary Jurisdiction Acts. Now, with reference to the Summary Jurisdiction Act, it seems clear that the mode of service there prescribed was not followed in this case. In that Act the mode prescribed for service is this: that it shall be served upon the person to whom it is directed by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode. Now that was not done in the present case; what was done here was to take advantage of the 128th section, by leaving a copy of the summons at the house to be delivered to any person who might be found on the premises. So that the point is, do the provisions of sect. 128 apply to the service of this summons? Now, in order to answer that question, I think it is necessary to refer to the earlier sections of the statute. The 4th section in sub-sect. (1) provides for the service of a notice by the sanitary authority on the person by whose act, default, or sufferance a nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same, and by sub-sect. (4) he is made liable to a fine for non-compliance. Sect. 5 further provides that where the person on whom a notice to abate a nuisance has been served as aforesaid makes default, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order, called a nuisance order. Now, looking at that section alone, it might be contended that it was necessary that the complaint which the sanitary authority makes should be based on a summons, and that that summons must be served under the provisions of the Summary Jurisdiction Act. But sect. 8 shows that it was not intended by the Legislature that that mode of service should be necessary in the case of a summons by the sanitary authority. Sect. 8 enacts that, when the person liable, or the owner or occupier of the premises is not known, or cannot be found, then the nuisance order may be addressed to the sanitary authority. It is

clear therefore that if, as I think, the complaint made by the sanitary authority under sect. 5 must be based on a summons, that summons may be served notwithstanding that the owner or occupier cannot be found, and thereupon a nuisance order may be made. It is clear, therefore, that a summons under sect. 5 may be in the form of the summons in this case, and may be dealt with in the manner prescribed by this Act. Then as to the service, sect. 127 provides that notices, orders, and other such documents under this Act shall be in writing, and then the section draws a distinction between "orders" and "notices and documents other than orders." Then sect. 128, sub-sect. (1), enacts that any notice, order, or other document required or authorised to be served under this Act may be served, where it is addressed to the owner or occupier of premises by delivering the same or a true copy thereof to some person on the premises, or, if there is no person on the premises who can be so served, then by fixing it on some conspicuous part of the premises. Now that is what was done in this case. Mr. Sutton, however, suggests that the words "notice, order, or other document" cannot include a summons, and he points out in support that in sect. 31 of the Nuisances Removal Act, now repealed (18 & 19 Vict. c. 121), which corresponds to this section, the word "summons" was expressly included, whereas it is omitted here, and he says it was purposely omitted here for this reason: Under the old order of things the magistrates had no power to inflict a fine for non-compliance with the notice of the sanitary authority, and the summons was issued only for the purpose of enabling an abatement order to be made; whereas under this statute the magistrates have power to inflict a fine for non-compliance with the notice. But, although the procedure may be different under this Act, I do not think that is any reason why we should not construe sect. 128 sufficiently liberally to include a summons. Sub-sect. (3) does not assist Mr. Sutton. He says that by virtue of it the only document which can be served upon the owner or occupier of premises, without naming him, is a "notice." The answer to that is in sect. 120, sub-sect. (4), which provides that, whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the "owner" or "occupier" without name or further description. I think, therefore, the true construction of sect. 128 is, that a summons may be served in the manner there prescribed. At first sight this appears a strained result, because you might be inflicting a penalty upon a person unknown. But I think that is not the case. The way in which the law works would be this: If the owner or occupier does not appear to the summons a nuisance order may be made against him, but you cannot inflict a fine, because there is nobody to fine. Then, when the owner or occupier has been found, it would still be necessary for the magistrate to inquire whether he was in default or not, and another summons would be necessary. I think, therefore, that no inconvenience results from this construction of the section, and that the summons in this case was regularly served.

COLLINS, J.—I am of the same opinion. The whole question is whether this summons was issued

Q.B. Div.]

PEEK v. RAY.

[CT. OF APP.]

in such a form as to found jurisdiction in the magistrate. The magistrate himself held it was not. The question turns upon sect. 128 of the Public Health (London) Act 1891, and if the true construction be that under the words "notice, order, or other document" a summons is embraced, then Mr. Sutton's contention, that the magistrate had no jurisdiction, fails. Now the summons was issued in the form prescribed in the schedule to the Act addressed to the owner or occupier of the premises, and was served in the manner pointed out by sect. 128. Mr. Sutton contends that the words "notice, order, or other document" do not embrace a summons, and therefore that there is no provision for the issue of any other summons than that under the Summary Jurisdiction Acts, or for service of a summons in any other way than those Acts prescribe. Well, it is true that, by sect. 117, all offences, &c., under this Act directed to be prosecuted in a summary manner, or the prosecution of which is not otherwise provided for, may be prosecuted in the manner directed by the Summary Jurisdiction Acts. But if sect. 128 embraces a summons, then, reading the clauses together, it is clear that a summons issued in the form prescribed in this Act may found jurisdiction under the Summary Jurisdiction Act. Now, do the words of sect. 128 embrace a summons? I think they do. In the first place, in the schedule to the Act is a form of summons not directed under Jervis's Acts, but directed to a person incapable of being designated. Mr. Sutton felt this difficulty, but explained that the form was borrowed by mistake from the old Act of 1855, which conferred no penal jurisdiction on the magistrates. To test this let us see whether there are any provisions in the Act which require to be carried out by means of the summons as given in the schedule. As has been pointed out, the provisions of sect. 8 are of this kind. A complaint against a person unknown may be followed by an order to the sanitary authority. The words of the section are: "Whenever it appears to the satisfaction of the petty sessional court that the person by whose act, default, or sufferance a nuisance liable to be dealt with summarily under this Act arises, or the owner or occupier of the premises is not known or cannot be found, then the nuisance order may be addressed to, and if so addressed shall be executed by, the sanitary authority." That is an instance of a summons which can be dealt with in no other way than that prescribed by sect. 128. Therefore that disposes of Mr. Sutton's argument, and accounts for the section being there, because there would be no machinery for serving a summons in the form of the schedule except in the manner prescribed by sect. 128. I think therefore that that section applies to the service of a summons. Mr. Sutton, however, addressed to us another argument of consequence. His argument was that, under sect. 4, a person served in this way may be fined, and therefore it was necessary to insist upon a personal designation in the summons. Well, on examination, that argument cannot be sustained, because the 4th sub-section, which authorises the fine, "where a notice has been served on a person under this section," and he makes default, could not be made available against a person without designating that person. I think it could not possibly result in a fine against an unknown or unnamed person,

and therefore the difficulty suggested by Mr. Sutton does not seem to me to follow at all. Then we come to the other provisions of the Act. Sect. 5 provides for the making of a nuisance order after complaint by the sanitary authority, and reading sects. 5 and 8 together, it follows that a summary order defined as a nuisance order may be made, although the person complained against cannot be found. Under these circumstances I think the whole Act is consistent; that this summons was properly served under the powers of sect. 128, and that there was jurisdiction in the magistrate to hear the case. The rule therefore must be made absolute.

Solicitors for the applicant, *C. V. Young and Son.*

Solicitor for the magistrate, *Solicitor to the Treasury.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 9.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

PEEK v. RAY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Discovery—Interrogatories—Discretion of judge.

An action was brought by the plaintiff against the defendants, R. and A., the executors of a testator who died in April 1888, with whom the plaintiff had been in partnership. The action arose out of a dispute as to what was the amount which the estate of the testator was entitled to receive for his share in the partnership business. R., besides being an executor of the testator, was a partner of the plaintiff. Therefore A., the other executor, obtained leave to defend the action on behalf of himself and R., and all the subsequent proceedings in the action were consequently conducted by A. alone.

Under the Rules of Court of Nov. 1893, the plaintiff obtained leave to administer interrogatories for the examination of both the defendants. The summons for leave to deliver the interrogatories came before North, J. in chambers, and his Lordship ordered certain of the interrogatories objected to by the defendants to be struck out, but as regarded the remainder of them made the order as asked, notwithstanding the opposition of the defendants to any interrogatories at all being administered.

A. appealed from that order on the grounds (1) that the plaintiff had no right to administer interrogatories to R. as well as to A., because his answers might be prejudicial to A., who was alone defending the action; and (2) that the interrogatories were premature, inasmuch as to order the defendants to answer the greater part of the interrogatories would be equivalent to compelling them at the present stage of the proceedings to prepare for trial on the merits and to disclose their case; and that, therefore, the interrogatories were unnecessary and oppressive.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

[CT. OF APP.]

PEEK v. RAY.

[CT. OF APP.]

Held, that the fact that A. had obtained liberty to defend the action alone was no ground for objecting to the delivery of interrogatories to R.; and that the plaintiff could not, on that account, be deprived of his ordinary remedy to interrogate both defendants.

Held also, that North, J. having exercised his discretion as to the allowance of the interrogatories, his order could not be disturbed, for no appeal ought to be entertained from an order for leave to administer interrogatories under the Rules of Nov. 1893, unless there was some material error, or some serious question of principle involved, or some substantial injustice done, it not being the function of the Court of Appeal to look through the interrogatories allowed by a judge of first instance to see whether they had or had not been properly allowed, and rule 6 of Order XXXI. of the Rules of Court 1883 being still in force to enable objections to be taken in answer.

THIS action was brought by the plaintiff, Francis Peek, against the defendants, Henry R. Ray and William F. A. Archibald, the executors of the will of William R. Winch, who died on the 4th April 1888.

The testator was in partnership with the plaintiff as a tea-merchant, and the action arose out of a dispute as to what was the amount which the estate of the testator was entitled to receive under supplemental articles of partnership, dated the 26th April 1887, for his share in the business in respect of capital and goodwill.

On the 12th April 1889 an agreement of compromise was entered into, which was subsequently sanctioned by the court, with the object of effecting a settlement of various disputes which had then arisen between the plaintiff and the defendants in respect of matters in which the plaintiff and the testator had been jointly interested, and in respect of the amounts which, under the supplemental articles of partnership, were payable to the testator's estate for capital and goodwill.

The plaintiff asked by his statement of claim (*inter alia*) for rectification of that agreement of compromise on the ground of mistake.

By their defence the defendants contended (*inter alia*) that the matter was concluded by the agreement of compromise.

The defendant Ray, besides being an executor of the testator, was a partner of the plaintiffs.

Therefore, the defendant Archibald, the other executor, applied to the court for liberty to defend the action commenced by the plaintiff, and that the conduct of such defence might be given to him. That application being granted, the subsequent proceedings in the action were conducted by the defendant Archibald alone.

Under the Rules of Court of Nov. 1893, Order XXXI., r. 1, the plaintiff took out a summons asking for leave to deliver interrogatories for the examination of both the defendants.

Upon the summons coming before the chief clerk the defendants objected to the major part of the interrogatories as being immaterial and unnecessary at that stage, stating that it was their intention to set down their special defences for preliminary argument. Accordingly the proceedings before the chief clerk were adjourned to the judge (North, J.), who, however, considered that nothing would be gained by setting down any

points for preliminary argument, and that the same could more conveniently be dealt with on the trial of the action.

Upon this the plaintiff restored the summons, and the defendants repeated their objections that the bulk of the interrogatories were still immaterial at the present stage, and that the application could properly be dealt with by the official referee, in the event of the action being referred, who had, under Order XXXVI., r. 50, the same power to order interrogatories and discovery as the court. They further stated that they objected to many of the interrogatories in detail, and asked the chief clerk to go through the same, and to allow their objections to be stated. This, however, the chief clerk declined to do, and he intimated that he was prepared to make an order as to all the interrogatories.

The matter was then adjourned to the judge in chambers, when his Lordship directed certain portions of the interrogatories to be struck out, but as regarded the remainder of them made an order as asked. At the same time, North, J. certified that he was satisfied that the case had been sufficiently argued before him.

From that order the defendant Archibald now appealed.

Coxens-Hardy, Q.C. and Montague Lush for the appellant.—First we say that the plaintiff has no right to administer interrogatories to the defendant Ray as well as to the defendant Archibald, because the answers of the former defendant may be prejudicial to the defendant Archibald, who is alone defending the action. Then we say, that to order the defendants to answer the greater part of these interrogatories will be equivalent to compelling them at the present stage to prepare for trial on the merits, and to disclose their case. Apart from the fact that the defendants ought not upon interrogatories to be compelled to disclose their case, there is the further point, that at the present stage the interrogatories are unnecessary and oppressive. Moreover, the learned judge, by allowing the interrogatories, has precluded the parties interrogated from taking any objections when they answer the interrogatories. The matter will be regarded as *res judicata*.

Swinfen Eady, Q.C. and Christopher James, for the respondent, were not called upon to argue.

LINDLEY, L.J.—This is a motion which is rather peculiar. It is an action by Mr. Peek, who is a surviving partner, against Mr. Ray, who is also a surviving partner, and Mr. Archibald, who with Mr. Ray, are the executors of a deceased partner named Winch. There is a controversy between them about the mode of winding-up the partnership, and, in particular, whether a certain deed of compromise come to in 1889 is binding, and what the true construction of it is. Now it seems that, by an order which we need not do more than refer to, Mr. Archibald has been appointed to defend this action on behalf of himself and Mr. Ray—that is, on behalf of the estate. The plaintiff has administered interrogatories for the examination of Mr. Ray and Mr. Archibald, and the learned judge (North, J.), under the Rules of Court of Nov. 1893, has looked into the matter, and has given leave to deliver those interrogatories to both of them. Now Mr. Archibald appeals, and says that the plaintiff has no right to deliver interrogatories to Mr. Ray. It strikes me as a most

CT. OF APP.]

PEEK v. RAY.

[CT. OF APP.]

extraordinary appeal. I never heard of one defendant appealing against an order that another defendant should answer interrogatories. It is quite new to me, and strange. It is sought to be made right by saying that Mr. Archibald has liberty to defend. That may be; he may have liberty to defend, but that is no reason at all why the plaintiff should not interrogate Mr. Ray. Why the plaintiff should be deprived of his ordinary right to deliver interrogatories to both of these defendants I do not know. I dismiss that, because I think it utterly wrong for Mr. Archibald to quarrel with the order requiring Mr. Ray to answer interrogatories or to make an affidavit. He has nothing to do with it any more than I have. As to his own, there is more to be said. The learned judge has required Mr. Archibald to make certain affidavits and to answer certain interrogatories, and the learned judge has, under the new rules, gone into the matter, and has come to the conclusion that these interrogatories ought to be allowed. That is all. Now I admit that, unfortunately, there is that section in the Judicature Act 1873 which enables appeals to be brought from all orders, and these matters may go to the House of Lords until that unfortunate section is modified, as I hope it will be in the present session of Parliament, but there it is. In substance, it appears to me that there is nothing wrong. But there may be numerous objections, for anything I know, which are perfectly open to the defendant to take by his answers. Although the learned judge has allowed interrogatories, of course he has allowed them subject to all proper objections. The only point upon which the judge is likely to, and must in practice, have made up his mind is as to whether, so far as he can judge at the time, a particular interrogatory is or is not premature when he is asked to allow the interrogatory. He must practically address his mind to that, and if he allows it that is an indication that it is not premature. Still it is not *res judicata*, and if the defendant can make out upon oath and show facts which make out that it is premature, it is open to the judge to reconsider it. But from the decision of the judge that interrogatories should be allowed because he thinks they are not premature, I do protest against there being an appeal. I object altogether to there being an appeal. It is a matter for the discretion of the learned judge, and we are not sitting here to review the learned judge's decision in such a matter. I think the whole thing is a mistake, and that the appeal ought to be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The interrogatories have been delivered under the new rules, the Rules of Nov. 1893, and Mr. Archibald takes this objection: He says that there is no right to administer interrogatories to Mr. Ray—that is, the other defendant. All I can say is, I never heard in the whole course of my life of a case where one defendant objected to interrogatories delivered to another defendant. Such an objection, I think, cannot be taken. The learned judge, as has been already said, has allowed these interrogatories under the new rules. He has carefully gone through them, and he has made certain alterations. He has struck out certain things that he thought ought not to be included in the interrogatories. He has allowed them, and then there is an appeal to this court having regard

to that allowance by the judge, and it is said that some of these interrogatories are premature. I think that that is the main objection that was taken. I am unable to say that there is not a right of appeal; but I do most emphatically say this, that I think an appeal of this kind is most improper. I think that no appeal ought to be brought, and no appeal I am certain will be entertained by this court, unless in a case like this there is some error, some question of principle involved, or some substantial injustice done. And at this stage (except that something of that kind is established) the court will not entertain an appeal of this kind. It seems to me that a mistake is made altogether. It is suggested that the learned judge by allowing interrogatories (as he has done in this case) precludes the party interrogated from taking any objection when he answers the interrogatories. In my opinion that is incorrect. What the learned judge does when he allows the interrogatories is this: He determines whether it is a proper case in which interrogatories ought to be delivered at all, and then under the new rules he deals with each interrogatory (he is bound to do that) for the purpose of seeing whether *prima facie*, and on the face of it, a particular interrogatory is proper. That is what he does when he allows the interrogatory. But he does not preclude any objections being taken by the party interrogated when he filed his affidavit in answer to the interrogatories. To my mind that is made perfectly clear by Order XXXI., r. 6. The new orders came into operation in Nov. 1893, but Order XXXI., r. 6, remains; and what does that say? It says: "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bona fide* for the purpose of the cause or matter," and then come these words "or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer." That rule remains still in force, and, to my mind, makes it absolutely clear, clear beyond all doubt, that an allowance does not preclude the objection being taken in the way provided for under that rule of Order XXXI. I think, therefore, that this appeal must be dismissed.

KAY, L.J.—I entirely agree with the judgments that have been pronounced, and I will only add a few words. I should have doubted, I confess, looking at the terms of Order XXXI., r. 1, of the new rules, whether any order was required. It is only: "In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories." I doubt whether leave should be treated as an order. Supposing it is, however, in this case the first objection made is a most extraordinary one. Before I notice any of the objections I say, speaking for myself, most emphatically, that where a judge has under these new rules himself had interrogatories brought before him, and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if anyone chooses from that allowance to appeal he cannot hope to succeed—and I hope he never will be allowed to succeed—unless he can show some serious question of principle in which the judge in the leave he has given has made a material error. To say that this court

[CT. OF APP.]

Re SALAMAN.

[CT. OF APP.]

is to be asked to look through the interrogatories which the learned judge of first instance has allowed, and to see whether this, that, or the other part of an interrogatory has been properly allowed or not is, to my mind, a total mistake as to the functions of the Court of Appeal. On the interrogatories being allowed by the learned judge, he allows them subject to the rules of the court, and one of the rules of the court which is not abolished by the new rules of Nov. 1893 is rule 6 of Order XXXI., to which my brother Lopes has referred. That rule enables everybody who has to answer interrogatories to raise any objection which he may think proper to raise and to decline to answer. Then for the first time the learned judge will have to consider whether the objection is good or not. The allowance of an interrogatory by a judge, although he goes through the interrogatory and strikes out part and allows other parts to remain, means no more than this: "I allow these interrogatories, subject to any objection which the person to whom they are addressed may have a right to make, that objection to answer being pointed out by Order XXXI., r. 6, and, notwithstanding my allowance, he may make the objection just as though I had not allowed it." The judge has given leave merely to administer interrogatories, and that does not mean, in my opinion, in the least degree that he has prejudged the question whether interrogatories ought to be answered or not. I confess I think that this kind of appeal should be discouraged in every way possible, and that this appeal is utterly wrong, and must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Paines, Blyth, and Huxtable.*

Solicitors for the respondent, *Druces and Attles.*

Wednesday, March 4.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re SALAMAN. (a)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Costs—Taxation—Several retainers by co-plaintiffs in action—Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 37.

Where the retainer of a solicitor is a several retainer by a number of persons, each is entitled to have the whole bill of costs taxed, although each has only to pay a proportion of the entire amount. And there is an absolute right to have the bill taxed without serving anyone except the solicitor.

Re Colquhoun (5 De G. M. & G. 35) followed.

Thirty-four persons gave separate retainers to a solicitor to take proceedings to cause their names to be removed from the register of shareholders of a company, on the ground of misrepresentations contained in its prospectus. The arrangement was that they should contribute to the costs in proportion to the number of shares they respectively held in the company. After the litigation had ended some of the thirty-four persons applied to have the solicitor's bill of costs taxed. Kekewich, J. made an order for taxation, but directed that not to be drawn up till evidence was produced that the applicants had communicated with all

the other of the thirty-four parties, and they were made respondents to the summons or were shown to desire to take no further part in the matter. The applicants endeavoured to comply with this direction, but some of the parties could not be found. Kekewich, J. thereupon dismissed the summons. The applicants appealed.

Held, that the strict right of the applicants was to have the bill taxed without serving anyone except the solicitor, but that Kekewich, J. was quite right in endeavouring to secure a taxation at which all parties were present, so that there could not be any subsequent application to tax by another party.

But held, that Kekewich, J. was wrong in dismissing the summons when it was found impracticable to communicate with the other parties; and that an order for taxation must be made. The applicants submitting to pay what should appear to be due from them respectively.

APPEAL from a decision of Kekewich, J.

The facts of the case sufficiently appear from the head-note and judgments.

The summons came on to be heard before Kekewich, J. on the 28th March 1893, when the following judgment was delivered:

KEKEWICH, J.—Mr. Warmington has argued that the submission to pay must be equivalent to, or the counterpart of, the legal liability; and with that I entirely agree. One's duty therefore is, first to ascertain what the legal liability is. The retainers in the first instance were undoubtedly separate. I have listened to an argument, supported by references to several cases, that I ought now to consider that, notwithstanding that fact, there was ultimately a joint retainer, and that the applicants necessarily come before me on that footing. To my mind, the affidavit of the solicitor himself is a sufficient answer to that. Mr. Salaman states in the second paragraph of his affidavit, filed on the 2nd Aug. 1892, that "he was separately retained by the alleged applicants." The "alleged applicants" there mean those who were supposed to be applicants for shares in the company in question. He then sets out the history of what occurred afterwards; and what happened was this: There being a large number of persons, it occurred to them, or perhaps more strictly to Mr. Salaman, their solicitor, that there would be an advantage in having a committee with whom he might communicate and who would act on behalf of all. And having obtained the assent of his clients in a large measure to that proposal, he further obtained a letter from them authorising the committee to act, and, amongst other things, to instruct him. The letter was well advised and well framed. It was desirable that there should be a document of that character to bind all parties, and it seems to me to have expressed exactly what was intended. The date of that letter was, I suppose, the 6th Nov. 1889, as it was inclosed in a letter of that date. It runs thus: "I appoint you and each of you"—that is, the committee—"to act on my behalf in any proceedings against the above company in which I have retained Mr. Ernest Salaman as my solicitor, and I hereby authorise you to instruct him on my behalf as you may be advised, and I agree to conform to and to be bound by what you may instruct him to do, and this shall be an authority to Mr. Salaman to take your instruc-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

tions on my behalf. I also agree, as between myself and the other allottees for whom Mr. Salaman is acting, to bear and pay my share of the whole costs and expenses in proportion to the number of shares held by me." It would be possible to construe that letter grammatically as meaning that as regards every one of the persons signing it the committee were to act on that person's behalf, and to instruct Mr. Salaman to incur whatever expenses were thought necessary. The last sentence seems to indicate that the distribution of the costs was to be between each individual signatory and the other allottees of shares, from which might possibly be drawn the inference that, as between each signatory and Mr. Salaman, each signatory was to be liable for the whole of the costs. But that, to my mind, would be entirely against the tenor of the whole proceedings, and I think also against the honour of Mr. Salaman. To suggest that by the grammatical phrasing of a letter of that kind, which was only written for the more convenient despatch of legal business, he intended to convert a separate retainer into a joint retainer would be doing injustice to a solicitor against whom not a word has been attempted to be said in these proceedings. He was the separate solicitor of those different clients, and, though there was a joint transaction in which they were all interested, I take it that he never intended and never desired to alter the relations. At the end of his judgment Bacon, V.C., in the case which has been cited of *Re Allen; Davies v. Chatwood* (40 L. T. Rep. N. S., 187; 11 Ch. Div. 244, 249), puts the contract in the case before him in terse and intelligible language. He says this: "It is a joint retainer to this extent. 'We'—he professes to speak in the name of the clients—'together undertake to pay you, but not that any one of us will pay you all; we jointly contract with you and with ourselves that we will pay you the whole amount of your charges.'" Although that letter which I have read was not written to Mr. Salaman nor signed by Mr. Salaman, he was in a larger sense a party to it and to the contract which was thereby made; and the contract, I hold, was of the character which Bacon, V.C. states in the words which I have just referred to. Therefore, I think that from the beginning to the end there was a separate retainer. The result would be that, according to the practice of the court and as laid down by the taxing master's certificate in *Re Colquhoun* (5 De G. M. & G. 35), and to be found elsewhere in many cases, the liability of each of those gentlemen is this: He is liable to pay all costs incurred on his behalf as a separate client, that is, anything which distinguishes his case from others, as, for instance, where compromises were entered into, the particular agreement of compromise which related to him, and in which others were not concerned, and, if two or three were grouped together, his proportion of that smaller section of the whole bill. He is also liable to pay his share of the whole bill. What is that share? According to *Re Colquhoun* (*ubi sup.*) and the general practice, the way of ascertaining the share would be to ascertain how many persons are, in the sense I have mentioned, jointly liable for the whole, and then to make each of them liable severally for a proportion exactly estimated according to the number of persons. That is to say, if there are five persons, each is liable for a

fifth. But here the contract is special as regards that; and they are to bear their share of the whole costs—that is the general costs—in proportion to the number of shares held by them in the company. That seems to me at the same time to introduce a great difficulty, though no doubt it also renders it easy to make a declaration which would enable one to give effect to it subject to remarks I have yet to make. It appears from Mr. Salaman's affidavit that various contributions were received from time to time from the alleged applicants. All that is matter for inquiry. To my mind it would be necessary on such an application as this to ascertain what is each applicant's liability; to find out how much he has paid; to determine, if possible, how that payment by him ought to be borne as regards the others. For that purpose it might probably be necessary to direct certain inquiries to be taken before the chief clerk, and in the end to direct taxation not for the purpose of settling those questions which the taxing masters are perfectly competent to settle, though not coming within their ordinary duties, but so that the taxation may be conducted on ascertained principles. My present impression is that, in order to do that properly, I must have the other parties before the court; that is to say, the parties who are at least as much interested in the result, though they do not desire taxation, as the present applicants who do desire taxation. And I think I must have some proof either before me or by an inquiry in chambers, what the different shares of these applicants are, and what sums they have paid. I can conceive the registrar finding it extremely difficult to give any usual directions respecting the application of the money received. I am not prepared to make an order which would refer the matter to the taxing master in order that he may in due course send it back to me. I do not think that that is the way in which to treat a matter of this kind. Remembering that the sum of 2700*l.* has already been paid, and that 3000*l.* more is now claimed, it is a large matter, and if it is to be dealt with at all it must be dealt with properly. Therefore I must give Mr. Eady the option of either taking a refusal of the summons, if he thinks that will be of any advantage to him, or of its standing over in order that he may amend and bring before me an application for a proper order. The order which he now asks me to make ought not, I think for the reasons I have advanced, to be made.

The matter having stood over in accordance with the above direction of the learned judge, it came on again before him on the 20th Dec. 1893, when the following judgment was delivered:

KEKEWICH, J.—Messrs. Salaman are, as regards this bill, in a position of some little embarrassment. I say this bill advisedly and distinctly, because I put out of the question altogether the small separate bills of business done for some few of the applicants separately. I speak of the one big bill in court on behalf of the syndicate or the committee, with regard to which I have held that there is a separate retainer by the different applicants and others who were formal parties to the summons. In the first place, they do not know, if there is to be a distribution of liability, exactly what they are to recover from each particular client. The liability may vary. There may be different shares held at

CT. OF APP.]

Re SALAMAN.

[CT. OF APP.]

different times. That, perhaps, is a small matter. The much more important matter is this: These gentlemen, or some of them, seem from time to time to have made payments to Messrs. Salaman, and it is very important now to know who made the payments, and to what amount, because, when you have found out the liability on the bill for any one of the applicants, you have to deduct from the amount of that liability, the amount for which he is to have credit, and his ultimate liability depends entirely upon the simple arithmetic of deducting the credit from the debt. How is that to be done? That can be done for aught I know without much difficulty as between any of them. But how about those who are away? Here are a certain number of gentlemen who say they do not desire to tax, and do not want to do anything in the matter. They have not assented to this order; they are not here. So far as I am aware they have never been told what the order was to be. The summons does show what it was proposed to be, but the summons does not show that the order is to be in this form. It asks for a reference to the taxing master to tax, and then, that all usual directions may be given touching such taxation. That certainly would not include—at least, I cannot conceive that anybody ought to be held to think that it would include—an inquiry as to what is due and what is the payment to be made by the several persons separately on account of their separate liability. That might possibly be got over by the form of the minutes which now contain directions. Let the solicitors give credit for all sums received from or on account of the applicants respectively, or for which the applicants respectively are entitled to credit, and it might be possible to get over that by giving these gentlemen, who say that they do not desire anything more, notice of the order, saying they may have time to object to it or anything of that kind. Probably under that direction the inquiry which I have mentioned would be carried on, and possibly that inquiry might, notwithstanding what I have said on the former occasion, be conveniently conducted before the taxing master. I thought not then. I am not satisfied now that a preliminary inquiry would not be better and fairer than to make a double process, which, of course, would increase the cost as well as cause delay, which has already been excessive. I see some reasons for thinking that I was a little bit hasty in saying that the inquiry could not be conducted before the taxing master. But how about those gentlemen who have not been served at all? There are several of them outside, and as regards each one of those, when this taxation is complete, Messrs. Salaman will be in the position of being liable to a fresh taxation by them (on special grounds of course) with a further inquiry what sums had been paid by them. Therefore, Messrs. Salaman having accepted, we will say, 100*l.* less 10 per cent., may find that they are obliged to accept also from one of these absent parties 100*l.* less, say, 10 per cent. In other words, they will be 10*l.* out of pocket. It seems to me that solicitors ought not to be put in that position. Their bargain was on separate retainers to conduct this business, and to make one bill. Nobody has found fault with that, and it is not suggested that there is not one proper bill. Their right is to have that one bill taxed, so as to bind every person who is liable

to them, and as against whom they are bound to give credit. And unless I can make an order which will put them in that position, so that when the whole thing is over the papers will be tied up and the matter settled. I do not think that I ought to make an order at all. I do not think that they have been very fairly treated in the delay. I do not say that there has been any want of good faith. But, on the ground I have just mentioned, I think it would be very unfair to the solicitors to make any order on this application at all. Mr. Warmington's offer is a proper offer. He asks that the refusal of an order on this summons should be without prejudice to any application which the applicants or any of them may be advised to make, and that he will not take the objection (I suppose within a reasonable time) that the application is out of time. I think that that is a fair concession from the solicitors, and one that they ought to make and do make. But subject to that, I think that the proper order to make now is that there shall be no order on this summons except that the applicants do pay the costs.

From that decision the applicants now appealed.

Swinfen Eady, Q.C. (*Gatey* with him) for the appellants.—No substantial answer can be raised to the application to tax the bill of costs in this case, the right to do which is undoubted:

Re Colquhoun, 5 De G. M. & G. 35;

Re Allen; *Davies v. Chatwood*, 40 L. T. Rep. N. S. 187; 11 Ch. Div. 244;

Burridge v. Bellew, 32 L. T. Rep. N. S. 807.

George White for the respondent.—I am not concerned to dispute the law in this case. [KAY, L.J.—That seems clear from the decision in *Re Colquhoun* (*ubi sup.*).] But I say that, if there is to be a taxation, let it be such as may do justice not only to the appellants, but to the respondent also. If the court thinks that the order for taxation should be made at all, I submit that it should be made in an amended form. An order to tax a solicitor's bill incurred by a number of persons, obtained on the application of only some of them, is irregular:

Re Iderton, 33 Beav. 201;

Re Hair, 10 Beav. 117.

No reply was called for.

LINDLEY, L.J.—I think that this is a case in which Kekewich, J. has gone too far. Here we have thirty-four gentlemen who had a claim against a company for misrepresentation. They might have brought thirty-four separate actions against the company; but they naturally combined together and brought a test action. They made arrangements with a solicitor to conduct the action for them all, agreeing to be responsible to him for the aggregate costs, but only proportionately to their shares, and they gave him a retainer expressed in such a form as to be not a joint but a series of separate retainers, each undertaking to pay his share. When that was done a committee was appointed to give instructions to the solicitor, and certain calls were made to meet the costs, amounting to 16*s.* 6*d.* per share. Now, one of these gentlemen says, "I want the solicitor's bill taxed." What is his strict right? It is no doubt to have the whole bill taxed; nor is he bound to serve anybody except the solicitor. It follows that each of the thirty-

four persons would have the right to have the bill taxed. That would be a circuitous and somewhat cumbrous proceeding. How then is the court to deal with the matter? The bill should be directed to be taxed, and so far as possible all the other gentlemen served. Kekewich, J. endeavoured to do this, and to that extent he was right. He made the order for taxation, but directed it not to be drawn up till evidence was produced that the applicants had communicated with all the others of the thirty-four persons, and they were made respondents to the summons, or were shown to desire to take no further part in the matter. The applicants endeavoured to comply with the order, but were unable to succeed in serving everybody, as some could not be found. Kekewich, J. thereupon dismissed the summons. Now, there he was wrong; he exceeded his jurisdiction. He ought not to have dismissed the application altogether because certain desirable terms could not be complied with. Accordingly, it appears to me that this appeal was necessary, and must be allowed. An order must be made for taxation, the appellants submitting to pay what shall appear to be due from them respectively. I think that the solicitor ought to pay the costs of this appeal, but no other costs.

KAY, L.J.—I agree. Out of respect for Kekewich, J. I will give my reasons for so doing. I agree with the learned judge in the court below that the order for taxation should be made with reference to this agreement that the parties should pay in proportion to their shares. In the case of *Re Colquhoun* (5 De G. M. & G. 35) it is expressly stated that, where the retainer is a several retainer by a number of persons, each person is entitled to taxation and may have the whole bill taxed, although he has only to pay a proportion of it. In this case, then, I agree that each has strictly a right to have the whole bill taxed without serving any of the others except the solicitor, in which event there would of course be a chance of having another taxation by each of the remaining persons. But any court would see that it would be best, if possible, to obviate the chance of other taxations. Kekewich, J. did his best to avoid this, and to get all the parties before the taxing master and to have them all served. But where I differ from him is in this, that when it was found impracticable to serve all—for at least three of the parties could not be discovered—he dismissed the application with costs without considering the position of the persons applying. Each of those persons had an absolute right to have the bill taxed. If it was found that everybody could not be served without incurring a good deal of expense, it was the duty of the court to say, "Well if anybody else does come in he shall be served." But Kekewich, J.'s decision does absolute injustice. To say that the solicitor is to escape taxation of his bill because all the other parties cannot be served is erroneous. The taxation must take place. In such a case as this the court must do the best it can under the circumstances. I agree with the order made by Lindley, L.J., and also as to the costs, for the solicitor was not in fault up to the time of appealing.

SMITH, L.J.—I agree. I have nothing to add.

Appeal allowed.

Solicitors: for the appellants, *Morley, Shirreff, and Co.*; for the respondent, *Ernest Salaman, Fort, and Co.*

May 8 and 9.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

MELLIN v. WHITE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Defamation—Rival traders—Proprietary article—Advertisement—Trade libel—Injunction.

The plaintiff was the proprietor and manufacturer of the food known as "Mellin's Infants' Food," which he supplied wholesale to the trade. The defendant was a chemist and the proprietor of "Dr. Vance's Food for Infants and Invalids." The defendant was a customer of the plaintiff, and was in the habit of affixing to the wrappers in which the plaintiff's goods were sold the following label: "Notice.—The public are recommended to try 'Dr. Vance's Prepared Food for Infants and Invalids,' it being far more nutritious and healthful than any other preparation yet offered." The plaintiff alleged that the statement in the label was made with the object of depreciating his food, and inducing the public to believe that his food was inferior to that of the defendant; and the plaintiff claimed an injunction to restrain the defendant from selling or offering for sale the plaintiff's food otherwise than under the original wrappers, and from selling or offering for sale such food under the plaintiff's wrappers with any unauthorised additions thereto or alterations thereof.

It was decided by Romer, J. that the plaintiff was not entitled to relief; that although what the defendant had been doing was no doubt most annoying to the plaintiff, it could not be said to amount to a trade libel, but was merely the puff of a rival trader; and that therefore the action must be dismissed with costs. On appeal:

Held, that Romer, J. had gone too far in giving judgment for the defendant on the materials laid before him, for, if it should be proved that the statement in the defendant's notice was false, and that the disparagement therein of the plaintiff's food caused damage to or was calculated to injure him, then an action would lie.

Held, therefore, that the order made by Romer, J. must be discharged; and that there must be a new trial.

THE plaintiff, Gustav Mellin, was the manufacturer and proprietor of Mellin's Infants' Food, which has been before the public for many years as a food for infants. The food was sold wholesale by the plaintiff. Timothy White, the defendant, was a chemist carrying on business at Portsmouth, and having branches of his business in several places in the neighbourhood, and the plaintiff had for six years past been supplying him with the said food at the prices charged to the trade. About the 25th July 1893 the plaintiff discovered that the defendant was in the habit of affixing to the wrappers in which the plaintiff's food was sold a label advertisement of Dr. Vance's prepared food for infants, of which the defendant himself was the proprietor. The following is a copy of the label advertisement:

Notice.—The public are recommended to try "Dr. Vance's Prepared Food for Infants and Invalids," it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing

(a) Reported by R. H. DEANE and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

CT. OF APP.]

MELLIN v. WHITE.

[CT. OF APP.]

1lb. net weight, at 7½d. each, or in 7lb. packets 3s. 9d. each. Local agent: Timothy White, Chemist, Portsmouth.

On the 29th July 1893 the plaintiff commenced this action for an injunction to restrain the defendant from selling or offering for sale the plaintiff's food otherwise than under the original labels and wrappers, and from selling or offering for sale such food under the plaintiff's labels or wrappers with any unauthorised additions thereto or alterations thereof, and from untruly representing to purchasers that the plaintiff's food was less nutritious or healthful than Dr. Vance's; for damages, and for other relief.

The case was heard before Romer, J. on the 3rd April 1894.

Moulton, Q.C. and A. à B. Terrell for the plaintiff.—By putting this label on to Mellin's Food, the defendant in effect states that it is inferior to Vance's, which is not only absolutely false, but a gross reversal of the truth made *malâ fide*, and calculated to injure the plaintiff's trade. There is an implied contract in the course of dealing not to alter the wrappers or labels except by adding the retailer's name and address. The defendant's statement is both untrue and injurious to the plaintiff, and the defendant adheres to that statement in his defence, and says it is true. The plaintiff is entitled to an injunction against the defendant. The fact that it is difficult to prove the falsity of this sort of statement ought not to deprive us of our right to relief, if we do prove it.

Sir E. Clarke, Q.C., Neville, Q.C., and Charles Macnaghten for the defendant.

ROMER, J.—I have no doubt that the conduct complained of in this case has been very irritating to the plaintiff, but I think what the defendant has done has not given the plaintiff a right to obtain an injunction. The plaintiff has sought to make out a case against the defendant in one of two ways. In the first place, it is said on behalf of the plaintiff that there was some implied contract on the part of the defendant when he bought the plaintiff's food that he should not retail it except in the exact form in which it was sold to him, or at any rate that he would only retail it with the addition of the defendant's name and address, and that there was an implied contract on the defendant's part, at any rate to the extent that he should not retail the plaintiff's food with any such label as that which was put on by the defendant, and which is complained of in this action. All I need say is, that that part of the case wholly broke down. No such implied contract was proved, or could be heard of for a moment, or be said to exist. The second case is this: It is said that what the defendant has done has amounted to publication of a trade libel upon the plaintiff. Well, as I have said, I have no doubt that what the defendant has done has been very annoying to the plaintiff. But as a matter of fact, I think any ordinary human being reading this label that the defendant has put on would come to the conclusion that it was a puff of Vance's food, and nothing more; and it is noticeable in the present case that the plaintiff has not attempted to bring any evidence to show that any person would for a moment read or understand it in any other light. Therefore what I do is to dismiss the action.

From that decision the plaintiff now appealed.

Moulton, Q.C. and A. à Beckett Terrell for the appellant.—We submit that we are entitled to a new trial on the principle established by

The Western Counties Manure Company v. The Lawes Chemical Manure Company, L. Rep. 9 Ex. 218, 222;

Thomas v. Williams, 43 L. T. Rep. N. S. 91; 14 Ch. Div. 864.

[*LOPES, L.J.*—In *Ratcliffe v. Evans* (66 L. T. Rep. N. S. 794; (1892) 2 Q. B. 524) it was held by the Court of Appeal that in an action for words not actionable *per se*, but constituting an untrue statement maliciously published about the plaintiff's business, which statement was intended or reasonably likely to produce, and in the ordinary course of things did produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business was admissible and sufficient to support the action.]

Neville, Q.C. and Macnaghten for the respondent.

Moulton, Q.C. replied.

LINDLEY, L.J.—I think in this case that the learned judge has gone a little too far in giving judgment for the defendant upon the materials which were laid before him. It appears to me that he proceeded upon the basis that, even if the plaintiff's evidence stood uncontradicted, this action could not in point of law be sustained. I think that that is going a little too far. It appears to me that the defendant has brought upon himself a new form of attack by adopting a new mode of carrying on business. Nobody, in this court at all events, has ever seen or heard of a tradesman selling goods such as Mellin's food sold by Mellin in bottles with his label, and putting on to them a label which disparages the thing contained in the bottle. It is quite a new idea. I do not say it is illegal; I do not say it is overstepping the mark. But I do say this, that the learned judge has been a little too quick, and if upon hearing the whole of the evidence advanced before him the result should be that the statement contained in the label complained of is a false statement concerning the plaintiff's goods, and that the disparagement of them in that statement has caused damage to, or is calculated to injure the plaintiff, this action will lie. Now, the facts have not been ascertained. The law applicable to the case is, I think, to be found in *The Western Counties Manure Company v. The Lawes Chemical Manure Company* (*ubi sup.*) and in *Thomas v. Williams* (*ubi sup.*), to which may be added *Ratcliffe v. Evans* (*ubi sup.*). And it is having regard to those decisions that I have enunciated the proposition that if those two facts are found in the plaintiff's favour an action for an injunction will lie. Under these circumstances, what we propose to do is this: We must discharge the order and direct a new trial.

LOPES, L.J.—All I desire to say is, that in my opinion it is actionable to publish maliciously, without lawful occasion, a false statement disparaging the goods of another person and causing such other person damage, or in circumstances likely to cause such other person damage. I think, provided that can be made out, an action for an injunction will lie. All these matters, as far as

CT. OF APP.]

Re HOLFORD; HOLFORD v. HOLFORD.

[CT. OF APP.]

we know at the present moment, are undecided. They have not been proved. The evidence has only been heard upon one side; and, whether or not that statement is false we are not in a position to say. Evidence was given on the part of the plaintiff, but no evidence was given on the part of the defendant. For anything I know the defendant may be able to show that the evidence which was given for the plaintiff was incorrect, and that no false statement has been made at all. Then there is the question of disparaging the goods of the plaintiff. That is a question which will have to be considered. Then there is the further question as to what are the consequences provided a false statement has been made; and if there is a statement disparaging the goods of the plaintiff what the effect of that will be upon the plaintiff's goods. As I have already said, I think in order to maintain an action at common law actual damage must be made out. But it is not necessary to show that in an action for an injunction. It is sufficient to show that what has been done is likely to produce damage. It has been suggested that there is nothing in this case calculated to make out that damage is likely to result. That matter will have to be considered, but it does appear to me that putting this statement upon Mellin's goods is at any rate raising a question well worthy of consideration as to whether or not damage may not be inferred. I think, therefore, there should be a new trial.

KAY, L.J. concurred.

Appeal allowed.

Solicitors for the appellant, *Eldred and Bignold*.
Solicitor for the respondent, *A. W. Mills*, agent
for *Cousins and Burbridge*, Portsmouth.

May 1, 2, and 28.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re HOLFORD; HOLFORD v. HOLFORD. (a)

APPEAL FROM THE CHANCERY DIVISION.

Infants — Contingent interest — Maintenance — Intermediate income — Conveyancing, &c., Act 1881 (44 & 45 Vict. c. 41), s. 43.

A testator, who died in July 1888, by his will dated in that year gave his residuary estate, consisting of a mixed fund comprising the proceeds of sale of real estate and of personal estate, to trustees upon trust for the child or children of T. H. living at his (the testator's) decease, and who should attain the age of twenty-one years, in equal shares if more than one, and if but one the whole to be in trust for that one child. The will contained no maintenance clause.

At the testator's death there were living six children of T. H., who were all infants. One daughter had recently come of age and had settled her interest under the will.

The income of the residuary estate was very large, and the accumulations of income during the period which had elapsed between the death of the testator and the time when the eldest daughter came of age, and not expended in maintenance, amounted to about 40,000l.

The daughter and her trustees claimed to be entitled to her sixth share of the original residuary estate, and of the fund accumulated during her minority;

also to the whole of the income of the residuary estate accruing from the time she came of age until the next child came of age, and from that time to one half of the same income until another child came of age, and so on until the youngest child attained its majority and to the income of the accumulated fund in the same manner.

Held (affirming the decision of Chitty, J., ante, p. 482), that the daughter was entitled to receive her one-sixth share of the original capital and of the accumulated fund and income down to the time of her taking a vested interest; but that she was not entitled to receive the income of the remaining five-sixths of the original capital and accumulated fund during the suspense of vesting, such income being applicable during the suspense to the maintenance of the infants.

Re Jeffery; Burt v. Arnold (64 L. T. Rep. N. S. 622; (1891) 1 Ch. 671) and Re Adams; Adams v. Adams (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329) overruled.

APPEAL from a decision of Chitty, J. (ante, p. 482).

Byrne, Q.C. and G. P. C. Lawrence for the appellant.

Farwell, Q.C. and Davenport; Cunliffe and H. F. Wilson for the respondents.

The arguments adduced in the court below were substantially repeated, and the authorities cited in support thereof were again referred to.

Cur. adv. vult.

May 28.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal from an order of Chitty, J., declaring that the trustees of a residuary estate, contingently given to six infants, one of whom (a daughter) has attained twenty-one, are entitled to apply five-sixths of the income of that estate to the maintenance of her five brothers and sisters, who are still infants. [His Lordship read the will and stated the facts, and continued:] The order appealed from appeared so manifestly right that I confess that I was surprised to find it made the subject of an appeal. It must be remembered that the income of a residuary personal estate, or of a residuary fund arising from the proceeds of the sale of real and personal estate, is regarded as accessory to the capital, and belongs to those to whom the residue is bequeathed: (see *Genery v. Fitzgerald*, Jac. 468; and *Countess of Bective v. Hodgson*, 10 H. of L. Cas. 656.) The income of such a residue belongs to the legatees thereof absolutely or contingently, according to the terms of the residuary gift. The case which has to be dealt with may therefore be put thus: A testator bequeaths property, and the income of it, to such of the six children of A. as shall attain twenty-one, and it is contended that as soon as one of them attains twenty-one he or she is entitled to the whole income until another of them attains twenty-one, and that then those two are entitled to the whole income until another attains twenty-one, and so on. This most extraordinary contention is not based on the intention of the testator, and is obviously opposed to that intention. But it is said that there is a series of decisions which compel the court to defeat that intention and to do a manifest injustice to the younger children. It is sought to make the injustice palatable to

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

Re HOLFORD; HOLFORD v. HOLFORD.

[CT. OF APP.]

trained lawyers by wrapping it up in technical language, and by bringing out the desired result as the logical conclusion from premises too well settled to be open to controversy. I confess that, when it is sought to drive me to a conclusion which appears to me unreasonable and unjust, I at once suspect the validity of the premises, even if I can detect no flaw in the reasoning from them. The argument for the appellant is based on the assertion that, in the case of such a gift as I have mentioned, each child as he attains twenty-one acquires a vested interest in the whole fund, subject to be divested by other children attaining twenty-one, and that the first child who attains twenty-one is entitled to the whole income of the fund until some other child attains twenty-one and thereby acquires a similarly vested interest. But upon what principle a child who attains twenty-one acquires, as between himself and his brothers and sisters, a vested interest in more than one-sixth of the fund is to me quite unintelligible. The fund is given to all the children alike; as each attains twenty-one he becomes absolutely entitled to one-sixth; he and the other children are still contingently entitled to the remaining unvested shares, but no child who has attained twenty-one is entitled to a vested interest in more than one-sixth until his share is increased by the death of one or more of the other children under twenty-one. This is as true of the income as of the capital, and is in accordance with common sense and justice, and is, moreover, warranted by *Hawkins v. Combe* (1 Bro. C. C. 335) and *Brandon v. Aston* (2 Y. & C. Ch. 24), which last case is undistinguishable in any material respect from the present. The principal authorities relied upon by the appellant are *Shepherd v. Ingram* (Amb. 448); *Mills v. Norris* (5 Ves. 335); and *Scott v. Scarborough* (1 Beav. 154). But, when those cases are looked at, it will be seen that not one of them decides the rights *inter se* of the existing members of a class of persons contingently entitled to property. *Shepherd v. Ingram* (*ubi sup.*) was a decision on the rights of such a class of persons on the one hand, and other persons not included in that class on the other; it turned on the effect of a contingent gift to a class, and of a gift over in the event of no one of the class attaining an absolute interest. But in this case we have no concern with anyone who is not a member of the class to whom the gift is made. That class cannot now wholly fail, for one child has attained twenty-one, and, if all the other members of the class die under twenty-one, the child who has attained twenty-one will take the whole fund absolutely. There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income, in which other persons belonging to the same class have already a contingent interest which may become absolute. In *Mills v. Norris* (*ubi sup.*) and *Scott v. Scarborough* (*ubi sup.*) the question for decision was whether some members of a class were entitled to the income of property given to them and others of the same class who were not yet born, and the answer was yes. The decision was obviously reasonable and just. To treat the future possible rights of unborn persons as existing rights, even if only contingent, would

have been to depart from sound principles for no sufficient justification. The other older cases cited by the appellant are open to similar observations, or present still less difficulty. *Re Jeffery* (64 L. T. Rep. N. S. 622; (1891) 1 Ch. 671), decided by North, J., proceeded, in my opinion, upon a misconception of the cases to which I have alluded, and cannot be supported. *Furneaux v. Rucker* (W. N. 1879, p. 135), referred to by North, J. in *Re Jeffery* (*ubi sup.*), and again more fully in *Re Adams* (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329), presents some difficulty, but it was not a case of a residue, and I do not know enough about it to adopt it as an authority for departing from the principle on which *Hawkins v. Combe* (*ubi sup.*) and *Brandon v. Aston* (*ubi sup.*) were decided. I come, therefore, to the conclusion that the infant children are contingently entitled to five-sixths of the residue with which we have to deal, and that neither the whole capital nor the whole income of that residue is during their minority vested in or payable to the child who has attained twenty-one. If this be so, it is plain that the Conveyancing Act 1881, sect. 43, authorises the trustees to apply the infants' contingent shares of income towards their maintenance. [His Lordship read the section, and continued:] It is true that, if all members of the class had died under twenty-one, there would have been an intestacy, and the next of kin would have taken the residue, but, notwithstanding that possibility, the Act authorises the application of the income towards the maintenance of the members of the class whilst all are under age. This was decided, and quite rightly, in *Re Adams* (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329). So although, if those children who are still under age should die under twenty-one, the child who has attained twenty-one will take their shares, still the Act authorises the application for their maintenance of the income of their contingent shares, for that income contingently belongs to them. This conclusion is perfectly consistent with the decision of this court in *Re Dickson* (52 L. T. Rep. N. S. 707; 29 Ch. Div. 331), for the interest on the legacy there in question did not follow the legacy before it became vested, but was payable to persons other than the legatee. The court held that sect. 43 did not authorise the maintenance of an infant out of income which did not, and never could, belong to him, but the Act was clearly intended to authorise, and does authorise, his maintenance out of income which will become his if he lives long enough to acquire a vested interest in the property from which the income arises. If the contention of the appellant were sound, it would follow that although, whilst all the children were under age, all might have been maintained out of the income of this residue, yet that, as soon as one of them attained twenty-one, he became entitled to the whole income, and none of it could be applied to the maintenance of his brothers and sisters. They would be left to the charity of their relations or to the poorhouse. I cannot construe the will or the Act so as to bring about so monstrous a result. The decision appealed from is quite correct, and the appeal must be dismissed with costs.

LOPES, L.J. concurred.

KAY, L.J.—A difference of opinion has arisen concerning the construction and effect of a gift

[CT. OF APP.]

Re HOLFORD; *HOLFORD v. HOLFORD.*

[CT. OF APP.]

by will of residue to such of the children of A. living at the testator's death as shall attain twenty-one. At the testator's death the maximum number to take are ascertained, and the question is whether the first who attains twenty-one takes all the income subject to admitting others to share as they respectively attain that age, or whether he should only have a share of such income according to the number of individuals living who, if they attain twenty-one, will acquire vested interests. None of the older authorities is exactly in point. But there are cases where the gift was in effect to all the children who may be born to A. in his lifetime. Where A. at the testator's death has only one child, there is authority for giving all the income to that child until another is born. The difference is obvious. There is no possibility of saying what is the least share to which the existing child is entitled, and therefore the alternative is to give him all or nothing. The words of the will in this case, which we have to construe, are a gift of the residue of the proceeds of the testator's real and personal estate after payment of debts and legacies, "Upon trust to pay and divide the same unto and among the child or all and every the children of the said Thomas Holford who shall be living at the time of my decease, and who shall attain the age of twenty-one years, in equal shares if more than one. And if there shall be only one such child the whole to be in trust for that one child." Thomas Holford was a brother of the testator. At the testator's death he had six children, all infants. One of these children has now attained twenty-three. The others are still infants. There is no provision for maintenance in the will. It is obvious that the statutes 23 & 24 Vict. c. 145, s. 26, and the Conveyancing Act 1881, s. 43, which enlarge the power of giving maintenance in certain cases, cannot affect the construction of the will. The words must be first construed, and then it must be seen whether the case is one in which the statute enables maintenance to be given. The testator was not *in loco parentis* to these legatees. Whichever construction be adopted there would be no power to give maintenance to the infant children independently of the statute. Therefore any argument as to the hardship of adopting one or other construction on the ground that the statute would not apply is entirely out of the question, and very likely to lead to error. To adopt one construction, because in that case the statute would enable maintenance to be provided for the infant children, would be wrong in point of logic and principle. This is a case in which the testator has not provided maintenance out of the income of a contingent share, and if he has given that income to some one other than the infant the statute does not enable the court to take away the income so given in order to maintain the infants: (*Re Dickson*; *Hill v. Grant*, 52 L. T. Rep. N. S. 707; 29 Ch. Div. 331.) The question is whether, upon the true construction of the will independently of the statutes, the testator has given away the intermediate income or not. In *Shepherd v. Ingram* (1764) Amb. 448 there was a gift of the residue of real and personal estate to such child or children as the testator's daughter F. should have as tenants in common. If she left no child there was a gift over. F. married after the testator's death, and had three children, all infants. It was held that

the children took interests which were defeasible, and that the first born took all the income and must share with others as they came into existence. It is clear that the children's interests were not contingent, but vested subject to be divested if all died in their mother's lifetime. This decision was followed in *Mills v. Norris* (5 Ves. 335) and *Scott v. Scarborough* (1 Beav. 154). In *Hawkins v. Combe* (1 Bro. C. C. 335) the testator gave his residuary personal estate to trustees as to one-third to invest, and during the joint lives of his niece and her husband or until one of her children should attain twenty-one, to accumulate the income, and if she survived her husband and had issue under twenty-one, then to pay the interest to her for their maintenance, and on their respectively attaining twenty-one to pay and transfer the capital and all arrears to such children equally. There were two children, one of whom had attained twenty-one. The father and mother were living, and Lord Commissioner Ashurst held that when the eldest came of age the accumulations ceased and the income thenceforward belonged to the two children in equal shares, although the infant's interest in the capital was contingent. In *Brandon v. Aston* (2 Y. & C. Ch. 24, 30), the gift was to such of the children of J. W. as should attain twenty-one, or being daughters marry, in equal shares. There were three children, two of whom had attained twenty-one when their interest came into possession. The Vice-Chancellor allowed to those two the interest of their shares only; the remaining one-third was carried to the contingent account of the infant, and the order was expressed to be without prejudice to the claim of any future born children. This case shows what I apprehend is the true distinction between the two classes of cases which I indicated in the commencement of my judgment. The Vice-Chancellor did not think he could withhold their actual shares of the income from the children who were in existence, because of the possibility that others might be born who might become entitled to share. On the other hand, he did not think it right to give the whole income to the children who had attained twenty-one, and whose shares had vested, so as to deprive an infant who was in existence of his contingent share if he attained twenty-one. This case was cited, and seems to have been followed, in *Rochford v. Hackman* (9 Hare, 475). In *Re Jeffery* (64 L. T. Rep. N. S. 622; (1891) 1 Ch. 671) North, J. seems to treat this case as though it were inconsistent with the previous decisions to which I have referred, but with deference, for the reasons I have given, I do not think it at all at variance. It seems to me to follow those decisions as to unborn members of the class, but to make a distinction as to individuals in existence who if they attain twenty-one will become entitled to share. In *Re Burton* (67 L. T. Rep. N. S. 221; (1892) 2 Ch. 38) Chitty, J. differs from the conclusion of North, J., but, though *Brandon v. Aston* (*ubi sup.*) was cited he does not refer to it in his judgment. The question came again before North, J. in *Re Adams* (68 L. T. Rep. N. S. 376; (1893) 1 Ch. 329), in which, after considering the case of *Re Burton* (*ubi sup.*), he adhered to his former decision, relying upon a case of *Furneaux v. Rucker* (W. N. 1879, p. 135), in which it appears that the late Master of the Rolls, Sir George

CT. OF APP.]

Re LUMLEY; HOOD BARRS v. CATHCART.

[CT. OF APP.]

Jessel, gave all the income of leaseholds specifically devised to a child who had attained twenty-one to the exclusion of other existing children who were infants who might become entitled if they attained twenty-one. The balance of authority as well as reason seems to me to be in favour of holding that the child who first attains twenty-one under such a gift should receive only an aliquot share of the income in proportion to the number of existing children, subject to be increased if any child should die under twenty-one. The income of the contingent shares, independently of the statute, would be accumulated for the benefit of those who may become ultimately entitled to it. To the income of such a contingent share the statute applies. It is obvious that only those who attain twenty-one will become entitled to such income. But the statute nevertheless enables the application of the contingent share of such income for the maintenance of an infant who may never become entitled to any of it, and thus takes away that income from the others who attain twenty-one; and indeed it goes further, and directs the accumulation and capitalisation of any of such contingent income not required for the maintenance of the infants. This is very arbitrary legislation. But it was attempted to carry the operation of the statute further, and to make out that it had the same effect, even where the intermediate income until the legatee attained twenty-one was given by the will to another person. The peculiar wording of the Conveyancing Act 1881, s. 43, differing from Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26, afforded considerable ground for this argument. But a construction so shocking to reason and justice was rejected by the court; and it may now be regarded as settled that where, either expressly or by the true construction of the will, the intermediate income is disposed of, such income cannot be taken away from the person entitled to it in order to maintain an infant only contingently entitled to the capital from which it is derived: (*Re Judkins*, 50 L. T. Rep. N. S. 200; 25 Ch. Div. 743; *Re Dickson*; *Hill v. Grant*, 52 L. T. Rep. N. S. 707; 29 Ch. Div. 331.)

Appeal dismissed.

Solicitors for the appellant, *Sutton, Ommanney, and Randall*.

Solicitors for the respondents, *Cunliffes and Davenport*.

Wednesday, April 11.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

Re LUMLEY; HOOD BARRS v. CATHCART. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Solicitor—Order for payment of costs—Leave to issue writ of sequestration—Four-day order—Rules of Court 1883, Order XLIII., rr. 6, 7.

Under Order XLIII., r. 7, of the Rules of Court 1883, an order giving leave to issue a writ of sequestration forthwith to enforce the payment of costs, no four-day order being necessary, is substituted for the subpoena according to the old Chancery practice, under which payment of costs where no time was fixed was enforced by subpoena, upon proof of service of which and

non-payment a writ of sequestration might issue as of course.

ON the 9th and 21st June and the 19th Oct. 1893 three separate orders were made for payment by Mary Cathcart, wife of J. T. Cathcart, to H. H. Hood Barrs, solicitor, who was the assignee of L. C. Lumley and others, solicitors, of three several sums of 32l. 10s. 4d., 32l. 15s. 4d., and 49l. 15s. 6d., for taxed costs, such sums amounting together to 115l. 1s. 2d.

The order was not obeyed, and upon the application of Hood Barrs for leave to issue a writ of sequestration, North, J., on the 15th Jan. 1894, made an order in chambers directing, that the respondent, Mary Cathcart, should pay to the applicant within four days after service of the order the sum of 115l. 1s. 2d. (being the aggregate amount of taxed costs directed to be paid under the three previous orders); and in default of such payment it was ordered that the applicant should be at liberty to issue a writ of sequestration against the separate estate of the respondent not subject to any restriction against anticipation, unless by reason of sect. 19 of the Married Women's Property Act 1882 the property should be liable to sequestration notwithstanding such restriction.

And it was ordered that it should be referred to the taxing master to tax the costs of the applicant of this application, and that the respondent should within four days after service of the taxing master's certificate pay to the applicant his costs when taxed, and in default of such payment the applicant should be at liberty to issue a writ of sequestration against the respondent's separate property as aforesaid for the same.

On the 2nd March 1894 Mrs. Cathcart moved before North, J. to discharge the order made in chambers on the 15th Jan. 1894, but North, J. refused to do so.

From that decision Mrs. Cathcart now appealed.

The appellant in person.

Swinfen Eady, Q.C. and *H. Terrell* for the respondent.—This order is in the same form as that in

Snow v. Bolton, 44 L. T. Rep. N. S. 571; 17 Ch. Div. 433.

A writ of sequestration can issue without any four-day order at all:

Willcock v. Terrell, 39 L. T. Rep. N. S. 84; 3 Ex. Div. 323.

They also referred to

Hurlbert and Crows v. Cathcart, 70 L. T. Rep. N. S. 558; (1894) 1 Q. B. 244.

LINDLEY, L.J., after reading the order above set out, continued:—Now, on the question of the form of this order, apart from the merits, we are of opinion that the form is obviously wrong. It is not competent to any judge to make an order for sequestration or attachment dependent upon a future uncertain event. He cannot make such an order before the order for payment has been disobeyed. He should make such an order in the exercise of his discretion on the facts brought before him at the time, and to make it conditionally in this manner is not in accordance with the law. If that were all that has to be considered, we should set this order aside; but that is not all. We have made inquiries, and have

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

ascertained how the matter came about. Certain orders were made that Mrs. Cathcart should pay Mr. Hood Barrs certain costs. These costs were not paid. An application was then made to North, J. for leave to issue a writ of sequestration, and he intended to give leave to issue the writ then and there, but, as a matter of concession, to give Mrs. Cathcart four days' grace. Now, the proper way to have effected that would have been to direct that the order should not be drawn up, or should lie in the office for four days; but by an inadvertence this four-day order was engrafted on the order giving leave to issue the writ. Now, the further question arises, had North, J. jurisdiction to give leave to issue the writ forthwith without previously making any four-day order at all limiting the time in which these costs must be paid? Order XLII., r. 6, which provides that "a judgment for the recovery of any property other than land or money may be enforced by a writ for the delivery of the property by a writ of attachment and by writ of sequestration" prohibits the issue of a writ of sequestration for the payment of money. Then Order XLIII., r. 6, provides that "where any person is by any judgment or order directed to pay money into court or do any other act in a limited time and after due service . . . neglects to obey the same . . . the person prosecuting such judgment or order shall at the expiration of the time limited . . . be entitled without obtaining any order for that purpose to issue a writ of sequestration . . . Such writ shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act. . . ." That order only applies to cases where money is directed to be paid in a limited time; it does not apply to the payment of costs. Under the old Chancery procedure the common practice was to issue a subpoena for the payment of costs, not fixing any time for payment, and on proof of service of the subpoena and proof of non-payment the writ would issue. That was all altered by Order XLIII., r. 7, which provides that "No subpoena for the payment of costs and, unless by leave of the court or a judge, no sequestration to enforce such payment shall be issued," and the effect of that is to substitute the leave of a judge for the old subpoena. Now, putting these rules together and considering what was the old practice, it seems to us that the practice since 1883 is right, and that an order for the issue of a writ of sequestration can now be obtained by application to a judge without the necessity of first obtaining a four-day order limiting the time in which payment must be made. We shall not, therefore, discharge this order, but it must be varied by striking out the four-day order, when it will be simply an order giving leave to issue a writ of sequestration. We make no order as to costs, as the order is wrong in form although right in substance.

LOPES, L.J.—The order we have to deal with with reference to costs, and, in my opinion, we have only to consider Order XLIII., r. 7, which abolishes the whole former practice. Under the old practice no time used to be fixed for the payment of costs, and I think that under the new practice no limit of time need now be fixed. Now the leave of the judge is substituted for the old subpoena. On the form of the order North, J.

was wrong; he made an anticipatory order, which he had no power to make, but inquiry shows that he intended to make an order for leave to issue the writ immediately, but to give four days' grace, and I agree that he had power to give leave to issue the writ without further limiting a time for payment. The order though wrong in form is right in substance. I agree that the order must be varied as Lindley, L.J. has said.

KAY, L.J.—I agree, and have nothing to add.

Order varied.

Solicitors for the respondent, *Hood Barrs and Co.*

Tuesday, April 17.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

PAGE v. NORFOLK. (a)

APPEAL FROM THE CHANCERY DIVISION.

Specific performance—Agreement for sale of business, &c.—Stipulation for formal contract—Contract contained in letter—"Subject to a detailed contract to be entered into"—Negotiation.

By a letter, dated the 17th April 1893, and signed by the plaintiffs, they offered the defendants 145,000l. for their business, including "the freehold brewery and premises at Deptford, the forty-six freehold and six leasehold houses enumerated in the list given to us, the book debts amounting to 5000l., and the loan 7800l., and all consumable and rolling stock, fixed and loose plant, horses, drays, carts, and other effects now used in connection with the business." The letter contained the following condition: "This offer is made subject to our approving a detailed contract to be entered into." The letter also mentioned the date for completion, and referred to the payment of the purchase money in cash and preference and debenture stock of a brewery company to be formed. The defendants accepted the terms contained in the letter by signing it. They also had the letter stamped as an agreement. Subsequently they refused to complete. No company was ever formed. An action was brought by the plaintiffs for specific performance.

Held, that the above letter was not a binding contract between the parties, inasmuch as not only was it expressed on the face of it to be made subject to the parties "approving a detailed contract to be entered into," but also because it was evident that various important details were left to be discussed and agreed on—matters that could not be settled without a further document. Held, therefore, that specific performance could not be ordered.

Decision of Romer, J. (ante, p. 23) affirmed.

APPEAL by the plaintiffs from a decision of Romer, J. (ante, p. 23).

Finlay, Q.C. and Neville, Q.C. (W. F. Hamilton with them) for the appellants.—The terms of the agreement are contained in the letter, and reference to the formal contract was made merely for the purpose that such terms should be put into proper legal form. The letter was signed by both parties, and sufficiently fulfils the requirements of the Statute of Frauds. The defendants clearly intended to bind themselves by the letter, which was duly stamped as an agreement. There was

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

therefore a complete and binding contract made by that letter; and the fact that the offer is expressed to have been made subject to the plaintiffs "approving a detailed contract to be entered into" does not make the contract any the less complete:

Bonnewell v. Jenkins, 38 L. T. Rep. N. S. 581; 8 Ch. Div. 70.

The court can accordingly order specific performance of it, the plaintiffs having waived the provision as to the detailed contract, which was solely for their benefit. *Romer, J.* was, we submit, wrong in refusing to hold that the contract must be enforced. The following cases, which no doubt will be relied upon by the other side, are, we say, altogether distinguishable:

Winn v. Bull, 7 Ch. Div. 29;

Hussey v. Horne-Payne, 41 L. T. Rep. N. S. 1; 8 Ch. Div. 670; 4 App. Cas. 311;

Hawkesworth v. Chaffey, 54 L. T. Rep. N. S. 72; 55 L. J. 335, Ch.

The question is, whether the parties were of a contracting mind. An intimation in the written acceptance of a tender that a contract will be afterwards prepared does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language:

Lewis v. Brass, 37 L. T. Rep. N. S. 738; 3 Q. B. Div. 667.

Hopkinson, Q.C. and *George Henderson*, for the respondents, were not called upon to argue.

LINDLEY, L.J.—I do not doubt that the parties in this case thought that they had contracted, because probably they did not know what a binding contract was. [His Lordship stated the facts of the case, and continued:] Now, why is that letter not a contract? At first sight it certainly looks like a contract. It contains an offer and an acceptance. The reason why it is not a contract is this: You cannot read it without seeing that, not only does it stipulate that a detailed contract is to be entered into, but also that various important details are left open to be discussed and settled. There are very important matters indeed to be discussed, agreed on, and settled. The price which was to be paid was settled, and also the date of completion. But the price was not to be wholly paid in cash. It was to be paid partly in preference stock and partly in debenture stock of a company which was to be formed. All those details were left unsettled, and could not be settled then. They were matters that could not be settled without a further document being prepared. That is the cardinal feature of the case. That which the parties had still to do was the essence of the bargain. It is not only because the letter stipulates that the "offer is made subject to our approving a detailed contract to be entered into." The question is, subject to what? The detailed contract was to be entered into not merely for the purpose of formally expressing that which had been already agreed upon, but to embody terms which had not yet been agreed upon. As regards the authorities, there is the well-known case of *Hussey v. Horne-Payne* (41 L. T. Rep. N. S. 1; 8

Ch. Div. 670; 4 App. Cas. 311), where the defendant made an offer by letter to sell an estate to the plaintiff, which offer the plaintiff accepted by letter "subject to the title being approved by my solicitor." It was held that those words were not merely an expression of what would be implied by law, but constituted a new term; that the plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted; and that there was no binding contract. Again, in *Winn v. Bull* (7 Ch. Div. 29) the defendant agreed in writing to take a lease of the plaintiff's house "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties; and it was held that there was no final agreement of which specific performance could be enforced against the defendant. A very similar case was *Hawkesworth v. Chaffey* (54 L. T. Rep. N. S. 72; 55 L. J. 335, Ch.), in which *Winn v. Bull* (*ubi sup.*) was followed. I think, therefore, that the decision of *Romer, J.* was right, and that this appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I do not think that this letter constitutes a binding contract between the parties of which specific performance can be enforced. No doubt some items are settled. But, to my mind, there are a vast number of things to be agreed on and settled which are not touched upon by this contract—matters relating to the brewery company to be formed. There was no company in existence at the date of the letter. A vast number of matters of detail were to be agreed on in regard to that company. Then there are the express words in the contract that the offer is made subject to the plaintiffs approving a detailed contract to be entered into, showing that in the minds of the parties there were matters left open to be discussed. This is a much stronger case than *Winn v. Bull* (*ubi sup.*), where the words were, "subject to the preparation and approval of a formal contract." Having regard to the nature and subject-matter of this contract, to the fact that no company had yet been formed, and to the other circumstances, this appears to me a much stronger case than *Winn v. Bull* (*ubi sup.*). I therefore think that this appeal fails.

KAY, L.J.—Where a contract is made as this is, subject to something to be done subsequently, then *prima facie* that must be done before the contract can be regarded as complete. Here the words are: "This contract is made subject to our approving a detailed contract to be entered into." The contract related to the intended purchase of a brewery business. It was argued that reference to the formal contract was made merely for the purpose that such terms should be put into proper legal form; and, therefore, that it was not a condition which made the contract not a completed one. The condition is, that a detailed contract is to be approved by both parties. The agreement is made subject to the condition that a detailed contract is to be approved. Before both parties could agree on the detailed contract there would be several matters to be discussed and further gone into. In truth, this letter, though signed by both parties, contains no more than the heads of an agreement which were to be discussed and settled by both parties before there would be any concluded agreement. In my opinion, therefore, the

learned judge in the court below was quite right; and consequently this appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Baker, Blaker, and Hawes.*

Solicitors for the respondents, *Benwell and Norfolk.*

April 11, 12, 13, 16, and May 2.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

ALLEN v. ALLEN AND BELL. (a)

APPEAL FROM THE PROBATE DIVISION.

Husband and wife—Divorce—Adultery of wife—Evidence—Denial of charge by co-respondent—Cross-examination of wife by co-respondent.

An application was made by the co-respondent in divorce proceedings instituted by a husband against his wife for judgment or a new trial of the suit as regarded himself. The suit was instituted by the husband on the ground of his wife's adultery with the co-respondent and a person unknown. The co-respondent denied the charge against him. The jury found that the respondent and the co-respondent had been guilty of adultery, and that she had also committed adultery with a man unknown. Sir Francis Jeune accordingly made a decree nisi for the dissolution of the marriage, with costs against the co-respondent. There was no appeal by the respondent.

It appeared that Sir Francis Jeune, in the course of the trial, had refused to allow any cross-examination of the respondent by the counsel for the co-respondent, holding, on the authority of *Glennie v. Glennie* (3 S. & T. 109), that there was no such right; and in his summing up the learned President, in a marked way, contrasted the evidence of the respondent with that of the co-respondent, observing that there was a complete discrepancy between the story told by the respondent and the story told by the co-respondent in two most important points. On appeal:

Held, that it was not right to deal with the evidence of the respondent as admissible against the co-respondent, and the evidence of the co-respondent as admissible against the respondent, without an opportunity being afforded of testing its truthfulness by cross-examination; and that the learned President was wrong in contrasting the evidence as he did after refusing liberty to cross-examine the respondent.

Held, therefore, that there must be a new trial, the costs thereof to abide the event.

Glennie v. Glennie (ubi sup.) questioned.

APPEAL by Bell from a decision of Sir Francis Jeune.

The facts of the case and the arguments of counsel sufficiently appear from the judgment of the Lords Justices.

Murphy, Q.C., Bigham, Q.C. (Bargrave Deane with them) for the appellant; Sir Henry James, Q.C., Sir Edward Clarke, Q.C., Lockwood, Q.C., and Searle for Allen.

Cur. adv. vult.

May 2.—The following written judgment of the court was delivered by

LOPES, L.J.—This was a suit by the husband against his wife for dissolution of the marriage,

on the ground of her adultery with the co-respondent Bell and a person unknown. The adultery relied upon was alleged to have been committed at Ostend and Bruges, in the latter part of July and the early part of August 1892. The charges of adultery at Paris, and all the counter-charges by the respondent against the petitioner were abandoned during the trial. The jury found that the respondent had committed adultery with the co-respondent Bell, and that the co-respondent Bell had committed adultery with the respondent. They also found that the respondent had committed adultery with a person unknown. The President granted a decree nisi, and condemned the co-respondent Bell in the costs incurred on behalf of the petitioner in respect of the charges of adultery proved, staying execution as against the co-respondent Bell. The co-respondent Bell has appealed to this court, asking that the verdict and judgment against him may be set aside, and that judgment may be entered for him on the ground that there was no evidence upon which the jury could reasonably find that he had committed adultery with the respondent; or, alternatively, for a new trial, on the ground (1) that the verdict was against the weight of evidence; (2) that the President misdirected the jury by telling them (a) that there was evidence from which they might infer and find that the co-respondent Bell had committed adultery with the respondent; (b) in omitting to point out to the jury that some of the evidence in the case, which was evidence against the respondent, was not evidence against the co-respondent; (c) in omitting sufficiently to explain the nature and quality of the evidence which would be necessary to support an inference of adultery. The parties were married on the 4th June 1890. The evidence of adultery committed by the respondent with a person unknown, and who could not have been the co-respondent Bell, at Ostend on the 28th and 29th July was clear. There was no direct evidence of any adultery with the co-respondent Bell. It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden v. Loveden* (2 Hag. Consist. Rep. 512): "If it were otherwise there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of the adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion, and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CT. OF APP.]

ALLEN v. ALLEN AND BELL.

[CT. OF APP.]

solution than that of the guilt of the party sought to be implicated. We will deal with the salient points of this case, so far as they relate to the respondent and the co-respondent Bell. The history of the respondent before marriage was peculiar. Of her birth and parentage we know nothing. She derived means from two gentlemen, to both of whom she had been engaged to be married. She travelled alone, staying at hotels by herself, without the protection of any female friend. It is not too much to say that while there is no evidence of any undue familiarity, she had been before the marriage on terms of intimate friendship with the co-respondent. Thus circumstanced, she marries the petitioner in June 1890. Soon after the marriage there are signs of those serious differences which afterwards became too apparent. She seems impatient of control, and apparently desires to return to the wandering and unsettled life which she had led before marriage. On one occasion she seeks the advice of the co-respondent in respect of something which the petitioner was proposing to do with some property of his, and this, not at her own house, but at a place arranged between them, an interview which did not take place owing to the respondent's illness, but of which the petitioner had not been informed. In May 1892, the relations had become so strained, and, so far as the respondent is concerned, so irrevocably hostile, that a separation was imminent. The respondent leaves her home without the petitioner's consent, frequents hotels unprotected, conceals from him her address, and is, on the 27th July 1892, to be found at the Hotel Fontaine, Ostend, having, so far as is proved, communicated her destination and address to no person but the co-respondent. That she was a woman of no delicacy of feeling and of no refinement is manifest from her letters to the petitioner. That she was a woman in July 1892 capable of yielding to immoral solicitation is made clear by her conduct with the unknown person on the 28th and 29th of that month. So far as the respondent is concerned we cannot think it unreasonable to assume that she would not have been unwilling to succumb to the advances, had he made them, of the co-respondent, with whom she had been on terms of friendship before marriage, to whom she was willing to have confided her complaints against her husband, and to whom alone she had intrusted the information of the place where, at the end of July, she was to be found. If the antecedents of the respondent had been different, if she had been a woman of strict virtue and irreproachable conduct, it would be more difficult to infer against her misconduct with the co-respondent than it is in the circumstances to which we have referred. But the infirm morality of the respondent must not be unduly pressed against the co-respondent. We will in a few salient points review his conduct. That it is highly suspicious is beyond controversy, but is it not more? Does it not lead to a reasonable belief that he is guilty? [His Lordship then reviewed the evidence (it being proved (*inter alia*) that on Sunday, the 7th Aug., the respondent left Ostend about three o'clock, and arrived at Bruges with a gentleman with whom she spent the night, and it being also proved that on the same day the co-respondent left Ostend about three o'clock) and the explanation given by the co-respondent, and referred to

his denial of the adultery, and continued:] We do not suggest that no weight is to be attributed to the evidence of a co-respondent, who on oath denies the adultery, but such denial is often, as one knows, prompted by the desire to shield the character of the woman with whom he has intrigued, and is rather regarded by him as a plea of "Not guilty" set up by a prisoner, than as a solemn denial on oath. Looking at all the circumstances of the case, is his story reliable? The jury thought not. It is not surprising. It seems to us to be pregnant with improbability. It was capable of corroboration, but no corroboration in a single particular is forthcoming. If this story is not reliable the question arises, where was the co-respondent on that Sunday night, and why has he invented this improbable story? The answer is, that it is highly probable he was the gentleman who spent the night with the respondent at Bruges, and who left his hotel about the same time she left hers at Ostend, and that this story has been fabricated by him in order to escape detection. Having regard to all the circumstances of this case, we cannot say that there was not at the end of the petitioner's case evidence upon which the jury could reasonably act, nor can we say on the whole case that the jury were not justified in finding the verdict which they did against the co-respondent. But a new trial is also asked on the ground that the President misdirected the jury, and this raises a very important question with regard to the practice in the Divorce Court. The respondent, in the course of her evidence, had given an account of certain matters at Ostend, which Mr. Murphy, the learned counsel for the co-respondent, knew would be at variance with the account the co-respondent would give of the same matters, and he sought to put certain questions to her by way of cross-examination. The President thereupon said that Mr. Murphy "must treat her as his witness or treat her as a hostile witness; that there was no ground for cross-examining her, and it was a thing he never knew to be done." In fact, cross-examination was refused. In his summing up, the President in a marked way contrasted the evidence of the respondent with that of the co-respondent. He said, "There is a complete discrepancy between the story told by Mrs. Allen and the story told by Mr. Bell in two most important points. There is no getting out of this." He then at some length dealt with the reasons given by the respondent and the co-respondent respectively for the visit to Ostend, reasons conflicting with each other, and added, "and that brings us at once to the observation that she is in direct conflict with Mr. Bell on this subject." The President then proceeded: "Now that brings us to another matter on which again they are absolutely in contradiction—that is, to that not unimportant by any means entry of his directly on his arrival in the *bulletin d'arrivée* of the hotel." The President then alluded to the reason the co-respondent gave for describing himself as "médecin," and then to her explanation, and characterised his story as one in absolute contradiction of hers, and concluded by saying, "The two stories are as different as can be, and you must judge for yourselves which of those stories is true, or whether either of them is true, or whether the truth is not that he went over to see her, and pass a couple of days or so in her com-

pany." This appears to us to be dealing with the evidence of the respondent, un-cross-examined by the co-respondent, as admissible against the co-respondent, and the evidence of the co-respondent as admissible against the respondent. Is this right? If there was a right to cross-examine, the admission of the evidence of the respondent and co-respondent against each other would be unobjectionable. The President held that there was no such right. It is contended that he was wrong in contrasting the evidence as he did, and that he ought to have allowed cross-examination. In our judgment he was wrong in contrasting the evidence as he did, after refusing liberty to cross-examine the respondent. It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination. In the case of prisoners jointly charged with an offence, the jury are always most carefully warned that what one may say inculpating the other is not evidence against that other. The reason is, because one prisoner cannot cross-examine another, and therefore their statements condemnatory of each other, unassailable by cross-examination, would be valueless. But when two prisoners are jointly indicted, and a witness called by one of them gives evidence criminatory of the other, the latter has a right by himself or his counsel to cross-examine that witness: (*Reg. v. Burditt*, 6 Cox C. C. 458.) In refusing liberty to the co-respondent to cross-examine the respondent, the President has acted on the authority of the case of *Glennie v. Glennie* (3 S. & T. 109), decided by Sir C. Cresswell in 1863. The learned judge in that case held that the counsel for the co-respondent could not examine a witness called for the respondent without adopting her as his own witness, and said "You clearly cannot cross-examine her. If so, how can you examine her in chief, unless she is your witness?" The witness was then examined as the witness of the co-respondent. Any judgment of Sir C. Cresswell must carry great weight; but this case was decided in the infancy of the present Divorce Court, and before any large experience had been acquired of the practice and procedure applicable to it. The case, moreover, is not satisfactorily reported. So much as relates to the practice in question is reported in a note to the case, and it does not appear that any arguments were addressed to the learned judge; nor does the learned judge assign any reasons for the conclusion at which he had arrived. The case is also reported in a note only in the *Law Journal* and *LAW TIMES*. In the courts of common law in the case of co-defendants, one co-defendant would have a right to cross-examine another co-defendant called as a witness, and the evidence of one would be evidence against the other. In the case of *Lord v. Colvin* (3 Drewry, 222) it was held that a defendant might cross-examine another defendant's witnesses. The Vice-Chancellor in that case consulted the whole of the judges, and said: "The opinion of the whole of the judges is that a defendant may cross-examine a co-defendant's witnesses." If a defendant may cross-examine his co-defendant's witnesses, *a fortiori* he may cross-examine his co-defendant, if he gives evidence. If it is objected that there is no issue between a respondent and a

co-respondent the answer is, that in most cases there is no issue between co-defendants, but still the right to cross-examine exists. In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross-examine, and we are at a loss to see why there should be any deviation from that rule in the Divorce Court. It is important to consider the state of the law of evidence when *Glennie v. Glennie* (*ubi sup.*) was decided. The Evidence Acts of 1851 and 1853 excluded from their operation the parties to any proceedings instituted in consequence of adultery. In 1863, when *Glennie v. Glennie* (*ubi sup.*) was decided, doubts were entertained as to how far the competency of witnesses in cases of adultery had been recognised in the Divorce and Matrimonial Causes Act 1857, which founded the new Divorce Court. In 1869 an Act for the further amendment of the Law of Evidence was passed, which rendered parties to proceedings instituted in consequence of adultery competent witnesses, subject to a proviso that they were not liable to be asked, or bound to answer, any question tending to show that they had been guilty of adultery, unless they had in the same proceedings given evidence in disproof of it. We understand this to mean that a party tendering himself or herself as a witness for the purpose of disproving an act of adultery is not protected from being cross-examined as to other acts of adultery, if these last be charged in the proceedings: (*Brown v. Brown and Paget*, 30 L. T. Rep. N. S. 767; L. Rep. 3 Prob. & Div. 198.) The evidence with regard to the adultery is not rendered inadmissible, but protection is afforded to the witness from being questioned on the subject if the witness claims protection; but it is for the witness, and the witness only, to make the claim: (*Hebblethwaite v. Hebblethwaite*, L. Rep. 2 Prob. & Div. 29.) Subject to this proviso, we should have thought that the competency of parties to proceedings instituted in consequence of adultery was absolute, and that, in respect of examination and cross-examination, and in all other respects, they were in the same predicament as other witnesses. Whatever may have been the grounds for the decision of *Glennie v. Glennie* at the time it was decided, we entertain grave doubts if it can be supported, and whether any practice in accordance with it can be maintained after the Evidence Amendment Act 1869. It is, however, unnecessary in the present case to express a concluded opinion on this point, because we are clearly of opinion that if the judge refuses to allow a co-respondent to cross-examine the respondent, as he did in this case, the jury should be distinctly directed to disregard the respondent's evidence when considering the case of the co-respondent. Instead of this, the President in this case contrasted her evidence with his, and the jury would naturally be influenced by such contrast, and the influence would be distinctly prejudicial to the co-respondent. Rule 6 of Order XXXIX. of the Rules of the Supreme Court provides that a new trial is not to be granted on the ground of misdirection unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been occasioned thereby in the trial. This rule is not applicable to the Divorce Court, and if it was we should not be prepared to say, having regard to

CT. OF APP.]

CARTER v. FEY.

[CT. OF APP.]

the nature of the case made against the co-respondent, and for the reasons above given, that the effect of the misdirection complained of did not cause a substantial wrong. There were other misdirections relied upon, to which, as we should not be prepared to grant a new trial in respect of them, it is unnecessary to refer. There must be a new trial. The appellant will have the costs of this appeal. As the co-respondent laid himself open to so much reasonable suspicion in the court below he ought not to have the costs of the first trial even if he succeeds in the second. The costs of the new trial will abide the event. The co-respondent will not have to pay the petitioner's costs of the first trial. Each party will bear his own costs of that.

Appeal allowed.

Solicitors for the appellant, *Tarry and Sherlock*.
Solicitor for the respondent, *J. R. Roberts*,
agent for *G. J. Simpson*, Sheffield.

Tuesday, May 22.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

CARTER v. FEY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Action by plaintiff—Relief sought by defendant in respect of matter not arising out of nor incidental to plaintiff's cause of action—No counter-claim delivered, nor writ issued in cross action—Rules of Court 1883, Order L., r. 6—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 8.

Where an action is brought against a defendant, and he also seeks relief against the plaintiff in respect of a matter which is not in any way arising out of nor incidental to the plaintiff's cause of action, he is not entitled to apply by way of motion in the plaintiff's action, but must deliver a counter-claim or issue a writ in a cross action.
Sargant v. Read (1 Ch. Div. 600) and Porter v. Lopes (37 L. T. Rep. N. S. 824; 7 Ch. Div. 358) distinguished.

Decision of Kekewich, J. affirmed.

ACTION to restrain the defendant from carrying on the business of a wine merchant in the city of Winchester, or within a radius of two miles.

The defendant appeared in the action, and, before any statement of claim had been filed or any defence put in, he moved for an interlocutory injunction against the plaintiff to restrain him from using the defendant's name on any vans, signboards, labels, or otherwise in his business.

The plaintiff and defendant had been partners, but their partnership had been dissolved, and it was stipulated in the deed of dissolution (among other things) that the defendant should not carry on the business of a wine merchant in Winchester or within a radius of two miles, and that the plaintiff should erase the defendant's name from the name of the old firm on all vans, signboards, &c.

Kekewich, J. dismissed the defendant's motion, being of opinion that the court had no jurisdiction to entertain the application until the defendant had either delivered a counter-claim, or issued a writ in a cross action.

The defendant appealed.

Le Riche for the appellant.—Rule 6 of Order L. authorises any party to an action to apply for an injunction at any time after appearance on giving notice to the plaintiff. Sub-sect. 8 of sect. 25 of the Judicature Act 1873 enacts that: "A *mandamus* or an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just. . . ." (LOPES, L.J.—In *Porter v. Lopes* (37 L. T. Rep. N. S. 824; 7 Ch. Div. 358) it was decided by Sir George Jessel, M.R., that in an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction under that sub-section to appoint a receiver until the hearing upon the application of the defendant. In that case the object was the protection of the property to which the partition action related. But here the relief sought by the defendant does not appear to be at all connected with the subject-matter of the plaintiff's action.] Under the Rules of Court 1875, Order LII., r. 4, a defendant in an action may, before judgment, apply for an injunction and a receiver. The defendant may do so, notwithstanding that the plaintiff has already served notice of motion for the like purpose; and in such case one order will be made on the two motions:

Sargant v. Read, 1 Ch. Div. 600.

[He was stopped by the Court.]

S. Dickinson for the respondent.—In cases where a defendant has been allowed to move as the defendant desires to do in this case, the court has had seisin of the matter to which his motion appertains; and therefore has had jurisdiction to make an order on the defendant's application. But there has been no case in which a defendant has been allowed on an interlocutory application to do what he could not do at the trial of the action, namely, to apply in respect of something in no wise connected with the plaintiff's action. The application of the defendant here is in respect of a matter altogether outside the plaintiff's action. He is raising an issue which will not be raised at the trial of the plaintiff's action, and which the plaintiff is not bound to raise at all. This is a case for a cross action, either by a counter-claim or a writ. In the cases cited, the decisions have proceeded on the footing that the relief claimed by the defendant is in respect of some matter contained in or incidental to the plaintiff's action. To follow the course suggested on behalf of the defendant here would be to cause a great inconvenience; and there is no case in which it has been followed.

Le Riche replied.

LINDLEY, L.J.—This appeal raises a point of practice of some difficulty which is new and certainly important. The question is, whether a defendant, who is in a hurry, is entitled to apply by way of motion in the plaintiff's action for an injunction, without waiting to deliver a counter-claim or issuing a writ in a cross action, where the relief which he seeks is not in any way arising out of nor incidental to the plaintiff's cause of action? In the present case the plaintiff only

claims an injunction to restrain the defendant from carrying on a business within a certain limit. It is not a partnership action; it is not an action for taking the partnership accounts, or for preserving the partnership assets. It is simply an action to restrain the defendant from carrying on a business in contravention of one of the covenants of the deed of dissolution of the partnership. The plaintiff moved for an injunction in the terms of the covenant, and the defendant met the plaintiff's motion by affidavits that the plaintiff was not entitled to relief because he had himself broken his covenant not to use the defendant's name in his business. And he not only did this, but he gave notice of motion for an injunction to restrain the plaintiff from using his name. When the defendant's motion was opened before Kekewich, J. it was met by the preliminary objection that it was not competent for the defendant to make such a motion at that stage of the proceedings, and the learned judge upheld the objection. The question is, whether his decision is correct. The defendant's claim is not for any relief arising out of nor incidental to the relief sought to be obtained by the plaintiff in his action. In this respect the case differs from *Sargant v. Read* (*ubi sup.*), which was an action for dissolution of a partnership and for taking the partnership accounts. Sir George Jessel there held that the defendant was entitled to give a cross notice of motion in the plaintiff's action for the appointment of a receiver. It differs also from *Porter v. Lopes* (*ubi sup.*), which was a partition action, and there the defendant was held entitled to move for a receiver for the protection of the property. In the present case the cross motions have nothing to do with each other, except that they are both based upon covenants contained in the same deed; but the covenants are quite distinct. The defendant says that if he were not in a hurry he might put in a counter-claim, and by it claim such an injunction as he asked for in his motion. Assuming that he could do so, can he now ask for an injunction without a counter-claim and without issuing a writ of his own? He relies upon Order L., r. 6, where it is provided that an application for an injunction may be made to the court or a judge by any party, and if it be made by the plaintiff it may be made either *ex parte* or with notice, and if it be made by any other party then on notice to the plaintiff, and at any time after appearance by the party making the application. That rule at first sight appears to favour the defendant's contention; but if the defendant is right it would be equally competent for a plaintiff to ask for an injunction for something outside the subject-matter of his action. If the defendant's application for an injunction were in any way connected with or incidental to the object and purpose of the plaintiff's action he would have good ground for his contention. But it has really nothing to do with the relief sought by the plaintiff, and therefore, in my opinion, the defendant is wrong. If he cannot wait till the time for delivering a counter-claim, he must issue a writ in an action of his own. So far as I am aware, this is the first time that such an application has been made, and the experiment must, in my opinion, fail, and the appeal must be dismissed with costs.

LOPES, L.J.—This is an appeal raising an important question of practice under Order L.,

r. 6. The question is this: Whether the defendant can move for an injunction against the plaintiff without filing a counter-claim or issuing a writ in a cross action? In my opinion he can in some cases, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action or is incidental to it. *Sargant v. Read* and *Porter v. Lopes* are cases of that description. But if the relief asked by the defendant is not connected with the subject-matter of the plaintiff's claim, and relates to nothing that is in issue in the plaintiff's action, but is outside the action altogether, then, in my opinion, the defendant cannot move for an injunction without a counter-claim or a new writ. It may be that, there being no statement of claim, he is not in a position to put in a counter-claim. In that case, if time is important to him, he must issue a writ. In the present case it appears clear to me that the defendant is seeking to obtain relief which is distinct from that which is claimed by the plaintiff in the action. And I therefore agree that the appeal must be dismissed with costs.

DAVEY, L.J.—It may or may not have been wise on the part of the Legislature to require a plaintiff to issue a writ stating in general terms the nature of the relief claimed before moving for an injunction, but the Legislature has so required. Mr. Le Riche, however, contends that a defendant is in a better position than a plaintiff, and that he may move for an injunction without converting himself into a plaintiff by filing a counter-claim or issuing a writ. For example, if an action is brought against a defendant for breach of trust, can the defendant move for an injunction to restrain the plaintiff from libelling him by saying that he (the defendant) cheated at cards? Mr. Le Riche says that he can, relying upon sect. 25, subsect. (8) of the Judicature Act 1873 and Order L., r. 6, of the Rules of the Supreme Court; and contending that the words of the rule should be construed to apply to any injunction that the defendant deems himself entitled to. I do not agree with that contention. In my opinion it must be relating to or arising out of the relief sought in the action which is before the court, and that any other injunction cannot properly be granted in the action. The defendant's cross motion in the present case does not, in my opinion, fulfil that condition; it does not arise out of the relief sought in the only action which is before the court. The case relied on, namely, *Sargant v. Read*, illustrates the difference very well. There the relief sought by the defendant did directly arise out of the relief claimed by the plaintiff in his action, and the object of the motion was to preserve the *status quo* of the property which was the subject-matter of the action until the trial. It is strange that if Mr. Le Riche is right in his contention, he could not find a single case to support his argument. The Judicature Act 1873 has been in force for nearly twenty years, and yet there has been no case in which relief such as that now asked for has been sought by a defendant until he has made himself an actor in the litigation, either by filing a counter-claim or issuing a writ. I agree that the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *Ordolph Wheable*, agent for *Scotney and Shenton*, Winchester.

Solicitor for the respondent, *W. H. Hales*.

CT. OF APP.]

RAMSAY v. MARGRETT.

[CT. OF APP.]

Friday, March 9.

(Before Lord ESHER, M.R., LOPES and
DAVEY, L.JJ.)

RAMSAY v. MARGRETT. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of sale—Sale of goods—Receipt for purchase money—Sale by husband to wife—Change of possession—Apparent possession—Bills of Sale Act 1878 (41 & 42 Vict. c. 31), ss. 4 and 8.

A wife who was living in the same house with her husband agreed to buy from him the furniture and plate which was in the house and was being used by them, and she accordingly paid him a fair price for the goods. Afterwards she asked her husband for an ordinary receipt, and he gave her a receipt for the purchase money, to which was added an acknowledgment that the goods were the absolute property of his wife.

Held, that the receipt being no part of the bargain or sale, it was not a bill of sale within the Bills of Sale Act 1878.

Semble, per Lord Esher, M.R. and Davey, L.J., that if the receipt had been a bill of sale within the Act of 1878, the goods would not have been in the "apparent possession" of the husband within sect. 8, because, since the fact that the goods remained in the house was consistent with the possession of either husband or wife, the possession must be attributed to the person, namely, the wife, who had the legal title to them.

THIS was an appeal from a judgment of Wright, J. at the trial of an interpleader issue without a jury.

The plaintiff in the issue was Lady Ramsay, the wife of Sir Alexander Ramsay, and the defendant was an execution creditor of Sir Alexander Ramsay.

In the issue the plaintiff claimed under the following circumstances to be entitled to certain goods which had been seized by the defendant in execution.

Sir Alexander and Lady Ramsay lived together in a house which was taken in his name, though she paid the rent. The furniture and plate which were in use in the house belonged to him.

In Aug. 1892, as he was in difficulties, she agreed to buy the furniture and plate of him, and she accordingly paid him 1700*l.* out of her separate estate, that being the full value of the goods.

After the money was paid, Sir Alexander Ramsay signed and gave to the plaintiff the following receipt, which had been drawn up by the plaintiff's solicitor:

Received this 8th of August 1892 from Lady Caroline Charlotte Ramsay the sum of 1200*l.*, making, with the sum of 500*l.* paid to me on the 3rd instant, the sum of 1700*l.* in payment of the agreed purchase money for all my furniture, plate, linen, china, glass, ornaments, pictures, silver, books, plants, musical instruments, and other household and garden effects at No. 2, Montpelier-parade, Cheltenham, which I hereby acknowledge are now absolutely her property.

After the sale the goods continued to be used in the house as before.

This receipt was not registered as a bill of sale.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

By the Bills of Sale Act 1878 (41 & 42 Vict. c. 31) it is provided as follows:

Sect. 4. In this Act . . . the expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreements, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred.

Sect. 8. Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale in the execution of any process of any court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which, at or after the time of filing the petition for bankruptcy, or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession, or apparent possession, of the person making such bill of sale (or of any person against whom the process has issued under, or in the execution of which such bill has been made or given, as the case may be).

The defendant, a judgment creditor of Sir Alexander Ramsay, having levied execution upon the furniture, an interpleader issue was ordered to be tried.

At the trial of the issue without a jury, Wright, J. found that there had been a *bona fide* sale of the goods by the husband to the wife, and that the receipt was intended to be only an ordinary receipt, and was not part of the transaction of the sale of the goods. He therefore held that the receipt was not a bill of sale within the Bills of Sale Act 1878, and did not require registration, and he gave judgment for the plaintiff.

The defendant appealed.

Herbert Beed, Q.C. and A. T. Lawrence for the defendant.—This receipt was a bill of sale within the Act of 1878, and not being registered is void as against an execution creditor. It is an "assurance of personal chattels" within sect. 4. There is no evidence that possession of the goods was transferred, and in such a case as this that is evidence of fraud. This receipt is a "muniment of title" and "a record of the transaction," and is, therefore, a bill of sale:

Marsden v. Meadows, 45 L. T. Rep. N. S. 301; 7 Q. B. Div. 80;

North Central Waggon Company v. The Manchester, Sheffield, and Lincolnshire Railway Company, 56 L. T. Rep. N. S. 755; 35 Ch. Div. 191.

The inference drawn by Wright, J. that the receipt was intended to be an ordinary receipt is an inference of law, not of fact. [Lord ESHER

M.R.—He has found as a fact that the intention of the parties was that the receipt should be an ordinary receipt. *Marsden v. Meadows* shows that the question is not merely one of the construction of the document in dispute, but that the whole question as to what the parties intended the document to be is one for the jury.] The receipt is part of the transaction of bargain and sale, so that the transaction cannot be proved without it. [Lord ESHER, M.R.—It was no part of the bargain of purchase and sale that a receipt should be given]. The effect of the transaction having been put into writing, it cannot be proved, according to the ordinary rules of evidence, without producing the writing.

Douglas Walker, Q.C. and Muir Mackenzie for the plaintiff.—Upon the findings of Wright, J. the bargain and sale of the goods was complete without the receipt, and the receipt does not constitute part of the plaintiff's title to the goods. It is, therefore, not a bill of sale within the Act of 1878:

Charlesworth v. Mills, 66 L. T. Rep. N. S. 690; (1892) A. C. 231.

Even if the receipt be a bill of sale within the Act, yet the plaintiff is protected by sect. 8, because the goods were not in the apparent possession of her husband. They were in her possession as soon as the property in them had passed to her under the sale. Since the Married Women's Property Act, a husband and wife in matters of property are in the position of strangers to each other. The facts being consistent with either husband or wife being in possession of these goods, the ownership draws with it the possession. Therefore the wife was in possession as soon as she obtained the ownership:

Jarman v. Woollaton, 3 T. R. 618;

Pollock and Wright on Possession, p. 24.

A. T. Lawrence replied.—As regards sect. 8 it is immaterial whether the plaintiff was actually in possession. The question is, who was in "apparent possession?" Nothing occurred to show that the husband ceased to be in possession.

Lord ESHER, M.R.—The first question in this case is as to the real meaning of the judgment of Wright, J. This was an interpleader issue which he tried without a jury, so that upon any question of fact his decision is in precisely the same position as a finding of a jury. The facts which he found were these. Lady Ramsay was a married woman who had separate property of her own. Her husband was in debt, and she agreed with him honestly to buy from him certain furniture and plate which was in the house where they both lived. She did not bargain about the price, she gave him their full value so that he might pay his creditors. He having agreed to sell for a fair price, she paid him the money, and either then or soon afterwards—it is not clear when exactly—she asked for a receipt. The learned judge found that what she asked for was "an ordinary receipt," that is to say, a receipt for the money she had paid. The receipt was drawn up for her by her solicitor, and so far as it goes it is a receipt, but at the end of it he put an acknowledgment by the husband that he had sold the goods to her. I see no reason to doubt the judge's finding as to those facts. There was

nothing suspicious about any of the persons concerned, and both the husband and wife seem to me to be perfectly truthful, and, moreover, it is perfectly clear from other evidence that Lady Ramsay did in fact pay the money to her husband. Now, what is the law applicable to those facts. It is argued that, though the facts are as I have stated, yet a creditor of the husband is entitled to levy an execution on these goods, not on the ground that the wife did not pay for them, not on the ground that the husband did not really intend to pass any property to her by the sale, but on the ground that the document which he gave her is within the Bills of Sale Act. Now, that document is not really a bill of sale, that is to say, a document by which the property in certain chattels is intended to pass from one person to another. But there are some documents which, though not really bills of sale, are deemed to be bills of sale within the Act. The last case of authority upon that point is *Charlesworth v. Mills* (*ubi sup.*) in the House of Lords. A rule was there laid down by Lord Halsbury, L.C. and Lord Herschell to this effect, that if the document in question is intended by the parties to be part of the bargain which is to pass the property in the goods, then, whatever be its form, it is to be deemed to be a bill of sale though it may not really be so. If the document is not part of the bargain, if the bargain which passes the property is complete without the document, then the document is not to be deemed to be a bill of sale. That is the test to be applied. An ordinary receipt for money which has been paid for goods sold is not part of the bargain which passes the property in the goods. If the giving of a receipt had been a condition precedent to the payment of the money, it would be a part of the bargain; but when after the goods are sold the buyer simply asks for a receipt for the money he has paid, the receipt is no part of the contract, and, according to the rule laid down in the House of Lords, it is not to be deemed to be a bill of sale. In this case Wright, J. has found as a fact that the receipt was nothing more than an ordinary receipt for money paid, and upon that finding alone, as the receipt was not intended by the parties to be any part of the bargain by which the property passed, this document is not to be deemed to be a bill of sale within the Bills of Sale Act 1878. It was further argued that the creditor was entitled to seize these goods in execution under sect. 8 of the Act of 1878 because they were in the "apparent possession" of the husband. But that section speaks of the "apparent possession of the person making such bill of sale," so that until that person has given a bill of sale he is not within that section. As I have already said, I do not think that this receipt is a bill of sale within the Act of 1878, and consequently no question arises here as to apparent possession. That is enough to decide this case. However, if it were necessary to decide whether possession of the goods was given to Lady Ramsay, I should say that in my opinion it had been given. This particular point could not have arisen before the passing of the Married Women's Property Act, because up to that time married women could not at law have any separate property. Formerly, if a married woman was entitled to any property it was held by trustees for her, it was not hers simply. If personal property was left to her

[CT. OF APP.]

RAMSAY v. MARGRETT.

[CT. OF APP.]

simply, it became her husband's. Since the passing of the Married Women's Property Act such property will remain the property of the wife, and does not pass to the husband. So far as personal property is concerned, a husband and wife are now in the same position as two men would be. In the present case we have a wife with money and a husband with furniture, and, upon a proper bargain being made, the furniture became hers and her separate property. The furniture was in the house in which the husband and wife were living together, so that you could not tell which of them was in actual possession. What is the rule of law under those circumstances? When the possession is doubtful, the law will attach it to the property, so that since the property of the goods is in the wife, the possession also will be in her. That would be enough to settle this case. So that, in either view, whether this receipt is a bill of sale or not, the judgment of Wright, J. is correct, and this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The learned judge at the trial found that the transaction between the husband and wife was *bonâ fide*, and the document given was an ordinary receipt and not an "assurance." A question has been raised whether possession of the goods in question passed from the husband to the wife, who was living with him in the same house, but I decline to give any opinion on that question because I think it is unnecessary to the case. Upon the other point, the question is whether the document was an "assurance." Was it part of the transaction by which the property in the goods passed from the husband to the wife? There are several tests by which that question may be tried. Is it necessary to look at the document in order to show the wife's title to the goods? I think not. Need she have proved the document in order to prove her title? I think not? Was the document intended to pass the property? I think not. The last case upon this point is *Charlesworth v. Mills* (*ubi sup.*). Lord Herschell there says: "Now, this document, beyond all question, was not a document which was intended to transfer or did transfer the property in these goods; because, if there is anything clear in the transaction, it is this, that at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document, he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession." Every word of that applies here, and this case appears to me to be well within that decision. This document was not a bill of sale, and I think that this appeal should be dismissed.

DAVEY, L.J.—I am of the same opinion. The first point is whether this document is within the purview of the Bills of Sale Act 1878. In my opinion it is not. It has been held in this court, in *Ex parte Hubbard* (59 L. T. Rep. N. S. 172, n.; 17 Q. B. Div. 690), and affirmed by the House of Lords in *Charlesworth v. Mills* (*ubi sup.*), that the Bills of Sale Act 1878 does not apply to a case in which the property in goods passes and is accompanied with possession. As to possession, it is

only in consequence of the Married Women's Property Act that the question could arise between husband and wife as in this case. Lady Ramsay purchased from her husband furniture which at the time of her purchase was in use in their common household, and after the purchase the goods remained where they were. Did the possession of them pass to her? How does the case stand on principle? In Littleton's Tenures, sect. 701, it is said: "Where two be in one house, or other tenements, and the one claimeth by one title and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements." Following that is this passage in Pollock and Wright on Possession, at p. 24: "Where possession in fact is undetermined, possession in law follows the right to possess." Then in *Jones v. Chapman* (2 Ex. 803) Maule, J. said: "It seems to me that, as soon as a person is entitled to possession, and enters in assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer the person who has the title is in actual possession, and the other person is a trespasser." It was argued that that applied only to real estate. But I can see no reason why the same principle should not be applied to personal chattels. Then it was said that there was, in this case, no apparent change of possession, that the ostensible possession of the goods was the same as before the sale. The same point was raised in *Charlesworth v. Mills* (*ubi sup.*), and Lord Herschell said: "The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878; but it is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it? When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those two persons to constitute a good pledge, it seems to me that the case is at an end. I say "inevitably admitted," because how can it be disputed that as between the two persons to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person a possession of the goods which would entitle him to hold them as a security for the advance? And that is all that a pledge is." In the present case the question is, whether possession of the furniture passed from the husband to the wife. Under the circumstances, I draw the inference that they intended that the goods should become out and out the goods of the wife, just as other articles which she had and which were in her possession were hers. In other words, they intended that possession of the goods as well as property should pass to the wife. That intention, I think, was carried out, and she had afterwards the sole disposition of them. As the goods remained in the house where they were both living, her possession of the goods was quite as consistent with everything as her husband's possession. It

CT. OF APP.]

THE INDUSTRIE.

[CT. OF APP.]

is difficult to see what she could have done more than what was done, because she bought the goods with the intention of using them in the house as before the sale. If there had been a tradition, symbolical or actual, there would have been no doubt in the matter, but in my opinion no formal act was necessary to transfer the possession. In my opinion, therefore, such possession was given as took the case out of sect. 8 of the Bills of Sale Act 1878. On the other point I agree with the judgments that have been delivered. Wright, J. has found that this document was intended to be only a common receipt, and the words which the solicitor put in at the end of it were not part of the transaction of sale. The document, therefore, is not within the Bills of Sale Act 1878, because it has been decided that the definition of "bill of sale" in sect. 4 only applies to such receipts as are intended to operate as "assurances." That was laid down by Bowen, L.J. in *The North Central Wagon Company v. The Manchester, Sheffield, and Lincolnshire Railway* (ubi sup.). I may also refer if necessary to the judgments in *Woodgate v. Godfrey* (42 L. T. Rep. N. S. 34; 5 Ex Div. 24). I agree with the findings of Wright, J., and upon those findings the Bills of Sale Act 1878 does not apply here.

Appeal dismissed.

Solicitors for the plaintiff, *Smythe and Brettell*.
Solicitors for the defendant, *G. S. Warmington and Co.*

Nov. 24 and 28, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE INDUSTRIE. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Carriage of goods—Foreign ship—Construction of charter-party—Sale of part of cargo at port of distress—Right of shipowner to full freight—Conflict of English and foreign law—Law of the flag.

The plaintiffs, who were German subjects domiciled in Germany and owners of a German steamship, entered into a charter-party with the defendants, who were British subjects, through their (the plaintiffs') agent, a German subject, whereby the defendants chartered the steamship *Industrie* for the carriage of a cargo of rice in bags from abroad to a port in England for orders. The charter-party, which was made in London, and was in the English language, contained all the provisions usually found in English charter-parties; and also the following words, "freight being payable at and after the rate of 35s. sterling per ton of 20cwt. delivered . . . all freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary, if on the Continent in cash at the exchange of the day of final discharge without discount."

The ship proceeded to her port of loading, and there took on board a cargo of rice belonging to the defendants, and on her homeward voyage, having encountered bad weather, put into a port of distress, when it was found that the cargo had sustained damage, and the master, acting under the advice of surveyors, sold part of the cargo as being unfit for reshipment.

In an action by the shipowner to recover full freight on the damaged cargo which was sold:

Held, by the Court of Appeal (reversing the decision of Barnes, J.), that the defendants were not liable, as the charter-party must be construed as an English contract according to English law, and that the law of the flag did not apply, and that the payment of freight being dealt with in the charter-party, none was recoverable in respect of cargo not delivered at the port of destination.

THIS was an appeal from a judgment of Barnes, J. in favour of the plaintiffs' claim for 121l. 13s. 2d., being the freight on 746 bags of rice belonging to the defendants, which were sold in consequence of their having sustained damage, by the master of the vessel the German ship *Industrie*, at a port of refuge. The charter-party was entered into on the 29th July 1891 by the defendants, merchants in London, as charterers, and by Lloyd Jones and Co., who also carry on business in London, acting as brokers for Carl Winters, one of the owners of the *Industrie*, a German subject domiciled in Germany, but who occasionally visited England on business. The charter-party was in English on one of the defendants' ordinary forms, and was signed in London. By it the *Industrie*, described as under German colours, with Kirchhoff as master, now at Rouen, was, after discharging outward cargo, to proceed to

Diamond Island for Bassein, for orders . . . to load at . . . Bassein . . . from the agents of the freighters . . . a full and complete cargo of cargo rice and (or) cleaned rice and (or) broken rice in bags not exceeding 2250 tons net intake weight . . . and being so loaded . . . proceed to Scilly, Falmouth, Plymouth, or Cowes . . . for orders . . . to discharge . . . in the United Kingdom, or on the Continent between Havre and Hamburg . . . freight to be payable at and after the rate of 35s. sterling per ton of 20cwt. net delivered.

The charter-party then made provision for the payment of a reduced freight in the event of the vessel being ordered to a direct port, and then after the ordinary exceptions including the "act of God" proceeded:

The freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary . . . and if on the Continent in cash at the exchange of the day of final discharge without discount . . . the liability of the charterers to cease as soon as the cargo is on board, provided the same is worth the freight at the port of discharge, but the owners of the ship to have an absolute lien for freight, dead freight, and demurrage, and any other claim they may have under the charter-party, which lien they should be bound to exercise.

On the 5th April 1892 bills of lading in English were signed by the master at Bassein, for a cargo of rice in bags deliverable to the order of the defendants, the freight and all other conditions to be in accordance with the charter-party, which was referred to in the bills of lading. On the 8th April the vessel sailed, and meeting with bad weather, the master for the safety of the ship and cargo put into Port Elizabeth, where part of the cargo was landed, and of this 746 bags were found on survey to be damaged to an extent rendering them unfit for reshipment. These were accordingly sold by the master, and the proceeds applied towards his expenses at Port Elizabeth. The vessel subsequently proceeded on her voyage and

[CT. OF APP.]

THE INDUSTRIE.

[CT. OF APP.]

delivered her cargo at Liverpool. All the freight except that on the bags sold at Port Elizabeth was recovered from the consignees, and for this the present action was brought.

The case was argued on a written admission of facts, in which it was agreed that, for the purpose of showing what was the German law applicable (if any) to the case, either side might refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August* as reported in the law reports (66 L. T. Rep. N. S. 32; (1891) P. 328; 7 Asp. Mar. Law Cas. 110).

Joseph Walton, Q.C. for the plaintiffs, the ship-owners.

Carver for the defendants, the owners of the cargo sold at Port Elizabeth.

July 11.—BARNES, J.—The first question to determine is whether the contract is English or German. The defendants say that the charter-party being made in England on an English form, was an English contract, and, as according to English law the freight on the 746 bags of rice, sold in the port of distress, would not be recoverable not even as *pro rata* freight, the case of the plaintiff fails. The plaintiff does not dispute that, if the contract is English, he is not entitled to sue; but he contends that, as this contract was made by a German shipowner domiciled in Germany (though made through his agent) for the employment of a German ship on an ocean voyage, the contract must be treated as a German contract in accordance with the decisions which have been given in the courts. I think it is unnecessary to deal with those decisions at any length, because they have been reviewed by Lord Hannen very fully in the case of *The August* (66 L. T. Rep. N. S. 32; (1891) P. 328; 7 Asp. Mar. Law Cas. 110). The cases referred to by him are *Lloyd v. Guibert* (13 L. T. Rep. N. S. 602; Law Rep. 1 Q. B. 115), *The Gaetano and Maria* (46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535), and *Chartered Mercantile Bank of India v. Netherlands India Company* (48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65); and, although the point in the case of *The August* (*ubi sup.*) was not distinctly whether or not the contract itself was a German contract, but whether or not the master of the *August* was entitled to act in conformity with the law of the flag of the ship, or only in conformity with the English law, the judgments to which Lord Hannen refers, I think, cover the point of the contract as well as the other point. The effect of the judgment of the Master of the Rolls in *The Gaetano and Maria* (*ubi sup.*) and Lord Hannen's judgment is to confirm what was said by Willes, J. in *Lloyd v. Guibert* (*ubi sup.*), and although I am correct, I think, in saying that in both these cases the contract was made by the master, Willes, J. in *Lloyd v. Guibert* (*ubi sup.*) says in effect, as I read his language, that it makes no difference whether the contract was made by the master himself or by the owner. I noticed that in the course of the argument it was stated that in *Lloyd v. Guibert* (*ubi sup.*) the charter was on a French form; but I have been unable myself to find where that suggestion comes from, unless it be from the passage in the judgment of Lindley, L.J. in *Chartered Mercantile Bank of India v. Netherlands*,

&c. (*ubi sup.*). The language used in the pleadings, I should have thought, rather led to the inference that the charter was in fact on an English form, because it expresses that it was for a voyage from St. Marc in Hayti to Havre, London, or Liverpool, at the charterers' option, and there is no indication given of that contract being in the French form. The effect of those cases, and especially of *Lloyd v. Guibert* (*ubi sup.*), is, that in the charter of a foreign ship the convenience of commerce and the desirability of having a certain rule upon which to act require that, unless there is something in the contract to show the contrary, the law of the flag should prevail. No doubt it is a question of intention. Counsel for the defendants asks me to infer the intention that it was an English contract because it was made in England and made on an English form. The plaintiff, on the other hand, asks me to treat it as coming under the general rule and affirming an intention that it should be a German contract because it was in fact made by the German owners of a German ship, which must sail under a German master, and because, in the course of that voyage, a German master must have to act in accordance with the law of his flag in such circumstances as arose in the case of *The August* (*ubi sup.*), and therefore there was nothing to show that the intention of the parties was other than—and that I ought to infer that it was in fact—an intention to apply the law of the flag to this contract. In my judgment this view is correct, and the contract ought to be treated in this case as governed by the German law. The second point raised by the defendants is, that even if the contract is governed by German law, inasmuch as it only provides for the payment of freight on delivery, it is in its terms inconsistent with the application of any provision that freight should be payable in such a case as this, and that, as the contract itself provides for the cases in which payment is to be made, no other freight is properly to become payable under the circumstances. I do not think that is a true conclusion to arrive at. I have looked through the translation of the German Code in Dr. Wendt's book (papers on Maritime Legislation, by E. E. Wendt, 3rd edit. 1888), and it will be found there in numerous sections that the scheme of the code would seem to be to allow the parties to contract in such a way as they please, and then to provide for matters they have left undealt with. One meets with the term in the code, "When no agreement to the contrary has been made," then such and such consequences should follow. It seems to me, therefore, that it may well be that, if the contract deals with certain specific payments on delivery and so forth, it may be supplemented by the provisions of the code, where the parties themselves have not made any particular bargain on the subject. The third and last point raised before me was, whether or not full freight is payable by German law under such circumstances as these—namely, when cargo is discharged at the port of refuge into which the vessel puts for repairs, and is necessarily sold or justifiably sold because its condition requires it. I confess that unaided I should have felt very great doubt as to what was the German law upon this point. After reference to the articles of this code which relate to this subject—viz., articles 638 and 640 [the material parts of these sections are as follow:—

Art 638: When the incident occurs after the commencement of the voyage the charterer shall pay the full freight for such portion of the cargo as is concerned therein, even when the master has been compelled to discharge such portion in a different port from the port of destination, and when he has subsequently continued the voyage with or without delay. Art. 640: In case the vessel must be repaired during the voyage the charterer may at his option either take delivery of the whole cargo at the place where the vessel is staying on paying the full freight and the other claims of the shipowner (art. 615), and on paying or securing the claims stated in art. 616, or he may wait until the repairs have been completed . . .] I should have felt some doubt as to the construction to be put upon them, though my inclination would have been in favour of the plaintiff's contention; but the parties have been good enough to relieve me from difficulty. In the case of *The August (ubi sup.)*, in which I was engaged as counsel, Mr. Hermann Hildebrand, a German advocate practising at Bremen, was examined, and I am sure no one who was present in court when he was examined can fail to have been impressed by the extremely able manner in which he gave his evidence; and Lord Hannen, in referring to his evidence, says, "I may add that Mr. Hildebrand appeared to me to give his evidence with intelligence, and candour, and without bias in favour of the party by whom he was called;" and although the agreement between the parties in this case at first was that either side might refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August (ubi sup.)* as reported in the Law Reports, it will be found upon reference to that report that Mr. Hildebrand's evidence in connection with freight is not set out in consequence of the fact that, after hearing his evidence, I as counsel for the plaintiff thought I could not maintain the contrary of what he had said in connection with the subject of freight. Now I understand no shorthand note was preserved of his evidence; but I recollected that my junior at that time (Mr. Hollams) had taken a note of the evidence, and I have asked the parties to allow me to refer to those notes and they have been furnished to me by both parties, and Mr. Hildebrand's evidence on the second head, viz., whether a full freight would be payable is as follows—of course it is in the form of a note of the witnesses' evidence: "If condemnation justified, then full freight would be payable"—he refers to art. 504 (*cf.* Lord Hannen's judgment in *The August*, 66 L. T. Rep. N. S. 35)—"The master in selling is agent for cargo owner, and if owner had sold he would have had to pay full freight"; and he quotes the cases of *Maurice and Co. v. Perger and Co.* on behalf of the Helvetia Insurance Company (Kierulf's decisions in the Lübeck Court of Appeal (1870), vol. 6, p. 350); *Lichtenberg v. Kormer* (vol. 25 of decisions (1878) p. 6); *Guiricke v. Nord Deutscher Lloyd* (vol. 14 of decisions (1884), p. 34). That was the evidence, and according to the note, it appears that, after hearing it, I cross-examined him at length on the other parts of the case. The note proceeds thus: I said, "If German law applies and sale is justified, I do not dispute the payment of full freight." I therefore hold that in this case there is a contract according to the

German law, that this law will allow of the supplementing of the terms of the charter where provision is not made in it as to what is to happen at the port of distress, and that according to that law freight under such circumstances as those in this case would be payable in full on the cargo which was sold at Port Elizabeth. My judgment must therefore be for the plaintiff with costs.

The defendants appealed.

Carver for the appellants.—The case of *The August (ubi sup.)* does not really govern the present case. All that was there decided was, that the law of the flag was the law which the master of a foreign ship was entitled to follow, when the contract of affreightment does not provide otherwise. The intention of the parties must be looked to; the intention here was that this charter-party should be regarded as an English contract; it contains the terms and exceptions usually found in English contracts, e.g., "the act of God," which is not found in German charter-parties. The equivalent expression in a German charter-party would be *vis major*, which has not the same meaning as "act of God."

Nugent v. Smith, 34 L. T. Rep. N. S. 827; 1 C. P. Div. 423; 3 Asp. Mar. Law Cas. N. S. 198.

If this contract is to be governed by English law, it is clear no freight is payable except on cargo delivered at the port of destination. He also referred to

Lloyd v. Guibert, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115;

Chartered Mercantile Bank of India, &c. v. Netherlands India Steam Navigation Company, 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65;

Missouri Steamship Company, 58 L. T. Rep. N. S. 377; 42 Ch. Div. 321; 6 Asp. Mar. Law Cas. 423;

Vhirboom v. Chapman, 13 M. & W. 230;

The Gastano and Maria, 46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, C. A. 535.

Joseph Walton, Q.C. for respondents.—The vessel being a German vessel the acts of the master will be governed by the law of the flag:

The Gastano and Maria (ubi sup.).

The fact that the exceptions are in the usual English form is not conclusive. In *Russell v. Niemann* (10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163; 34 L. J. 10, C. P.), the expression "King's enemies" was held, in the case of a Mecklenburg ship, to mean the enemies of the Duke of Mecklenburg. The payment of freight is also to be determined by the law of the flag; by German law, when the contract is silent, it will be supplemented by the provisions of the code; according to the evidence of the expert in *The August (ubi sup.)* the shipowners would be able to recover full freight here. He also referred to

Chartered Mercantile Bank of India v. Netherlands, &c. (ubi sup.);

Russell v. Niemann, 10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163; 34 L. J. 10, C. P.;

Lloyd v. Guibert (ubi sup.).

Lord ESHER, M.R.—This case turns entirely on the one question whether the defendants are liable to pay certain freight. The charter-party, which is the contract of carriage, is in writing, and therefore it is for the court to construe it; and

[CT. OF APP.]

THE INDUSTRIE.

[CT. OF APP.]

the court under one set of circumstances must construe it according to one set of canons of construction, and in another set of circumstances according to another set. If a foreign contract is brought before an English court, the court has to construe that foreign contract; but it must be construed according to the canons of construction used in the country to which the contract belongs, or, as we say, according to the place where it is made. Therefore the first question is this: Is this contract as a matter of construction to be construed according to the canons of English construction, or according to the canons of German construction. It is a contract made for the carriage of goods on board a German ship. Is that conclusive to show that it is to be construed according to German canons of construction? It seems to me that it is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied. The mere fact of its being written in English will not enable the court to say that it is not a German contract. It might be made with the master abroad for the use of his ship from one foreign country to another foreign country, so as to have nothing to do with England at all. If it were so, and the only fact to rely on was that the contract was written in the English language, I should think it would be construed according to the canons of the law of the country of the ship. It would be made under the flag just as if it were made in the country to which the ship belongs. But where you find a great many other matters come in, you have to consider them. This is no doubt a contract in regard to carriage on board a German ship, but it is made between a German owner and the proposing English shipper, and it is made by means of a charter-party in writing; the instrument being headed with the English words "Charter-party." It is made in London, the contract is negotiated between two English houses, the English brokers authorised by the German owner, and the defendants the shippers who are English merchants. It is made on an ordinary English form of charter-party. Whether an ordinary German charter-party is at all in the form of an English charter-party I do not know. But this is on an ordinary English form of charter-party, and every stipulation in it is an ordinary stipulation in an English charter-party. The words or phrases used are peculiar to England. One has been particularly noticed, namely, "the act of God." That is an English phrase and has an English meaning. I care not whether there are words in a German charter-party agreeing with that; but it seems almost agreed that there are not. In the same way there are the words "the Queen's enemies." If this was a German charter-party I do not doubt that "the Queen" would mean "the Emperor of Germany" in accordance with the decision in *Russell and Niemann* (10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163). But it is a thing to be taken notice of when you are trying to determine whether the document is an English or a German document; and then when you find the terms used are applicable to England and not applicable to Germany, it goes a great way to show that the document is to be construed as English. It is not, therefore, on any one of the facts which I have stated that reliance is to be placed, but on all of them together. What is the true inference? In

order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made in English form and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together show that the intention was to make an English contract, and that is all we want. It has been admitted, and I think, for the reasons I have given, rightly admitted, that this written contract must be judged by English canons. Then, if it is to be construed according to English canons of construction, we have to construe the phrase which deals with the payment of freight. It is not as if the payment was not dealt with in the contract. It is dealt with, and we have to construe the meaning of the phrase in which it is dealt with, and that phrase is "freight to be paid on right delivery of cargo;" that is an ordinary English phrase in common use in contracts of affreightment, whether they be bills of lading or charter-parties. Counsel for the plaintiff wishes to read it thus: "Payment to be made on right delivery of cargo, if discharged in the United Kingdom;" in other words "if discharged nowhere else." I cannot read it so. I do not think that is the right construction. It is freight to be paid on right delivery of cargo, wherever the destination is. But as to the mode in which it is to be paid if discharged in the United Kingdom, it is to be paid in cash as customary, and if discharged elsewhere in cash at the exchange of the day. That is to say, the freight when due is to be paid in English money. If it is to be paid in England, it is to be paid of course in cash; and if it is to be paid abroad, the payment is to be equal to cash in England, by reason of its being at the exchange of the day. Therefore you have now, if that be the true construction, to construe according to the canons of English construction the phrase "freight to be paid on right delivery of cargo." For long years that common phrase in ordinary English charter-parties and bills of lading has been construed in but one way, viz., that it is an affirmative sentence which by implication contains the negative. It means payment of freight on right delivery of the cargo at the port of destination. That is the affirmative construction. The second is, that it contains this negative by necessary implication, viz., that no freight is to be paid if there is no delivery of cargo. If it is, then, by necessary implication, it is common knowledge that it is the same as if it was written there in terms. Therefore, you have the liability to pay freight, and the obligation to pay freight dealt with in a written contract, and you are to construe it in the way I state. There is to be no freight payable unless the cargo is delivered at the port of destination, and that that has been the common reading of charter-parties and bills of lading

OT. OF APP.] *Re HARVEY'S OYSTER CO.; Ex parte ORMEROD AND OTHERS.* [CHAN. DIV.]

cannot be denied. The cargo may be lost by perils of the sea, part may be lost or the whole. It may be jettisoned rightly or justifiably; it may be sold justifiably or not, and it may be delivered in an intermediate port, whether a port of distress or not, if the skipper is there, and if the shipowner agrees to deliver it to him and he agrees to take it at an intermediate port. In all these cases when the ship arrives at her port of destination, there being by reason of any one of these things no cargo to deliver or a short cargo to deliver, on the true construction of the written contract no freight is payable in respect of that part of the cargo, or the whole which is not delivered. With regard to the payment of freight, therefore, it is immaterial how it is comes that the cargo is not there. The cargo is not there, and that is all. But if the cargo is dealt with by the shipowner or his captain before the ship arrives, it is lost to the consignees. If he brings an action for the loss of his cargo, he is met in the different cases I have described in different ways. If he brings an action for the non-delivery of cargo, the captain says: "I jettisoned your cargo for the safety of all concerned. There is an exception in the bill of lading which says, I am not to be liable for jettisoning cargo which is justifiably jettisoned. If I have jettisoned cargo without proper justification, my shipowner is liable to you for the loss of your cargo. If I jettisoned it justifiably he is not liable." If the master has put into a port of distress and rightly sold your cargo, you cannot sue him for the sale, loss, or non-delivery of it, because by the maritime law, if he is in a port of distress and the cargo is in a particular condition and must be sold, he has a right to sell. It is immaterial whether he sells as agent of the cargo owner or by reason of his right as captain. If it is a justifiable sale, the owner of the cargo cannot maintain an action against the shipowner for it. If the sale is justifiable under the circumstances, the owner of the cargo must settle with his underwriter on cargo, but he cannot sue the shipowner. Whether the captain at the port of distress is or is not justified must be determined as in the case of the *Gaetano and Maria* (46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535), not by reason of any words in the contract of affreightment, but by reason of the right which he has outside that contract altogether—in his right, as captain, to deal with damaged cargo in a port of distress. That case shows that his power and authority to sell must be determined by the law of his country, whether he has made an English contract or a contract under the flag. That does not interfere with the contract for the payment of freight, which is wholly independent of that and deals only with the state of things actually existing when the ship arrives at the port of destination; and the meaning of the words in the charter-party is that there and then, if you are ready and willing to deliver, you are entitled to your freight. If you are not ready and cannot deliver you are not entitled to it. It seems to me that that is the true construction of the charter-party with regard to the payment of freight, and therefore I cannot agree with the able and learned judge who decided this case. I felt some hesitation for a long time because he decided the matter; but I cannot agree with him. I think that this contract is to be determined according

to the canons of construction always in use; therefore, that these defendants were not liable to pay freight in respect of the cargo not delivered, and that we must disagree with the judge below, and say that judgment ought to have been entered for the defendants.

LOPES and KAY, L.JJ. concurred.

Appeal allowed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, and Wharton.*

Solicitors for the respondent, *Field, Roscos, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, May 3.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re HARVEY'S OYSTER COMPANY LIMITED; Ex parte ORMEROD AND OTHERS. (a)

Company—Winding-up—Contributory—Application for shares—Underwriting agreement.

A. wrote and sent to the vendor to a company an underwriting letter in which he agreed for a certain consideration "at any time within three months after the date hereof, if and as called upon by you, to subscribe or find responsible subscribers for any number of shares of 1l. each of this company you may require, not exceeding 1000, in accordance with the terms of the prospectus. . . . This agreement is to be irrevocable, and to be sufficient in itself to authorise you, in the event of my not subscribing or finding responsible subscribers as above mentioned, to subscribe for the said shares in my name, and to authorise the directors of the company to allot such shares to me, and to enter my name in the company's register of members in respect thereof.

Held, that the letter did not amount to an application for the allotment of the shares, but only to an authority to subscribe for such shares in A.'s name in the event of A. neglecting to subscribe or find responsible subscribers after having been called upon to do so.

Re Licensed Victuallers' Trading Association; Ex parte Audain (42 Ch. Div. 1).

SUMMONS.

On the 25th April 1893, certain persons, including Jacob Ormerod, signed an underwriting letter for 1000 shares in the above-named company. Each letter was addressed to James Harvey, the vendor to the company, and was in the following terms:

I agree for the consideration hereinafter stated at any time within three months from the date hereof, if and as called upon by you, to subscribe or find responsible subscribers for any number of shares of 1l. each of this company you may require, not exceeding 1000, in accordance with the terms of the prospectus, dated the 8th April 1893, and to pay or cause to be paid the instalments upon the said shares in accordance with the terms of the said prospectus, in consideration whereof you are to pay me a commission of 5 per cent. in respect of the said 1000 shares. If upon the publication of the said prospectus the shares offered to the public are

(a) Reported by W. IVIMY COOK, Esq., Barrister-at-Law.

CHAN. DIV.] *Re* WEST LONDON & GENERAL PERMANENT BENEFIT BUILD. SOC. [CHAN. DIV.]

partly subscribed for by the public, my liability is to be proportionately reduced, so that I only shall be bound to subscribe or find subscribers rateably with the other persons who shall have underwritten the shares, or any portion of the shares of the company, and if the whole of the shares so offered are subscribed for by the public, I shall be under no liability in respect hereof; but in any event I shall be entitled to receive the whole amount of the said commission upon the said 1000 shares, and the same shall be paid to me on or before the 1st day of August next. This agreement is to be irrevocable, and to be sufficient in itself to authorise you in the event of my not subscribing, or finding responsible subscribers as above-mentioned, to subscribe for the said shares in my name, and to authorise the directors of the company to allot such shares to me, and to enter my name in the company's register in respect thereof. It is a condition precedent of my liability to subscribe or find subscribers as aforesaid, that the said prospectus shall be properly issued to the public, that sufficient copies of such prospectus shall be printed and issued among responsible persons.

None of the underwriters were ever called upon to subscribe or find subscribers for shares, but in exercise of the authority purported to be given by the underwriting letters applications were made in their names for shares, which on the 27th April were allotted to them, and their names entered in the company's register of shareholders in respect thereof.

On the 31st July 1893 an order was made to wind-up the company, and the liquidator placed the names of Ormerod and the other underwriters upon the list of contributories in respect of the shares so allotted to them.

This was an application by Ormerod and the other underwriters that the list might be varied by excluding their names therefrom.

Cane (*Gore Browne* with him) for the summons.—The underwriting letters were merely proposals to take shares on certain conditions which were never fulfilled. Under these letters the underwriters were to subscribe or find responsible subscribers "if and as called upon." Such an application was to be a condition precedent to the company allotting them shares. They were never applied to to subscribe or find responsible subscribers, and therefore the right of the company to allot them shares never arose. The case is governed by *Brussel's Palace of Varieties Limited v. Procter* (10 Times L. Rep. 72).

Greenwood for the liquidator.—It was not a condition precedent to the allotment of shares by the company that the underwriters should be called upon to subscribe or find responsible subscribers. Had this been intended, it would have been specifically so stated. The letters must be treated as applications for the allotment of rateable proportions of so many of the 1000 shares as should not be applied for by the public:

Re Licensed Victuallers' Mutual Trading Association; *Ex parte Audain*, 42 Ch. Div. 1.

Re Brussel's Palace of Varieties Limited v. Procter (*ubi sup.*) does not apply. The words there were different to those in the present case.

Cane was not called upon to reply.

WILLIAMS, J.—In my opinion there was no authority given by these gentlemen to make any application for shares in their names. If they gave no authority they are in the same position as strangers whose names have been put on the

register of shareholders without their consent, by which they could incur no liability. Under the underwriting letters they were liable within three months from the date of them to subscribe or find responsible subscribers for a certain number of shares, if and as called upon. It is common ground that no application to subscribe or find responsible subscribers was ever made to any of them, but it is said that the letters were intended by them to be used as authorities to apply for shares in their names, although no such application had ever been made. I do not so read the letters. It seems to me that what was contemplated was that the underwriters should either subscribe for the shares or find responsible subscribers, and that before they were put on the register they should be called upon to do so, in order that they might have an opportunity of finding responsible subscribers if unwilling to subscribe themselves. They never were in fact called upon to subscribe, or to find responsible subscribers. If they had been they might have been able to find some persons to subscribe. In *Ex parte Audain* (*ubi sup.*) the question was, as here, whether a person who had signed an underwriting letter intended it to be used as an application for an allotment of shares. The court seemed to have had some doubt about it, but the postscript to the letter showed that it was so intended. The agreement was to underwrite 10,000l. A shares in the company on certain terms, and the postscript was as follows: "We further agree to pay the application money upon any balance of shares required to make up the 10,000 within one week's date." Cotton, L.J. in his judgment said: "The postscript to the letter written by the appellant shows that he considered that what he had done amounted to an application, and that he himself treated the letter not only as a guarantee, but as an application for allotment, and, in my opinion, it must be regarded as an application to take the balance of the shares required to make up the 10,000l." In my opinion it was not intended by the applicants in this case that their letters should be so treated, but only as authorities to the vendor to subscribe for shares in their names if they did not subscribe or find responsible subscribers if and when called upon to do so. The names of the applicants must therefore be removed from the list of contributories.

Solicitors: *Farmer, Gray, and Tottenham*; *E. C. Rawlings*.

Jan. 24, 25, 27, 30; Feb. 14; March 12 and 17.

(Before WRIGHT, J., sitting as an additional Judge of the Chancery Division.)

Re WEST LONDON AND GENERAL PERMANENT BENEFIT BUILDING SOCIETY. (a)

Company—Winding-up—Building society—Contributories—Redemption of mortgages—Liability of advanced and unadvanced members—Borrowing powers—Costs of winding-up and realisation.

The doctrine of principal and agent, and not that of partnership, applies to building societies. The directors are the agents of the members who are the principals.

In a society therefore which is not registered under the Building Societies Act 1874, every member,

(a) Reported by W. IVIMY COOK, Esq., Barrister-at-Law.

CHAN. DIV.] *Re* WEST LONDON & GENERAL PERMANENT BENEFIT BUILD. SOC. [CHAN. DIV.]

whether advanced or unadvanced, must contribute towards the payment of the ordinary debts of the society.

The advanced members of such a society cannot redeem their mortgages without contributing to the ordinary debts unless they are expressly exonerated from liability either by the rules of the society, or by the conditions of their mortgages.

A rule enabling the directors to personally bind the members for money borrowed would be ultra vires.

Where members have authorised the borrowing of money, a claim for contribution towards the payment of the ordinary debts of the society cannot be resisted on the ground that but for such borrowing the assets of the society would be sufficient for their payment.

The costs of winding-up such a society are payable by the advanced and unadvanced members, and those of realising the assets out of the assets of the society.

SUMMONSES.

The West London and General Permanent Benefit Building Society was formed in 1868 under the Act 6 & 7 Will. 4, c. 32. The society was never registered under the Building Societies Act 1874.

In 1893 an order was made under the Companies Acts to wind-up the society.

There were two classes of members of the society, viz.: First, advanced members, who had borrowed money from the society, taken shares to the amount of their loans, and given mortgages to secure them; and secondly, unadvanced or investing members, who held shares of the society. The society owed about 1200*l.* to ordinary creditors, but it had also borrowed about 70,000*l.* from outside lenders; and it was estimated that after realisation of all assets and securities there would be a deficit of about 6000*l.*

By the rules the objects of the society were stated to be to raise a fund to enable its members to erect or purchase a dwelling-house or dwelling-houses, or to acquire other real or leasehold estate. The rules provided for the management of its affairs by directors and paid agents and officers. Every member was to pay an entrance fee and an annual sum for postage, and was liable to fines in certain events; fines were to be considered part of the assets of the society.

Rules 15 and 16 were as follows:

15. The shares in this society shall be divided into two classes, namely, deposit or unadvanced shares, and anticipated or advanced shares, and shall be of the value of 50*l.*, to be subscribed for by the monthly payments as hereinafter specified. The entrance fee shall be 22 per share.

16. The monthly subscriptions on deposit shares shall be 5*s.* per share, commencing at the meeting when such share is first taken, and shall be continued monthly at such time and place as the directors may hereafter from time to time appoint, until the amount paid, together with the interest and profits thereon, shall be of the value of 50*l.*, but the subscriptions may be paid in advance, and the shares be completed at any time.

Interest was payable on deposit shares. By rule 20 it was provided that when any member should have any advanced shares allotted to him, pursuant to rule 18, he should give notice in writing of the nature and situation of the premises intended to be offered for the security thereof,

and the trustees should pay him the money on his executing a mortgage.

Rule 21 provided:

That if any member of this society shall be desirous of paying off and satisfying the security or securities which he or she shall have given to the society, and shall give notice of such his or her desire to the directors, they may release the same on payment of the total amount due from him or her to the society for principal, interest, fines, and other payments, and require the trustees to deliver all deeds and other documents in their custody relating to the security to such member; and at his or her costs to indorse a receipt or acknowledgment on such mortgage pursuant to the 6 & 7 Will. 4, c. 32, s. 5.

Rule 22 referred to the withdrawal by members of their investments, and provided that, in case of the withdrawal of shares from the society, all fines incurred previously to any such notice should be deducted from the amount which the member or members should be entitled to receive.

Only unadvanced members shared profits, and there was no provision for making the advanced members liable to contribute to losses. By rule 31 the trustees, directors, and officers of the society were to be indemnified "out of its funds and property" against all losses, costs, charges, damages, or expenses.

By rule 17, which was added in 1870, it was provided as follows:

2nd. That the trustees for the time being may from time to time, as may be necessary for the purposes of the society, borrow and take up at interest any sum or sums of money from any bankers with whom the funds of the society may be deposited, or from any other person or persons; and to procure such loan or loans the trustees may give their own personal security, and they shall be indemnified out of the first funds of the society which shall be received, provided that the whole sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages of the society.

Under this rule large sums were borrowed, for which deposit receipts were given, which simply stated that the money was to be placed to the deposit account of the lender, with a note as to the requisite length of notice for withdrawal.

The forms of mortgages taken from advanced members had not been uniform, but two had been selected as test cases.

Alsop's mortgage of Oct. 1877, recited that he had applied for a loan of 200*l.* in respect of his four advanced shares, and the mortgagor demised a leasehold house to secure the discharge of 220*l.*, the aggregate amount of such advance and a premium, "and such sums as may become payable by him to the said society under or by virtue of these presents, or the rules or bye-laws of the said society, or in any other way." The security was not to be "redeemable until the said sum of 220*l.*, together with all such further sums (if any) as the trustees shall have paid under or by virtue of these presents, with interest thereon at the rate of 5 per cent. per annum, and all fines due in respect thereof, and all other moneys which are now or which at any time hereafter may become due to the said society from the mortgagor in respect of any share or shares in the said society shall have been duly paid."

The other mortgage was Speller's, dated in 1891. He was the owner of six shares, and

CHAN. DIV.] *Re* WEST LONDON & GENERAL PERMANENT BENEFIT BUILD. SOC. [CHAN. DIV.]

received 300*l.*, and covenanted "that he, the mortgagor, will duly and punctually pay on the second Monday in every month during a period of four years, to be computed from the month of Nov. 1891, the monthly subscriptions of 7*l.* 5*s.*, and will pay all subscriptions, fines, and other sums of money payable according to the rules of the said society for the time being, and will in all other respects duly observe the said rules."

Mrs. Girardet's mortgage was in the same form as Speller's.

There were two summonses by Speller and Alsop respectively, asking for leave to redeem their mortgages on payment only of the amounts due from them under their mortgages, and by the rules of the society, without making any contribution towards payment of the society's debts, either ordinary debts or loans; and further that, if they were under any such liability, it might be declared that the unadvanced members were primarily liable.

On the summonses coming on for hearing it was agreed that some of the outside depositors, who were not then represented, should be represented by counsel for the official receiver.

Grosvenor Woods, Q.C. and *Warrington* for the applicants on the two summonses.—The applicants are entitled to redeem in accordance with the rules of the society upon payment by them of the amounts secured by their mortgages, and thereupon to be freed from any future liability as contributories or otherwise. The cases on this point are principally those of societies registered under the Building Societies Act 1874. Sect. 14 of that Act shows what the Legislature thought was the limit of liability: (see *Wurtzburg* on Building Societies, 2nd edit., p. 145, *et seq.*) The liability of the members of the society depends upon their contract, *inter se*:

Brownlie v. Russell, 48 L. T. Rep. N. S. 881; 8 App. Cas. 235;

Re Sheffield and South Yorkshire Permanent Building Society, 60 L. T. Rep. N. S. 186; 22 Q. B. Div. 470;

Buckle v. Lordonny, 56 L. T. Rep. N. S. 273.

Any person dealing with the officers of the society is deemed to have notice of its rules:

Re Victoria Permanent Benefit Building, Investment and Freehold Land Society; Hill's case; Jones' case, 22 L. T. Rep. N. S. 777; L. Rep. 9 Eq. 605;

Chapleo v. Brunswick Permanent Building Society, 44 L. T. Rep. N. S. 449; 6 Q. B. Div. 696.

An advanced member on redeeming his mortgage is not under any further liability to contribute even for the debts existing at the time, and although the society is being wound-up:

Tosh v. North British Building Society, 11 App. Cas. 489;

London Provident Building Society v. Morgan, 69 L. T. Rep. N. S. 595; (1893) 2 Q. B. 266;

Buckle v. Lordonny (*ubi sup.*);

Re Doncaster Permanent Building Society, L. Rep. 4 Eq. 579;

Re West Riding of Yorkshire Permanent Benefit Building Society; Ex parte Pullman, 63 L. T. Rep. N. S. 483; 45 Ch. Div. 468.

And the circumstance of the society being incorporated or unincorporated, or of there being outside creditors or not, does not affect the ques-

tion. Where members have completely withdrawn, they are free from all liability:

Re Borough Commercial and Building Society, 69 L. T. Rep. N. S. 96; (1893) 2 Ch. 242.

The members of the society did not pledge their individual credit, and are therefore not personally liable for the money borrowed under rule 17 of the rules of 1870. A rule imposing personal liability would be incompatible with the nature of a building society, and *ultra vires*:

Murray v. Scott, 51 L. T. Rep. N. S. 462; 9 App. Cas. 519;

Re Mutual Aid Permanent Benefit Building Society, 53 L. T. Rep. N. S. 802; 30 Ch. Div. 434.

A creditor can only recover through the medium of the society, and then only so much as the members have agreed to contribute under their contract *inter se*. Here the contract is constituted by the rules, and it is only under such rules that the members are liable to contribute:

Re London Marine Insurance Association, 20 L. T. Rep. N. S. 943; L. Rep. 8 Eq. 176.

Sect. 200 of the Companies Act 1862 does not apply to the present case, for it cannot be contended that the applicants are liable to contribute anything for the adjustment of the rights of the members *inter se*. As between the applicants and the unredeemed members, there can be no liability on the part of the former to contribute. Assuming there is any liability to contribute, it must be by the unadvanced members, as they received dividends out of the profits made by the society out of the premiums paid by the advanced members. The latter did not receive any share of these profits, and consequently are only liable to pay the amounts remaining due on their mortgages:

Brownlie v. Russell (*ubi sup.*);

Re Britannia Permanent Benefit Building Society, 65 L. T. Rep. N. S. 196.

It is only under special rules that advanced members can be rendered liable to contribute to the payment of losses:

Re West Riding of Yorkshire Permanent Benefit Building Society, 62 L. T. Rep. N. S. 486; 43 Ch. Div. 407.

Re Doncaster Permanent Building Society (*ubi sup.*) does not apply, as there were special circumstances in that case. We submit, therefore, that the applicants, in accordance with *Tosh v. North British Building Society* (*ubi sup.*) and *London Provident Building Society v. Morgan* (*ubi sup.*), ought not to be placed on the list of contributories.

Haldane, Q.C. and *Macnaghten* for unadvanced members.—The advanced members cannot withdraw or redeem if the outside lenders are creditors of the members of the society. They can only do so if the lenders have merely a charge upon the assets of the society:

Tosh v. North British Building Society (*ubi sup.*).

Neither advanced nor unadvanced members are liable to outside creditors:

Murray v. Scott (*ubi sup.*).

The question of notice is not material. The notice is not of a rule, but of an Act of Parliament. A rule imposing direct or indirect liability on members would be *ultra vires*. Here, however, there is no such rule. The rules do not impose

CHAN. DIV.] *Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILD. SOC.* [CHAN. DIV.]

any personal liability either upon the advanced or the unadvanced members, but only render the funds of the society liable:

Re Doncaster Permanent Building Society, 15 L. T. Rep. N. S. 270; L. Rep. 3 Eq. 158.

An advanced member may accordingly withdraw from the society, and redeem his mortgage without regard to creditors. No distinction is drawn in the rules between the position of advanced and that of unadvanced members. They are both equally members of the society whether they hold investing or advanced shares. If, therefore, there is any liability, it is common to both classes of members. A member desirous of paying off the amounts due on his mortgage may do so at any time, and his release is provided for by rule 21. Until, however, he has transferred his shares, he is in the same position as any other member. If there is any liability to contribute to the payment of loans, the liability of the advanced is the same as that of the unadvanced members:

Brownlie v. Russell (ubi sup.);

Tosh v. North British Building Society (ubi sup.).

The question of liability turns entirely upon the nature of the contract between the members and the society.

Buckley, Q.C. and Bramwell Davis for the liquidator and the outside lenders.—We contend that the advanced members can only redeem on payment of everything due from them in their capacity of members of the society, and that in the event of a winding-up they still remain liable for the debts of the society even after redemption. This liability in the present case is common both to the advanced and to the unadvanced members, as by the rules both classes are equally members. Under rule 21 an advanced member can only redeem on paying the total amount due to the society for principal, interest, fines, "and other payments," from which it would appear that a larger liability was contemplated by the rule than was covered by his mortgage. No provision is contained in the rules enabling an advanced member to terminate his membership on payment only of the amount secured by his mortgage. The liability in such a case depends entirely on contract. Here the liability imposed by the contract upon all the members was unlimited, and this is shown by the form of the mortgages. If, however, the lenders are not entitled to require contribution from members, they may nevertheless have a first charge on the assets of the society, in which case the whole of the assets would be absorbed, and the ordinary debts of the society would have to be paid by the members: (see *Wurtzburg on Building Societies*, 2nd edit., p. 74.) In a winding-up, an advanced member cannot refuse to pay except only in the way provided in his mortgage:

London Provident Building Society v. Morgan (ubi sup.).

He may be compelled to pay up his future instalments immediately. A rule authorising the directors to pledge the individual credit of the members to lenders of money to the society would be *ultra vires* as being inconsistent with the nature of a building society:

Mutual Aid Permanent Benefit Building Society (ubi sup.).

On the present contract, as constituted by the rules, we say that both the advanced and un-

advanced members became members of the society with unlimited liability to contribute to the payment of the debts and liabilities of the society. The only restriction imposed by rule 17 on the borrowing powers of the society is that the borrowing must be for the purposes of the society.

Eve for Mrs. Girardet.

Grosvenor Woods replied.

Cur. adv. vult.

Feb. 14.—WRIGHT, J. stated the facts, and continued:—The first question to be determined in order to ascertain the rights of the parties is whether the members, advanced or unadvanced, of such a society can be called upon to contribute towards discharge of its ordinary debts (which are usually small, and in this case are about 1200*l.*) anything beyond such subscriptions or instalments and fines as remain unpaid on their shares or mortgages according to the society's tables and rules. In other words, must the ordinary creditors look to the assets of the society as the only fund out of which they can obtain payment, or can they, if that fund is insufficient, come upon the members personally? In the case of an unincorporated industrial society, which is much more like an ordinary trading partnership than building societies are, there seems to be no doubt that the members would be liable individually and without limit, although such liability could be enforced only by means of a judgment against the trustees or other persons prescribed for that purpose and *scire facias* against particular members: (see *Myers v. Rawson*, 1 L. T. Rep. N. S. 405; 5 H. & N. 99; *Dean v. Mellard*, 15 C. B. N. S. 19.) In a winding-up also the liability would be unlimited, but would, of course, be enforced only on terms of equality so far as practicable. But building societies are not in the nature of partnerships, and there is no express decision in the case of a building society, unless *Re Doncaster Permanent Building Society* (15 L. T. Rep. N. S. 270; L. Rep. 3 Eq. 158) can be considered to be a decision. There Wood, V.C. at chambers settled advanced members on the list of contributories, and afterwards said, "There is no doubt that they were members for the purpose of paying debts, and therefore it was proper and right that they should be made contributories." But the matter does not seem to have been discussed, because the creditors had been paid off; and as the Vice-Chancellor appears to have thought that the advanced members would, under the rules of that society, have been bound to contribute to the losses of the unadvanced—i.e., to pay the debt of the society to them—it is not clear that the expression quoted refers to ordinary creditors at all. In *Re Professional Commercial and Industrial Benefit Building Society* (25 L. T. Rep. N. S. 397; L. Rep. 6 Ch. 856), James and Mellish, L.J.J. said that, if the society were wound-up, the advanced members would be contributories; but there is nothing to show to what extent or for what purposes, or on what ground, and I cannot find anything in the case which supports the expression in the head-note about unlimited liability. In the absence of express decision, it would seem on principle that, the doctrine of partnership being inapplicable, the doctrine of principal and agent must be applicable

CHAN. DIV.] *Re* WEST LONDON & GENERAL PERMANENT BENEFIT BUILD. SOC. [CHAN. DIV.]

in the case of ordinary debts properly incurred by the directors for the ordinary purposes of the society, and that if the assets (including the unmatured subscriptions of the unadvanced members and the unmatured instalments of the advanced members) are insufficient to pay such debts, all the persons who were members when such debts were incurred ought to be held liable on the principles of common law. And of this opinion Lord Blackburn seems to have been in *Murray v. Scott* (see 9 App. Cas. at pp. 546-8 and 554). I come, therefore, to the conclusion that if there were no creditors except ordinary creditors and the assets were insufficient, the members would be personally liable, and are therefore to be settled on the list of contributories. There cannot be any difference for this purpose between advanced and unadvanced members. The liability depends not on the terms of contract of the members *inter se*, but on the fact of all members being principals and of the directors being their agents in relation to the necessary business of the society. The hardship is very small, because there seems to be no ground of objection to registration under the Act of 1874 for the mere purpose of liquidation, and limitation of liability would then follow even as regards liabilities previously incurred: (*Re Sheffield and Hallamshire Ancient Order of Foresters' Co-operative and Industrial Society Limited; Fountain's case*, 12 L. T. Rep. N. S. 335; 34 L. J. 593, Ch.) The second question is, What are the liabilities of the members in respect of the moneys borrowed under rule 17? Here, again, *Murray v. Scott* (*ubi sup.*) is the only important case. There the decision was that the mere fact that the rule in that case placed no limit on the extent of the borrowing power did not *per se* make it *ultra vires*. But all the Law Lords seem to me to have intimated, not obscurely, the opinion that if a rule giving power to borrow had to be construed as giving power to bind the members personally for borrowed money, and not as binding merely the assets of the society, it would be *ultra vires*, as turning the obligations of the members into something inconsistent with the purpose of such societies. Their business does not necessarily require borrowing at all, and it is only for necessary purposes of their business that any authority to bind the members individually can be implied or is consistent with the nature and objects of such societies. A rule which should go beyond this would, therefore, be *ultra vires* to that extent. The security of lenders, Lord Selborne says, is "necessarily the total amount of the contribution of members, and the creditors can have no recourse except against such funds and property." It is true that no one of the Law Lords who took part in the decision of *Murray v. Scott* (*ubi sup.*) purports to decide this. It is true also that the rules and mortgages in that case contained expressions which, more clearly than anything in the present case, indicated an intention to charge only the assets of the company; but I think that the language used by all of them shows that they would have been prepared to take this view in cases much less distinct in definition of the funds to be charged than in that case. I therefore think that the members, advanced or unadvanced, cannot be held personally liable in respect of these loans beyond the amounts payable under the terms of the rules and tables. And this is really the substantial question in this case.

The third question which I have to decide (nominally the only one) is whether the advanced members are entitled to redeem their mortgages without providing for the liabilities to ordinary or loan creditors in so far as such liabilities may be found to exist—that is to say, in this case the liability in respect of ordinary creditors. It is not very material if I am right on the main questions, because the applicants must pay either as mortgagees or as contributories. I think, though with much doubt, that they are not under either form of mortgage. The decision of Chitty, J. in *Re West Riding of Yorkshire Permanent Benefit Building Society* (62 L. T. Rep. N. S. 486; 43 Ch. Div. 407) seems to me to govern this. It is true that in that case the rules themselves expressly provided for contribution by the advanced members to losses. In the present case the mortgagees by themselves do not subject the mortgagors to any liability beyond that to which they are subject as members under the rules and tables, but I think they are bound by the terms of the mortgages and rule 21 taken together, as a condition of redemption, to satisfy every liability to which they are subject to the society or its liquidator as members, whether by express provision made in the rules or by implication from the fact of membership under rules of this kind. One ground of doubt, to my mind, is that possibly the obligation to provide for ordinary creditors is satisfied when it appears that there are assets enough to pay them, and that they are made insufficient only because the borrowed moneys have also to be paid. But on the whole I think the members cannot set this up. They authorised the borrowing, with the necessary consequence that the loans have to be paid out of the assets, and to the extent to which the assets are so made insufficient to pay ordinary debts—that is to say, in this case about 8 or 9 per cent.—the obligation to pay them is not satisfied by reason of the members' own act in authorising the borrowing. There is a fourth question, which does not properly arise on this application, but on which I understand the parties desire an expression of my opinion. That is the question as to the order in which the claims of the several classes of creditors are to be met out of the assets, or by the several classes of contributories. The costs of the winding-up ought, I suppose, to be first paid out of the assets, and as the present applications are test cases the costs of them on both sides ought to be treated as costs in the winding-up; but this does not apply to Mrs. Girardet's claim. She was sufficiently represented by Speller, and I do not allow her costs. Against the remaining assets both the ordinary creditors and the loan creditors ought to rank *pari passu*, there being no consent, as in *Murray v. Scott* (*ubi sup.*), to prefer the ordinary creditors, and the assets having been swollen by the loan deposits. Any deficiency due to the ordinary creditors ought to be made up by contributions from all members, advanced or unadvanced. As I understand the figures, this contribution will be small—probably about 5l. a share. The advanced members are not liable to make any further contribution to the losses of the unadvanced, in the absence of any contract by the rules or otherwise to that effect. The advanced members are therefore entitled to redeem on payment according to the rules and tables, and of that amount which I have suggested as 5l. per share, but the exact

Q.B. DIV.] *Re THE HORSHAM INDUSTRIAL AND PROVIDENT SOCIETY LIMITED.* [Q.B. DIV.]

measure of which must be matter of inquiry if no agreement can be made.

March 12.—A question having arisen as to the costs of realising the assets and of winding-up, the matter was again brought before the court.

Buckley, Q.C. and Bramwell Davis, for the liquidator and the outside lenders, submitted that the whole of the costs of realising the assets and the general costs of winding-up ought to be borne by all the members, and that the liquidator ought to make a call for their estimated amount. They referred to

Companies Act 1862, ss. 38, 102;

Re Professional Life Assurance Company, 17 L. T. Rep. N. S. 631; L. Rep. 3 Ch. 167;

Re Agriculturist Cattle Insurance Company; Ex parte Official Manager, 31 L. T. Rep. N. S. 710; L. Rep. 10 Ch. 1.

Haldane, Q.C. and Macnaghten, for the unadvanced members, contended that the costs of realising and of winding-up were first payable out of the assets before any payment could be made to creditors (*Re State Fire Insurance Company*, 34 L. J. 436, Ch.), and that in any case the liability of the unadvanced members could not exceed that of the advanced members.

Grosvenor Woods, Q.C. and Warrington, for the advanced members, submitted that the costs of winding-up were payable out of the assets, as otherwise the advanced members would never be in a position to redeem their mortgages.

Cur. adv. vult.

March 17.—WRIGHT, J.—I think that the proper declaration on the points reserved as to costs is that the actual costs of realisation must be paid out of the assets of the society other than assets arising from the contributions or calls payable under this order; and the costs of winding-up must be paid by the members advanced and unadvanced. The liquidator is to make an estimate of what call on the members advanced and unadvanced in proportion to their shares will meet the costs of winding-up. The advanced members are respectively to be permitted to redeem on payment of the amounts due to the society according to the society's rules and tables and to the terms of their respective mortgages, and on payment of the contributions for which they are by this order declared liable, and on payment of the amount of the call upon them hereby ordered. This declaration as regards costs of winding-up applies to both forms of mortgages—to Alsop's form by the very terms of the mortgage, and to Speller's form by virtue of rule 21.

Solicitors: Grundy, Izod, and Grundy; Collyer, Bristow and Co.; Rudall, Vaizey, and Smith; T. R. Watson.

QUEEN'S BENCH DIVISION.

Tuesday, April 24.

(Before CHARLES and BRUCE, JJ.)

Re THE HORSHAM INDUSTRIAL AND PROVIDENT SOCIETY LIMITED. (a)

Company — Winding-up — Withdrawable share capital—Suspension of right of withdrawal—Business carried on at a loss—Winding-up order “just and equitable”—Companies Act 1862 (25 & 26 Vict. c. 89), s. 79, sub-sect. 5.

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

On a petition by three shareholders to wind-up an industrial society, the County Court judge found as a fact that the society was solvent as regards outside creditors, but that it could only continue to carry on business by a suspension of the right of withdrawal of share capital. The rules of the society empowered the committee to suspend the right of withdrawal for a limited time. The petitioning shareholders had given notice of withdrawal, but the committee had exercised their right of suspension by successive resolutions for a period of nearly two years prior to the presentation of the petition. The winding-up was opposed by a majority of the shareholders.

Held, that, if not having been proved to be impossible to carry on the business of the society, it was not “just and equitable” within the meaning of sect. 79, sub-sect. 5, of the Companies Act 1862 that the society should be wound-up.

APPEAL from an order of the judge of the County Court of Sussex holden at Brighton ordering the winding-up of the Horsham Co-operative Industrial and Provident Society Limited upon the petition of three shareholders.

The society was registered in the year 1868 as an industrial and provident society, and was established for the purpose of carrying on the business of general dealers. Its amended rules were on the 9th Oct. 1866 registered under the Industrial and Provident Societies Act 1876.

The rules provided, so far as is material, as follows:

10. The capital of this society shall be raised in shares of one pound each. Each member must hold one transferable unwithdrawable share. . . . Members may hold any number of shares not exceeding 200 in all, but any sum in excess of the 1*l.* transferable share may be withdrawn on due notice being given (Rule 14), unless such sum shall be purchased transferable shares.

11. No member can withdraw from the society until he has disposed of his transferable share or shares to a person approved by the committee.

14. Share capital other than transferable shares may be withdrawn on giving notice in accordance with the following scale: 2*l.* on application to the committee, 2*l.* to 5*l.* on two weeks' notice, 5*l.* to 10*l.* on three weeks' notice, and one week's extra notice for every additional 10*l.*, in urgent cases earlier by sanction of the committee.

15. The right of withdrawal may for a limited time be suspended by a resolution of the committee of management, if such withdrawals should appear to them to be dangerous to the interests of the society.

48. The society may be voluntarily dissolved by an instrument of dissolution signed by three-fourths of the members for the time being.

(Sect. 58 of the Industrial and Provident Societies Act 1893, which applies to societies registered under any Act relating to industrial and provident societies, contains a similar provision as to winding-up.)

The petition alleged that the paid-up capital of the society was 4963*l.* 14*s.* 11*d.*; that the society had for several years been trading at a loss; that the last two half-yearly reports showed a loss upon the trading account for the year of 1265*l.* 3*s.* 5*d.*, and the later of these accounts showed the liabilities of the society to be 8446*l.* 13*s.* 7*d.*, as against 7087*l.* 19*s.* 8*d.* assets, which sum included certain bad debts; that since 1888, when the trade done by the society amounted to 12,830*l.* 18*s.*, the business done by the society had steadily fallen off, and in the year ending the 1st July 1893 the trade done amounted to 5806*l.* 19*s.* 5*d.* only.

Q.B. Div.] *Re THE HORSHAM INDUSTRIAL AND PROVIDENT SOCIETY LIMITED.* [Q.B. Div.]

The petitioners had given notice under rule 14 claiming the withdrawal of their shares, but had been unable to obtain payment from the society, which had in 1892, under rule 15, suspended the right of withdrawal, and had from time to time down to the present time continued the suspension by resolutions passed at intervals of six months.

By leave of the County Court judge the petition was amended by adding after the names and descriptions of the petitioners that they were "creditors for moneys advanced by them as members in respect of which notice of withdrawal has been given," and by adding the following paragraph: "If a winding-up order is made, there will be a substantial surplus resulting from the realisation of the assets of the society after paying the debts of the society other than the debts due to shareholders entitled to withdraw."

The petitioners held between them 400l. worth of shares.

The petition was opposed by shareholders to the extent of nearly 3000l., and by creditors to the extent of 700l. out of 800l.

At the annual meeting in 1893 a committee of investigation was appointed, which reported in favour of continuing the business of the society, and at the annual general meeting in 1894 a resolution was carried unanimously affirming that there was no necessity for a winding-up, and that such a course ought, in the interests of the society, to be opposed. The petitioners alleged that this resolution was passed upon the faith of a misleading balance-sheet.

The County Court judge came to the conclusion on the evidence that the company was solvent for the purpose of paying outside creditors, but insolvent for the purpose of paying withdrawable capital; and that the business of the society could not be carried on except by further suspending the right of withdrawal. He therefore held that it was "just and equitable" that the society should be wound-up.

The Companies Act 1862, s. 79, provides that

A company under this Act may be wound-up by the court as hereinafter defined under the following circumstances (that is to say): (1) Whenever the company has passed a special resolution requiring the company to be wound-up by the court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in numbers to less than seven (7); (4) whenever the company is unable to pay its debts; (5) whenever the court is of opinion that it is just and equitable that the company should be wound-up.

Levett, Q.C. and Bozall for the society.—The County Court judge was wrong in ordering this society to be wound-up. The three cardinal principles upon which these societies are carried on are that the members should work together for their mutual advantage, that members shall not exercise their right of withdrawal so as to endanger the society, and that a three-fourths majority of the members is necessary for a voluntary winding-up. A domestic forum is thus provided by the rules for the settlement by the society itself, without the intervention of the court, of all questions as to advisability of carrying on the business of the society. This petition is opposed by the majority of the members and of the outside creditors. By sect. 91 of the Com-

panies Act 1862 the court may have regard to their wishes in considering whether it is just and expedient that the society should be wound-up. The right of withdrawal having been suspended, the petitioners are not in the position of creditors, and cannot claim a winding-up as of right. The County Court judge has found that the society is solvent as regards outside creditors, but he was of opinion that it is "just and equitable" that the order should be made. The meaning of these words "just and equitable" in sect. 79, sub-sect. 5, of the Companies Act 1862 has been discussed in several cases, and the principle laid down is that the court ought not to order a winding-up against the wishes of the majority of the shareholders unless it appears that the position of the company is hopeless, and that it is impossible to carry on the business of the company any longer:

Re Suburban Hotel Company, 17 L. T. Rep. N. S. 22; L. Rep. 2 Ch. 737;

Re Langham Skating Rink Company, 36 L. T. Rep. N. S. 605; 5 Ch. Div. 669;

Re Planet Benefit Building and Investment Society, 27 L. T. Rep. N. S. 638; L. Rep. 14 Eq. 441.

Mackintosh for the petitioners.—The County Court judge has found that the business of the society can only be successfully carried on by a continued suspension of the right of withdrawal. Rule 15 only allows a suspension for a limited time. It is therefore impossible for the society to carry on its business in accordance with the rules. The petitioners, having given notice of withdrawal, are in the position of outside creditors, and are entitled to a winding-up order. In any case, the position of a holder of withdrawable shares is more favourable with regard to his right to petition for a winding-up than that of an ordinary shareholder in a company with no right of withdrawal. Under the circumstances of this case the County Court judge was right in holding that it was "just and equitable" that the company should be wound-up:

Re Queen's Benefit Building Society, 24 L. T. Rep. N. S. 346; L. Rep. 6 Ch. 815;

Re Planet Benefit Building and Investment Society (*ubi sup.*).

CHARLES, J.—In this case the County Court judge has ordered the winding-up of the society. I need scarcely say that it is with much hesitation that I am compelled to differ from the conclusions at which he has arrived. It is necessary in order to ascertain on what principles our decision should be based to consider the case in the light of various decisions of the Chancery Division as to making a winding-up order under sect. 79, sub-sect. 5, of the Companies Act 1862. Reading that sub-section by itself it would seem to give the court an unqualified discretion as to what is "just and equitable," but it is clear from other sections and the authorities that that unqualified discretion does not exist. The circumstances under which a winding-up order can be made under sub-sect. 5 must be *ejusdem generis* with those mentioned in the preceding sub-sections. Now, in this case there is no doubt that a large number of the shareholders do not want the society to be wound-up. If they did, they could bring about a winding-up by means of a special resolution under sub-sect. 1. Further, sect. 91 gives liberty to the court to have regard to the wishes of the creditors, and the creditors do not desire a winding-up.

Q.B. Div.] *Re THE HOERSHAM INDUSTRIAL AND PROVIDENT SOCIETY LIMITED.* [Q.B. Div.]

It is true that they are not much interested in the matter because as to them the society is solvent. The question is, whether the court ought to accede to the wishes of three shareholders who are desirous that the society should be wound-up. The society has rules to which the members adhere, and which are part of the bargain entered into by the members with the society. Under these rules the business of the society is carried on. [His Lordship read rules 14 and 15.] For the last two or three years the business of the society appears to have been carried on at a loss, and members commenced to exercise their right of withdrawal. A resolution was therefore passed suspending the right of withdrawal, and the suspension has been continued down to the present time. The County Court judge has found as a fact that, so far as outside creditors are concerned, the society has ample funds to pay them, and the society is not insolvent in that sense. He has further found that the society cannot pay all its withdrawable capital, and to his mind it is not "just and equitable" that the society should carry on business at the risk of the loss of withdrawable capital, and he deems that he is entitled to make a winding-up order because business cannot be carried on except by continuing to suspend the right of withdrawal. Can it be said on those findings to be "just and equitable" to wind-up the society. The principles by which the question is to be determined are to be found in *Re Suburban Hotel Company (ubi sup.)*, where Lord Cairns decided that "the fifth head of sect. 79 of the Companies Act 1862 is restricted to matters *ejusdem generis* with the four previous heads, and does not authorise the court to wind-up a solvent company, against the wish of the majority of shareholders, because the business has been carried on at a loss, and appears likely to continue a losing concern." Lord Cairns in that case points out that the wishes of the members of the company have a material bearing on the question, and that, to justify a winding-up against the wishes of the company, it is not enough to show that the business of the company is being managed at a loss; there must be something like an absolute impossibility of carrying on the business any longer. He says in conclusion: "I am therefore unable to find that any larger rule has been laid down, and I certainly do not think it desirable now to lay down a larger rule than that laid down by Lord Cottenham, and followed by the Master of the Rolls in the case of the *Anglo-Greek Steam Company* (14 L. T. Rep. N. S. 120; L. Rep. 2 Eq. 1), that if there be insolvency or anything which is equivalent to a test of insolvency, if there be the circumstances that the company has not for a certain time commenced business or has suspended business, that is a test given to the court by which to prove that the business cannot be carried on, and in those cases the company may be wound up. It is not necessary now to decide it, but if it were shown to the court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the court might, either under the Act of Parliament, or on general principles, order the company to be wound up. But what I am prepared to hold is this, that this court, and the winding-up process of the court, cannot be used, and ought not to be used, as

the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation. This company may become successful, or may continue to be unprofitable, as I believe it has hitherto been, and it may, therefore, hereafter reappear in this court under different circumstances, but it is not for this court to pronounce on opinion-evidence that this is likely to be an unprofitable speculation, and that, therefore, at the wish of a minority of shareholders, against the will of a large majority, the company should be wound-up and put an end to." That decision was referred to and approved of by the last Master of the Rolls in *Re Langham Skating Rink Company (ubi sup.)*. He lays down the principle that the power given by sub-sect. 5 of sect. 79: "Must not be acted upon unless there is a very strong ground for acting upon it, and for this reason, that these companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal." It is suggested that in the present case there are circumstances *ejusdem generis* which bring the case within sub-sect. 5. The argument is that by reason of their notices of withdrawal the petitioning shareholders are placed in the same position as creditors, and therefore have a *locus standi* to petition. In support of that contention, *Re the Queen's Benefit Building Society (ubi sup.)* was cited. It is clear from that case that they have a *locus standi* to petition, but the case does not decide, as contended, that they not only have the right to petition, but are entitled, being in the position of creditors, to insist on a winding-up order being made. I do not think that that is the effect of the petition. Nor do I think that the case before Lord Romilly (*Re Planet Benefit Building and Investment Society, ubi sup.*) avails the petitioners. He held that internal creditors had not *ex debito justitiæ* a right to a winding-up order, but it appeared in that case that the condition of the company was utterly hopeless. I do not think that those decisions do more than show that internal creditors have a right to petition. When their petition is presented the judge still has to consider whether he should make a winding-up order or not. I am unable to find in the judgment of the County Court judge any suggestion that in his opinion the business of this society is in a hopeless condition. As to the question of the withdrawal of capital, the members have by the rules given the directors power to suspend the right for a limited time. There is no suggestion that the suspension has been done *malâ fide*, but on the contrary it was done *bonâ fide* with the intention of assisting the society. It is impossible, therefore, to say that this society is insolvent, because by the terms of the contract between the members and the society the right of withdrawal does not now give rise to an existing, but only to a future, liability. For these reasons I am unable to agree with the judgment of the County Court judge, and this appeal will therefore be allowed.

BRUCE, J.—I am of the same opinion. It seems to me clear that the judge has not found that this society is insolvent. He has found that the society is solvent for paying outside creditors. It is true that he has also found that the society is insolvent for the purpose of paying withdrawable capital,

Q.B. Div.]

HARPER (app.) v. MARCKS (resp.).

[Q.B. Div.]

but by the rules power is given to suspend the right of withdrawal, and if the right is suspended, then there is no debt due to the shareholders in respect of their withdrawable capital. The principles on which a winding-up order ought to be made against the wishes of the shareholders are defined in the cases which have been referred to, and also in *Re European Life Assurance Society* (L. Rep. 9 Eq. 122), where James, L.J. (then Vice-Chancellor) says: "In my view of the law of the case, it would be just and equitable to wind-up a company like this assurance company if it were made out to my satisfaction that it is, not in any technical sense, but plainly and commercially, insolvent—that is to say that its assets are such, and its existing liabilities are such, as to make it reasonably certain—as to make the court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities." There is no such finding in this case; and there is no suggestion that the existing assets will not meet the existing liabilities.

Appeal allowed.

Solicitors for the society, *Bower, Cotton, and Bower, for Aston, Harwood, and Summers, Manchester.*

Solicitor for the petitioners, *J. H. Lee, for Coote, Horsham.*

Wednesday, May 23.

(Before CAVE and WRIGHT, JJ.)

HARPER (app.) v. MARCKS (resp.). (a)

Criminal law—Cruelty to animals—"Domestic animals"—Lions in confinement—Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), ss. 2, 29—Cruelty to Animals Act 1854 (17 & 18 Vict. c. 60), s. 3.

Five full-grown lions were confined in a cage and were kept in subjection by a man armed with a whip while a performance of dancing was given for profit in the cage by a lady dancer. Feats of jumping were also performed by one of the lions. Held, that the lions were not "domestic animals" within the Cruelty to Animals Acts 1849 and 1854.

Per Wright, J.: A domestic animal is one which is of a kind ordinarily domesticated, and which is in fact domesticated.

CASE stated by a Metropolitan police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

An information was preferred at the police-court, Westminster, by the appellant against the respondent under the Cruelty to Animals Act 1849, s. 2, charging the respondent as follows, namely, that on the 27th Feb. 1894, at the Royal Aquarium, Westminster, he did cruelly beat, ill-treat, abuse, and torture a certain animal, to wit, a lion.

On behalf of the appellant it was conceded that ss. 2 and 29 of the Cruelty to Animals Act 1849, and s. 3 of the Cruelty to Animals Act 1854, applied to domestic animals only; but it was contended that lions kept in confinement as hereafter described were domestic animals within the meaning of the Act.

The following facts were proved:

The lions in question were five in number, and between four and five years old. They were kept

in a cage five yards long by four yards wide in the Imperial Theatre inside the Westminster Aquarium. There the public were admitted at an extra charge to see the performance in the cage, which was as follows: A lady known as a skirt dancer entered the cage accompanied by the respondent armed with a formidable whip in one hand and a strong pole with a steel head to it in the other. With the aid of these weapons the lions were kept in subjection while the lady danced; and subsequently one of the lions was made to jump over a board several times.

According to the evidence of the appellant, considerable violence was used with the whip, but for the purposes of this case it was not to be assumed that any cruelty was used by the respondent, as his witnesses were not called in consequence of the magistrate's decision as hereinafter set out.

In no sense, except as above stated, did these lions differ in any way from any other wild animals kept in confinement at the Zoological Gardens or elsewhere.

The magistrate was of opinion that a lion, even when kept in confinement, was not a domestic animal within sect. 2 of the Cruelty to Animals Act 1849, and he therefore dismissed the summons.

If the court should be of opinion that these lions were domestic animals, the case was to be remitted to the magistrate to be further dealt with on the question of whether they were cruelly used or not.

If the court should be of opinion that these animals do not come within that section of the Act, the judgment of the magistrate was to stand.

By the Cruelty to Animals Act 1849, s. 2:

If any person shall cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding £5.

By sect. 29:

The word "animal" shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.

By the Cruelty to Animals Act 1854, s. 3:

The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word "animal" shall in the said Act and in this Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act or of any other kind or species whatever, and whether a quadruped or not.

Willis, Q.C. (Colam with him) for the appellant.—The magistrate was wrong in holding that these lions were not domestic animals. They have been brought under the control of man, and have been trained to perform and bring profit to their owner. They are therefore domestic animals within the Act. An animal is none the less domestic because it is vicious, or because it is one of a class which is not ordinarily domestic. It is a question of fact in each case whether the individual animal is domestic:

Swan v. Sanders, 44 L. T. Rep. N. S. 424; 50 L. J. 67, M. C.;

Colam v. Pagett, 12 Q. B. Div. 66;

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. RICHARDSON AND OTHERS.

[Q.B. Div.]

Aplin v. Porritt, 69 L. T. Rep. N. S. 433; (1893) 2 Q. B. 57;

Budge v. Parsons, 3 B. & S. 379;

Filburn v. People's Palace and Aquarium Company Limited, 25 Q. B. Div. 258.

Bonsey, for the magistrate, was not called on. The respondent did not appear.

CAVE, J.—I am of opinion that the answer to the question contained in this special case is, that these lions are not domestic animals within the meaning of the Acts. They are merely wild animals in confinement, and, in my opinion, wild animals in confinement are not yet brought within the protection given by the Acts. The Acts of Parliament which deal with this subject are of modern date, and the strong public feeling which led to their being passed has been gradually accumulating and strengthening. It may be that at some future date the Legislature will say that wild animals in confinement shall not be ill-used, but as yet it has not done so. The list of animals mentioned in sect. 29 are all tame animals which serve some useful purpose to mankind, and the words "other domestic animals" cannot be extended beyond the features which the animals specified possess generally. The only general feature which they possess is that they may all be tamed to serve some purpose for the use of man. In some cases the species is so altered as to be quite different from the wild stock from which it was derived. Before a wild animal can be called "domestic" it must have been tamed and made subservient to the use of man. Merely keeping it in confinement is not sufficient to make it domestic. The strongest case in favour of the appellant is that of the linnets (*Colam v. Pagett*, *ubi sup.*). That case goes some way, because the linnets had been originally wild birds; but they had been caught and trained to be used as decoys, and for that purpose they were subservient to the use of man. That case can be supported on that ground, and on that ground only. In the present case the lions are kept in a cage, and are merely prevented by terror from following their natural instinct and tearing the dancer to pieces. It is impossible under those circumstances to say that the lions are domestic animals. I agree with the decision of the learned magistrate, and am of opinion that this appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. I agree with Mr. Willis to this extent, that I think an animal, however wild by nature, may become domestic under certain circumstances; for example, wild elephants caught in the woods and trained to be of service to mankind might be called domestic animals. Domestic is not the same thing as domesticated, but I should say that an animal ought to be regarded as domestic which is of a kind ordinarily domesticated, and which is in fact domesticated.

Appeal dismissed.

Solicitors for the appellant, *Lindsay, Greenfield, and Masons*.

Solicitor for the magistrate, *Solicitor to the Treasury*.

Friday, May 25.

(Before CAVE and WRIGHT, JJ.)

REG. v. RICHARDSON AND OTHERS. (a)

Poor Law—Friendly society—Weekly allowance—Pauper member—Right of guardians of union to pauper's allowance—Dispute—Arbitration—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 23.

Justices have power under sect. 23 of the Divided Parishes and Poor Law Amendment Act 1876 to make an order for the payment to the guardians of any union or parish of any periodical payment to which a pauper may be entitled.

Guardians applied to the justices under this section for an order for payment to them of a weekly allowance which they alleged that a pauper was entitled to under the rules of a friendly society. The trustees of the society disputed the claim. The rules of the society provided that all disputes arising between any member or any person claiming an account of any member and the society should be referred to arbitration.

Held, that the guardians were claiming the payment on account of a member, and that the dispute between the guardians and the trustees as to whether or not the pauper was entitled to the payment must be settled by arbitration, in accordance with the rules of the society, and that until the dispute had been so settled the justices had no jurisdiction to make an order for the payment of the weekly allowance to the guardians.

ORDER nisi calling upon two justices of the county of Durham and the Northumberland and Durham Miners' Permanent Relief Fund Friendly Society to show cause why the justices should not proceed to hear and determine the matter of a certain complaint preferred by the Houghton-le-Spring Union Board of Guardians against the society, charging

That John Wilkinson, being an aged member of the above-named society, is entitled to the periodical payment to him of the sum of 4s. weekly out of the funds of the said society, and that the said John Wilkinson is a pauper resident in the workhouse of the Houghton-le-Spring Union, and is relieved by the guardians of the said union, and chargeable to the common fund thereof, such relief having been declared by the guardians to be by way of loan, and that there is now due from the said society in respect of such periodical payment or weekly sum the sum of 1l. 4s., which sum the said society have declined to pay to the said guardians in respect of the said relief.

The Northumberland and Durham Miners' Permanent Relief Fund Friendly Society was a friendly society registered under the Friendly Societies Act 1875. Wilkinson was a member of the society, and on the 12th Feb. 1890 he became chargeable to the common fund of the Houghton-le-Spring Union, and was admitted an inmate of the workhouse of the union. At that date he was entitled as an aged member of the society to a weekly payment of 4s. under the rules of the society.

Rule 51 was as follows:

Benefits to the aged and infirm members.—The benefits in this department shall be 4s. per week, and should the contributions be at any time insufficient to meet the claims the committee shall have power to lower the allowance proportionately until the following

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. RICHARDSON AND OTHERS.

[Q.B. Div.]

annual meeting, when the whole question of contributions and benefits may be reconsidered. No member receiving relief from this department can claim benefit from any other department of this society. All who are in receipt of this relief must continue their contributions of 3d. per fortnight thereto.

On the 31st July 1891 this rule was amended by adding the words:

If an aged member who is in receipt of relief goes into the workhouse this 4s. shall not be paid.

On the 3rd May 1890 the clerk to the guardians applied to the society for payment of the sum of 4s. per week, but no payment was made until the 22nd Aug. 1891, when the society paid to the guardians, under protest, the sum of 17l. 1s. in respect of arrears of weekly payments. Continuous payments of the 4s. per week were made up to the end of Oct. 1893, when they ceased.

The Divided Parishes and Poor Law Amendment Act 1876, s. 23, provides that:

Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper, may, from time to time, pay to the board of guardians of any union or parish out of the instalments which have become due, the cost incurred in the relief of such pauper, accrued since the last instalment, and such payment shall be a legal discharge to such trustee or other person for so much money as shall have been so paid. . . . Where any trustee, manager, or other person shall decline to make any payment, the guardians may apply to the justices in petty sessions assembled, and such justices may, if satisfied that it is right under all the circumstances to do so, make an order upon him to pay the requisite amounts then due to the guardians at once, and to pay from time to time in future as the liability in respect of the relief arises thereafter. Provided that this clause shall not have effect unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, nor in respect of any relief granted contrary to the rules and orders made under the authority of the statutes in that behalf.

The Poor Law Amendment Act 1879, s. 1, provides that:

Where a pauper, having no wife or relative dependent upon him for maintenance, is entitled to receive any moneys as a member of any friendly or benefit society, no claim shall be made under sect. 23 of the Divided Parishes and Poor Law Amendment Act 1876 by the guardians of any union or parish upon any such society of which he is a member, or against any branch thereof, for the expenses incurred in his relief, unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, and shall have, within thirty days thereof, notified the same in writing to the secretary or trustees of the society or branch of which the pauper . . . is a member, and as such entitled to receive any payment.

On the 2nd Jan. 1894 the board of guardians passed a resolution declaring that the relief to Wilkinson was given on loan.

On the 15th Feb. 1894 an information was laid before the justices in the terms set out above, and a summons was issued thereon against the society.

Rule 20 of the society's rules provided that:

All disputes that may at any time arise between any member or person claiming on account of any member, or under the rules, and the society or the trustees, treasurer, or other officer of the society, or the general committee thereof, shall be referred to arbitration.

The rule then provides for the manner in which

the arbitration is to be conducted, and concludes:

The decision of the said arbitrators or the major portion of them shall be final, binding, and conclusive on all parties within the appeal.

(The society had obtained a certificate from the Registrar-General of Friendly Societies under the Friendly Societies Act 1889 exempting the society from the provisions of sect. 30 of the Friendly Societies Act 1875, sub-sect. 10 of which enacts that, in the case of certain friendly societies, in all disputes between a society and any member, or any person claiming through a member, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court or court of summary jurisdiction, and such court may settle the dispute.)

The justices held that they had no jurisdiction to hear and determine the matter, and that the case was one for arbitration under the rule.

The board of guardians obtained an order nisi as above mentioned.

Bethune Baker (*Lawson Walton*, Q.C. with him). for the friendly society, showed cause against the order.—There is a dispute between the society and the board of guardians as to whether under rule 51 as amended the pauper is entitled to the weekly payment. That dispute must be settled by arbitration in accordance with rule 20, and unless and until the arbitrators have decided the question in favour of the guardians the justices have no jurisdiction.

Poland, Q.C. and *A. Glen* for the board of guardians, in support of the order.—The guardians do not make a claim to this weekly payment through or on account of a member of the society. They are simply creditors of the member. The provisions of the rule as to arbitration do not therefore apply to the guardians, and the justices had jurisdiction to make an order compelling payment. Secondly, rule 51 as amended does not apply to this case, because the pauper was already in the workhouse when the rule was amended, and it is not retrospective in effect:

Reg. v. Justices of Swindon, 42 J. P. 407;
Caistor Union v. Cleaver, 56 J. P. 503.

CAVE, J.—I am of opinion that this order must be discharged. It is provided by sect. 23 of the Divided Parishes Act 1876, that, "Where any pauper shall be entitled to any annuity or periodical payment" the trustee or other person bound to make payment of the same may pay the cost of the pauper's relief out of such annuity or periodical payment. The condition upon which the whole section depends is that the pauper must be "entitled" to payment. I cannot see in the section anything to show that the question whether or not the pauper is entitled is to be decided by the justices. It is true that the justices are interposed between the guardians and the trustee, because the guardians cannot compel the trustee to make payment to them unless the justices are satisfied that it is right under all the circumstances to order the payment to be made. But there is nothing in the section to indicate that the jurisdiction of the justices comes into existence at all so long as there is a dispute between the parties as to whether the pauper is entitled to the payment. It seems to me, on the contrary, to be a condition precedent that the

Q.B. Div.]

REG. v. BERGER.

[Q.B. Div.]

pauper should be so entitled. If there is a dispute as to that question it must be settled by arbitration, as provided by the rules of the society. I base my judgment on that short ground, and say nothing as to whether or not on the true construction of these rules this pauper is, under the circumstances of the case, entitled to receive this payment. That question must be settled by arbitration, and not by this court.

WRIGHT, J.—I am of the same opinion. The guardians are only entitled to receive anything which the pauper is entitled to, and no more. That must be ascertained by looking at the rules, and it is clear that under the rules this dispute as to whether going into the workhouse is the same thing as being in the workhouse is a question to be settled by arbitration.

Order discharged.

Solicitors for the guardians, *Croft and Mortimer*, for *Bentham*, Sunderland.

Solicitors for the friendly society, *Dix and Warlow*.

March 19 and 20.

(Before CAVE and WRIGHT, JJ.)

REG. v. BERGER. (a)

Criminal law—Obstruction of highway—Conviction for—Right to new trial—Evidence—Map annexed to inclosure award—Admissibility of map for purpose of showing boundaries of property.

Upon an indictment preferred in the Queen's Bench Division for obstructing a highway, a defendant, who has been found guilty, may have a new trial on the grounds of misreception of evidence and that the verdict was against the evidence; though, if there had been a verdict of acquittal, a new trial could not have been granted against the defendant.

Upon the trial of such an indictment, when the allegation is that the defendant, an owner of land adjoining the highway, has inclosed a strip of land which formed part of the highway, a map annexed to an inclosure award made under an Inclosure Act for inclosing certain commons, when the commissioners had no jurisdiction to deal with, and had not in fact dealt with, the strip of land in question, is not admissible in evidence for the purpose of showing what were the limits of the highway or the defendant's property respectively at the time when the map was made.

RULE on behalf of the defendant, calling on the prosecutors, the Finchley Local Board, to show cause why the verdict obtained for the Crown in the case of *Reg. v. Berger* should not be set aside and a new trial had on the grounds of misdirection, misreception of evidence, and the verdict being against evidence.

An indictment was found by the grand jury of the county of Middlesex and was preferred against the defendant in the Queen's Bench Division of the High Court, charging him with having obstructed a highway called the Great North road, near Whetstone, in the county of Middlesex, by inclosing certain strips or pieces of land and placing a fence and houses and buildings thereon.

The case was tried in the Queen's Bench Division, before Lawrance, J. and a jury, on the 12th Feb. 1894, when from the evidence given it appeared that the defendant was the owner of a piece of land lying on one side of the highway in question; that on this land there were some houses the access to which was over the strips of land in front of them respectively, and that the defendant had built upon these strips some new houses with post and rails to the footpath.

The allegation of the local board was that the defendant had extended his fences so as to inclose these strips of land lying between his original fences and the highway, and they said that the land so inclosed formed part of the highway, and the question at the trial was whether the strips of land so inclosed by the defendant was the property of the defendant or formed part of the highway.

Evidence was given on behalf of the defendant to show (among other things) that he and his predecessors in title had exercised acts of ownership over the strip of land in question, and on behalf of the prosecutors, amongst other evidence to show that the land formed part of the highway, there was tendered in evidence a map attached to an inclosure award made in 1814.

This award was made by commissioners acting under an Inclosure Act, 51 Geo. 3, c. xxiii. (an Act for inclosing lands in the parish of Finchley, in the county of Middlesex), sect. 46 of which Act provided:

That the award to be made by the said commissioners, under the authority of this Act, together with a proper map or plan of the said commons and waste lands thereto annexed, shall . . . be delivered to the clerk of the peace for the said county of Middlesex, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any person or persons interested in the premises . . . and the said award shall, from and after the delivery thereof to the said clerk of the peace, be deemed and taken to be enrolled according to the directions and within the meaning of the said Act hereinbefore referred to, and a copy of the said award, with a proper map or plan of the allotments to be set out for the proprietors of estates in the said parish, shall be deposited in the parish church of Finchley, and the said award and copy thereof . . . attested by the said clerk of the peace or his deputy, shall from time to time and at all times thereafter be admitted and allowed as legal evidence of the matters and things therein contained in all courts whatsoever.

The map was tendered in evidence for the purpose of showing that at the date when it was made the strip of land in question was not inclosed or separated from the highway, but formed part of it. The map had been duly made under the authority of the Inclosure Commissioners, and the award and map were both produced from the proper custody.

The land in question was not dealt with in any way by the award, and, although the highway was shown on the map, there was no allegation by the prosecutors that the commissioners had jurisdiction to deal with or define the property of the predecessors in title of the defendant, or set out the limits of the same.

The defendant objected that the map was not admissible in evidence for the purpose for which it was tendered, but the learned judge overruled the objection and admitted the map.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. BERGER.

[Q.B. Div.]

The jury found a general verdict of guilty, and the defendant obtained a rule *nisi* for a new trial upon the grounds already set out.

Philbrick, Q.C. and *A. Macmorran* for the prosecutors, showed cause.—This is a criminal case and an indictment for a criminal offence, for an act, not of non-repair of the highway or other nonfeasance, but for the obstruction of the highway, which is an act of misfeasance for which a person on conviction is liable to fine and imprisonment. This court has no jurisdiction to grant a new trial in such a case after a conviction, any more than it has to grant a new trial after an acquittal, and it is extremely clear from the authorities that there is no such power in the case of an acquittal. In a criminal case, assuming there has been no misconduct or gross miscarriage in the proceedings, the court cannot entertain a rule for a new trial upon the grounds stated in this rule. This is laid down in *Pratt on Highways* (13 edit., p. 127): "This being a criminal proceeding, a new trial will not be granted after acquittal or conviction, either on the ground of misreception of evidence, misdirection, or that the verdict is against evidence." So, in *Short and Mellor's Crown Office Practice*, p. 252, it is said: "Where, however, the case is strictly a criminal one and renders the defendant liable to imprisonment upon conviction, as upon an indictment for obstruction to a highway, it is clear that there can be no new trial." [WRIGHT, J.—That is with reference to cases of acquittal.] No; it is not limited to that, though we cannot find any case where a verdict of guilty had been found and a new trial granted, except a case of a conviction for murder which came before the Privy Council in 1867 on appeal from the Supreme Court of New South Wales, namely, the case of *Reg. v. Bertrand* (16 L. T. Rep. N. S. 752; L. Rep. 1 P. C. 520.) The last case on the subject is *Reg. v. Duncan* (44 L. T. Rep. N. S. 521; 7 Q. B. Div. 198.) There was an acquittal, and it was held that a new trial could not be granted, and there is no distinction for the present purpose in point of principle between an acquittal and a conviction. The defendant can take his chance, and if the maxim *Nemo debet bis vexari* applies in case of an acquittal, it ought also to apply in case of a conviction, and we have searched in vain to find a case in which after conviction anybody supposed that the court had power to grant a new trial. There is no reason why there should be a new trial in the case of a conviction for obstructing a highway more than in the case of any other misdemeanour, and no such distinction can be drawn, and there is no reason why on an acquittal there should be no power to give a new trial, but for a conviction there should be power. [WRIGHT, J.—It is laid down the other way in *Archbold's Pleading in Criminal Cases* (21st edit., p. 207), where it is said: "Where an indictment has been preferred in the Queen's Bench Division, or has been removed into that court by *certiorari*, a new trial may, after conviction, be moved for," upon such grounds as are given in this rule.] That is in case of a conviction for a nonfeasance, but there is not a single case to show that that can be done where the conviction is for a misfeasance. The distinction between convictions for nonfeasance and for a misfeasance is well shown by the case of *Reg. v. Johnson* (2 E. & E. 613), and especially by the judgment of Crompton, J. in that case.

[WRIGHT, J.—There is a case of *Rez v. Fowler* (4 B. & Ald. 273)—a case of felony—which is against you, and there is another authority of no mean weight in 1 Chitty's Criminal Law (2nd edit., p. 654), where it is said: "In all cases of misdemeanour, after a conviction there is no doubt that the superior courts may grant a new trial, in order to fulfil the purposes of substantial justice." So in *Reg. v. Whitehouse* (1 Dears. 1) there was a new trial granted after a conviction for misdemeanour.] The point was not taken in that case. There is no case which shows that where there is a verdict one way there may be a new trial, but if the other way no new trial. With regard to the point as to the misreception of evidence, there is authority to show that, when the question is "highway" or "no highway," old maps can be received if they come from the proper custody and are made by persons who have some knowledge of the locality:

Hammond v. Bradstreet, 10 Ex. 390;

Freeman v. Read, 4 B. & S. 174.

These cases lay down that evidence of reputation is admissible under such circumstances. In *Freeman v. Read* (*ubi sup.*) a very old map was tendered, and the court held that it could be received in evidence.

[There was further argument on the question of the verdict being against evidence, which is not now material.]

Crump, Q.C. and *Macaskie* for the defendant, in support of the rule, were not called upon.

CAVE, J.—This is a motion for a new trial in the case of an indictment preferred in this court against the defendant for obstructing the highway. It was first of all contended on behalf of the prosecutors that such a motion as this could not be made upon the grounds upon which it was sought to be substantiated; but it is laid down in text-books of undoubted authority that such a motion may be made on those grounds, and our attention has not been called to any case in which that law has been doubted. It has no doubt been laid down that such a motion cannot be made where there has been a verdict of acquittal; but that proceeds upon a principle which is applicable to cases of acquittal alone. That principle is that where a man has once been put in peril upon a criminal charge, he cannot be put in peril again upon the same grounds. But that doctrine, which is particularly a doctrine in favour of the accused party, does not apply where the application for a new trial is made after a conviction, and the prosecution here are unable to show us any authority which alleges that it does. I am therefore of opinion that it is open to the defendant to make this motion upon the grounds which have been put forward. When we come to the merits of the case, it appears to me that the learned judge went somewhat too far in admitting the map of 1814 for the purposes for which it was admitted. The evidence without that map went strongly in favour of the defendant. Part of the evidence showed undoubtedly that there were on either side of the defendant's premises inclosures which went up to the footpath as subsequently laid out by the highway authority, and that state of things would have been eminently favourable to the defendant, because it is quite possible that the defendant or his predecessors in title should have allowed this spot of land to have remained

Q.B. Div.]

In the Goods of SHOOSMITH (deceased).

[Prob.]

open and unfenced from the public way for the more easy access of people to their property and to the houses and shops which were in existence there, and it is very unlikely that he should have dedicated this little inlet as a portion of the high road to be used by the public to the exclusion of himself and his successors in title for ever. That was a great difficulty in the way of the prosecution; but it was met by the production of the inclosure award map, and especially by the production of an enlarged drawing of a portion of it, and, undoubtedly, looking at that map, there would seem to have been—if that map is accurate—no inclosures to the south of the defendant's property, and an inclosure to the north much less than those which were proved by one witness to have existed much more recently than the date of that map. It seems to me that with that map the prosecution had a strong case to make, because, if that map was reliable, there were no such inclosures in 1814, and consequently it would follow that all those inclosures were encroachments subsequent to 1814, and that none of them would be entitled to remain, and that was the contention of the prosecution. The difficulty, then, arises that the learned judge at the trial admitted this map for purposes for which it was not admissible. It seems to me that, inasmuch as the map was made by one of the public, it could not have been excluded upon a question of reputation as to whether the Great North road was a public highway or not; but that point was not for a moment in dispute. On the other hand, it seems to me that as a proof, or even as evidence, that there were in 1814 no inclosures south of the defendant's property, this map was entirely inadmissible, and it was for that purpose, and that purpose only that it was sought to be proved. The authorities establish this, that, although hearsay is good evidence of reputation in matters of public and general interest so far as the general question is concerned, hearsay is not good evidence of any particular fact from which the general fact is sought to be drawn. An old map, no matter, apparently, by whom made, so long as the man is shown to be dead—which may be inferred in this case—would be evidence of reputation that there was a road in the particular direction shown upon the map, if the contest had been whether there was a public highway or not. But it was not evidence for the purpose of showing what exactly were the boundaries of that particular highway, and that appears to have been the main use, and the very conclusive use, to which that map was put in the hands of the prosecution, and was the purpose for which it was admitted by the learned judge. It seems to me that he went beyond what the cases warrant in admitting the map for that purpose, and one cannot doubt for a moment the very great effect which that map must have produced upon the jury. It seems to me, therefore, that under those circumstances there was a wrongful admission of evidence of a kind which was very effective and likely to have very strong weight indeed with the jury, and that consequently the case ought to go down for a new trial.

WRIGHT, J.—I am of the same opinion, and for the same reasons. *Rule absolute for a new trial.*

Solicitors: for the prosecutors, *Stevens and Parkes*; for the defendant, *V. I. Chamberlain.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Oct. 30, 1893.

(Before BARNES, J.)

In the Goods of SHOOSMITH (deceased). (a)

Administration with will annexed—Testatrix deserted by her husband—Grant to son without citing husband—Probate Act 1857 (20 & 21 Vict. c. 77), s. 73.

The Court passed over the husband of a testatrix without citation, and granted administration with the will annexed to her son, where it appeared that the husband of the testatrix had left her many years before her death, and she had not since heard of or from him, and she and her family believed him to have died.

MOTION for administration with will annexed.

Mary Ann Shoosmith, late of the Mineral Springs, Flitwick, in the county of Bedford, died on the 18th April 1893, leaving a will of the 28th Jan. 1893, in which no executor or residuary legatee was named. The deceased left Thomas Henry Fullick, Arenia Mary Fullick, and Henry Fullick, children by a former husband, her surviving. Henry Shoosmith, the second husband of the testatrix, deserted her more than fifteen years before her death. He was believed to have gone to Australia, but none of his relatives or friends had since heard of him, and they believed him to be dead. Practically the whole property of the testatrix consisted of an interest in the Flitwick Mineral Springs; and, by her will, she appointed Henry Fullick, one of her sons, to be trustee and manager of her share and interest in that property. The three children of the deceased were said to be in bad pecuniary circumstances, and urgently in need of the money which, it was stated, they would be entitled to, from the realisation of their mother's interest in the Mineral Water Springs in question. Beyond the interest in these springs, there was not 10*l.* worth of property. The interest in the springs was said to be worth between 4000*l.* and 5000*l.* The person with whom she was in partnership was stated to have refused to recognise the children or to give them any share of the profits, which were considerable. This was all the children had to live upon, and, if citation upon the husband of the testatrix were required, great delay would arise.

W. M. Cann, on behalf of Henry Fullick, moved for administration with the will annexed, under sect. 73, by reason of the "special circumstances" of the case, without citing Henry Shoosmith, the husband of the testatrix.

BARNES, J. granted administration with the will annexed, under sect. 73, to Henry Fullick, the son of the testatrix, without requiring him to cite the husband; justifying security to be given by the administrator.

Solicitor for the applicant, *Claude Ormerod*, Croydon.

(a) Reported by H. DURLY GRAZEBROOK, Esq., Barrister-at-Law.

PROB.] In the Goods of **LEESE** (deceased)—In the Goods of **BLANK** (deceased). [PROB.]

Monday, Feb. 5.

(Before the PRESIDENT (Sir F. H. Jeune).)

In the Goods of **LEESE** (deceased). (a)

Administration—Aged and infirm person—Lunacy Act 1890 (53 Vict. c. 5), s. 116, sub-sect. 1—Grant to committee for use and benefit of infirm person—Probate Act 1857 (20 & 21 Vict. c. 77), s. 73.

Where the next of kin of a deceased person was an aged and infirm woman, for whose protection a committee had been appointed under the Lunacy Act 1890, the Court, upon the application of the said committee, granted administration to the estate of the deceased, under sect. 73 of the Probate Act, for the use and benefit of the infirm person.

MOTION for administration.

Jessy Leese died on the 1st Jan. 1894 at a private asylum. She had, for many years prior to her death, been of unsound mind; and Alice Louisa Meinertzhagen was the committee of her person and estate, the former committee, Jane Leese, having died in Sept. 1891.

The only next of kin of the deceased was her sister Mary Leese, a person ninety-four years of age, and so infirm that a receiver had been appointed for the protection of her property under the direction of the judge in lunacy, the receiver so appointed being the said Alice Louisa Meinertzhagen.

Master Bulwer's order, dated the 4th Dec. 1893, was in these terms:

"Alice Louisa Meinertzhagen, having given an undertaking to apply all moneys belonging to Mary Leese or her estate, I order that, upon the certificate of the masters in lunacy that she has completed her security, she be authorised, in the name and on behalf of the said Mary Leese, to receive and give a discharge for all income to which the said Mary Leese is entitled under the will of Jane Leese and of Jessy Leese, deceased, and for the annuity of 50*l.* to which she is entitled under the will of Amelia Meinertzhagen, deceased, and of the Government annuity for her life of 43*l.*"

By the Lunacy Act 1890 (53 Vict. c. 5), s. 116, sub-sect. 1 (d), relating to the extent of the administrative powers of the judge in lunacy, it is provided that the powers and provisions for management and administration shall apply

To every person not so detained (as a lunatic) and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing her affairs.

And sub-sect. 2 of sect. 116 provides that,

In the case of any of the before-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct; and any such order may confer upon the person therein named authority to do any specified act or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers, without further application to the judge.

The property in question consisted of 1913*l.* 15*s.* New Consols and 12*l.* 15*s.* 6*d.* in cash, now in court in the lunacy.

(a) Reported by H. DURLY GRAZEBROOK, Esq., Barrister-at-Law.

Deane, on behalf of Alice Louisa Meinertzhagen, moved that administration in respect of the personal estate and effects of the deceased, Jessy Leese, be granted to the applicant by reason of the "special circumstances" of the case, under sect. 73 of the Probate Act. The applicant had, under sub-sect. 2, the powers of a committee, and was really administering the whole estate. He cited

In the Goods of Burrell, 1 Sw. & Tr. 64;

In the Goods of Eccles, 61 L. T. Rep. N. S. 652; 15 P. Div. 1.

The PRESIDENT.—I think the case of *In the Goods of Eccles* (*ubi sup.*) is sufficient authority for granting this application. It is clearly the best thing that can be done for the benefit of the infirm person. I make a general grant of administration in respect of the personal estate and effects of Jessy Leese, to the applicant under sect. 73, for the use and benefit of the infirm next of kin.

Solicitor, R. S. Gregson.

April 16 and June 14.

(Before BARNES, J.)

In the Goods of **BLANK** (deceased). (a)

Administration with will annexed—Sureties.

The testator, a domiciled German, left to his widow everything that he could dispose of in her favour by the laws of Germany. The testator left considerable property in this country, and the very small amount of his debts had been paid.

Upon application by a son, the duly constituted attorney of the widow, who filed a written consent:

The Court refused to dispense with sureties to the administration bond, or to reduce the amount of the bond to a nominal amount.

In the Goods of Allen (68 L. T. Rep. N. S. 462; (1893) P. 184) *disapproved.*

In the Goods of Earle (10 P. Div. 196) *approved and followed.*

MOTION to dispense with sureties or to reduce the amount of bond upon administration with will annexed.

The testator Emil, otherwise Emilius Blank, late of Barmen, in the empire of Germany, deceased, died on the 5th Aug. 1893, domiciled in Germany, leaving a will, bearing date the 12th May 1880, by which he left everything which he could dispose of by the laws of Germany to his widow, Maria Blank, who resided at Barmen aforesaid.

The deceased left property in the United Kingdom amounting to 58,158*l.* 3*s.* 11*d.* and debts 11*l.* 17*s.* 10*d.*, which had been paid.

The widow appointed a son, Emilius Blank, her duly authorised attorney in this country for the purpose of applying for a grant of letters of administration with the will annexed, and she also filed her consent to the usual sureties being dispensed with, or to the bond being reduced to a nominal amount.

Durley Grazebrook (Searle with him), on behalf of the attorney of the widow, now applied for administration with the will annexed, without sureties, and relied upon the case of *In the Goods*

(a) Reported by H. DURLY GRAZEBROOK Esq., Barrister-at-Law.

PROB.] In the Goods of **MALKIN**—In the Goods of **BROWN-SÉQUARD** (deceased). [PROB.]

of *Allen* (68 L. T. Rep. N. S. 462; (1893) P. 184). [BARNES, J.—Lord Hannen refused to dispense with sureties *In the Goods of Earle*, 10 P. Div. 196.] That was in 1885. The practice has been considerably modified during the last year or two. In this case, as *In the Goods of Allen* (*ubi sup.*), the widow takes everything, and she is willing that the order should go, dispensing with sureties or reducing the bond to a nominal amount. [BARNES, J.—I am told by the registrar that the practice has not been modified in regard to sureties. I think that the order must have been made *In the Goods of Allen* (*ubi sup.*) on account of the small amount of the property of the deceased.] There is nothing in the reports of that case to show that the amount had anything to do with the making of the order. The former practice in regard to sureties has certainly been modified of late, and the court should follow the more recent decision on the point.

BARNES, J.—I do not see why the practice established by Lord Hannen should be departed from. The administrator must give a bond with sureties in the usual way, but the number of the sureties need not be limited to two, as the amount is so large.

June 4.—*Searle*, upon a fresh notice of motion, renewed the application to dispense with sureties, and stated that evidence had now been obtained to the effect that the only person interested in the estate was the widow of the testator. The children, who might have had some rights to a part of the estate under German law, had parted with their rights in favour of their mother, in consideration of certain sums which she had paid to them. There was a certificate from a German lawyer that the widow was now the sole person entitled to the estate of the deceased. It was the largeness of the estate which made the difficulty in obtaining sureties. The applicant carried on business in London.

The PRESIDENT (Sir F. H. Jeune) said he was very reluctant to depart from the practice, for fear of creating a precedent.

Searle asked if the court would not dispense with sureties altogether; that the applicant might be allowed to find sureties in Germany; that the amount of the sureties might be limited to the value of the estate; and that the amount might be divided among several sureties.

The PRESIDENT said that he did not like to split up foreign sureties, though, if English sureties were obtained, the amounts might be split up. Under the circumstances, and seeing that there were no debts, the sureties in this case might be limited to the actual amount of the estate, instead of bonds being required for double the amount. Two foreign sureties would be accepted; or, if English sureties were found, the amount might be subdivided among more than two.

Solicitors: *Vallance and Vallance*.

Monday, April 23.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of **MALKIN**. (a)

Administration—Motion by creditor passing over next of kin—Probate Act 1857 (20 & 21 Vict. c. 77), s. 73—Grant *ad colligendum*.

The fact that the next of kin of a deceased intestate was a lady over eighty years of age, who had held no communication with the deceased, and that the estate was said to be insolvent:

Held, insufficient grounds for passing over the next of kin and granting administration to a creditor under sect. 73.

THIS was a motion by a creditor, who was also a cousin of the deceased intestate, for a grant of administration under sect. 73, passing over the next of kin, by reason of the special circumstances of the case.

Affidavits were filed to the effect that the next of kin, an aunt of the deceased, was a lady over eighty years of age, who had held no communication with the deceased. Moreover, it was stated that the estate was insolvent.

C. *Rose-Innes*, on behalf of the creditor, asked for a similar order to that which was made in the case of *In the Goods of Shoosmith* (*ante*, p. 809; (1894) P. 23). The matter is pressing, as the landlord of the deceased has offered to accept 10% in compensation for cancelling an agreement which the deceased had entered into.

The PRESIDENT.—It seems to me that it would be straining the 73rd section to grant this application. You may, however, take a grant *ad colligendum*, with liberty to the administrator to make terms with the landlord. That will protect the estate until the next of kin can have notice of your application.

Solicitor: *H. Rose-Innes*.

Monday, April 30.

(Before the PRESIDENT (Sir F. H. Jeune).)

In the Goods of **BROWN-SÉQUARD** (deceased). (a)

Probate—Married woman's will—Wife of naturalised French subject—Naturalisation Act 1870 (33 Vict. c. 14), s. 10, sub-sect. 1—Status of married woman—French law—Grant to executors.

Although by the Naturalisation Act 1870 (33 Vict. c. 14), s. 10, sub-sect. 1, the wife of a foreign subject is deemed to be herself a foreigner, by French law the act of naturalisation is purely personal, and effects a change of status solely in regard to the person naturalised.

Therefore, in a case where the testatrix had married a British subject, a native of Mauritius, and, by a settlement made upon the said marriage and declaring the English domicile, power was given to her to appoint, by will or codicil, the income and corpus of the settled fund; and, after her husband had become a naturalised Frenchman, she, while on a temporary visit to this country, made her will, in English form, pursuant to the power her thereto enabling, and died domiciled in France:

The Court, upon evidence that the will, though not made in accordance with the law of France,

(a) Reported by H. DUBLEY GRAZEBROOK, Esq., Barrister-at-Law.

[PROB.]

In the Goods of ELIZABETH LISTER (deceased).

[PROB.]

would be operative in that country, granted probate thereof to the executors therein named.

MOTION by executors for probate of the will of a married woman domiciled in France.

Emma Elizabeth Brown-Séguard, the testatrix, was born in England, the child of English parents.

On the 26th Feb. 1867 she was married at the British Embassy in Paris to Thomas Doherty, who was described as a bachelor, of the parish of Burslem, in the county of Stafford, a domiciled French subject resident in Paris. He died in Paris on the 10th Dec. 1875 without issue.

On the 7th March 1877 his widow, Elizabeth Emma Doherty, was married at the British Embassy in Paris to Dr. Edward Charles Brown-Séguard, who was described as of the parish of Port Louis in the island of Mauritius, a British subject then residing in Paris. Dr. Brown-Séguard was a native of Mauritius and had lived in British territory for twenty-one years, afterwards travelling with an English passport in France and the United States of America.

By a settlement, dated the 6th March 1877, and made between Mrs. Doherty, Dr. Brown-Séguard, and two trustees named Waterhouse, the English domicile of the proposed husband was declared, and it was agreed that the trustees should, after the death of the lady, stand possessed of the trust funds as she should, during coverture, by will or codicil appoint.

In 1878 Dr. Brown-Séguard, in order to qualify for an official appointment as professor of experimental medicine at the College of France, became a naturalised French subject, and he and his wife continued to reside in France down to the time of the lady's death, which occurred at Nice on the 17th Jan. 1894.

Dr. Brown-Séguard died at Paris on the 1st April 1894.

While on a temporary visit to England, Mrs. Brown-Séguard, on the 20th Aug. 1888, executed her will in English form, and thereby exercised the power of appointment conferred upon her by the settlement. By her said will the testatrix gave to her husband, for his life, the income arising from the settled property, and, after his death, she directed the said income to be paid to her adopted daughter, Charlotte Maria, her husband's daughter by a former marriage, to whom she gave power to appoint the income for life to any husband of her said adopted daughter. Subject to the foregoing life interests, the testatrix left the settled property in trust for any child or children of her said adopted daughter, and appointed, as executors and trustees of her will and guardians of her adopted daughter, three persons, of whom two were trustees of the settlement.

The trust funds had always been in England, and by her will the testatrix gave to her trustees power to continue investments, and to sell and re-invest, as therein directed. Power was given to the life tenants to appoint new trustees, and the same power was given to the surviving trustee or trustees after the death of the tenants for life.

Deane, for the executors, moved for probate of the will.—The testatrix, though an Englishwoman by birth, was, at the date of the will and at the time of her death, the wife of a naturalised French citizen, and consequently, by English law, she was

a Frenchwoman; the wife of a foreigner being deemed to be herself a foreigner: (the Naturalisation Act 1870 (33 Vict. c. 14), s. 10, sub-sect. 1.) Upon that the court must look at the French law. [The PRESIDENT.—Is not the first question, what is the domicile? She was domiciled in France.] If she had been a Frenchwoman domiciled in England there would be no difficulty in the matter; but, as she was a French subject domiciled in France, the court must look at the French law:

Tatnall v. Hankey, 2 Moo. P. C. 342.

The affidavit of Maxime de Gorostarzu, a French advocate of thirteen years' standing, residing and practising in London, states: "The will is not made in accordance with French law, it not being in proper form, is not holograph, nor made in the presence of a notary; but the French courts would give effect thereto, so as to pass thereunder any property in France belonging to the deceased notwithstanding the domicile of the deceased, inasmuch as the deceased was, by French law, an Englishwoman. By the law of France the act of naturalisation is a purely personal one; and, notwithstanding that the husband of the deceased became a naturalised Frenchman, this did not in any wise alter the status of the said deceased." The executors are, therefore, entitled to probate.

The PRESIDENT.—The testatrix, being at the time of her death, according to English law, a domiciled subject of France, I must look at the French law and see what it says on the point. I find, from the affidavit of a French advocate, which has been read, that, according to the law of France, this will is operative. I therefore admit it to probate.

Solicitors: *Wilkinson and Sons.*

Monday, April 23.

(Before the PRESIDENT (Sir F. H. Jeune.)
In the Goods of ELIZABETH LISTER
(deceased). (a)

Will—Intermeddling executor—Failure to take probate—Citation—Disobedience—Peremptory order.

An intermeddling executor is bound to prove, and where, after he has been cited, he has still failed to prove, a peremptory order will be made against him, upon motion, calling upon him to take probate within a certain time.

ELIZABETH LISTER, the testatrix, died leaving a will by which she appointed Howard Horner to be executor thereof. The persons interested under the will experienced great difficulty in getting the will brought into the registry, and filed a notice of motion to attach the said Howard Horner for disobedience to a citation calling upon him to bring the will in. Before the motion came on for hearing, the will was, however, lodged in the registry, and Mr. Horner was not attached, but was ordered to pay the costs of the motion. Thereafter he realised the greater part of the estate but without proving. Thereupon a citation was issued against him as an intermeddling executor, but he entered no appearance thereto, and still failed to prove the will.

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

PROB.]

In the Goods of MARIA BOND (deceased).

[PROB.]

Deane, on behalf of a person interested under the will, now moved the court to compel the executor to take probate. An intermeddling executor is bound to prove:

Mordaunt v. Clark, L. Rep. 1 Prob. & Div. 592.

The practice is to make a peremptory order that he take probate of the will within a certain time.

The **PRESIDENT**.—I make a peremptory order that the executor do take probate of the will of the deceased within ten days.

Solicitors: *Iliffe, Henley, and Sweet*.

Monday, April 30.

(Before BARNES, J.)

In the Goods of MARIA BOND (deceased).

Will—Construction—Clause appointing executor—Chain of representation.

M. B., the testatrix, by her will appointed her friend *C. S.* to be her sole executor, but, in case the said *C. S.* should predecease her, or should die before having fully performed his functions as executor, then she appointed her son, *A. B.*, to be sole executor of her will.

C. S. survived the testatrix, and took probate of her will, but died in 1873, before having completed his functions as executor, leaving a will, which was duly proved by his executors. *A. B.* survived the testatrix, but predeceased *C. S.*

Held, that the chain of representation to *M. B.*'s estate was not broken, and that her legal personal representatives were the executors of her deceased executor *C. S.*, who were entitled to administration with the will annexed, in respect of the unadministered portion of her estate.

MOTION for administration with will annexed.

Maria Bond, late of *Margate*, in the county of *Kent*, deceased, died on the 7th Sept. 1856, leaving a will bearing date the 18th Oct. 1852, whereby, after making certain specific bequests, she gave all the residue of her property (except a watch thereafter mentioned) equally between her two sons, *George Bond* and *Frederick Charles Augustus Bond*, as tenants in common, and then proceeded to nominate executors in these terms:

I nominate and appoint my . . . friend *Charles Smith* sole executor of this my will, and in case my friend shall happen to die before me, or before he shall have fully performed his functions of executor hereto, then I appoint my son *Frederick Charles Augustus Bond* sole executor of this my will.

The said will, with two codicils thereto, was proved on the 3rd Nov. 1856 in the Prerogative Court of Canterbury.

Frederick Charles Augustus Bond died on the 25th Jan. 1860, in the lifetime of the said *Charles Smith*.

Charles Smith died on the 11th Sept. 1873, and his will and codicil were duly proved, in Nov. 1873, by the two executors therein named, both of whom were still living.

On the 22nd May 1884 a sum of 331l. 9s. 2d., representing the share of *Maria Bond* in the unadministered estate of *Charles Gurney*, deceased (who died in 1849), was paid into the Chancery Court to the credit of the legal personal representative of the said *Maria Bond*, and this now

amounted to 431l. 19s. New Consols and 2l. 17s. 8d. cash.

George Bond, who was entitled under the will of his mother, *Maria Bond*, to one moiety of her personal estate, died on the 7th May 1861 in Australia, having by his will appointed his wife, *Sybella Bond*, sole executrix and beneficiary, and probate of the will was granted to the executrix on the 13th June 1861, and on the 22nd April 1893, letters of administration with the will annexed in respect of the personal estate and effects of *George Bond* were granted by this court to *Augustus Kenneys de Bernardy*, the lawful attorney of *Sybella M. Bond*, for her use and benefit. *A. K. de Bernardy* was now the legal personal representative in this country of *George Bond*, deceased, and he recently applied to the Chancery Division that the sum of 431l. 19s. New Consols might be sold, and that half the amount standing to the credit of *Maria Bond*'s legal personal representative might be paid to himself as the administrator of the late *George Bond*, and half to the legal personal representatives (when constituted) of *Frederick Charles Augustus Bond*, deceased.

For the purposes of the application it was necessary that a legal personal representative of *Maria Bond*, on whose estate, in respect of the fund in court, additional probate duty was claimed, should be before the court. The chief clerk of the judge in the Chancery Division objected that *Charles Smith*'s executors were not the legal personal representatives of *Maria Bond*, by reason of the appointment in her will of another person as executor in case *Charles Smith* died before having fully performed his functions as executor.

Under these circumstances, *A. K. de Bernardy*, as the administrator of *George Bond*, now applied that administration with the will of the 18th Oct. 1852 and two codicils thereto, of *Maria Bond*, deceased, be granted to him in respect of the unadministered portion of the personal estate of *Maria Bond*.

G. W. Brabant, in support of the application, submitted that the chain of representation was broken, and that a fresh grant was necessary. This was the view of the chief clerk in Chancery. He referred to *Williams on Executors*, 9th edit., 205.

Deane, for the executors of the executor *Charles Smith*, said that they being the executors of the only executor who had ever proved, it was a question whether they were not entitled to take the fund out of court. They did not, however, wish to do so, and they came and submitted to the court. If they could renounce they would do so. The property came in after the death of *Charles Smith*. He feared that his executors having got the grant must act.

G. W. Brabant, in reply, referred to *Coote and Tristram's Probate Practice*, 64. As the executor was appointed only for his life his office was not transmissible to his own executors. The reason for transmissibility in the chain of representation was founded on the special confidence of the testatrix in her own executor.

BARNES, J.—I think this is a case of construction.

Cur. adv. vult.

April 30.—**BARNES, J.**—This case raises a short point. The applicants ask that administration with the will annexed, dated the 18th Oct.

(a) Reported by H. DUBLEY GRAZEBROOK, Esq., Barrister-at-Law.

[PROB.]

In the Goods of STELFOX (deceased).

[PROB.]

1852, and two codicils thereto in respect of the unadministered portion of the estate of Maria Bond, deceased, be granted to Auguste Kennys de Bernardy, the administrator of George Bond, deceased, one of the residuary legatees named in the will. The will of the deceased appears to have been proved on the 3rd Nov. 1856, and by it and the codicils she left her property practically to her two sons and their children. One of these sons was George Bond, and the other Frederick Charles Augustus Bond. By the will she appointed an executor in these terms: "I nominate and appoint my said friend Charles Smith sole executor of this my will, and in case he shall die before me, or before he shall have performed his functions of executor hereto, then I appoint my son, Frederick Charles Augustus Bond, sole executor of this my will." The will having been proved by Charles Smith, he died on the 11th Sept. 1873, the testatrix herself having died on the 7th Sept. 1856. Frederick Charles Augustus Bond died on the 25th Jan. 1860, and therefore before the executor Charles Smith. George Bond died on the 7th May 1861, and the present applicant has taken out letters of administration in this country. Charles Smith, the executor, made a will with a codicil thereto, and these were proved in the principal Probate Registry by the two executors therein named. Some small portion of Maria Bond's estate was left unadministered by Charles Smith, and there is at present a sum of 400*l.* odd in the Chancery Division to the credit of that estate, which it is now sought to have paid out of court, so that the two sons or their representatives may take their respective shares. I gather from the documents before me, that an application was made to have paid out whatever share George Bond's representative would be entitled to, but that the application was not acceded to by the chief clerk, on the ground that the application was made by Charles Smith's executors, and that they did not really represent the deceased, inasmuch as Charles Smith's representation as executor was limited by the terms of the will, and that it was, therefore, necessary that an application should be made to this court to obtain a grant of letters of administration with the will annexed to the representative of George Bond before the money could be paid out. Both parties concurred in making the application before me, with the simple object of finding out who is the proper person to go to the Chancery Division and obtain the money. The whole question depends on the construction of the clause in Maria Bond's will appointing executors. Charles Smith was undoubtedly executor so long as he lived; and, after carefully considering the case, I have come to the conclusion that Charles Smith's executors do, in fact, represent the estate of Maria Bond, and that the present application for a grant is therefore unnecessary. The executors who proved Charles Smith's will take the office under the ordinary principle of transmissibility in cases where the original executor was executor and has not had his office cut down. I think, therefore, that this application must fail.

Deane.—The court holds that the people entitled to apply for the money in the Chancery Division are the executors of the dead executor. This is a proper case for the costs of all parties out of the estate.

BARNES, J.—The executors will take their costs as of right. I do not think any order for costs is necessary.

Solicitors: *F. A. Brabant; F. C. Smith.*

Monday, Feb. 19.

(Before the PRESIDENT (Sir F. H. Jeune).

In the Goods of STELFOX (deceased).

Administration bond—Sureties dispensed with.

In an estate where there were no debts, and where it appeared that no money could come into the hands of the administratrix except her own share in the estate, owing to the appointment of a receiver, who had given security:

The Court made an order dispensing with sureties to the administration bond.

MOTION to dispense with sureties to an administration bond.

Ellen Stelfox died on the 13th May 1888 a widow, leaving nine children her surviving. Two of the children were infants.

In 1891 letters of administration were granted to the eldest daughter, the estate at that time consisting only of some shares in an Indian Cotton Company and in another company of the value of about 100*l.*

On the 17th Oct. 1892 an order was made in the County Palatine Court, in reference to another estate, directing that one-eighth of that estate should be carried to the credit of the estate of Ellen Stelfox, deceased. The amount so transferred was about 1200*l.* An endeavour was made to find the necessary sureties, but, as this could not be done, an administration action was instituted on the 19th Jan. 1893 in the Chancery Division, and on the 9th Feb. 1893 an order was made referring it to the master to appoint a receiver, and the administratrix was ordered to pay into court all moneys in her possession. Later in that month a receiver was appointed and gave security for 1600*l.* The whole of the new fund had been paid into the Palatine Court.

An order was subsequently made that the receiver should sell the shares, and this was done, 40*l.* being realised by the sale of the Indian Cotton Company's shares and 6*l.* 7*s.* 6*d.* by the sale of the other shares in the Solway Junction Company. Neither of these amounts passed into the hands of the administratrix.

There were no debts whatever, and no money could be received by the administratrix except her own share of the estate.

R. H. Pritchard moved to dispense with sureties to the administration bond, and referred to *In the Goods of Anstruther* (unreported), in which the case of *Cleverly v. Gladdish* (5 L. T. Rep. N. S. 689; 2 S. & T. 335) was cited, and sureties were dispensed with.

Roby, for the infants, did not oppose.

The PRESIDENT.—All the money being in court, I think this case falls within the decision *In the Goods of Cleverly* (*ubi sup.*). Upon the applicant giving an undertaking not to oppose any application to deal with the after-accrued funds, I make an order dispensing with sureties.

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

[Div.]

NORTHLEDGE v. NORTHLEDGE—POLLARD v. POLLARD.

[Div.]

Solicitors: *Pritchard, Englefield, and Co.*, agents for *H. Barber, Ashton-under-Lyne*; for the infants, *H. Barber, Ashton-under-Lyne*.

DIVORCE BUSINESS.

Monday, April 23.

(Before the PRESIDENT (Sir F. H. Jeune.)

NORTHLEDGE v. NORTHLEDGE. (a)

Divorce suit—Molestation—Motion to restrain respondent—Injunction.

The Court granted an injunction to restrain the respondent in a divorce suit from molesting the petitioner by going to and remaining in the petitioner's house, contrary to the expressed wish of the petitioner.

THIS was a motion by the petitioner, asking the court to restrain the respondent from molesting her by going to or remaining in her house.

The wife, who was the owner of the freehold and business of a public-house, had petitioned the court to dissolve her marriage, on the ground of her husband's adultery and cruelty. The petition and citation were served upon the respondent on the 5th April, and on the 9th April he returned to his wife's house, and, in spite of her remonstrances, forced his way into the house, and into his wife's bedroom. She told him to go, but he refused. This occurred again on the following night, and the respondent stayed again all the next day and night. He slept in a small bed which was in the petitioner's room, while she and a niece occupied the larger bed in the same room. After this, the respondent removed the small bed from that room and slept elsewhere, but he refused to leave the house in spite of the petitioner's repeated requests. The licence was in the wife's name, and the respondent had acted as her barman during the cohabitation.

From an affidavit filed by the petitioner on the 16th April, in support of the application, it appeared that the respondent was, at the time, still in the petitioner's house.

Deans, for the petitioner, now moved for an injunction to restrain the respondent from molesting his wife by coming to or remaining in her house. The respondent is guilty of contempt of court in trying to bring pressure to bear upon his wife to force her to condone the acts alleged in her petition. This is *res nova*. We have been able to find no reported case on this point.

The PRESIDENT.—Upon an affidavit of personal service being filed, you can take an injunction restraining the husband from molesting his wife, or from going to or remaining in her house.

Solicitors: *Field, Roscoe, and Co.*

Monday, March 5.

(Before the PRESIDENT (Sir F. H. Jeune.)

POLLARD v. POLLARD. (a)

Divorce—Variation of settlements—Petitioner's power to appoint to her second husband or children of second marriage—Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61), s. 5.

The wife obtained a final decree dissolving her

(a) Reported by H. DURLEY GRAZEBROOK Esq., Barrister-at-Law.

marriage with her first husband, and petitioned the court to vary the settlement made upon the said marriage. Under the said settlement the petitioner had power to appoint the settled fund, or any part thereof, after the death of her first husband, in favour of any future husband and the children of any future marriage which she might contract.

The Court refused to vary the settlement in such a way as to enable her to appoint to her second husband and the children of her second marriage during the lifetime of the divorced husband.

MOTION upon registrar's report upon petition for variation of settlements.

The wife obtained a final decree dissolving her marriage on the grounds of cruelty and adultery, and afterwards married a second husband. There were five infant children issue of the marriage of the petitioner with the respondent. All the children were in the petitioner's custody.

Upon her first marriage the petitioner brought a fund into settlement, and the respondent settled a policy for the sum of 1000*l.* upon his life. The present income arising from the settled property amounted to 933*l.* a year. The petitioner took the first life interest in the income without power of anticipation; the respondent took the second life interest, with remainder subject to the exercise of certain powers of appointment, to the children of the marriage in equal shares—sons on attaining twenty-one years, and daughters on attaining that age or marrying.

There was also a clause in the settlement which provided that, should the respondent marry again, he should be entitled to only half the income, and, should he become bankrupt, his interest was entirely to cease. Further, if the petitioner should survive the respondent and marry again, she was to have power to appoint half the fund to the child or children of the second marriage, and half the income to the second husband. There was also a power to the trustee to raise for the respondent's benefit a sum of 4000*l.* out of the property brought into settlement by the petitioner, such sum to be secured by a life policy. The said sum of 4000*l.* had been raised, but both the policy securing that amount and the policy for 1000*l.* brought into settlement by the respondent had lapsed, owing to nonpayment of premium. The respondent had become bankrupt, and had not obtained his discharge.

Upon the petition to vary the settlement, the registrar reported in favour of the extinguishment of the respondent's interest and powers, and also recommended that the petitioner's costs of and incidental to the divorce proceedings should be paid out of the settled fund; but he did not report in favour of varying the settlement in such a way as to enable the petitioner to exercise her powers of appointment thereunder, in favour of her second husband and the children (if any) of her second marriage, as though the respondent were dead.

J. T. Prior, for the petitioner and the trustees of the settlement, moved to confirm the report, so far as extinguishing the respondent's interest and powers was concerned, but asked that the report might be varied by ordering that the petitioner should have power to appoint in favour of her second husband and second family (if any) as though the respondent were dead, and had died

Div.]

Ex parte HOBSON.

[Div.]

in the lifetime of the petitioner. The court, in accelerating the petitioner's power, might impose restrictions, if it thought fit to do so. For instance, there might be a limitation that any appointment she might make in favour of any child of her second marriage should not take effect unless if, to a son, on his attaining twenty-one years of age, or, if to a daughter, on her attaining that age or marrying. Further, there might be a limitation that no child of the petitioner's second marriage should take more than he or she would be entitled to if the whole fund were divided equally between all the petitioner's children, present or future, who, being sons, should attain twenty-one years, or being daughters, should attain that age or marry.

E. Macnaghten for the guardian *ad litem* of the five infant children of the petitioner and respondent.—The court has no power to vary the settlement to the prejudice of these children. As matters now stand, they will be entitled to the whole of the settled fund after their mother's death. He referred to

Crisp v. Crisp, 27 L. T. Rep. N. S. 428; L. Rep. 2 P. & D. 426;
Noel v. Noel, 10 P. Div. 179;
Forsyth v. Forsyth, 65 L. T. Rep. N. S. 556; (1891) P. 363.

The PRESIDENT.—Is there any case in which the court has varied a marriage settlement in the manner desired by the present petitioner?

Inderwick, Q.C. (amicus curiæ).—I had recently to consider the point, and I could find no authority whatever which would enable the court to insert a power of appointment in a marriage settlement.

The PRESIDENT.—This is really a very simple point, though it seems to me to be a new one. The question is whether, in a case where a settlement has given a wife power to make appointments in favour of a second husband and second set of children, only after the death of the first husband, and where a divorce has supervened, the power given to the wife ought to be altered, so as to enable her to make an appointment of the settled property in favour of a second husband and second set of children while her first husband is still alive. There might, possibly, be good reason why this should be allowed to be done; but I confess that, looking at the fact that there is no reported authority in favour of allowing anything of the sort, notwithstanding the fact that settlements of this kind are tolerably common, and must have been frequently before this court, I feel very great difficulty in setting to work now, for the first time, to mould what would practically be a new settlement. I do not say that to do this would not be within my powers; but I feel that, if I were to exercise those powers in such a way, great difficulties might arise. It has been suggested by counsel for the petitioner that limitations might be imposed. That suggests that many things might be found necessary to be done before arriving at an equitable settlement, and I do not think I ought to embark in speculations of that kind. The wisest course to pursue is to fall back on the first settlement and to say that, inasmuch as that settlement only gives power to the wife to appoint to her second husband and second family after the death of her first husband, she cannot have that power extended, although the first marriage has been dissolved. Under these circum-

stances I confirm the registrar's report. The costs of the application I order to be paid out of the settled fund.

Solicitors: *Norton, Rose, Norton, and Co.; Hargrove and Co.*

Monday, Feb. 26.

(Before the PRESIDENT (Sir F. H. Jeune).)

Ex parte HOBSON. (a)

Divorce practice — Petitioner engaged abroad — Leave to solicitor to sign petition on his behalf — Order for proof of marriage and cohabitation to be given by affidavit.

Where it appeared that a proposed petitioner was engaged as an engine-driver at the Diamond Fields at Kimberley, in South Africa, and that the acts of adultery to be alleged against his wife in the petition had been committed after he left England; and it further appeared that he could not come to England without risking the loss of his situation:

The Court gave leave to the solicitor to sign the petition and swear the affidavit verifying the same on behalf of the petitioner; and also gave leave to prove the marriage and cohabitation by affidavit.

THE proposed petitioner, Wm. Stephen Hobson, was in South Africa, employed as an engine-driver in the service of the De Beers Consolidated Diamond Mines Limited, at Kimberley, Griqualand West.

From the affidavit of Henry Coggan Tombs, it appeared that his firm were instructed by the said Wm. Stephen Hobson to institute and prosecute proceedings in order to obtain the dissolution of his marriage with Harriet Hobson, his wife, on the ground of her adultery. At the times when the acts of adultery intended to be alleged in the petition were committed, the husband was already in South Africa, and was unable to give any evidence in proof of any of the acts; and all the information upon which the proposed petition was founded had been obtained by his solicitor, acting upon his instructions. The deponent further stated that Wm. Stephen Hobson was unable to return to England, except at great expense and at the risk of losing his situation.

Newson moved to allow the solicitor to sign the petition and the affidavit verifying the same on behalf of the proposed petitioner. He referred to

Ex parte Bruce, 6 P. Div. 16.

The PRESIDENT.—The petition may be presented if it is verified as far as practicable by the solicitor for the proposed petitioner; but the usual affidavit must be sworn by the petitioner as soon as it is possible for him to do so.

On a subsequent day, upon summons in chambers, the President made an order allowing the marriage and cohabitation to be proved by an affidavit to be sworn by the petitioner.

Solicitor: *J. Spencer Chapman*, agent for *Kinneir and Tombs*, Swindon.

(a) Reported by H. DURLY GRAZEBROOK, Esq., Barrister-at-Law

House of Lords.**Friday, March 2.**(Before the LORD CHANCELLOR (Herschell),
Lords WATSON, ASHBOURNE, and MORRIS.)RICHARDSON, SPENCE, AND CO., AND OTHERS
v. ROWNTREE. (a)ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.**Passenger — Shipowner — Conditions on ticket
limiting liability—Notice—Evidence**

The respondent became a passenger by a steamship owned by the appellants, and received a ticket upon which were printed in small type certain conditions limiting the liability of the shipowners for loss or injury to the passengers or their luggage. This ticket was handed to the respondent folded up, so that the conditions were not visible, and her attention was not called to them.

Held (affirming the judgment of the court below), that there was evidence upon which the jury might find that the appellants had not done what was reasonably necessary to give the appellant notice of the conditions, and that she was not bound by them.

Parker v. South-Eastern Railway Company (36 L. T. Rep. N. S. 540; 2 C. P. Div. 416) approved.

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.J.J.) delivered in Feb. 1893, affirming a judgment of Bruce, J. at the trial at the Liverpool Assizes in Dec. 1892.

The action was brought to recover damages for personal injuries caused by the alleged negligence of the defendants' servants.

In Oct. 1889 the plaintiff, a lady's maid, took a steerage ticket at Philadelphia for Liverpool, by the defendants' steamship *Lord Gough*, and went on board the next day. During the voyage the plaintiff fell overboard, owing, as she alleged, to the defendants' servants not providing proper guard-rails to a gangway and not properly lighting it. Upon the upper part of the ticket, in large type, were these words:

Received in payment in full for steerage passage for one adult.

Lower down, after some small print, were certain terms, printed in small type, one of which was as follows:

It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted under the following conditions: (d) The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage.

Across the conditions the name of the ship and other matters were printed in red ink, which partially obscured the printed conditions. The plaintiff having brought her action, the defendants pleaded that they were relieved from liability by the conditions.

The action was tried before Bruce, J. and a special jury, at Liverpool, when the jury found—(1) That there was negligence on the part of the defendants' servants, and no contributory negligence on the part of the plaintiff; (2) that the

plaintiff knew that there was writing or printing on her ticket; (3) that she did not know that the writing or printing on the ticket contained conditions relating to the terms of the contract for her carriage; (4) that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions. The jury assessed the damages at 100*l.*, and the learned judge upon these findings entered judgment for the plaintiff.

The defendants applied to the Court of Appeal for judgment, upon the ground that they were protected by the conditions.

The Court of Appeal upheld the judgment in favour of the plaintiff.

Pickford, Q.C. (Bigham, Q.C. with him), for the appellants, contended that, the negligence being admitted, the only question was as to the effect of the conditions on the ticket. We say that as a matter of law they were incorporated with the contract. The judge left the question to the jury in the terms of

Parker v. South-Eastern Railway Company, 36 L. T. Rep. N. S. 540; 2 C. P. Div. 416.

The ticket is not only a voucher; the contract is to carry on the terms of the ticket, and there was nothing of the nature of a trap. *Henderson v. Stevenson* (32 L. T. Rep. N. S. 709; L. Rep. 2 H. of L. Sc. 470) is distinguishable upon the facts. In two very similar cases, namely, *Burke v. South-Eastern Railway Company* (41 L. T. Rep. N. S. 554; 5 C. P. Div. 1) and *Watkins v. Rymill* (48 L. T. Rep. N. S. 426; 10 Q. B. Div. 178), since the decision in *Parker v. South-Eastern Railway Company* verdicts for the plaintiffs have been set aside.

J. Walton, Q.C. and Collingwood Hope, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Lord Herschell).—My Lords: The only question that arose on the trial of this action was, whether the plaintiff was bound by certain conditions limiting the liability of the defendants who had engaged to carry her on the steamer from Philadelphia to Liverpool. The plaintiff paid her passage money and received her ticket from the defendants. On that ticket undoubtedly there were a great number of conditions detailed. The ticket began by stating that each passenger would be required to provide bedding and eating utensils, and then it continued: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." There are a number of conditions, beginning at the letter (a) and going down to the letter (i); the condition in question was one under letter (d): "The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." These questions were left to the jury: (1) "Did the plaintiff know that there was writing or printing on the ticket?" That question they answered in the affirmative. (2) "Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?" That they answered in the negative. (3) "Did the defen-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.] GUARDIANS, WEST HAM, v. CHURCHWARDENS, ST. MATTHEW, BETHNAL GREEN. [H. OF L.]

dants do what was reasonably sufficient to give the plaintiff notice of the conditions?" That they answered in the negative also. Now, these are questions which the majority of the Court of Appeal in the case of *Parker v. The South-Eastern Railway Company* (36 L. T. Rep. N. S. 540; 2 C. P. Div. 416) pointed out by their judgment ought to be left to the jury. That was a case in its broad features very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed "See back," and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods, the plaintiff was bound by the conditions; that those were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants. The only question which now comes before this House is, whether there was any evidence to go to the jury upon which they could properly find the answer which they gave to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is and must be this, that where there are no facts beyond those which I have stated, the defendants are entitled, as matter of law, to say that the plaintiff is bound by those conditions. That seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in the case of *Parker v. South-Eastern Railway*, with which I entirely agree, and it does not seem either to be consistent, when the case is carefully considered, with the case of *Henderson v. Stevenson* (32 L. T. Rep. N. S. 709; L. Rep. 2 H. of L. Sc. 470) in your Lordships' house. I therefore move your Lordships that this appeal be dismissed with costs.

Lord WATSON.—My Lords: I concur. It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all.

Lord ASHBOURNE.—My Lords: I also quite concur. The ticket in question in this case was for a steerage passenger, a class of people of the humblest description, many of whom have little education, and some of them none. I think, having regard to the facts here, the smallness of the type in which the alleged conditions were printed, the absence of any calling of attention to the alleged conditions, and the stamping in red ink across them, there was quite sufficient evidence to justify the learned judge in letting this case go to the jury.

Lord MORRIS.—My Lords: I concur.

Judgment of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Hill, Dickinson, and Co.*, Liverpool.
Solicitors for the respondent, *Field, Roscoe, and Co.*, for *Bellringer and Cunliffe*, Liverpool.

Dec. 1 and 5, 1893, and March 20, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords HALSBURY, ASHBOURNE, and MORRIS.)

GUARDIANS OF WEST HAM UNION v. CHURCHWARDENS OF ST. MATTHEW, BETHNAL GREEN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor law—Settlement—Test of removability—Residence apart from parent while under sixteen—Statutes 9 & 10 Vict. c. 66, s. 1—11 & 12 Vict. c. 111, s. 1—39 & 40 Vict. c. 61, s. 34.

The test of the removability of a person who has not gained a settlement of his or her own in any parish is whether the parent or husband of such person would or would not be removable from the parish.

A pauper had resided in domestic service from the age of fourteen to the age of eighteen, in a parish in the appellant union. Her father was dead, and her mother resided outside the appellant union.

Held (reversing the judgment of the court below), that she had not acquired a settlement in the appellant union, not having resided for three years under such circumstances as to make her irremovable therefrom.

Reg. v. Leeds Union (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) disapproved.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Kay, L.J.J.) reported in 67 L. T. Rep. N. S. 465; (1892, 2 Q. B. 676), who had affirmed a judgment of the Divisional Court (Pollock B. and Williams, J.) reported in (1892) 2 Q. B. 65, affirming a judgment of the Court of Quarter Sessions upon a special case stated on appeal from the decision of a metropolitan police magistrate, who had adjudged that the parish of Low Leyton in the appellant union was the place of the last legal settlement of Caroline Batchellier, a pauper who had become chargeable to the respondent parish.

The facts appear in the report in the court below, and in the judgment of the Lord Chancellor.

Jelf, Q.C. and R. Cunningham Glen, for the appellants, argued that residence in the appellant union while under sixteen did not render the pauper irremovable. The Act of 1876 (39 & 40 Vict. c. 61), s. 35, fixes sixteen as the period of emancipation. In *Hagworth v. Westbury* (61 L. T. Rep. N. S. 733; 14 App. Cas. 465) the residence of the pauper both before and after sixteen was continuously with her parents. Here the residence in the appellant union was apart from the parent. The authorities are uniform from the Act of 1846 (9 & 10 Vict. c. 66) to the Act of 1876 that a settlement is not acquired by such residence by an unemancipated child. See

Reg. v. St. Ebb's, 12 Q. B. 137;

Reg. v. Pott-Shrigley, 12 Q. B. 143;

Reg. v. Llanelly, 17 Q. B. 40;

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.] GUARDIANS, WEST HAM, v. CHURCHWARDENS, ST. MATTHEW, BETHNAL GREEN. [H. OF L.]

Reg. v. Manchester, reported in a note to the above case;

Reg. v. Much Hoole, 17 Q. B. 548.

In *Reg. v. Elvet* (2 E. & E. 266), which appears not to be in accordance with the other authorities, the pauper had no parent living. See also

Reg. v. St. Olave's, 29 L. T. Rep. N. S. 426; L. Rep. 9 Q. B. 38.

The decision in *Reg. v. Leeds* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323), which the court below held governed this case, is wrong, and cannot be supported.

T. Beven and Crossfield, for the respondents, supported the judgment of the Court of Appeal.

Jelf, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 20.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The question raised by this appeal is, whether Caroline Batchellier acquired a legal settlement in the West Ham Union, and was therefore properly ordered to be removed thither from the parish of St. Matthew, Bethnal Green. The pauper, a few days before she attained the age of fourteen, went into domestic service in the parish of Low Leyton, in the West Ham Union. She remained there nearly four years, and left before she became eighteen years of age. After that time she resided for the most part with her widowed mother, but was occasionally in service at places outside the West Ham Union. The widowed mother of the pauper never resided in or acquired a status of irremovability from the appellants union. The father died when the pauper was two years old. It is argued for the respondents, and this contention has been sustained both by the Divisional Court and the Court of Appeal, that the pauper acquired a settlement in the appellants union by virtue of her residence in Low Leyton for a period exceeding three years. That contention is founded on the 34th section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), which is as follows: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient." It is to be observed that a settlement is not acquired under this section by the mere fact of residence; it must be residence in such manner and under such circumstances in each of the three years as would, in accordance with the statutes in that behalf, render the person irremovable. It is necessary, therefore, to ascertain what are the statutory conditions of irremovability, and then to inquire whether they were satisfied in each year of the pauper's residence. Before referring to these statutes it is as well to note that by sect. 35 of the Divided Parishes Act it is provided that a child under the age of sixteen shall take the

settlement of its father, or of its widowed mother, and shall retain the settlement so taken until it shall acquire another. The earliest of the statutes creating the status of irremovability as distinguished from a settlement was 9 & 10 Vict. c. 66. By the first section of this Act it is enacted that, "no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant." At the end of the section there is a proviso in these terms: "Provided always that, whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." By 24 & 25 Vict. c. 55, the term of residence necessary for irremovability was reduced to three years, and by 28 & 29 Vict. c. 79, s. 8, to one year. But for the proviso at the end of the first section of 9 & 10 Vict. c. 66, the case would be free from any difficulty, the conditions of irremovability would clearly have been complied with, and the pauper's settlement in West Ham would have been made out. The question turns upon the construction and effect of that proviso, or rather of the proviso substituted for it by 11 & 12 Vict. c. 111, which is in these terms: "Provided always that, whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." The whole difference between this proviso and that for which it is substituted is that the repealed proviso made the wife and children removable from any parish from which the husband or parent is removable, and not removable from a parish from which the husband or parent is not removable. The substituted proviso makes the test whether the husband or parent would or would not be removable from the parish. Whatever the reason for the change, the latter statute makes it quite clear that the test is not the removal but the removability of the husband or parent. It is contended for the appellants that, by virtue of this proviso, the pauper did not reside for three years at Low Leyton in such a manner and under such circumstances during each of the three years as to render her irremovable. During the first two years of her residence she was under sixteen years of age. Her settlement was that of her mother, who never resided in the West Ham Union and would have been removable from that union. It is said, therefore, that notwithstanding the enactment in the earlier part of the first section of 9 & 10 Vict. c. 66, the daughter was also removable thence. The courts below have held this contention not well founded. In their view the proviso is inapplicable to such a case as that now before the House. The Court of Appeal proceeded mainly—indeed, almost entirely—upon the limitation which it was said the decision of the Divisional Court of Queen's Bench in the case of *Reg. v. Leeds Union* (40 L. T. Rep. N. S. 521; 4 Q. B. Div. 323) had placed upon this proviso—namely,

H. OF L.] GUARDIANS, WEST HAM, v. CHURCHWARDENS, ST. MATTHEW, BETHNAL GREEN. [H. OF L.]

that it was only intended to prevent the separation of families, and that where there was no question of such separation the proviso was inapplicable. Kay, L.J., though he did not dissent from the rest of the court, thought the question a doubtful one. Bowen, L.J. did not express any opinion whether the judgment in *Reg. v. Leeds Union* was right or not, but said that he was unwilling to disturb the law there laid down, which had been acted upon for fourteen years. If no other construction than that adopted in *Reg. v. Leeds Union* had been put by the courts upon the proviso in question, I, too, might have been unwilling to disturb it; but after careful consideration it appears to me that the decision in *Reg. v. Leeds Union* is in direct conflict with several earlier authorities. In *Reg. v. St. Ebb's* (12 Q. B. 137) it was held that the proviso to the 1st section of 9 & 10 Vict. c. 66 refers to the case of a person being legally removable and not to his being in fact removable or not by reason of his presence in the parish, or absence from it. In *Reg. v. Pott-Shrigley* (12 Q. B. 143) the pauper had resided with her husband nearly five years in a parish when he was committed to prison out of it for felony and afterwards transported. The wife continued to reside in the same parish until her residence there exceeded the period of five years. An order was made for her removal. It was held that the pauper was removable. "The effect of the proviso," said Lord Denman, "whether we look to the statute 11 & 12 Vict. c. 111, or not, appears to us to be that the wife is removable if, under the circumstances, the husband having come to her and become chargeable, would have been removable." It seems obvious that in this case the question whether the removal would operate to separate husband and wife was regarded as immaterial. She was already separated from her husband; he had left the parish where she had, in fact, resided for more than five years, and was still residing at the time of the order of removal. Again, in *Reg. v. Lilanelly* (17 Q. B. 40) a married woman and her children were removed from a parish where she had resided as a married woman for ten years; her husband had left her two years previously and gone to America. No *animus revertendi* being shown, it was held that there had been a disruption of the husband's residence, and that he was not resident in the respondent parish. Lord Campbell said: "If he is not resident himself, it is impossible to contend that the wife has, by her own residence, acquired a right of irremovability." In *Reg. v. Manchester* (reported in a note to the last case) the pauper had lived five years in a parish not that of her settlement when she became chargeable, and an order of removal was made. Her husband had left her before the five years had expired and gone to America without an *animus revertendi*. Before the order of removal was made he died. It was held that the pauper was not irremovable. In *Reg. v. Much Hoole* (17 Q. B. 548) an Irishman with an English settlement married a woman whose settlement was in A., and lived with her for more than five years in B. He then deserted her and left the kingdom. It was held that the wife was removable from B. to the place of her settlement. There are several other cases to the same effect to which I do not think it necessary to refer in detail; but it may be well to call attention to one other decision of a somewhat later

period. In the case of *Reg. v. The Guardians of St. Olave's Union* (29 L. T. Rep. N.S. 426; L. Rep. 9 Q. B. 38) the pauper had resided in service in the respondent union for a little more than two years. During that time she had gained her own living entirely independent of her mother. The pauper had the same settlement as her mother, having never gained a settlement in her own right. The question was, whether, by her residence in service and apart from her mother for two years in the respondent union, the pauper had acquired a status of irremovability in that union. It turned entirely upon the construction of the proviso which has to be construed in the present case. The court held that the proviso applied, and that, inasmuch as the mother would have been removable from the respondent union, the pauper herself was. I find it difficult to reconcile this decision with that which is now under review by your Lordships. The facts bearing upon the question whether residence in service apart from the mother in a parish from which the mother would have been removable enabled the child to acquire a status of removability appear to me to be identical. In none of the cases prior to *Reg. v. Leeds Union* (to which I will refer immediately) do I find any suggestion that inquiry ought to be made whether an order of removal would effect a separation between a child and its parent, or a wife and her husband, nor do I find that circumstance treated as material. It seems to me that, if it be material, some of the decisions ought to have been the other way. The case of *Reg. v. Elvet* (2 Ell. & Ell. 266) was much relied on by the learned counsel for the respondents; but I do not think it is at all inconsistent with the other cases to which I have referred. In that case the pauper had resided with her father in E. from her birth, in 1844, until her father's death in 1857. After his death the pauper remained there till the following year, when she became chargeable, and an order was made for her removal. At this time the mother also was dead. It was contended that the father's status of irremovability was taken away by the receipt of relief through his wife, and that, therefore, the pauper was removable. The court held that this was not so, inasmuch as the father had acquired a status of irremovability from E., which was not lost by the subsequent receipt of relief. As he, therefore, would not have been removable, there was nothing in the proviso to prevent the substantive enactment applying to the pauper and to make her removable, notwithstanding her residence in the parish for more than the statutory period. I now pass to the case of *Reg. v. Leeds Union*. The pauper was the illegitimate child of a single woman, and was born in the parish of R. When the child was a fortnight old it was placed by its mother in the care of a man and his wife, who resided with it for six years in the parish of S. No evidence was given of the settlement by birth or otherwise of the mother of the pauper, though evidence was given that the respondent union had made unsuccessful inquiries about it. The court, consisting of Cockburn, C.J. and Lopes, J., held that the pauper had acquired a settlement in S. by reason of the provisions of 39 & 40 Vict. c. 61, s. 34. The Lord Chief Justice said: "It has been argued that the proviso in 9 & 10 Vict. c. 66, s. 1 (as explained in 11 & 12 Vict. c. 111, s. 1), goes to show that a child is irremovable

H. OF L.] GUARDIANS, WEST HAM, v. CHURCHWARDENS, ST. MATTHEW, BETHNAL GREEN. [H. OF L.]

only where the parent is irremovable; and that, therefore, the three years' residence under 39 & 40 Vict. c. 61, s. 34, ought not to give it a settlement distinct from that of its mother. But the proviso in question has really nothing to do with the case before us. It was enacted to prevent the dispersing of different members of a family. Here there is no question of separating the child from its parent, and we have simply to consider sect. 34 by itself. The child had actually resided for three years in Seacroft, but it is contended that because the mother lived in another parish the child constructively resided with her, and where she resided. It is true that where a child is under the authority and control of its parent it may, even when placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother; it was not a suspension, but a mutual abandonment of the maternal right." Much stress appears to have been laid in this case upon the argument that the child was to be regarded as constructively residing with her mother, and that, therefore, she had not resided three years in the parish of Seacroft within the meaning of the statute. It is to this argument with reference to residence that the greater part of the judgment of the Lord Chief Justice is addressed. The proviso which has to be construed is put aside as having nothing to do with the case then before the court, on the ground, apparently, that there was there no question of separating the child from the mother. None of the numerous previous cases in which the proviso had been considered and construed were cited in the argument, and there was consequently no attempt made to distinguish them. It may be quite true, and probably is, that the object of the proviso was to prevent the separation of husband and wife, or children and parent; but there is nothing in its language to limit its application to those cases where, if it were not applied, such a separation would be effected. It lays down, as I read it, a test perfectly easy of application, namely, whether the parent or husband would have been removable, if so, the children and wife are removable likewise, and, as far as I can see, that test is to be applied in all cases. It is one thing to come to the conclusion that the Legislature had a certain object in laying down a particular rule. It is quite another to confine the rule in the manner suggested, where no such words of limitation are to be found in the enactment itself. To my mind the authority of *Reg. v. Leeds Union* is much diminished by the fact that the previous decisions were not brought to the attention of the court or dealt with by them. Looking at the section apart from authority, I cannot myself feel justified in importing into the enactment a condition which is not to be found there. It is impossible to have in view all the various cases that might arise, and I am by no means sure that by adopting the rule which was laid down in *Reg. v. Leeds Union*, and followed in the present case, we might not in some cases defeat the suggested intention of the Legislature. Although we were informed by the learned counsel for the appellants that the authorities I have referred to, or some of them, were cited in the Court of Appeal, I doubt whether they were brought home to the minds of the learned judges, inasmuch as no attempt is made in the judgment below to distinguish them

from or reconcile them with *Reg. v. Leeds Union*. For these reasons I think the judgment of the court below ought to be reversed and judgment given for the appellants. The respondents must bear the costs both here and in the courts below.

LORD HALSBURY.—My Lords: I believe that no question would have arisen in this case but for the supposed application of the decision in *Reg. v. Leeds Union* (*ubi sup.*). I think that decision was wrong, and ought not to be followed, but I think that the decision, or at least the ground upon which the learned judges based it, would have no application to the case before your Lordships. Both the learned judges seem to have treated the case as depending upon what they call the constructive residence of a child with its parent, while in fact it is at a school with the authority of the parent. Cockburn, C.J. adds a reply to an argument which, I think, could hardly have been used by Mr. Poland, that in order to make the status of irremovability the child must have chosen its own residence. Certainly no such provision is to be found in the statute, and no such observations are applicable here. If it were to depend on any such principle I should agree with that decision. It cannot be doubted that during two years of the residence which is relied on as making the pauper irremovable the parent of the pauper was removable; and therefore it seems to me impossible to contend, having regard to the plain words of the statute, that a child under sixteen was not removable also; and if so the child had not acquired the status of irremovability. With all respect to the learned judges who decided that case of *Reg. v. Leeds Union* (*ubi sup.*), it appears to have been decided under two serious errors, or misapprehensions, in the reasoning. One was in supposing that the constructive residence with the parent had anything to do with the question before the court. It had nothing whatever to do with it. The question was as to the status of irremovability of a child under sixteen as involved in the removability or irremovability of the parent. Another error was in supposing that the language of the proviso can be construed with reference to the supposed policy of the enactment to prevent the separation of families. Now it is to be observed that the separation of families is undoubtedly one of the objects which the statute sought to prevent; but it apparently was not brought to the attention of the court that that object was effected by a specific provision. The section (9 & 10 Vict. c. 66, s. 3) is as follows: "And be it enacted that no one under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish in any case where such father, mother, stepfather, stepmother, or reputed father, may not be lawfully removed from such parish." Now to construe the language of the proviso contrary to the natural interpretation of the words, with reference to some supposed policy of the Act, where the Act itself has provided for the specific case, appears to me to be absolutely inadmissible. The real truth is, that the child was removable, not by reason of any residence or constructive residence, but because the child was the child of its parent. That is the natural interpretation of the statute, and I can

CT. OF APP.]

AITKEN, LILBURN, AND CO. v. ERNSTHAUSEN AND CO.

[CT. OF APP.]

find no words whatever which would cut down the operation of that enactment. The proviso can hardly be construed as intended to do what had already been done by substantive enactment; but it is clear from an observation made by Cockburn, C.J., and reported in the *Law Journal* (48 L. J. 130, M.C.), though not in the *Law Reports*, that it was one of the grounds of his decision. It seems to me, therefore, that the decision now appealed from was based on a case which to me is manifestly wrong, and I think it ought to be reversed.

Lords ASHBOURNE and MORRIS concurred.

Judgment appealed from reversed, with costs in this House and in the courts below.

Solicitor for the appellants, *F. E. Hilleary*.

Solicitor for the respondents, *W. T. Howard*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 25, 26, and Feb. 7.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

AITKEN, LILBURN, AND CO. v. ERNSTHAUSEN AND CO. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Full cargo not loaded—Damages—Freight on cargo loaded by ship-owner.

By a charter-party the defendants contracted, except prevented by fire, to load the plaintiffs' ship with a full cargo of jute at 11. 17s. 6d. per ton, but the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owners' lien, provided the bill of lading freight in the aggregate fully covered the freight due under the charter-party. The defendants had shipped 7545 bales of jute, when a fire broke out and destroyed 5458 of the bales and delayed the sailing of the ship. The freight specified in the bills of lading for the goods burnt was 11. 5s. per ton. The defendants then refused to ship any more goods, and the plaintiffs filled the ship with cargo, some at 11. 5s. per ton, and some at a lower rate. The plaintiffs having brought this action to recover damages for breach of the charter-party by the defendants in not having loaded a full cargo:

Held (affirming the decision of Pollock, B.), that with regard to the bales burnt, each party had pro tanto fulfilled their respective obligations under the charter-party, and the defendants were under no liability to pay freight for the bales burnt, nor bound or entitled to reload cargo to take their place; and that the freight received by the plaintiffs for the cargo shipped by them in the space formerly occupied by the burnt bales ought not to go in reduction of any damages payable by the defendants.

Held also, that the fire only absolved the defendants from payment of so much of the freight as would have been actually received for the goods burnt, viz., 11. 5s. per ton, and not 11. 17s. 6d. per ton.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

THIS action was brought by shipowners to recover damages for a breach of charter-party by the defendants in not having loaded the plaintiffs' ship with a full and complete cargo in accordance therewith. The defendants by their pleadings traversed the breach, and also set up that by reason of a fire which had broken out on board the ship at the port of loading they were absolved from the performance of their contract. By way of amended defence they subsequently, whilst denying liability, paid 775l. into court.

The case came to trial before Pollock, B. at the Guildhall, when the breach was admitted, and the sole question which had then to be tried was the amount of damages, if any, the plaintiffs were entitled to recover. Pollock, B. found that the amount paid into court was sufficient, and gave judgment for the defendants, and ordered the 775l. to be paid out to the plaintiffs.

The plaintiffs appealed, upon the ground that Pollock, B. should have held that the sum paid into court was not sufficient, and should have given judgment for them in excess of that amount. The defendants also appealed, upon the ground that the learned judge should have found that the plaintiffs had suffered no damage at all, and that the 775l. should have been ordered to be paid out to them, or, in the alternative, some portion of it.

By a charter-party dated 17th Nov. 1891, the plaintiffs and the defendants contracted that, except prevented by fire, the plaintiffs' ship, the *Loch Broom*, should receive from the defendants, and that the defendants should load at Calcutta, a full and complete cargo of jute in bales, each bale not exceeding 400lb. net weight, and not exceeding in measurement at the time of shipment an average of fifty-two cubic feet for five bales, and that the plaintiffs should deliver the same at Dundee. Freight was to be paid in cash at the rate of 11. 17s. 6d. per ton on right delivery of the cargo, and the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owners' lien, provided that the bill of lading freight in the aggregate should fully cover the freight due under the charter-party. A full and complete cargo of jute under this charter-party would have consisted of 15,061 bales, which at 11. 17s. 6d. per ton would have earned a freight of 5647l. 17s. 6d. The defendants commenced to load a cargo of jute in bales pursuant to the charter, when a fire broke out and destroyed 5458 of 7545 bales which had then been shipped by the defendants. They thereupon refused to continue loading the ship, asserting that, by reason of the fire which had taken place, they were absolved from further performance of their contract. This position, however, as before stated, the defendants abandoned at the trial, and admitted that they were bound to have loaded the residue of the cargo which they had not loaded when the fire broke out.

Bigham, Q.C. and Leck for the plaintiffs; Reid, Q.C. and A. T. Lawrence for the defendants.

Feb. 7.—LINDLEY, L.J.—The judgment which will be read by Smith, L.J. is to be taken as being also mine.

KAY, L.J.—Under the charter-party in this case the total freight which would have been due, if no accident had occurred, was 5647l. 17s. 6d.,

being the freight of 15,061 bales of jute, at 1*l.* 17*s.* 6*d.* per ton; 7545 bales were supplied by the shippers. Of these 5458 were burnt. This accident was excepted by the charter-party, so that those bales were lost to the shippers, and the freight in respect of them was lost to the ship-owners. The freight lost, at 1*l.* 17*s.* 6*d.* per ton, would be 2046*l.*, and, deducting this from the total freight 5647*l.* 17*s.* 6*d.*, there would remain 3601*l.* 17*s.* 6*d.* as the total freight to which the shipowners were entitled under the charter-party. The owners have received on bills of lading for the shippers' cargo actually carried 725*l.* 18*s.* 9*d.*, and also 343*l.* 15*s.* cash paid by the shippers, making together 1069*l.* 13*s.* 9*d.* Deduct this from the 3601*l.* 17*s.* 6*d.* freight due under the charter-party, and there remains 2532*l.* 3*s.* 9*d.* The charterers broke their contract by not shipping any more jute than the 7545 bales. The owners shipped cargo on their own behalf, for which they received freight amounting to 2862*l.* 7*s.* Upon the whole voyage, therefore, the owners suffered no damage, except that they lost part of the freight on the burnt goods. The general rule is, that when such a breach by non-delivery of cargo occurs, the owners are entitled to damages to the amount of the freight thereby lost. But if they fill up the ship on their own account the amount of freight so earned goes in reduction of such damages: (*Smith v. McGuire*, 3 H. & N. 554, 565.) This general rule is not denied, but it is argued that it does not apply to the cargo put into the space left vacant by the burnt bales. The shippers were not bound to refill this space; and the owners, it is argued, might use it on their own account to recoup themselves the amount of freight which they would otherwise lose by the fire. That is, the charter-party should be treated as if, in the event which happened, it was for a portion of the ship only, excluding the part left vacant by the fire, and the shippers cannot claim that the freight for goods carried in that part of the ship should be deducted from the damages for which they are liable. The question is a nice one, and seems to be untouched by authority. Suppose the charter-party to have been for half the carrying capacity of the ship, the owners being at liberty to use the other half, and that the shippers only supplied goods enough for a quarter, so that half the freight was due as damages, and suppose that the owners could not obtain cargo for more than their own half of the ship, it would be manifestly unjust to deprive them of any part of the freight for that half in reduction of the damages payable by the shippers. I am inclined to think that is perfectly analogous to the position of affairs under this charter-party after the occurrence of the fire. The charter-party was, under the actual circumstances, for a portion of the ship only, excluding that portion which the fire rendered vacant. The space so left I think the owners might use in any way consistent with the voyage—that is, they might ship, as they did, cargo on their own behalf for the same voyage in that part of the ship, and the freight for that cargo ought not to go in reduction of the damages payable by the shippers. The damages, in this view, can only be reduced by the freight obtained by the shippers for that portion of the ship which the shippers ought to have filled. This, the owners say, was 1710*l.* 18*s.* 11*d.* They claim to deduct as commission for procuring the new freight

65*l.* 16*s.* 4*d.* But the owners contend that the burnt goods must not be treated as though the freight for them was at the rate of 1*l.* 17*s.* 6*d.* per ton. In fact, it was less by about 128*l.* 1*s.* 3*d.*, as is shown by the bills of lading. The charter-party allowed the shippers to fill the ship at any rates they pleased, so that the whole freight reached 5647*l.* 17*s.* 6*d.*, and in fact the cargo put on board was shipped at a lower rate. I think the owners are right, and that the fire only absolved the shippers from so much of the freight as would have been actually received for the goods burnt, and that this 128*l.* 1*s.* 3*d.* ought to be added to the damages in favour of the owners. Another question is, whether the owners can take the average freight per ton of what they themselves shipped, or whether they ought not to take 25*s.* per ton. This is the rate which in their own accounts they did credit the shippers with as against the damages claimed. Charging 25*s.* per ton, the sums to deduct from the 5647*l.* 17*s.* 6*d.* are: Bill of lading, 2644*l.* 12*s.* 6*d.*; cash, 343*l.* 15*s.*; 7516 bales at 25*s.*, 1879*l.*; total deduction, 4867*l.* 7*s.* 6*d.*, leaving 780*l.* 10*s.* Add commission, 65*l.* 15*s.* 3*d.*—846*l.* 5*s.* 3*d.* The sum paid into court was 775*l.*, which leaves 71*l.* 5*s.* 3*d.* still due. In my opinion, the judgment should be for the amount paid into court *plus* 71*l.* 5*s.* 3*d.*

SMITH, L.J. (after stating the facts as above set out continued:—) In my judgment, the position of the plaintiffs and defendants under the charter-party after the fire was as follows: On the one hand the plaintiffs could not insist upon the defendants reloading cargo to take the place of that which was burnt, and, on the other hand, the defendants could not insist (if they had been so minded) on so doing. Each party, as regards those bales shipped and burnt, had *pro tanto* fulfilled their respective obligations under the charter-party—the defendants by loading them, and the plaintiffs being exempted from carrying them on the contracted voyage. The defendants were under no liability to pay freight for the bales burnt, and the plaintiffs had lost that freight. The space theretofore occupied by the burnt bales became vacant space in the plaintiffs' ship, and the only obligation then attaching to the defendants was to fill up the residue of the space in the plaintiffs' ship, and when this was done they would have loaded a full and complete cargo pursuant to the charter. This obligation the defendants refused to perform, and it is for breach of this that the present action is brought. It is not disputed that, when the defendants refused to perform this obligation, it was incumbent upon the plaintiffs to do what was reasonable to mitigate the damages which the defendants would have to pay by reason of their breach of contract, and that, if the plaintiffs could reasonably obtain other cargo to fill up the space which the defendants had wrongfully refused to fill up, they were bound to do so. The plaintiffs did find other cargo, and filled up that space, and they give credit, against the damages they seek to recover from the defendants in this action, for the freight earned by the carriage of such cargo. The defendants, however, insist that the plaintiffs were under obligation to do more—viz., to fill up, if they could, with other cargo for the defendants' benefit, the space left vacant by the burnt jute, and they assert that, as the plaintiffs did find other cargo with which to fill up this vacant space,

CT. OF APP.]

AITKEN, LILBURN, AND CO. v. ERNSTHAUSEN AND CO.

[CT. OF APP.]

the freight the plaintiffs have received for this cargo should also be credited against the damages the plaintiffs would otherwise recover from the defendants, and should not go to mitigate the loss the plaintiffs had incurred by losing their freight upon the burnt jute. In my judgment, this position taken up by the defendants is wholly untenable. No doubt, in ordinary cases, the measure of damages would be as stated by Watson, B. in *Smith v. M'Guire* (*ubi sup.*)—viz., the difference between the charter-party freight and the net freight actually earned, after deducting expenses. But the provision in this charter-party as to fire modifies the application of that rule to this case by, in effect, reducing as between the parties to the contract the capacity of the ship to the extent previously occupied by the burnt cargo. Under the charter-party the obligation of the shipowner was only, if he reasonably could, to find cargo to take the place of that cargo which the goods owner had made default in shipping, and for which default damages are, and can alone be, sought for in this action. As regards the jute burnt (i.e., the 5458 bales), the defendants have made no default, and for such no damages are, or could be, asked herein. For that jute the shipowner was under no obligation to try and find other cargo, for, as regards this, there were no damages to be mitigated. With the space left vacant in the ship by reason of the burnt jute the defendants had nothing whatever to do. All they had to do after the fire was to fill up the residue of the ship. If the defendants after the fire had had to fill up again the space left vacant by the burnt jute, and they wrongfully omitted to do so, I agree that then the shipowner should, if he could, have obtained other cargo for that space; but that is not the case. The shipowners might do with that vacant space what they liked so long as they did not delay the voyage upon which they had contracted to carry the defendants' goods. As before stated, the plaintiffs did fill up that space left vacant by the burnt jute so as to mitigate their own loss of freight, and now the defendants assert that they are entitled to that freight. Test it in this way: Suppose there had been no fire, and the defendants had loaded, as they did, the 5458 bales, and then refused to load any more (I leave out of consideration the difference between the 5458 burnt and the 7545 bales which were again reshipped, to keep this point clear), what would have been the plaintiffs' obligation? Clearly, only to load up the space wrongfully left unfilled by the defendants, so as to mitigate that damage. In the existing circumstances the space left vacant by the burnt jute stands, as regards the defendants, in the same position as if it were filled with jute, for they have performed their contract as regards that space, and have nothing more to do with it, and the only difference is that they have had to pay no freight for that jute, and the plaintiffs have lost it. All that the defendants can call upon the plaintiffs to do is to act reasonably in procuring cargo to take the place of that which they should have shipped, so as to mitigate their loss in respect of it, and this the plaintiffs have done. For the reasons above, in my judgment, this point fails the defendants. The next question is this. The plaintiffs did find cargo to fill up the space which the defendants should have filled up after the fire, and for non-performance of which they are being sued in this

action, and the point is, whether the defendants are to be credited with that freight which the plaintiffs did in fact earn upon goods so found and shipped, and which earned freight at 25s. a ton, or whether the average of the freight earned upon all goods brought home in the defendants' ship, which is less than 25s. a ton, is that which is to be credited to the defendants. Upon the evidence it appears that goods which carried freight at 25s. a ton were shipped by the plaintiffs at Calcutta, and allocated to the defendants' breach of contract, for the purpose of mitigating the damages they otherwise would have had to pay. In these circumstances I am of opinion that the defendants must be credited with this freight—viz., 25s. a ton—and not at the average rate of freight of the whole goods on board, which was considerably less. In this the defendants are right in their contention. Now, as to the last point, which is this. The plaintiffs say, and say truly, that by the charter-party the defendants were bound to load a full and complete cargo, so as to bring out a freight of 11. 17s. 6d. per ton all round. They say that the bill of lading freight of the cargo which was shipped by the defendants before the fire was less than the charter freight of 11. 17s. 6d. for the same cargo by the amount of 128l. 1s. 3d. To fulfil their contract the defendants were consequently bound to load the residue of the ship, which they had not loaded, with goods which would have earned a freight in excess of 11. 17s. 6d. per ton by the amount of the 128l. 1s. 3d., and that this would have been so, whether a fire had occurred or not. In my judgment this contention of the plaintiffs is correct, and I do not understand that, if the principle is right, the figure is disputed. This being so, the defendants have not paid into court enough by the difference between 846l. 5s. 3d. and 775l.—viz., 71l. 5s. 3d. I arrive at this in this way: I take the 718l. 4s., which the defendants by their computation make out to be the damages payable by them, if their point about being liable to nothing is held, as it is, against them. I then add thereto the 128l. 1s. 3d., which the defendants have left out of their computation. 718l. 4s. added to 128l. 1s. 3d. makes 846l. 5s. 3d., and, deducting 775l. from that amount, that leaves 71l. 5s. 3d. still due from the defendants to the plaintiffs. In my judgment, the plaintiffs' appeal should be allowed, with costs, and judgment should be entered for them for 71l. 5s. 3d. in addition to the sum paid into court, with costs in the court below, and the defendants' cross appeal should be dismissed with costs. The money in court will be ordered to be paid out to the plaintiffs, if they have not yet obtained it.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Hollams, Son, Coward, and Hawksley.*

CT. OF APP.]

Re FISH; INGHAM v. RAYNER.

[CT. OF APP.]

Thursday, March 1.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re FISH; INGHAM v. RAYNER. (a)

APPEAL FROM THE PALATINE COURT OF LANCASTER.

Will—Construction—Niece—Grand-niece of wife—Illegitimacy—Extrinsic evidence.

A testator gave his residuary estate to his "niece E. W." Neither the testator nor his wife had any niece, but his wife had two grandnieces named "E. W." of whom one was legitimate and the other illegitimate.

Held, that the illegitimate grand-niece could not come into competition with the legitimate grand-niece; therefore there was no latent ambiguity, and the illegitimate grand-niece was not entitled to produce evidence to show that she was the person referred to.

Decision of the Vice-Chancellor of the Palatine Court of Lancaster affirmed.

THIS was an appeal from a decision of the Vice-Chancellor of the Palatine Court of Lancaster.

George Fish died on the 2nd June 1884, and by his will, dated the 12th Jan. 1884, he gave the residue of his real and personal estate after the death of his wife to his "niece Eliza Waterhouse during her life."

Neither the testator nor his wife had any niece, but his wife had two grand-nieces named Eliza Waterhouse, of whom one was legitimate and the other was illegitimate.

The testator's widow died in March 1893, and an originating petition was filed by the surviving executor to obtain the opinion of the court on the question to whom the residuary estate of the testator belonged.

The illegitimate grand-niece claimed the residue, and tendered evidence that she was the person referred to by the testator, but Robinson, V.C. refused to admit the evidence, and held that the legitimate grand-niece was entitled to the residuary estate, and this was an appeal from that decision.

Upjohn for the appellant.—If there had been a niece of the testator named Eliza Waterhouse, no evidence could have been received that someone else was intended. But here there is no one who exactly answers the description in the will, and therefore there is a latent ambiguity, and evidence is admissible to show that there are persons who answer the secondary meaning of the description, and also which of these two claimants the testator referred to:

Sherratt v. Mountford, 29 L. T. Rep. N. S. 284; L. Rep. 8 Ch. App. 928;

Grant v. Grant, 21 L. T. Rep. N. S. 645; 23 L. T. Rep. N. S. 233, 829; L. Rep. 2 P. & D. 8; L. Rep. 5 C. P. 380, 727;

Doe v. Hiscocks, 5 M. & W. 363.

The evidence tendered is not evidence of the intention of the testator, but is evidence of the surrounding circumstances which will place the court in the position of the testator, so that it may ascertain the application of the language which he uses. Such evidence is admissible:

Charter v. Charter, L. Rep. 7 E. & I. App. 364, 377;

In the Goods of Ashton, 67 L. T. Rep. N. S. 325; (1892) Prob. 83.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Macnaghten for the respondent.—The respondent, being legitimate, is entitled to this residue:

Re Brown; Brown v. Brown, 37 W. E. 472.

Evidence cannot be received to show that the testator referred to the appellant:

Dorin v. Dorin, 33 L. T. Rep. N. S. 281; L. Rep. 7 E. & I. App. 568.

The case of *Grant v. Grant* (*ubi sup.*) has been disapproved of:

Wells v. Wells, 31 L. T. Rep. N. S. 16; L. Rep. 18 Eq. 504;

Re Taylor, 55 L. T. Rep. N. S. 649; 34 Ch. Div. 255; 58 L. J. 420, Ch.

Mansfield for the executor.

Upjohn in reply.

LINDLEY, L.J.—This is one of those painful cases in which it is probable that the testator's intention will be defeated, but the rule of law is too strong for the appellant. I think the Vice-Chancellor was right in refusing to admit the evidence that was tendered. The testator gave his residuary estate to his "niece Eliza Waterhouse." There was no person accurately answering to that description. Neither the testator nor his wife had any niece, but his wife had two grandnieces named Eliza Waterhouse, of whom one was legitimate and the other was illegitimate. We are asked to admit evidence in favour of the illegitimate grand-niece who is in competition with the legitimate one, who, but for her, would be undoubtedly entitled. I think it would be contrary to the authorities to do so. The principle applicable cannot be stated more satisfactorily than by Mellish, L.J. in *Sherratt v. Mountford*, where he says (29 L. T. Rep. N. S. 285; L. Rep. 8 Ch. App. 931): "No doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces are his nephews and nieces according to the ordinary meaning of the words in a secondary sense." I have here to say that there are cases in which great-nephews and great-nieces have been let in under the description of nephews and nieces. Then the Lord Justice goes on: "So that if he has no nephews or nieces according to the strict primary sense, then his wife's nephews and nieces will take under the description of his nephews and nieces, unless there is some other class of persons who come into competition with them, and who are proved by extrinsic evidence, first to be persons who may take under the description of nephews and nieces, and, if that is proved, then that they are the persons who really were intended to take." I think this applies to the case before us, where the person most nearly answering the description is the legitimate grand-niece of the testator's wife, and that no evidence can be admitted to prove that her illegitimate grand-niece was intended. In my opinion the Vice-Chancellor was right, and the appeal must be dismissed.

KAY, L.J.—I am of the same opinion. This is really an attempt to bring in evidence of what the testator intended under the guise of evidence of the surrounding circumstances. The testator had no niece, nor had his wife one, but his wife had a legitimate grand-niece. Therefore there was a person who would be clearly entitled if there had been no other claimant. But it is ingeniously contended that, when once the fact

was ascertained that the testator had no niece, there was a latent ambiguity which enabled the court to let in evidence of this kind, that the illegitimate grand-niece was living in the house of the testator, and was sometimes called by him his niece. And this was called evidence of the surrounding circumstances. Suppose in a case where there was a question of illegitimacy a testator left a legacy to his son John, and suppose he had a son named John who had been living away from him, and there was another person named John living with him who was not his son, but whom he called his son, in such a case would any evidence be admitted that his son John was not the person intended to be benefited? How can the fact of a testator being in the habit of calling a person his son who is not his son be evidence of surrounding circumstances? It is really evidence of the intention of the testator to prove that he meant someone else, and not the person designated in the will. Does it make any difference that in this case the testator had no niece, and that there was only a grand-niece of his wife, named Eliza Waterhouse? An attempt is made to oust her by introducing an illegitimate grand-niece, and this case is therefore stronger than the one I put, because it is the rule of law that a legitimate relation is always to be preferred to an illegitimate one. I need only refer to *Hill v. Crook* (24 L. T. Rep. N. S. 488; L. Rep. 6 E. & I. App. 265) and *Dorin v. Dorin* (*ubi sup.*). For this reason also the application fails. I am therefore of opinion that the Vice-Chancellor was right, and the appeal must be dismissed.

SMITH, L.J.—I have come to a decided conclusion that the evidence offered ought not to be admitted. If we could have admitted it, I confess that I should have gladly done so, but we are precluded by authority. The testator gave his residue to his "niece Eliza Waterhouse." Neither he nor his wife had a niece, but his wife had two grand-nieces of that name, one of whom was legitimate and the other illegitimate. These two ladies are in competition, and the question is, whether the illegitimate grand-niece can give evidence that she is the person intended by the testator, and not the legitimate one. In my opinion the rule of law is well established. *Prima facie* a gift to a testator's niece refers to his legitimate niece, and, supposing the only person who could take under the gift was a grand-niece of the testator's wife, that means a legitimate grand-niece of his wife, and not an illegitimate grand-niece of his wife. That being so, there is no latent ambiguity. If both had been legitimate there would have been a latent ambiguity; but, inasmuch as one is legitimate and other is not, there is none. Therefore the Vice-Chancellor was right in rejecting the evidence, and the appeal must be dismissed.

Solicitors: *T. H. Philpots*, agent for *E. Rennison*, Blackburn; *Pritchard, Englefield, and Co.*, agents for *Ellis D. Little*, Blackburn; *J. W. Shaw*, Blackburn.

Thursday, April 5.

(Before Lord ESHER, M.R., SMITH, and DAVEY, L.J.J.)

HEBDITCH v. MACILWAIN AND OTHERS. (a)

APPLICATION FOR A NEW TRIAL.

Defamation—Libel—Privileged occasion—Publication to a person having no duty, interest, or power in the matter—Belief of defendant as to duty, interest, or power of the person to whom publication is made.

Where a defendant has published a defamatory document to a person who has no duty, or interest, or power in the subject-matter of the libel, the occasion is not privileged by reason that the defendant had at the time of the publication a bona fide and reasonable belief that the person to whom the publication was made had some duty, interest, or power in the subject-matter of the libel.

Tompson v. Dashwood (48 L. T. Rep. N. S. 943; 11 Q. B. Div. 43) overruled.

THIS was an application by the defendants for judgment or a new trial upon the trial of the action before Williams, J., with a jury, at Taunton.

The action was for libel under the following circumstances:

The plaintiff had been a candidate at an election of guardians for the parish of South Pether-ton, in the county of Somerset, and was elected.

After the election the defendants, who were electors, wrote and sent to the board of guardians a letter imputing to the plaintiff improper conduct in obtaining votes at the election, and asking for an investigation. The improper conduct alleged was the tampering with the voting papers, as they were handed in, by a person in the employ of the plaintiff, who was engaged in collecting the votes, and treating with drink at certain public-houses several of the voters.

At the trial of the action Williams, J. left the following questions to the jury: (1.) Is the letter libellous? Answer: Yes. (2.) Is the plea of justification proved, either wholly or in part? Answer: No. The third question became unnecessary by reason of the jury's answer to the first. (4.) Did the defendants, and each of them, honestly believe it to be their duty to make each and all the communications in the letter, and did they each sign the letter under a sense of duty? Answer: In part. (5.) Did the defendants, and each of them, honestly and reasonably believe that the board of guardians were the proper authority to whom to apply in respect of each and all of the matters mentioned in the letter? Answer: Yes. The learned judge then redirected the jury as to the fourth question, and left them two questions in its place, referring to the two parts of the letter, the questions in each case being: Did the defendants write that under a sense of duty and believing the board to be the proper persons to write to? Answer as to the first part, Yes; as to the second part, No.

Upon that the learned judge ruled that the occasion was not wholly privileged, and said he would put no question as to malice.

He then directed the jury to find the amount of damages. The jury returned a verdict of 10*l.* damages, and the learned judge gave judgment

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

for the plaintiff accordingly. The defendants now moved for judgment or a new trial.

J. Alderson Foote (Metcalfe with him) for the defendants.—The learned judge ought to have ruled that the occasion was privileged, and the plaintiff not having proved malice, judgment ought to have been given for the defendants. I admit that the board of guardians had no interest or duty or power in the matter complained of. Nevertheless, as the defendants sent the letter for the purpose of obtaining redress, and did so honestly believing that the board had some power or duty which would enable the defendants to obtain redress, the occasion was privileged. He referred to a dictum of Fitzgerald, B.:

Waring v. McCaldin, 7 Ir. Rep. C. L. 232, at p. 288;

Tompson v. Dashwood, 48 L. T. Rep. N. S. 943; 11

Q. B. Div. 43;

Harrison v. Bush, 5 E. & B. 344;

McDougall v. Claridge, 1 Camp. 267;

Scarl v. Dixon, 4 F. & F. 250;

Cleaver v. Sarrade, 1 Camp. 268;

Fairman v. Ives (5 B. & A. 642) shows that the fact of a letter being written for the purpose of obtaining redress rebuts the presumption of malice. [Lord ESHER, M.R. referred to *Pearson v. Lemaitre*, 5 M. & G. 700, and the remarks of Cresswell, J. at pages 709 and 710.]

Blake Odgers, Q.C. and Whately for the plaintiff.—In every action of libel where it is sought to show that an occasion is privileged, an interest or duty must be shown in the person sending and in the person receiving the libellous document:

Toogood v. Spyring, 1 C. M. & R. 181;

Harrison v. Bush, 5 E. & B. 344.

Communications made for the purpose of obtaining redress are in exactly the same position as any other communication, so far as the question of privileged occasion is concerned. The cases cited for the defendants are no authorities for the proposition in support of which they are used, they are all explainable except *Tompson v. Dashwood* (*ubi sup.*), which, it is submitted, was wrong, and should be overruled. In the case of complaints made to certain state officials they are really made to the Crown, although to get to the Queen they have to pass through certain channels. There is direct authority against the proposition contended for by the defendants in a decision in this court:

Stuart v. Bell, 64 L. T. Rep. N. S. 633; (1891) 2 Q. B. 341.

Lord ESHER, M.R.—In this case the plaintiff has brought an action of libel against the defendants for writing and publishing with regard to the plaintiff that when he was a candidate in an election of guardians of the poor he had bribed some of the electors. Now, such an action as that consists not merely in writing a libel, but in writing and publishing, and the material point is the publication of what has been written. In this case it has been proved to the satisfaction of the jury that the defendants wrote a document which was libellous on the plaintiff, and that they published it to the board of guardians. The defendants argue that though that may be so, yet the libel was published on a privileged occasion, and that the plaintiff had not proved malice. The proof that an occasion was privileged lies on the defendant, and if he proves it, then the burden is on the plaintiff to prove malice; but there is no

need for him to prove malice until the defendant has first proved that the occasion when the libel was published was privileged. Whether or not an occasion is privileged is a question of law, a question for the judge, not for the jury. Now, the facts in the present case upon which the question of law, whether or no the occasion was privileged, has to be determined are these: The plaintiff had been a candidate, and had been elected at this election of guardians. The defendants are persons who had a right to vote at this election and after the election was over they sent the defamatory letter to the board of guardians, and this is the publication relied on. It is clear that the board could do nothing. They could not set aside the election or do anything in the matter. That being so, the first question for the judge at the trial was whether the defendants had an interest in the matter. I am not prepared to say that they had not. I am inclined to think that they had, because they were electors, but for the purposes of this judgment I will assume that they had an interest. The next question is, were the board of guardians interested? I think they were not. It seems to me that they had no duty or power to move in the matter. Under these circumstances it seems to me perfectly clear that the occasion was not privileged. To that the defendants reply that, though the board of guardians may not have had any interest or duty in the matter, nevertheless the occasion was privileged because the defendants believed honestly and reasonably, or not unreasonably, that the board of guardians had a power or duty in the matter, and were able to give the defendants some redress, and that was the reason why the defendants sent the letter to the board. I cannot accept that proposition. In what way can the belief of the defendants, who have made a mistake and published a libellous document to certain persons who have no interest or duty or power in the matter, affect the question whether the occasion of the publication was privileged? It is true that the belief of the defendants may be important upon the question of malice, but if the occasion was not in any other respect privileged I cannot see what is the importance of the defendants' belief. However, the argument was put forward as being based upon authority. I do not think that any court has decided the point which has been argued here, but certainly it has not been so decided by the Court of Appeal. It is unnecessary for us to justify our decision by a minute discussion of all the cases that have been cited in the argument. The first case relied on is *Waring v. McCaldin* (*ubi sup.*), and Fitzgerald, B. no doubt used an expression in that case which justified its citation here, but I do not think he meant to decide the point. He says in his judgment: "If without express malice I make a defamatory charge which I *bonâ fide* believe to be true against one whose conduct in the respect defamed has caused me injury, to one whose duty it is, or whose duty I reasonably believe it to be, to inquire into and redress such injury, the occasion is privileged." The alternative there mentioned is what is relied on here. But is that the real judgment of the learned judge? Immediately before the sentence I have just read he said: "The occasion of making a defamatory communication is thus privileged—when it is made by one having an interest in making, or a duty to make, that par-

[CT. OF APP.]

HEBDITCH v. MACILWAINE AND OTHERS.

[CT. OF APP.]

ticular defamatory communication . . . to one having a corresponding interest or duty in respect of that subject-matter—that is to say, who has an interest in hearing, or a duty to arise upon hearing, such defamatory communication.” So that, having laid down the law correctly, he immediately after is supposed to lay down the proposition that the defendant’s belief will make an occasion privileged. I cannot believe that the words relied upon are his real judgment, and I think he must have used them inadvertently. I do not think he meant to decide the proposition cited here for the defendants, but, if he did use these words purposely, I cannot agree with him. The only case cited which is binding on us is *Stuart v. Bell* (*ubi sup.*), which is a decision of the Court of Appeal; but I think that, when that case is looked into, it will be found to be an authority against the defendant’s contention. After considering a number of cases, Lindley, L.J. then says: “Now, adopting the language of Erle, C.J., I ask, do the circumstances show that the statement complained of was made in the discharge of some social or moral duty, or that the speaker or the person addressed had an interest in making or receiving the communication?” He then discussed the question of the defendant’s interest, and continued: “But the question still remains, whether the defendant was not under a moral or social duty to make such communication. Both the defendants and Stanley say that the defendants acted under a sense of duty; but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant’s belief, but on whether he was right or mistaken in that belief.” That seems to me distinct authority that the belief of the defendant at least is immaterial. Then the case of *Harrison v. Bush* (*ubi sup.*) was cited as an authority; but Lord Campbell, C.J. there declined to give any opinion on the point, so that it seems to me that the case cannot be cited as an authority upon this question. Then the cases of *McDougall v. Claridge* (*ubi sup.*) and *Fairman v. Ives* (*ubi sup.*) were cited, but from what was said by the Court of Common Pleas, when those cases were cited in *Pearson v. Lemaitre* (5 M. & G. 700), it appears that they are both within the ordinary rule, and do not assist the defendants here. The report also of the case of *Scarll v. Dixon* (*ubi sup.*) is not satisfactory. There is one case which seems to be in favour of the defendants’ contention, and that is *Tompson v. Dashwood* (*ubi sup.*). There, I think, the judges did draw a distinction between writing and publishing a libel; but, as I have said, the cause of action depends on the publication of the document, not on the writing of it. The only way in which that case can be dealt with is to say that we do not agree with it, and in my opinion it was wrongly decided. Therefore, with regard to the present case, when it was proved that the defendants had published this libel, and that the board of guardians to whom it was published had no interest, or duty, or power, to deal with the complaint made to them, then the judge ought, without more, to have held that the occasion was not privileged, and that there was no further question in the case except as to damages. Therefore, the last questions which the learned judge left to the jury were unnecessary and irrelevant, and it is

immaterial what the findings of the jury upon them were. I am of opinion, upon the undisputed facts of this case, that the occasion was not privileged, and this application therefore fails, and must be dismissed.

SMITH, L.J.—I agree that this application fails. The action is for libel, and the plaintiff established a *prima facie* case, namely, that the defendants had falsely and maliciously published a document which was defamatory of the plaintiff. The defendants in reply say that the occasion was privileged, and so seek to rebut the presumption of malice which the law implies on the publication of a libellous document. The question therefore arises, what constitutes a privileged occasion. The law was laid down by Parke, B. in *Toogood v. Spyring* (*ubi sup.*) and also by Lord Campbell, C.J. in *Harrison v. Bush* (*ubi sup.*). In the latter case it was laid down that “a communication made *bona fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty”—and I will add here, whether legal, moral, or social—“is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable.” That is to say, there must be a corresponding duty or interest in the person sending and in the person receiving the libellous document. In this case it is clear that the board of guardians had no interest or duty in the matter complained of by the defendants, and therefore it follows that the libel was not published upon a privileged occasion. That was to a certain extent admitted, but it was argued that, though the communication was addressed to persons who had no interest or duty in the matter, nevertheless the occasion would be privileged if the defendants *bona fide* and reasonably believed that the board of guardians had some interest, duty, or power. That does not seem to me to be the law. The belief of a libeller cannot make an occasion privileged if it is not otherwise privileged. In *Stuart v. Bell* (*ubi sup.*) Lindley, L.J. pointed out that the question of privilege does not depend on the defendant’s belief, and I entirely agree with him there. Several cases were cited in support of the defendants’ contention, but I must pass most of them by. The strongest case is *Waring v. McCaldin* (*ubi sup.*), in which Fitzgerald, B. used the words which the Master of the Rolls has already read. I do not think that the passage in his judgment which is relied on is right in law. It seems to me, therefore, that my brother Williams ought, at the trial of this action, to have ruled that the occasion was not privileged. No doubt he thought it safer to leave to the jury the later questions, but they were unnecessary. Even if we were wrong in the law which we are applying to this case, I think that on the findings of the jury the defendants would be out of court. I agree that this appeal ought to be dismissed.

DAVEY, L.J.—I agree that this appeal must be dismissed.—I agree also with what the Master of the Rolls has said with regard to *Tompson v. Dashwood* (*ubi sup.*), and I think that the case cannot be supported. Upon the question whether the occasion of the publication of a libel is privileged, I cannot see how the state of the defendant’s mind can of itself make any difference. I think

it is unnecessary to discuss all the authorities that have been cited by the learned counsel for the defendants, because I think none of them, except *Tompson v. Dashwood* (*ubi sup.*) are really in his favour, and *Stuart v. Bell* (*ubi sup.*) in this court is against him. As to the case of *Waring v. McCaldin* (*ubi sup.*), I must say, with great respect to Fitzgerald, B., that I think the dictum that has been cited to us was uttered *per incuriam*, and cannot be supported. I agree that the appeal fails.

Application dismissed.

Solicitors for the plaintiff, *Rowcliffes, Rawle, and Co.*, for *John Trevor-Davies*, Yeovil.

Solicitors for the defendants, *Taunton and Dade*, for *Sir Richard Howard*, Weymouth.

Thursday, April 19.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

FLOWER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

APPLICATION FOR A NEW TRIAL.

Infant—Contract—Benefit of infant—Carriage of infant by railway company—Company not to be liable for negligence.

Under an arrangement with a colliery owner, a railway company agreed to issue passes by their railway to persons employed in the colliery. They accordingly gave a free pass to the plaintiff, a boy employed in the colliery, who was between thirteen and fourteen years of age, and the plaintiff at the same time signed an agreement by which, in consideration of being carried by the defendant company, he agreed that neither he, his executors, his administrators, or relatives should have any claim against the defendant company by reason of any accident, injury, or loss which might happen to him or his property while travelling on the defendants' railway, notwithstanding such accident, injury, or loss might be occasioned by the negligence of the defendants or their servants; and that he, his executors, and administrators would indemnify the defendant company against all loss, costs, damages, and expenses which they might incur by reason of any such accident, injury, or loss, or by reason of any claim or legal proceedings instituted or taken by him or them against the defendants or any of their officers or servants in respect thereof; and that he would desist from exercising his privilege of using the pass whenever required by the defendants or any of their agents so to do.

Held, that the agreement taken as a whole was so prejudicial to the plaintiff, being an infant, that it was unfair that he should be bound by it, and it was therefore not binding upon him.

THIS was an application by the defendant company for judgment or a new trial in an action tried before Kennedy, J. with a jury at Cardiff.

The action was brought to recover damages for personal injuries caused to the plaintiff by the negligence of the defendants' servants while travelling on the defendants' railway.

The defendants pleaded that there was no negligence on their part, that there was contributory negligence on the part of the plaintiff, and

they relied upon an agreement which the plaintiff had entered into with them under the following circumstances:

In 1891, the plaintiff, being then between thirteen and fourteen years of age, was employed by one Williams in a colliery belonging to him at a place called Hollybush. He, with many other colliers employed at this colliery, lived at Blackwood, a place about four and a half miles from the colliery. There was no direct road between the two places, and practically the only means of going from one to the other was by the defendants' railway.

Williams therefore made an arrangement with the defendants under which they carried the colliers from Blackwood to Hollybush and back again, Williams paying the defendants monthly according to the number of colliers carried.

The plaintiff under this agreement between Williams and the defendants received a free pass between Hollybush and Blackwood, and at the same time signed a printed form of agreement as was done by the other colliers living at Blackwood and employed at Hollybush.

This agreement was as follows:

Colliers Indemnity Form. Feb. 28, 1891. I, the undersigned, Abraham Flower, of Blackwood, in consideration of you, the London and North-Western Railway Company, permitting me to travel by your railway between Blackwood and Hollybush, either by mineral, goods, or passenger trains, as may be most convenient to you, at certain agreed reduced rates, do hereby agree that neither I nor my executors or administrators or relatives shall have any claim against you by reason of any accident, injury, or loss which may happen to me or my property while joining, travelling by, or alighting from such trains, or while upon your railway or property, notwithstanding any such accident, injury, or loss, is occasioned by the negligence of you or any of your officers or servants. And further that I, my executors and administrators, will indemnify you from and against all loss, costs, damages, and expenses which you may incur by reason of any such accident, injury, or loss to me or to my property, or by reason of any claim or legal proceedings instituted or taken by me or them against you or any of your officers or servants in respect thereof. And, lastly, that I will desist from exercising the privilege aforesaid whenever I shall be requested by you or any of your agents so to do.

In April 1891 the plaintiff was knocked down and injured by an engine of the defendants on a journey from Hollybush to Blackwood, and he commenced the present action in consequence.

At the trial of the action before Kennedy, J. with a jury, the jury, in answer to the questions left them by the learned judge, found that there was negligence in the defendants' servants, that there was no contributory negligence in the plaintiff, and that the above-mentioned agreement between the plaintiff and the defendants was not to the plaintiff's benefit, and they assessed the damages at 175*l.*

The learned judge said that, upon the question whether the agreement was beneficial to the plaintiff, he was of the same opinion as the jury, and he gave judgment for the plaintiff.

The defendants moved for judgment or a new trial.

Bailhache (B. F. Williams, Q.C. with him) for the defendants.—The contract is binding on the plaintiff, though he is an infant. What the court has to consider is, using the words of Lord Esher,

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.]

ANDERSON v. DEAN.

[CT. OF APP.]

M.R., who adopts the rule laid down by Fry, L.J., "whether the stipulation objected to is not such as to make the whole contract of service under particular circumstances unfair."

Corn v. Matthews, 68 L. T. Rep. N. S. 480; (1893) 1 Q. B. 310.

The risks of travel by railway are inappreciable; the loss of any remedy against the company in case of accident through the negligence is more than compensated by the free pass which the plaintiff obtained; so that the contract cannot be considered to have been inequitable at the time when it was made. This same contract was signed by all the other men and boys working in the Hollybush collieries and living at Blackwood, so that such provisions as are in it "were at the time common to labour contracts," and should therefore be held binding on the plaintiff:

Leslie v. Fitzpatrick, 37 L. T. Rep. N. S. 461; 3 Q. B. Div. 229;

Fellows v. Wood, 59 L. T. Rep. N. S. 513.

Abel Thomas, Q.C. and S. T. Evans, for the plaintiff, were not called upon.

LORD ESHER, M.R.—The question in this case is, whether this agreement is not so prejudicial to a boy of thirteen as to be wholly unfair to him. That is a question for the judge. It was contended that the agreement was fair when it was made, though it has since turned out not to be a fair one. There seems to me to be no argument in that contention, because the agreement was made in view of the very thing happening which has in fact happened. The agreement provides not only against the negligence of the defendants' servants, but also against the negligence of the directors themselves, if they should do anything in disregard of their own rules. It provides that if by reason of their negligence the plaintiff should be killed, his mother, for instance, whose support he may be, could not bring an action under Lord Campbell's Act, and if she should do so, the plaintiff's executors are to indemnify the defendants against their damages and costs. Such a contract must produce indignation in the mind of any reasonable person, and it is impossible, as it seems to me, to hold that it is beneficial to the plaintiff. I think it is wholly unfair to him, and the application must be dismissed.

SMITH, L.J.—I agree with what my Lord has said. The question is, whether this agreement, as a whole, is so much to the detriment of the infant that it is unfair that he should be bound by it. That is a question for the judge. The effect of it is that, provided the defendants carry the infant so long as they like, they may be as negligent as it suits them. It seems only necessary to state that, to show that the agreement cannot be for the plaintiff's benefit, and that it is not binding on him.

DAVEY, L.J.—I agree. *Application dismissed.*

Solicitors for the plaintiff, *T. Metcalfe and Sharpe*, for *T. S. Edwards*, Newport, Mon.

Solicitors for the defendants, *T. White and Sons*, for *Gustard and Waddington*, Usk.

April 11 and May 1.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.J.J.)

ANDERSON v. DEAN. (a)

APPLICATION FOR A NEW TRIAL.

Practice—Liverpool Court of Passage—Appeal—Court of Appeal—Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37), s. 10.

Under sect. 10 of the Liverpool Court of Passage Act 1893, an Appeal from a decision of that court lies to the Court of Appeal, not to the Queen's Bench Division.

Upon a motion in the Court of Appeal for a new trial of an action tried in the Liverpool Court of Passage, the judge of that court should supply the Court of Appeal with a note of the evidence.

THIS was an appeal by the plaintiff from a decision of the judge of the Court of Passage at Liverpool at the trial of the action without a jury, in which he gave judgment for the defendant.

By the Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37) it is enacted by sect. 10 as follows:

An appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at Nisi Prius, and subject to the same rules, regulations, and provisions.

April 11.—Upon the appeal being called on.

Montagu Lush, for the defendants, took a preliminary objection that the appeal should have been brought, in the same way as an appeal from a County Court, to the Queen's Bench Division, and it was therefore wrongly brought to the Court of Appeal. He referred to

Speers v. Daggers, Cab. & E. 503.

Shepherd Little for the plaintiff.

Cur. adv. vult.

May 1.—DAVEY, L.J. read the following judgment of the court (Lord Esher, M.R., Smith and Davey, L.J.J.):—This is an appeal from a judgment of the learned judge of the Court of Passage on the trial of an action. A preliminary objection has been taken on behalf of the respondent that the appeal is not to this court but to a divisional court of the Queen's Bench Division. The question depends on the true construction of sect. 10 of the Liverpool Court of Passage Act 1893 (56 & 57 Vict. c. 37). But in order to understand the question one must look at the position of the Court of Passage as regards appeals at the time when the Act was passed. The Court of Passage is an inferior court, though an ancient Court of Record. By a section of the Court of Passage Act 1853 an appeal is given with the leave of the judge of the court "on the trial of any issue" to one of the superior courts at Westminster; and by sect. 45 of the Judicature Act 1873 that jurisdiction is transferred to the High Court. There was, therefore, at the time of the passing of the Act of 1893 existing a right of appeal "on the trial of any issue" (whatever those words may mean) from the Court of Passage to the High Court, but subject to the leave of the judge of the Court of Passage. Sect. 7 of the Act of 1893 gives to the registrar of the Court of Passage all the powers which a registrar, district registrar, master, taxing officer.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

or associate of the High Court has or would have in the same matter if the same were proceeding in the High Court; and sect. 8 enables the judge of the Court of Passage, with the concurrence of the Rule Committee, to adopt and apply to the Court of Passage all or any of the rules for the time being regulating the practice and procedure of the High Court. So far an intention may be discerned to assimilate the practice of the Court of Passage to that of the High Court. Then comes sect. 10. The question is whether this section gives a new right of appeal to this court, or merely regulates the ordinary right of appeal and defines the conditions under which it is exercisable. It is argued that "a trial at Nisi Prius" can take place in the High Court only, and that under the provisions of 53 & 54 Vict. c. 44, known as Mr. Finlay's Act, a motion for a new trial or to set aside a verdict, finding, or judgment (which is the only way of appealing on a trial at Nisi Prius) comes to this court. It is further pointed out that the word "provisions" is large enough to include the provisions of the Judicature Acts (including Mr. Finlay's Act), and that word will have no force or effect as distinguished from rules and regulations unless it be so construed. On the other hand, it is contended that the effect of the section is merely to remove the necessity for obtaining the leave of the judge to an appeal "upon the trial of any issue" under the Act of 1853, and to assimilate the procedure on appeals to the Divisional Court to that on appeals to this court from the High Court in like cases. We are not altogether satisfied that we ought without express words to construe the section as creating a new Court of Appeal from the Court of Passage; but, looking to the intention shown in sects. 7 and 8 to assimilate the procedure of the Court of Passage to that of the High Court and to the difficulty of giving full effect to the language in which sect. 10 is expressed, without saying that an appeal is given to this court, we think that this is the sound and right construction of this somewhat obscure section. We therefore think that the preliminary objection should be overruled.

Lord ESHER, M.R.—I wish to add this, that as an appeal from the judge of the Court of Passage will now come direct to this court in like manner as a motion for a new trial in the case of a trial by a judge of the High Court with a jury, the judge should supply this court with a note of the evidence in the same way as is done by a judge of the High Court.

The Court then heard the appeal, and ordered a new trial to be had.

New trial ordered.

Solicitors for the plaintiff, *Ridsdale and Son*, for *H. Davies*, Liverpool.

Solicitors for the defendant, *Crowders, Vizard, and Co.*, for *Clarke and Davis*, Liverpool.

April 17 and May 1.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

NIND v. THE NINETEENTH CENTURY BUILDING SOCIETY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant—Underlease—Breach of covenant to repair—Landlord's costs of solicitor and surveyor under Conveyancing Act—Liability of under-lessee—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 14—Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13), ss. 2 and 4.

By sect. 2 of the Conveyancing and Law of Property Act 1892 a lessor is entitled to recover as a debt due to him from a "lessee," and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, "or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act 1881 or of this Act."

Held (reversing the judgment of the Queen's Bench Division (ante, p. 316; (1894) 1 Q. B. 472), that a lessor has no right of action under this section against an under-lessee of the demised premises.

Semle (per Lord Esher, M.R. and Davey, L.J.), that the words in the section, "from which the lessee is relieved," &c., refer to relief given by the court in a case in which a lessor has an enforceable right of re-entry or forfeiture.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division (Day and Lawrance, JJ.) upon an appeal from a decision of the judge of the City of London Court.

The case is reported *ante*, p. 316; (1894) 1 Q. B. 472, where the facts are fully set out.

By the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41) it is enacted as follows:

Sect. 14. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach. (2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and, in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit. (3) For the purposes of this section a lease includes an original

or derivative underlease . . . and a lessee includes an original or derivative under-lessee.

By the Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13) it is enacted as follows:

Sect. 1. (1) . . . The Conveyancing and Law of Property Act 1881, and the Conveyancing Act 1882, and this Act, shall be read together . . .

Sect. 2. (1) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act 1881 or this Act.

Sect. 4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise as the court in the circumstances of each case shall think fit.

The Queen's Bench Division (Day and Lawrance, JJ.) held that a lessor was entitled, under sect. 2 of the Act of 1892, to bring an action for costs incurred by him in the employment of a solicitor and a surveyor against the under-lessee of the demised premises.

The defendants, the under-lessees, appealed.

April 17.—Hopkinson, Q.C. and D'Eyncourt, for the defendants, cited

Cresswell v. Davidson, 56 L. T. Rep. N. S. 811;
Burt v. Gray, 65 L. T. Rep. N. S. 229; (1891)
2 Q. B. 98;
Skinner's Company v. Knight, 65 L. T. Rep. N. S.
240; (1891) 2 Q. B. 542.

Jelf, Q.C. and T. Terrell for the plaintiff.

The arguments were the same as those used in the court below.

Cur. adv. vult.

May 1.—Lord ESHER, M.R.—I entirely agree with the judgment which has been prepared by Davey, L.J., and there is nothing that I wish to add to it.

SMITH, L.J. read the following judgment:—In this action the plaintiff, who is a lessor, sues the defendants, who are under-lessees of premises of the plaintiff, to recover from them certain costs and expenses which the plaintiff has incurred in employing a solicitor and surveyor to prepare a notice specifying the particular breaches of covenant he complained of prior to commencing an action of ejectment founded upon such breaches. It is obvious that, inasmuch as no privity of contract exists between the plaintiff and the defendants, this action is not maintainable, unless the plaintiff can bring himself within sect. 2 of the Conveyancing and Law of Property Act 1892 (55 & 56 Vict. c. 13). This section enacts that "a lessor shall be entitled to recover as a debt due to him

from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which at the request of the lessee is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act 1881, or of this Act." Now, it is apparent that if this sect. 2 stood alone the plaintiff could not bring his case within it, for the section only deals with the case of lessor and lessee, and not the case of a lessor and lessee of a lessee, who is specially dealt with by sect. 4 of the Act. Moreover, sect. 2 deals with the recovery as a debt due of the costs and expenses, in addition to damages (if any) accrued to the lessor, which last presupposes a contractual relation between the lessor and lessee, for otherwise how are damages to be recovered? But it is said that this section does not stand alone, and the Queen's Bench Division, from which this appeal is brought, has held that a lessee in sect. 2 of the Act of 1892 includes an under-lessee. It is true that the Act of 1892 is to be read together with, amongst others, the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), and by sect. 14, sub-sect. 3, of that Act, "for the purposes of this section," it is enacted that a lease includes an original or derivative underlease, that a lessee includes an original or derivative under-lessee, and that a lessor includes an original or derivative under-lessee. It has been held that the true reading of sect. 14, sub-sects. 1 and 2, when coupled with the interpretation in sub-sect. 3 thereof, is that when an original lessor proceeds by way of forfeiture against an original lessee, or a derivative lessor so proceeds against a derivative lessee, the relieving provisions of sect. 14 come into play, but not otherwise, and consequently, if there be an under-lessee, and an original lessor proceeds against an original lessee for a forfeiture and thus breaks the head lease, the under-lessee cannot avail himself of the provisions of the section, for in such a proceeding that section does not apply to an under-lessee. I have arrived at the conclusion that this is the true view to take of the section, and that what was said by Kay, J. in *Cresswell v. Davidson* (*ubi sup.*) and by Mathew, J. and Williams, J. in *Burt v. Gray* (*ubi sup.*) is correct. It was in these circumstances, inasmuch as an under lessee was not able to avail himself of the relief to be obtained under sect. 14 of the Act of 1881, when an original lessor was proceeding to eject the original lessee and thus break the head lease, that sect. 4 of the Act of 1892 came to be passed which, leaving the construction which had been placed upon sect. 14, sub-sect. 3, where it was, gave power to the court to protect an under-lessee in such cases, he not being within the beneficial provisions of sect. 14. In my judgment the word "lessee" in sect. 2 of the Act of 1892 means lessee and not under-lessee, and this being so this action fails. It was also said on behalf of the defendants that even if the word "lessee" in sect. 2 of the Act of 1892 included an under-lessee, still the defendants in this case, though under-lessees, were not "relieved under the provisions of the Act of 1881" so as to come within the section. It was said that "relieved under the provisions of the Act" meant only when relief had been obtained

under sub-sect. 2 of sect. 14 of the Act of 1881, and no "relief under the provisions of the Act of 1881" was obtainable under sub-sect. 1 of sect. 14. I am not prepared to hold this at the present moment, and as it is not necessary on this appeal to decide this point, I abstain from expressing any opinion thereon. I think, therefore, that this appeal should be allowed.

DAVEY, L.J. read the following judgment:—In this case two points have been decided in favour of the respondent by the court below on the construction of sect. 2, sub-sect. 1, of the Conveyancing Act 1892: (1) that the word "lessee" includes a lessee of a lessee so as to give the lessor a right of action for debt against such an under-lessee with whom the lessor has no privity of contract; (2) that the words "from which the lessee is relieved" under the provisions of the Act of 1881 or this Act include the case of a lessee who under sub-sect. 1 of sect. 14 of the Act of 1881 has remedied the breach of covenant and made compensation as required by a notice given in accordance with that sub-section. The appellants contest both these points, but if they succeed on one only, it is sufficient for the appeal. It has been argued, and I think correctly, that we ought to give the word "lessee" the same construction in this sub-section which it bears in sect. 14 of the Act of 1881, because this sub-section is but an enlargement and extension of sect. 14. Now, it has been held by Kay, L.J. in *Cresswell v. Davidson* (*ubi sup.*) and by a Divisional Court in *Burt v. Gray* (*ubi sup.*) that the word "lessee" in sect. 14 does not include the lessee of a lessee between whom and the lessor there is no privity of contract or tenure, and that the definition clause in sub-sect. 3, which I need not read again, is to be construed only so as to make the provisions of the section applicable as between a derivative lessor and his lessee, as well as between the first or head lessor and his lessee. On the whole, I agree with those decisions. I do not find any sufficient grounds for holding that by sect. 14 it was intended to create new statutory rights between an original lessor and a derivative lessee claiming under his lessee between whom no privity of contract exists, and I think that the words of sub-sect. 3 can have full effect given to them without assuming such an intention on the part of the Legislature. If I turn to the section before us, sub-sect. 1 of sect. 2 of the Act of 1892, I observe that the effect of the section is to give an action of debt to the lessor for the costs and expenses in question "in addition to damages." Now damages can only be recovered in an action from a lessee in privity of contract with the lessor. I therefore do not find in this enactment any indication of intention to give a right of action against one who has not contracted with or is not liable to be sued by the lessor, but the intention seems to be to extend the amount recoverable through an existing right of action to these costs and expenses. If this be so, the appeal succeeds, and it is unnecessary for the purpose of this appeal to give an opinion on the second point, but as it has been argued, and the court below has expressed an opinion upon it, I will shortly state my views. I am of opinion that the words "from which the lessee is relieved" *prima facie* and according to their natural sense point to some action of the court on the relations of the two parties, and the words "under the pro-

visions," &c., point to such an act having been done pursuant to powers conferred by the Act. The words "relief" and "relieve" are the appropriate terms to describe the remedial action of the court of equity in cases where a penalty or forfeiture has been incurred, and which the court thinks it equitable that the complainant should not lie under or suffer. Sub-sect. 1 of sect. 14 imposes a fetter by way of condition precedent on a lessor wishing to enforce a right of re-entry or forfeiture. If the lessee within a reasonable time complies with the notice which the sub-section requires the lessor to give, there is not, in fact, any enforceable right of re-entry or forfeiture, and there is nothing from which the lessee requires to be relieved. And it seems to me an inaccurate use of language to speak of the lessee being relieved in such a case. I am aware that the words at the end of the sub-section—"or of this Act"—create some difficulty, but not in my judgment sufficient to induce the court to depart from the *prima facie* meaning of the words, or to give to the words a meaning which, in my opinion, they are not appropriate to express. I am therefore of opinion that the appeal should be allowed, and judgment in the action given for the defendants.

Appeal allowed.

Solicitors for the plaintiff, *Corsellis, Mossop, and Burney.*

Solicitors for the defendant, *Griffinhoofs and Brewster.*

Monday, May 7.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

UNDERWOOD v. LEWIS. (a)

APPLICATION FOR A NEW TRIAL.

Solicitor—Retainer in an ordinary common law action—Duty of solicitor to carry on the action to its end—Refusal to do so without good cause—Action on bill of costs.

A solicitor, retained in an ordinary common law action, cannot, without good cause, give his client notice determining his retainer before the action is finished and sue for his charges up to such notice of determination.

THIS was a motion for judgment or a new trial after the trial of the action before Grantham, J. and a jury.

The plaintiff was a solicitor, and brought this action on a bill of costs incurred in three actions brought in the Queen's Bench Division, in which he had been retained to act as solicitor for the present defendant.

The defendant was defendant in the three actions mentioned, which all arose out of some building operations, and were brought by the architect and builder, one being for architect's charges and commission, one for libel, and one for the builder's charges for work done and materials supplied.

The defendant verbally retained the plaintiff to act as his solicitor in these three actions, and the plaintiff accepted the retainer.

Before any of the actions were terminated, the plaintiff gave notice to the defendant that he would not go on acting as his solicitor, and after-

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.]

UNDERWOOD v. LEWIS.

[CT. OF APP.]

wards he brought this action on his bill of costs incurred in the three actions up to the time when he gave this notice.

The defendant counter-claimed for negligence and for damages for breach of contract.

At the trial of the action before Grantham, J. sitting with a jury, the defendant began and was examined in chief. The learned judge stopped the cross-examination of the defendant on the ground that the plaintiff was entitled to determine his retainer whenever he liked, subject to giving his client a notice reasonable in point of time, and then to sue for his bill of costs; and as the defendant admitted that the plaintiff's notice was reasonable in point of time, he refused to receive any evidence as to the grounds on which the plaintiff had given the notice.

Upon the question of negligence the jury found a verdict for the plaintiff.

The learned judge gave judgment for the plaintiff.

The defendant now moved for judgment or a new trial.

Sir Henry James, Q.C. and Jelf, Q.C. (*Bankes* with them) for the defendant.—The defendant does not dispute that the plaintiff gave him reasonable notice before throwing up his retainer. The only point that it is desired to argue is as to the plaintiff's right to withdraw before the termination of the case in which he was retained, without good cause, at his own will and pleasure. In 1801 Lord Eldon, L.C., in making some regulations in bankruptcy, is reported as saying: "In one court of Westminster Hall it was held that if a solicitor undertakes to bring an action, or do any business, part of the undertaking is that he shall faithfully and honestly bring that business to a conclusion; and if he fails in that, he cannot bring an action for anything:" (see 6 Ves. Jr. 2.) In 1807 Lord Eldon, L.C. said: "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill:"

Cresswell v. Byron, 14 Ves. 271.

In 1831 Bayley, B. said: "The impression of my mind upon this subject is, that the attorney is not entitled arbitrarily to abandon a cause at any stage of it he may think fit, and to insist on payment of his bill up to that period; but if he has good ground he may do so, and may recover the amount of his bill:

Wadsworth v. Marshall, 2 C. & J. 665.

In 1832 Tindal, C.J. is reported to have said: "The objection, however, which has been raised to the plaintiff's recovery is that an attorney cannot sue for his bill till the business which he has been retained in is terminated. It would be long before I should be induced to assent to such a proposition. Suppose the employer to become insolvent while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede—resile—from such an engagement. I agree that he cannot wantonly, so as to throw unexpected difficulties in the way of his client, take the course which has been taken by the plaintiff here:"

Vansandau v. Browne, 9 Bing. 402.

In 1834 Lord Lyndhurst, C.B. said: "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. I do not mean

to say that under no circumstances can he put an end to this contract, but it cannot be put an end to without notice." The court there found that no notice had been given:

Harris v. Osbourn, 2 C. & M. 629.

In 1852 Parke, B. said: "The rule as applicable to this case was correctly laid down in *Harris v. Osbourn*, that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final termination, and he cannot sue for his bill until that time has arrived, subject, however, to the exception there stated, &c.:"

Whithead v. Lord, 7 Ex. 691.

They referred also to the following cases:

Bryan v. Twigg, 3 L. J. 114, Ch.;

Nicholls v. Wilson, 11 M. & W. 106;

Hawkes v. Cottrell, 3 H. & N. 243;

Harris v. Quine, 20 L. T. Rep. N. S. 947; L. R. 4 Q. B. 653;

Stokes v. Trumper, 2 K. & J. 232;

Beck v. Pierce, 61 L. T. Rep. N. S. 448; 23 Q. B. Div. 316.

The result of all these cases is that the retainer of a solicitor in an ordinary common law action is a retainer to conduct the case to the end. The contract to carry on the litigation is an entire one, so that, unless he has some reasonable excuse for doing so, the solicitor cannot throw up his retainer and sue upon a *quantum meruit*. The fact that the client gets the benefit of what the solicitor has done in the litigation does not prevent his refusing to pay for it:

Cutter v. Powell, 2 Sm. L. C. 1.

In the present case Grantham, J. refused to hear any evidence as to whether there was reasonable cause for the plaintiff quitting his client, and the defendant is therefore entitled to a new trial.

Lockwood, Q.C. and Tindal Atkinson (Winch, Q.C. with them) for the plaintiff.—It is submitted that Matthew, J. was right. Upon older authorities it appears to have been held that a retainer of a solicitor in a suit binds him to carry on the suit to its end; but since *Vansandau v. Browne* (*ubi sup.*), followed by *Harrison v. Osbourn* (*ubi sup.*) and *Re Hall and Barker* (9 Ch. Div. 538), a solicitor is entitled to put an end to his retainer and sue upon his bill of costs upon giving reasonable notice. The contract is a mutual one, either party can terminate it upon giving reasonable notice. In *Vansandau v. Browne* (*ubi sup.*) "wantonly," in the judgment of Tindal, C.J., means "inconsiderately," or "without reasonable notice." There is nothing in his judgment opposed to the plaintiff's contention, and Bosanquet, J. says in his judgment distinctly, that if an attorney "gives reasonable notice he is at liberty to discontinue the conduct of a cause." In *Harris v. Osbourn* (*ubi sup.*), Parke, B. says, that a retainer is not now to be considered "as an entire contract" as in former times, and "the attorney is at liberty to determine the contract on reasonable notice." [SMITH, L.J.—In that case all that the court held was that the solicitor must at least give reasonable notice, and that he had not in fact done so.] The law was laid down in the same way by Sir George Jessel, M.R., and there is no reason for limiting his judgment to the particular class of actions to which he actually referred:

Re Hall and Barker, 9 Ch. Div. 538.

They referred also to

Rowson v. Earle, M. & M. 538;
Tidd's Practice, 9th edit. p. 86.

Jelf, Q.C., in reply, referred to

Re Romer and Haslam, 69 L. T. Rep. N. S. 547;
(1893) 2 Q. B. 286.

LORD ESHER, M.R.—I confess that I cannot agree with the law as laid down by Grantham, J. When the matter is considered, it seems clear that the contract which we have to deal with here is what is called an entire contract. When a client employs a solicitor in a lawsuit, he does not employ him to take merely one step in the action and to wait for fresh instructions before taking another, and so on. He is employed to act on behalf of the client in the suit. A solicitor is a skilled person, and it would be no use to employ him except for the purpose of taking all the steps necessary to bring the suit to an end. If that is the nature of his employment, his contract is an entire one to carry on the action to its conclusion. That was the view taken by judges in former days, that in the case of an ordinary retainer of a solicitor in a lawsuit without any specific terms, the implication of law was that the contract was to carry on the litigation to its conclusion. That is what was held by Lord Eldon, and was acted on by him when he was Chief Justice of the Court of Common Pleas. In *Cresswell v. Byron* (*ubi sup.*), in 1807, he used these words: "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill." Those words are exactly in point in the present case. It is true that it might be argued that Lord Eldon's words mean that under no possible circumstances could a solicitor bring an action successfully for work done and disbursements made before quitting his client. If that be the meaning of Lord Eldon's words, then I may say that the law has since been modified, but the engrafting of a modification upon a rule is not the same thing as setting the rule aside. Now I will not go through all the cases that have been cited. It seems to me that the effect of them is that ever since Lord Eldon's time a retainer of a solicitor in a common law suit has always been held to be one entire contract, so that, unless some recognised exception to the rule arises, the solicitor cannot sue for his bill of costs until his obligation under the contract has been entirely fulfilled. One of those recognised exceptions, if they can rightly be called exceptions, is that a solicitor cannot reasonably be asked to pay out of his own pocket disbursements which he may possibly never recover. Therefore, if he asks his client to provide money for immediate disbursements, and the client refuses to do so, then the solicitor is entitled to refuse to act further for the client in the litigation. Then, in addition to this, lest the solicitor, by throwing up his retainer suddenly at a critical moment should ruin his client, it has been decided that the client is entitled to have reasonable notice of the solicitor's intention not to act any more for him. Now it is not denied that that was the law up to the time of the decision in *Vansandau v. Browne* (*ubi sup.*). In that case the judges seem to me to have decided no more than this, that before suing on his bill a solicitor must, at all events, give his client reasonable notice that he intends not to act for him any longer. *Harris v. Osbourn* (*ubi sup.*) seems to

me a much more satisfactory case. Lord Lyndhurst, C.B. there says: "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination." In that sentence the words "special contract" mean "implied contract," and they are used by way of antithesis to a general contract under which the solicitor might sue as upon a *quantum meruit* for each step in the action which he might from time to time take on behalf of his client. Lord Lyndhurst goes on: "I do not mean to say that under no circumstances can he put an end to his contract." Lord Lyndhurst there recognises the fact that there are certain circumstances under which a solicitor can justify his putting an end to his retainer. Then he goes on, "but it can not be put an end to without notice." He seems to me to mean by that, that unless a valid notice is given to the client, the solicitor cannot treat his contract of retainer as at an end and sue upon his bill. The next argument was that the earlier cases must be treated as overruled since a decision of Sir G. Jessel, M.R. in *Re Hall and Barker* (*ubi sup.*). If that decision were inconsistent with the earlier decisions I think it ought to be overruled, but I do not think that it is inconsistent. The effect of Sir George Jessel's judgment is this: that whatever meaning may be implied at common law in a contract by which a solicitor is retained in a common law action, it would be wrong in the case of a Chancery suit to imply an agreement by the solicitor to carry on the suit to its termination before he is entitled to payment, because Chancery suits are often of a very complicated nature, and sometimes last for years. It would be unjust, he says, in a suit lasting for many years, to forbid the solicitor from enforcing payment for the work he has done until the completion of the suit, and therefore such an agreement is not to be implied. It may be that in the case of a retainer in a Chancery suit there is an implication that the solicitor shall continue the litigation to the end, but Sir George Jessel declined to imply any agreement that the solicitor should not be entitled to payment of his bill until the suit is finished. But with that decision we have nothing to do in the case which is before us. We have only to deal with an ordinary common law action. The plaintiff was employed as solicitor in three such actions, none of which are finished. He maintains that he is entitled by simply giving notice to his client, reasonable as to time, to put an end to his retainer at his own will and pleasure, without giving any other excuse, and then immediately to bring an action to recover the costs already incurred. I can find no authority which would justify us in holding that to be the law. Every authority which has been cited to us seems to me to be opposed to that contention. I therefore think that Grantham, J. was wrong in his ruling, and that the trial ought to have gone on in order to find out whether the solicitor had any reasonable ground for refusing to carry on the three actions to their termination. What are reasonable grounds for such a refusal I am not at present able to say. I doubt whether anything which may happen to the solicitor without any fault on the part of his client would be a sufficient ground for his suing for his costs before he has completed the litigation as he had agreed to do. It was suggested that if any great mis-

[CT. OF APP.]

UNDERWOOD v. LEWIS.

[CT. OF APP.]

fortune happened to him, such as a severe illness, which prevented him from giving personal attention to the litigation, it would not only put an end to his retainer, but would also enable him to sue for his bill of costs for work done up to that time. I do not know that it is necessary to decide that point on the present occasion, but I am strongly of opinion that such a misfortune to the solicitor would not put an end to his contract, and he would not be entitled to sue for the work he had done or the disbursements he had made. Such misfortunes happen in the case of other entire contracts. Take for instance the case of a captain who has agreed to navigate a ship from Liverpool to the Cape upon the terms that he is to be paid a certain sum at the end of the voyage. Would his death in the middle of the voyage enable his executors to sue for the work he had done, and alter the contract from one by which he had agreed to do a certain thing for a certain sum into one by which he was to be paid week by week a reasonable sum for what he had done? I think that if any such misfortune happened to the solicitor which prevented him from carrying on the litigation, it might perhaps be a ground which would protect him if an action was brought against him, but I do not think that it is a ground for saying that his retainer was changed into an agreement to pay for his services on a *quantum meruit* so as to entitle him to sue for his costs before he has completed that which he contracted to complete. The obligation of the client is to pay his solicitor at the end of the action, unless he does something which justifies the solicitor in putting an end to the retainer and suing for a *quantum meruit*. I am of opinion that the judgment of Grantham, J. cannot be supported, and we must therefore order a new trial.

SMITH, L.J.—The question in this case is, whether or not the plaintiff, who is a solicitor, and who brings this action upon a bill of costs, is entitled, under the circumstances of this case, to maintain the action. I wish to confine my observations to the facts of this case which apply solely to a retainer in an action at common law, because I look upon this retainer in the same light as if there had been a separate retainer in these three actions. Now, if there is one thing clearer than another from the authorities which have been cited to us since 1801, Lord Eldon's time, down to the present day, it is this: that the contract of a solicitor with his client upon a retainer like this is an entire contract, and it is his duty to go on with the action until the litigation is finished. I find that laid down hard and fast in Lord Eldon's time, and, subject to some conditions which appear to have crept in, it will be found to have been laid down in *Vansandau v. Brown* (*ubi sup.*), and by Lord Lyndhurst in the case of *Harris v. Osbourn* (*ubi sup.*), where he says: "I consider that when an attorney is retained to prosecute or defend a cause he enters into a special contract to carry it on to its determination." I find it laid down in *Whitehead v. Lord* (*ubi sup.*) by Parke, B., in which he says: "The rule as applicable to this case was correctly laid down in *Harris v. Osbourn* that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final determination, and he cannot sue for his bill until that time has arrived." I find that not dissented from by the late Master of the Rolls, Sir George Jessel, in the case of *Re*

Hall and Barker (*ubi sup.*) as applicable to common law actions. He referred to *Harris v. Osbourn* (*ubi sup.*), where it was held that as a general rule an attorney or solicitor retained to conduct a suit was under an obligation to conduct it to its termination, and that he could not sue for his bill of costs until that period had arrived. That was the old principle at common law. The Master of the Rolls did not adopt that principle of common law in the suit which was then before him, but he enunciates that as the principle of common law which has been traced out before us by the learned counsel in the cases which have been produced to-day. But the authorities go a bit further in my judgment, because in *Re Romer and Haslam* (*ubi sup.*) Bowen and Kay, L.JJ. enunciate the same proposition. Therefore the *primâ facie* obligation which a solicitor undertakes when he accepts a retainer from a client in a common law action is this: He has entered into an entire contract to carry on the litigation for the client to the end, and until he has carried on that litigation to the end he cannot sue his client for costs. That is the *primâ facie* obligation which he undertakes; but, on the other hand, it seems to me upon the cases that a solicitor may be put into a position by a client in which he may withdraw from the retainer. The point which we have to decide in this case is, whether a solicitor can for no reason whatever, in the middle of a common law action, throw up the retainer provided that he gives his client due notice that he is going to do so, and then sue the client for the bill of costs which has been incurred up to that date. That is the point of law which we have to decide. It seems to me to be the result of *Vansandau v. Browne* (*ubi sup.*) and the later cases that have been cited that a client may put his solicitor into such a position that the solicitor becomes entitled to treat the retainer as at an end. For instance, if the client refuses to furnish his solicitor with funds, the solicitor is not bound by his retainer to finish at his own costs the litigation which he has begun for the client. Again, if the client insists upon his solicitor doing something which the solicitor knows to be dishonourable or disgraceful, then I think, speaking for myself, that the solicitor would be justified in refusing to act any longer. There may be other cases in which a client may put his solicitor into such a position that it would be only right that the solicitor should have an option of refusing to act any longer under the retainer. Under those circumstances, as it appears to me, the solicitor would be entitled to sue for his costs out of pocket and his costs up to that date. But that really is not the case which we have to decide now. The sole point of law here is, whether a solicitor without rhyme or reason, can throw up his retainer, having given the client due notice that he is going to throw it up, and then sue him for the costs incurred up to that date. That is the real point. Now, the only difficulty I have had about this case is this: I have no difficulty about the judgment of Parke, B. in *Harris v. Osbourn* (*ubi sup.*). The difficulty which did arise in my mind, but I think it is explainable, is in *Whitehead v. Lord* (*ubi sup.*), where Parke, B. explains, as I understand, what he meant in *Harris v. Osbourn*. The result of all the cases which have been cited since *Vansandau v. Browne* in 1832 may be summed up

in this: that at any rate a solicitor cannot get rid of a retainer without giving due notice to a client. I believe that to be the real decision in all these cases. The decision in most of them turned upon the Statute of Limitations. A solicitor having sent in a bill for costs, part of which had been incurred more than six years before the suit, and the client having set up the Statute of Limitations, the question was, whether or not the retainer which the plaintiff had accepted from the client had ever been put an end to. What the learned judges said in those cases was that, inasmuch as no notice was given by the solicitor to the client, the retainer was a continuing one—it was an entire contract and therefore the Statute of Limitations had not begun to run. That seems to me to be perfectly consistent with Lord Lyndhurst's judgment in *Harris v. Osbourn* (*ubi sup.*), where he says: "I do not mean to say that under no circumstances can he" (that is, the solicitor) "put an end to this contract; but it cannot be put an end to without notice." Parke, B. in effect says the same thing. It seems to me that that is the correct interpretation of that judgment. The learned counsel for the plaintiff were quite right to rely upon what was said by Parke, B. in *Whitehead v. Lord* (*ubi sup.*), when he said: "The rule as applicable to this case is correctly laid down in *Harris v. Osbourn* (*ubi sup.*), that an attorney under a retainer to conduct a suit undertakes to conduct the suit to its final determination, and he cannot sue for his bill until that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives." The learned Baron did not have his mind directed to the point which we have now before us, namely, whether, upon giving due notice, a solicitor, as I said before, may, without rhyme or reason, throw up his retainer. In my judgment the authorities are too strong against the plaintiff's contention. The law is that in a common law action he cannot do so. My brother Grantham stopped the case *in limine*, and I therefore agree that it must go down for a new trial.

DAVEY, L.J.—I am of the same opinion, and I so entirely agree with the reasons which have been given by my learned brother Smith, L.J., that I do not think it necessary to repeat them as I could only do so in less good language. I only desire to say that I express no opinion, since it is unnecessary to do so, as to what might be the effect of a solicitor's death or permanent incapacity upon a contract to conduct his client's case.

New trial ordered.

Solicitors for the plaintiff, *Underwood, Son, and Piper.*

Solicitors for the defendant, *Letts Brothers.*

May 1 and 9.

(Before Lord ESHER, M.R., SMITH, and DAVEY, L.J.J.)

HELBY v. MATTHEWS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Hire-and-purchase agreement—Power to terminate hiring by return of goods—Agreement to buy—Goods pawned by hirer—Factors Act 1889 (52 & 53 Vict. c. 45) s. 9.

The plaintiff entered into a written agreement with B. by which he let on hire to B. a piano upon certain terms by which (inter alia) B. agreed that he would pay the plaintiff instalments of 10s. 6d. a month until eighteen guineas were paid, and that if he did not duly perform the agreement the plaintiff might terminate the hiring and retake the piano; and the plaintiff agreed that B. might terminate the hiring by delivering up the piano to him, and that if the full sum of eighteen guineas should be punctually paid, the piano should become the sole and absolute property of B., but until that sum was paid it should continue to be the sole property of the plaintiff.

After receiving the piano, and paying a few of the monthly instalments, B. pawned the piano with the defendant. Upon B. failing to pay the next instalment the plaintiff claimed the piano, and brought this action against the defendant to recover it. The defendant relied on sect. 9 of the Factors Act 1889, by which it is provided that, where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods, the delivery by that person of the goods under a pledge to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery were a mercantile agent in possession of the goods with the consent of the owner.

Held (reversing the decision of the Queen's Bench Division), that the agreement between the plaintiff and B. was an agreement to buy within sect. 9.

THIS was an appeal from a judgment of the Queen's Bench Division (Lord Coleridge, C.J. and Day, J.) affirming a decision of the judge of the Bloomsbury County Court.

The action was brought to recover possession of a piano which had been delivered by the plaintiff, the owner, to one Brewster under an agreement dated the 23rd Dec. 1892, and which Brewster had pledged with the defendant, who carried on the trade of a pawnbroker.

The following is the agreement between the plaintiff and Brewster:

This agreement, made the 23rd Dec. 1892, between Charles Helby, of 22, Baker-street (hereinafter called the "owner") of the one part, and Charles Brewster, of 24, Chester-street, Kennington-road, S.E. (hereinafter called the "hirer") of the other part, witnesseth that the owner agrees, at the request of the hirer, to let on hire to the hirer a pianoforte, No. 896, Maker Ross, and in consideration thereof the hirer agrees as follows:—

1. To pay the owner, on the 23rd Dec. 1892, a rent or hire instalment of ten shillings and sixpence (10s. 6d.), and 10s. 6d. on the 23rd of each succeeding month.
2. To keep and preserve the said instrument from

(a) Reported by MERVYN LL. PERL and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

[CT. OF APP.]

HELBY v. MATTHEWS.

[CT. OF APP.]

injury (damage by fire included). 3. To keep the said instrument in the hirer's own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing. 4. That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument; and for that purpose leave and licence is hereby given to the owner (or his agent and servant, or any other person employed by the owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake possession of the said instrument, without being liable to any suit, action, indictment, or other proceeding by the hirer, or anyone claiming under the said hirer. 5. That if the hiring should be terminated by the hirer (under clause a, below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not, on any ground whatever, be entitled to any allowance, credit, return, or set-off for payments previously made.

The owner agrees:—(a) That the hirer may terminate the hiring by delivering up to the owner the said instrument. (b) If the hirer shall punctually pay the full sum of 18l. 18s. by 10s. 6d. at date of signing, and thirty-six monthly instalments of 10s. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer. (c) Unless the full sum of 18l. 18s. be paid, the said instrument shall be, and continue to be, the sole property of the owner. In witness whereof, &c.

On the 21st July 1893, before all the instalments had been paid under this agreement, Brewster pawned the piano with the defendant.

Upon the next instalment becoming due and not being paid the plaintiff claimed to retake possession of the piano, and finally brought this action in the Bloomsbury County Court to recover possession.

The defendant relied on sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45) which provides that

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The County Court judge found that the defendant received the piano in good faith, and without notice of any lien or other right of the plaintiff to it, but he held that there was no agreement to buy within the section, and therefore gave judgment for the plaintiff.

The defendants appealed.

Jelf, Q.C. (*C. L. Attenborough* with him) for the appellants.—The whole question in this case is whether Brewster had "bought or agreed to buy" the piano, or had merely hired it. In *Lee v. Butler* (69 L. T. Rep. N. S. 370; (1893) 2 Q. B. 318) the Court of Appeal held that a very similar agreement was an agreement to buy. There is no real distinction between the two cases, and both are within the meaning of the Act.

J. Walton, Q.C. (*Finlay, Q.C.* and *Hextall* with him) for the respondent.—*Lee v. Butler* (*ubi sup.*) does not apply. That case only decides that an agreement which is called an agreement to hire may really be an agreement to buy. But in this case, looking at the agreement as a whole, it is not an agreement to buy; it is an agreement to hire with the option of purchasing. There is nothing in the agreement to compel the hirer to pay the whole purchase money. On the contrary, it is expressly stipulated that "the hirer may terminate the hiring by delivering up to the owner the said instrument." This is clearly not an agreement to buy, though it might become so by the hirer settling to keep the piano. The difference between the two cases is, that in *Lee v. Butler* (*ubi sup.*) there is a purchase of a particular piano with time given to the purchaser to pay the purchase money by instalments, while this is simply a case of hiring with a subsidiary agreement that if the hirer should happen to like the piano he is to have the option of purchasing it.

Jelf, Q.C. in reply.—The agreement in *Lee v. Butler* (*ubi sup.*) contains a clause authorising the owner to resume possession in the event of non-payment of the instalments, which has practically the same effect as the clause allowing the hirer to return the instrument in this case; so that there is no substantial difference between the two agreements. But, in any case, even if at one time the hirer had a right to return the piano and terminate the agreement, he gave it up when he pawned the piano. If the hirer had an option to purchase under the agreement, or if it could ripen into an agreement to purchase by the hirer electing to keep the piano, the act of the hirer in pawning it was clearly an exercise of his option, and was quite inconsistent with any intention of returning it to the owner.

Lord COLERIDGE, C.J.—If I followed my own impression of the meaning of the statute, I should decide that the agreement in this case was not an agreement to buy within the meaning of sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45). But we are told that the case is governed by *Lee v. Butler* (*ubi sup.*), a case decided by the Court of Appeal. It becomes necessary, therefore, to see if the facts of that case are really the same as those of the case now before us. The argument for the respondent rests mainly on a single clause in the agreement in this case which does not appear in the agreement in *Lee v. Butler* (*ubi sup.*). By this clause (a) the owner agrees that the hirer may terminate the hiring by delivering up to the owner the instrument he has hired. I am clear that this is a good distinction between the agreement in this case and that in the case that has been cited, and I think that it does distinguish this case from that. I am equally clear that, if upon appeal it shall anyhow appear that this is not a good distinction, the decision will have to be in favour of the appellants. As it is, I feel satisfied that the case is not governed by authority, and I think that I ought to act on my own opinion of it. The decision of the judge of the County Court must therefore be upheld.

DAY, J.—I am entirely of the same opinion. I am clear that this is not an agreement to buy. A consideration of the nature of the hire-and-purchase system confirms me in this view. The

object of it is to create a credit which is not a lien, but which will enable the vendor to retake the goods in the event of nonpayment by the buyer. Now, the agreement that was before the Court of Appeal in *Lee v. Butler* (*ubi sup.*) carries out this object in form as well as in substance. It is true that the terms of the credit are dealt with in the form of terms of hiring, and that the agreement speaks of the transaction as one of hire and purchase. But it is substantially a sale in which the payments of the purchase money are called hire. It is a sale upon credit with the right to retake the goods in case of nonpayment. This is clear, in view of the circumstances under which payment was to be made. There can be no doubt that in that case the hirer, or purchaser, would have been liable to an action if he did not pay for the goods. Indeed, so palpably was it a sale, that no possible defence could be suggested to such an action. The purchaser had bought the goods, and agreed to pay the money for them. Now, what is the present case? We find here an entirely different state of things. It is in form a case of hire, and in substance a case of hire, as Mr. Walton, in his concise and able argument, has pointed out to us. Hire is to be paid in monthly instalments. Then, if a certain number of these instalments are paid, the piano is to become the property of the hirer. But there is a special reservation. "The hirer may terminate the hiring by delivering up to the owner the said instrument." If, therefore, after paying one of these instalments of 10s. 6d. he chooses to do so, he may at once surrender the piano and relieve himself of all further liability. Yet, if it is an agreement to buy at all, it must be so at once. But here at no time till he elects to take the piano can he become the buyer. Then it is argued that some kind of estoppel arises here owing to the hirer having pledged the piano. But that can make no difference if at the time when the agreement was entered into there was no buyer and no seller. Under the agreement the hirer was not bound to pay hire longer than he chose. It was doubtless a breach of the agreement for him to pawn the piano, but that does not make him a buyer. I can see no foundation for the argument that there is an estoppel here. There is no buying in the case so as to bring it within sect. 9 of the Factors Act 1889. The decision of the County Court judge must be affirmed.

Appeal dismissed.

The defendant appealed.

May 1.—*Jelf*, Q.C. and *C. L. Attenborough* for the defendant.—The defendant is protected by sect. 9 of the Factors Act 1889, and we rely on a recent decision of this court, which, it is submitted, governs this case:

Lee v. Butler, 69 L. T. Rep. N. S. 370; (1893) 2 Q. B. 318.

Sect. 9 is not confined to absolute agreements of sale, but it applies also to conditional agreements. As has been held in cases of delivery of goods on sale or return, the fact that the buyer has done an act which is inconsistent with returning the goods, takes away his option to return them, and makes him an actual buyer:

Ex parte Wingfield; *Re Florence*, 40 L. T. Rep. N. S. 15; 10 Ch. Div. 591.

It is true that in this case Brewster might have redeemed the piano, but that is of no consequence,

because, until he has done so, he is estopped from saying that he had not taken a step inconsistent with his power to return the article. The intention of the parties to this agreement was that it should be an agreement to sell, and as soon as the instalments were complete the property should pass. It is not less so because Brewster has an option to determine the agreement before the sale was complete. It is of no consequence that the expressions "hirer" and "hiring" are used in the agreement; that does not alter the true nature of the transaction. The plaintiff, by this agreement, has put it out of his power to do otherwise than pass the property in the piano if Brewster chooses. The object of the statute is the protection of *bonâ fide* advances of money upon goods which are found for a long time in the possession of persons whose possession is ripening into a sale. It is not necessary for me to show that the agreement to sell, which I submit existed between the plaintiff and Brewster, was in writing within the Statute of Frauds:

Hugill v. Masker, 60 L. T. Rep. N. S. 774; 22 Q. B. Div. 384.

It is not necessary to show that the agreement to sell existed at the moment when the agreement of the 23rd Dec. was signed. Any subsequent date before the piano was pledged is enough, *e.g.*, the moment when Brewster elected not to avail himself of his option to return the piano. An agreement to buy on a condition would be enough for the defendant.

Finlay, Q.C. and *Hextall* (*Joseph Walton*, Q.C. with them) for the plaintiff.—The only question we wish to argue here is whether there was an "agreement to buy" within sect. 9. In *Lee v. Butler* there clearly was such an agreement; in the present case there is no such agreement. In that case there was an agreement to pay the whole sum; here there is no such agreement. Here Brewster has not bound himself to do anything except to pay one sum of 10s. 6d. The plaintiff has merely agreed to give an option of buying; until that is exercised there is no sale or purchase. The option is one that could not have been withdrawn by the plaintiff, because it was given for a consideration. The fact that the owner of the piano has put himself in such a position that he cannot put an end to the hiring does not put him in the position of having agreed to sell.

Jelf, Q.C. replied.—In this case one-third of the price of the piano is to be paid for one year's hire. That shows that something more than a mere hiring is intended, and the agreement is really one for the sale of the piano. In a certain event the owner can be compelled to sell; the power of the hirer to return the piano after a year's use does not prevent the agreement being really for the sale of it:

Bianchi v. Nash, 1 M. & W. 545.

Cur. adv. vult.

May 9.—Lord *ESHER*, M.R.—This is an appeal of the defendant from a decision of the Lord Chief Justice and Day, J. affirming a decision in a County Court. The facts seem to be these. The plaintiff entered into a certain written agreement with a man named Brewster with regard to a piano, and under the agreement he delivered the piano to Brewster. Afterwards Brewster pawned the piano, as if it were his own, with the

CT. OF APP.]

HELBY v. MATTHEWS.

[CT. OF APP.]

defendant, who is a pawnbroker. The County Court judge found—and this fact is not disputed—that the defendant took the piano and advanced money on it *bonâ fide* and without knowledge of any defect in Brewster's title to it. The plaintiff now brings this action against the pawnbroker, demanding the piano from him without payment of the amount of the pledge. The defendant relies upon sect. 9 of the Factors Act 1889. The Divisional Court held that this section afforded him no protection. Now, in this case two questions are raised. One is, what is the true construction of sect. 9 of the Factors Act 1889; the other is, what is the true construction of the written agreement between the plaintiff and Brewster. Sect. 9 begins in a somewhat peculiar way. Like the preceding sect. 2, it does not refer to the acts of the owner of goods, but to the acts of some other person. It refers to the acts of a person who has bought or agreed to buy goods, and nothing is said about any person who has sold or agreed to sell. The section has nothing to do with an ordinary simple case of the hiring of goods; it deals solely with the purchase and sale of goods. But it cannot be meant to refer to a simple case of the sale of goods because in an ordinary sale of goods the property passes at once to the buyer, so that the buyer can do what he likes with them as the owner, and the seller has no interest at all in them. It is clear, therefore, that the section deals with some peculiar contract of sale by which the property in the goods does not immediately pass. If there is a contract by which someone agrees to buy goods from the owner, but the property in them does not pass, there must be in existence another party to the contract, namely, the seller. Therefore, though the section mentions only the person who has agreed to buy, it implies that there is a contract of purchase and sale between two parties, and it applies, if in such a case the person who has agreed to sell delivers the goods to be sold to the person who has agreed to buy, although under the contract the property in the goods has not passed. Now, is this agreement of the 23rd Dec., between the plaintiff and Brewster, an ordinary simple case of hiring goods? If it is, then it is not within the statute, and the plaintiff must succeed in his action. By this contract Brewster was to make thirty-six monthly payments of 10s. 6d., and when those payments were completed the piano was to become his sole and absolute property. Such an agreement as that cannot, in my opinion, be said to be a mere case of hiring goods. The contract is called a hire-and-purchase agreement; but that is only a loose phrase, and we have to consider what it really is. The two parties to the agreement, Charles Helby and Charles Brewster, are described as "hereinafter called the owner" and "hereinafter called the hirer," but that is a mere description used for the purpose of the agreement and does not affect their legal relations. After the description of the parties comes an agreement which, if it stood alone, would no doubt be a simple hiring; but it is followed by several other terms of agreement. Brewster agrees to pay monthly "a rent or hire instalment." If this agreement were a mere hiring it would be quite enough to speak of "a rent." But a rent was never before considered to be an instalment. Rent is not an instalment of anything, and if this

were really a hiring agreement merely it would be unnecessary to say anything about instalments. [His Lordship read the other terms of the agreement.] Under clause (b) the owner has bound himself to sell the piano to Brewster, if Brewster pays punctually thirty-six monthly instalments of 10s. 6d., and it cannot be disputed that he has in that clause agreed to sell. But it is argued that there is no contract by Brewster to buy. The piano would become his property if he paid the thirty-six instalments punctually, but he was at liberty at any time before that to return the piano to Helby, and so to terminate the agreement. To my mind, after considering clause (b), it is clear that there was an agreement here by Helby to sell the piano, and an agreement by Brewster, if he did not change his mind, to buy it: and if this agreement between them were carried out, it would end in a purchase and sale. It is to my mind, an agreement by the one to sell, and an agreement by the other to buy, but with an option to the buyer to put an end to the contract at any time by delivering up the piano to the seller. Now Brewster has pawned the piano with the defendant, and until he redeems it he cannot get it back from him. He has, therefore, put it out of his power to deliver the piano to Helby, and has shut himself out from exercising his option to put an end to his agreement of the 23rd Dec. If that agreement is what I have said I consider it to be, that is to say, an agreement to buy and an agreement to sell, the property to pass only on completion of the payment of the thirty-six instalments, but with an option to the proposed buyer to put an end to the agreement at any time before the sale is complete, then the defendant in this case is protected by sect. 9 of the Factors Act 1889. The plaintiff's only remedy is an action against Brewster for his breach of contract. I cannot agree with the judgment of the Divisional Court, and this appeal must be allowed.

SMITH, L.J. delivered the following written judgment:—This is an action of trover brought by the plaintiff to recover possession of a piano from the defendant, a pawnbroker, with whom it had been pledged by a person named Brewster, who had obtained possession of it under what has been termed a hire and purchase agreement from the plaintiff, and the question raised is whether Brewster had bought or agreed to buy the piano of the plaintiff within the meaning of sect. 9 of the Factors Act 1889 (52 & 53 Vict. c. 45). The Act, besides making certain dealings by a mercantile agent, who with the consent of the owner is in possession of goods or the documents of title to goods, valid as against that owner, has by sect. 9 enacted that "where a person," which means any person, "having bought or agreed to buy goods," obtains with the consent of the seller possession of the goods, or the documents of title to the goods," he may sell or pledge such goods or the documents of title to a third person if that person takes in good faith and without notice of any lien or other right of the original seller in respect of the goods. It will be seen that the power conferred by this section to make a good title against the original seller is confined to persons who have bought or agreed to buy goods of sellers, and it does not include the case of persons who with the consent of sellers are in possession of any goods, or the documents relating thereto, unless they have bought or agreed

to buy the goods. It is evident that this section contemplates both a seller who has sold or agreed to sell, as also a buyer who has bought or agreed to buy, for there cannot be a buyer who has "bought or agreed to buy," which are the words of the section, without there being also a seller who has sold or agreed to sell. It is clear that this section includes the case of a sale where the property in the goods has not passed, for it includes the case of a seller who has contracted to sell, and retains a lien or other right in respect of the goods, as for instance the right to retake possession of them upon the happening of given events. Thus an agreement for sale by a seller, subject to a defeasance by him, is in my judgment as much within the section as an agreement to sell without defeasance, so is also an agreement to buy subject to a defeasance as an agreement to buy without a defeasance. This brings me to what has been called the hire and purchase agreement of the 23rd Dec. 1892, though I should observe that the word "purchase" is not to be found therein. The real question is, has Brewster, who therein is called the hirer, in reality agreed to buy the piano in question of the plaintiff within the meaning of the section, for if he has then the section in the circumstances of this case defeats the plaintiff, for Brewster could confer, and has conferred, a good title on the defendant; if, on the contrary, Brewster has not agreed to buy, then the plaintiff is entitled to judgment. It is quite true that throughout the agreement the plaintiff is termed the owner, and Brewster is termed the hirer, and the agreement is drafted in the form of a letting and hiring of the piano by the plaintiff to Brewster; but if the transaction be a selling and buying of the piano, the form will not avail so as to defeat the effect of the real transaction. Now, in the first place, what is the position of the plaintiff under this agreement? Did he only let out the piano on hire to Brewster, or did he bind himself to sell it to him? I agree with Day, J. that if in this case there be an agreement for a sale by the plaintiff, it must be at the time when the agreement was executed. Under this agreement the plaintiff delivered the piano to Brewster upon the terms that Brewster should pay the plaintiff for it by thirty-six monthly instalments, and he therein irrevocably bound himself to Brewster that if he (Brewster) performed his part of the agreement, i.e., paid the instalments, kept the instrument from injury, including damage by fire, and in his own custody, that upon payment of the last instalment the piano should be the sole and absolute property of Brewster. It will be seen that by the agreement the plaintiff has bound himself past recall, that upon being paid the price of the piano by monthly instalments the piano shall become the property of Brewster. What is this but an agreement on the part of the plaintiff to sell? It is true that the plaintiff reserved to himself the right to retake possession if Brewster failed in performing the agreement on his part; but this possible defeasance makes the transaction none the less an agreement by the plaintiff to sell, and here it is that I cannot adopt the view of Day, J. when he says that no contract for sale can be conceivable—that there was no seller and no one bound in the present case to sell; and he holds this because, in his opinion (which I will deal with hereafter), no one had

agreed to buy, nobody being bound to buy, and no price fixed. In my judgment, it must be determined what it is that the plaintiff has bound himself to do; has he or has he not bound himself to sell to Brewster? It appears to me that, unless Brewster made default, so as to give the plaintiff the right to terminate the agreement, as far as the plaintiff is concerned the piano was agreed to be sold by the plaintiff to Brewster at the price of 18*l.* 10*s.*, to be paid in instalments. So much for the position of the plaintiff under the agreement. I now come to Brewster's position thereunder. It is strange if the plaintiff has bound himself to sell the piano to Brewster, which for the reasons above I hold he has, that Brewster on his part has not bound himself to buy the piano of the plaintiff. Mr. Finlay felt the force of this, and admitted that it would be so had the plaintiff agreed to sell the piano to Brewster, but he said that all the plaintiff had done was in consideration of the payment of the instalments to grant an option of purchase to Brewster. If this be so, I would point out that away goes that part of his case which was that as between the parties it was, until the last instalment was paid, only a hiring agreement. For what is a grant of an option to purchase, but an agreement in *presenti* by the plaintiff to sell to Brewster, subject to his right to exercise his option? Had Brewster agreed to pay for the piano in thirty-six instalments without reserving this option, I cannot doubt that Brewster would have agreed to buy the piano from the plaintiff, and this is what was held by the court in *Lee v. Butler* (*ubi sup.*). But although Brewster reserved the option, he bound himself to pay, in any event, the first instalment of the price of the piano before he could exercise the option of being allowed to return it to the plaintiff. It is upon the fact that Brewster had reserved this option that the plaintiff rests his case, and asserts that Brewster had not agreed to buy the piano of him, but had only agreed to hire the piano with the right of exercising the option to purchase if he so desired. It will be seen that the only way that Brewster could avoid becoming possessed of the piano, if the plaintiff did not exercise his right to retake possession, if circumstances arose which entitled him to do so, was by delivering it to the plaintiff within the period of thirty-six months. Supposing the piano was burnt, say during the first month, whilst in Brewster's possession, so that he never could deliver it up to the plaintiff, what would be the result? Brewster would be liable to pay the instalments during the residue of the thirty-six months, and the loss of the piano so burnt would fall upon Brewster, for he would have paid the whole of the contract price and not had the instrument. This result follows because Brewster had in reality agreed to purchase the piano for better or for worse, subject to this, that during the term if he could do so, he might send back the piano to the plaintiff. In my judgment the true view of this agreement is, that as on the one hand the plaintiff agreed to sell the piano to Brewster, subject to a defeasance to be exercised by the plaintiff, so on the other Brewster agreed to buy the piano of the plaintiff, subject to a defeasance to be exercised by Brewster. For these reasons, in my judgment Brewster did agree to buy the piano of the plaintiff within the meaning of sect. 9 of the Factors Act 1889, and consequently

CT. OF APP.]

PONTING v. NOAKES AND OTHERS.

[Q.B. Div.]

judgment should be entered here and below for the defendant, and this appeal allowed.

DAVEY, L.J. delivered the following written judgment:—Sect. 9 of the Factors Act 1889 contemplates a purchase or agreement to buy goods when the purchaser has possession of the goods, but the property has not passed to him. It was decided in *Lee v. Butler* (*ubi sup.*) that what is called a hire-and-purchase agreement was within the scope of this section, i.e., an agreement where the hirer has possession of the goods and agrees to pay a sum certain by fixed instalments, accompanied by an agreement that upon payment of all the instalments the goods are to become the property of the hirer, but subject to a proviso that on default in payment of any instalment the owner of the goods may resume possession. In this case there is this further term, that the hirer may put an end to the contract by returning the goods. Does this distinguish this case from *Lee v. Butler* (*ubi sup.*) and take it out of sect. 9 of the Act? I think not. There is an agreement by the owner of the goods that on payment of thirty-six monthly instalments the goods shall become the property of the hirer—in other words, an agreement to sell. But a seller connotes a buyer, and an agreement to sell connotes an agreement to buy. The hirer agrees to pay his instalments monthly, not during any expressed period, but I think it may be inferred from the context that the total sum to be paid—viz., the amount of thirty-six monthly instalments—is made a sum certain by the terms of the contract, and that the hirer's agreement to pay is also sufficiently defined to be until thirty-six instalments are paid. So long as the hirer retains possession and the contract remains undetermined, the hirer is under contract to pay the instalments, and may be sued for them as they become due on the terms that upon payment of the last instalment the goods will become his property. But he has a power to determine and defeat his contract by returning the goods. Until he does so he is under contract to buy, and at the time of the pledge to the pawnbroker he remained under that contract, and was, in my opinion, a person who had agreed to buy goods within the meaning of sect. 9 and the decision in *Lee v. Butler* (*ubi sup.*), and none the less so because he had a power which he had not exercised, and, in fact, by pledging the goods had for the time put it out of his power to exercise, of defeating the contract. I agree with Day, J. that you must find the agreement for sale at the time when possession of the goods is handed to the buyer; but, in my opinion, it is only by virtue of the written contract that the hirer will on payment of the instalments become the owner of the piano. For my reasons above given I cannot agree with the learned judge that at that time there was no purchaser or that nobody had agreed to buy, or that there was no price fixed. I agree that the judgment of the court below must be reversed.

Appeal allowed.

Solicitor for the plaintiff, *H. E. Tudor.*

Solicitor for the defendant, *John Attenborough.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

April 10, 11, and 26.

(Before CHARLES and COLLINS, JJ.)

PONTING v. NOAKES AND OTHERS. (a)

Poisonous tree on neighbour's land—Trespassing animal injured.

The plaintiff's horse was poisoned by eating the leaves of a yew tree which grew upon land of the defendants adjoining the plaintiff's field in which the horse pastured. No part of the yew tree projected over the plaintiff's land, but some branches could be reached by the horse stretching its neck over a ditch which belonged to the defendants, and which divided their land from the plaintiff's field. No duty on the part of the defendants to fence their land from the plaintiff's cattle was proved. The plaintiff having brought an action for the value of the horse:

Held, that, in the absence of any intention to injure the plaintiff's horse by placing something in the nature of a trap for him, the defendants were not liable for injury sustained by the horse through its own wrongful intrusion.

Fletcher v. Rylands (19 L. T. Rep. N. S. 220; L. Rep. 3 H. of L. 330) distinguished.

THIS was an appeal by the defendants from a verdict and judgment of the deputy judge in the Andover County Court in favour of the plaintiff for 22l., the value of a horse.

The facts and arguments sufficiently appear from the judgments.

Horace Browne for the appellants.

T. W. Chitty and Newbolt for the respondent.

The following written judgments were delivered:

CHARLES, J.—This was an appeal from a verdict and judgment for the plaintiff given in the County Court at Andover for 22l., being the value of a colt of the plaintiff which was alleged to have been poisoned by eating the defendants' yew tree. The grounds of the appeal were, first, that there was no evidence to go to the jury that the colt had in fact eaten of the yew tree of the defendants; and, secondly, that if there was, the colt had eaten the yew leaves under circumstances which entailed no legal liability on the defendants. The facts of the case were as follows: The plaintiff was a farmer, and occupied a field separated from the premises of the defendants by a fence. On the side of the fence next the plaintiff's field was a ditch belonging to the defendants. On the defendants' land near the fence grew a yew tree, the branches of which projected over the ditch, but not beyond it. They did not overhang the plaintiff's field. At the distance of about 120 yards grew another yew tree in the garden of one Hunt, which overhung the plaintiff's field, and in the hedge of the plaintiff's field, about fifty yards from the defendants' yew, there was a small yew bush. On the 25th Jan. the colt and several other horses were in the plaintiff's field. On the 26th the colt was found dead five yards from the defendants' yew, and there was no doubt, from the examination made of the body, that it had died from eating yew leaves. All the three trees—the defendants', Hunt's, and the plaintiff's yew bush—

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Q.B. Div.]

PONTING v. NOAKES AND OTHERS.

[Q.B. Div.]

presented appearances of having been recently eaten. A veterinary surgeon stated that it was a fact within his knowledge that horses have been known to walk a mile after eating yew before dying, and then to drop down dead. Such a case, however, would be, he said, exceptional. The animal most often drops down dead directly after eating, or within a short distance. Upon this evidence the judge was asked to direct a verdict for the defendants, on the ground that there was no evidence pointing to the colt having eaten of the defendants' yew. It was equally consistent, it was said, with the colt having eaten either of Hunt's yew tree or the plaintiff's yew bush. The judge, however, thought there was a case for the jury, and they found that the colt had eaten of the defendants' tree, and not of the other trees. I have, after some hesitation, come to the conclusion that there was some evidence to support this finding, having regard in particular to the evidence of the veterinary surgeon. The defendants' yew had been freshly eaten, and the most common case is that death ensues directly. The colt was found only five yards from the tree, and the two other possible causes of mischief were respectively 120 and fifty yards off. This being the view I take of the evidence, it becomes necessary to consider the second point. The poisonous tree was admitted to be wholly on the defendants' land, but, inasmuch as it was so near to the boundary that an animal could easily reach the branches, it was contended that the principle of *Fletcher v. Rylands* (L. Rep. 1 Ex. 265; L. Rep. 3 H. of L. 330) was applicable. But this argument appears to me to rest on a misconception of what that case really decided. The decision only refers to the escape from a defendant's land of something which he has brought there, and which is likely to do mischief if it escapes. In delivering the judgment of the Exchequer Chamber, Blackburn, J. laid down the true rule of law in words expressly approved and adopted in the House of Lords, as follows: "The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." Various illustrations are then given, in all of which the cause of offence was "not kept in" by the defendant. Thus the person whose grass is eaten by the escaping cattle of his neighbour, whose mine is flooded by water from his neighbour's reservoir, whose cellar is invaded by filth from his neighbour's privy, or whose habitation is made unhealthy by vapours from his neighbour's factory, has in each case legitimate ground of complaint. To use the language of the Court in *Tenant v. Goldwin* (1 Salk. 360), "He whose dirt it is must keep it in that it may not trespass." And many other cases might be referred to illustrative of the rule. In all of them, however, it will be found that the noxious thing, be it "beasts, water, filth or smells," or what not, has somehow escaped from the defendant's land. Thus in *Firth v. Bowling Iron Company* (38 L. T. Rep. N. S. 569; 3 C. P. Div. 254) the defendants' predecessors had fenced their land with wire rope, which the defendants allowed to remain. From long exposure the strands of the wire composing the rope became decayed, and pieces of it fell on the plaintiff's adjoining pasture. One of his cows

swallowed a piece, and died in consequence. The defendant was held liable to compensate the plaintiff. So, again, where the defendants planted on their own land a yew tree which projected over the plaintiff's land, and the plaintiff's horse ate of it and died, the defendants were held liable: (*Crowthurst v. Amersham Burial Board*, 39 L. T. Rep. N. S. 355; 4 Ex. Div. 5.) On the other hand, in a case where the declaration merely charged that "the defendant was possessed of yew trees, the clippings of which he knew to be poisonous," it was held that such an allegation of fact did not support a duty to take care to prevent the clippings from being put upon his neighbour's land where horses and cattle might eat them: (*Wilson v. Newberry*, 25 L. T. Rep. N. S. 695; L. Rep. 7 Q. B. 31.) The rule of law enunciated in *Fletcher v. Rylands* I think therefore has no application, and I proceed to consider whether upon any other ground the defendant's liability can be made out. Can it be said that there is any duty on a man either not to grow a poisonous tree so near the boundary of his property as to be easily accessible to the stock of his neighbour, or, if he does so, to take precautions to prevent any danger to the stock arising? Now here it must be remembered that no liability on the part of the defendant to fence against the cattle of his neighbour was proved. Had any such liability been shown to exist, and had the fence been defective, it might well have been found by the jury that the colt had obtained access to the defendant's land through breach of his obligation to fence, and, the poisonous tree being immediately within the fence, that the eating of its leaves by the colt was the natural consequence of the defendant's breach of duty; but, there being no liability on the part of the defendant to repair the fence, I do not see that he can be made responsible for the eating of these yew leaves by an animal which, in order to reach them, had come upon his land. The hurt which the animal received was due to his wrongful intrusion. He had no right to be there, and his owner therefore has no right to complain. The true test in such a case is pointed out by Gibbs, C.J. in *Deane v. Clayton* (7 Taunt. at p. 533), in a judgment which was emphatically approved by the Court of Exchequer in *Jordin v. Crump* (8 M. & W. 782), though on the facts proved in *Deane v. Clayton* the court was equally divided as to what judgment should be entered. We must ask, he says, in each case, whether the man or animal which suffered had or had not a right to be where he was when he received the hurt. If he had not, then—unless, indeed, the element of intention to injure, as in *Bird v. Holbrook* (4 Bing. 628), or of nuisance, as in *Barnes v. Ward* (9 C. B. 392), is present—no action is maintainable. It was, however, urged that there was here something in the nature of a nuisance, and that the growing of this yew tree so near the boundary was actionable in case damage was caused by it, on the same ground as that on which *Townsend v. Wathen* (9 East, 277) was decided. It was there held that if a man places traps baited with flesh on his own ground so near to the premises of another that dogs kept on his neighbour's premises must probably be attracted by their instinct into the traps, and if in consequence his neighbour's dogs are so attracted and are injured, an action lies. But no evidence whatever was offered in this case that

Q.B. Div.]

PONTING v. NOAKES AND OTHERS.

[Q.B. Div.]

the yew trees could be regarded as a trap in this sense to the plaintiff's horses, and, in the absence of any such evidence, it was, I think, the plaintiff's business to keep his horses from going too near the tree, and not the defendants' duty to take any precautions against their doing so. In the result, therefore, I think that this appeal must be allowed and judgment entered for the defendant with costs.

COLLINS, J.—As we are differing from the learned judge below and as I have written a judgment I will read it, although I agree entirely with that of my brother Charles. [After referring to the question of evidence, his Lordship continued:] The yew tree in question was wholly within the defendants' boundary; therefore it seems clear that the principle of which *Fletcher v. Ryland* is an instance has no application to this case. The principle there stated was that "the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril." That case, as is pointed out by Mellor, J. in *Wilson v. Newberry* (25 L. T. Rep. N. S. 695; L. Rep. 7 Q. B. 31), was decided on the analogy of *Tenant v. Goldwin* (1 Salk. 21), where it was said, "He whose dirt it is must keep it that it may not trespass." Here there has been no escape or trespass of anything kept by the defendant, and, if he is liable at all, it must be for not taking precautions to prevent the plaintiff's cattle from getting access to the defendants' yew tree on the defendants' own premises—in other words, for negligence. I should add that there was no evidence of any obligation on either party to maintain the fence for the benefit of the other, and the case may be treated, therefore, as if there had in fact been no fence. What, then, was the duty cast upon the defendant the breach of which grounds this action? Mr. Chitty, who argued for the plaintiff, contended that the owner of anything capable of attracting cattle and dangerous to them if they yielded to the attraction was bound to use reasonable care to prevent them getting access to it. Does such a duty exist? I think not; and Mr. Chitty was not able to produce any authority which went near to establish it. The point might have arisen in *Crowhurst v. Amersham Burial Board* (39 L. T. Rep. N. S. 355; 4 Ex Div. 5). There a horse had died from eating of a yew tree growing on defendant's land, and the case as originally stated by the County Court judge left it doubtful whether the death was caused by eating portions of tree which projected over the plaintiff's land, or portions on the defendant's own land which the horse was able to reach by stretching its neck over the intervening fence. The court, however, sent the case back to be re-stated, and it was then found as a fact that the horse died exclusively from the effects of eating portions which projected over the plaintiff's land, and the case was accordingly decided in favour of the plaintiff on the authority of *Fletcher v. Rylands*. The court therefore evidently thought that different considerations might apply to the two sets of facts. Again in *Firth v. The Bowling Iron Company* (38 L. T. Rep. N. S. 569; 3 C. P. Div. 254) it was not suggested that liability could be established if the cattle had died from eating wire which had fallen on the defendant's side of the fence, and this case also was brought under *Fletcher v. Rylands*. What, then, are the duties towards strangers of a man

who keeps a dangerous thing on his own ground? There was not much evidence on the point, but it was assumed in argument, and I treat it as established, that a yew tree is a dangerous thing—i.e., it may be injurious if eaten by horses. It is, however, lawful and usual, as pointed out by Kelly, C.B. in *Crowhurst v. Amersham Burial Board*, to plant yew trees near fences. Though possibly dangerous, therefore, under some circumstances, there is nothing unlawful in a yew tree so planted. Further, the danger, such as it is, is obvious; it does not constitute a trap. Is the person who keeps such a thing upon his own land liable to a stranger for loss happening to the cattle of the latter while straying on such person's land without his permission? It seems quite clear on the authorities that he is not. *Jordis v. Crump* (8 M. & W. 782) is decisive on this point. There the facts admitted on demurrer were that, while the plaintiff was walking on a public footpath running across the defendant's close, his dog in chasing a rabbit on the defendant's land ran against a dog spear concealed in the bushes not far from the path and was killed. The plaintiff had notice of the existence of dog spears on the defendant's ground. Alderson, B., in giving the judgment of the court in favour of the defendant, adopts the reasoning of Gibbs, C.J. in the earlier case of *Deane v. Clayton* (7 Taunt.). He says: "The present case is much stronger than that, for here the plaintiff had express notice that dog spears were set in the wood, though, were this even otherwise, our decision would still be in favour of the defendant on the short ground that the setting of them was a lawful act, and the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the footpath." Unless the fact that the yew tree was close to the fence makes a difference, this authority seems conclusive that the defendant is not liable, if the yew tree be regarded merely as a dangerous thing, like a dog spear, not having in itself the additional element of tempting a trespasser. It seems quite clear, however, that the principle cannot be affected by the distance from the defendants' boundary. It was the duty of the plaintiff to keep his horse from trespassing, and not of the defendant to guard against the consequences of such trespass. Such duty is clear, and the plaintiff might have been liable to the defendant, for damage done by his horse, while so trespassing, to the land of the latter: (*Cox v. Burbidge*, 13 C. B. N. S. 430; *EHIS v. The Loftus Iron Company*, L. Rep. 10 C. P. 10.) Does it, then, make any difference that a yew tree is likely to tempt a horse to trespass? I think not, unless it were proved that it was put or kept there for the purpose of enticing the animal to his destruction, as was done in *Townsend v. Wathen* (9 East, 277), cited by Mr. Chitty. The wrongful intention was the gist of that action. If such intention is disproved, it follows, if the above reasoning is correct, that there can be no liability. Indeed, the very point is put as an illustration by Gibbs, C.J. in *Deane v. Clayton* (at p. 537), where he takes the case of water in which a plaintiff has no right polluted by the act of the defendant and drunk by the plaintiff's cattle, who reach it through a trespass on the defendant's land. He says: "The right to be there is the gist of the action, and in no instance has an action been

Q.B. Div.] FREEMAN v. THE GENERAL PUBLISHING CO.—REG. v. MANSEL-JONES. [Q.B. Div.]

supported where cattle had no right to be in the place in which they received the damage unless the defendant had used some undue means to entice them, as in *Townsend v. Wathen*, which stands on a distinct ground." It is obvious that water might have just as great an attraction for cattle as a yew tree. The result may be summarised by saying the action is one of negligence, and the possession of something attractive and injurious to cattle casts no duty on the owner to take precautions against their trespassing in pursuit of it when he has not placed or kept it there with that purpose. As already pointed out, a yew tree near a fence is a lawful and usual thing, and it would be strange if the owner should find himself fixed with varying obligations in respect thereof according to the varying uses to which the adjoining owner chose to put his land. Lastly, it was suggested that the analogy of such a case as *Lynch v. Nurdin* (1 Q. B. 29) might apply, and that as in that case a defendant who had left his cart and horse in a highway where he had a right for the time being to place them was held liable for injury to a child who trespassed upon it in his absence, so here the defendant might be liable for not taking precautions to prevent the horse getting access to the tree. The cases, however, differ in a crucial point. There the cart was left in a public highway, where the children and the plaintiff had an equal right to be; and the children were not trespassers before they got into the cart. If the plaintiff had licensed the defendant to carry his yew tree across the plaintiff's field, and the defendant while doing so had left it unguarded, and while so left the horse had eaten it, the cases would be more nearly parallel. So of the case put during the argument, of a poisonous drug exposed in a very tempting shape in an open shop-front beside a highway within reach of a child, who, being tempted, ate it and was injured. If an action could be maintained in such a case, it would, I think, be only on the analogy of those cases which decide that the person who makes or keeps a pitfall so near the highway as to be a danger to persons passing along it is responsible in damages to a passenger along the highway who accidentally falls into it (see *Barnes v. Ward* 9 C. B. N. S. 392), the child obeying its instinct being regarded as in the same position as a person who without negligence falls off the highway into the pitfall. Those cases rest on the special duty incident to the occupation of property adjoining a highway, and have no application to a case where the question is merely between the occupiers of adjoining land; and, even if the duties were identical, the danger in the illustration is concealed, while in the case of the yew tree it is obvious. I think, therefore, that judgment ought to be entered for the defendants.

Solicitors for the plaintiff, *Stocken and Jupp*, for Godwin, Winchester.

Solicitors for the defendants, *Peacock and Goddard*, for Longman, Andover.

Friday, June 1.

(Before CAVE and COLLINS, JJ.)

FREEMAN v. THE GENERAL PUBLISHING COMPANY. (a)

Company—Voluntary winding-up—Action against company stayed—Costs—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 85, 138.

Where the court had granted an application by a company in voluntary liquidation for stay of proceedings in an action brought against it by a plaintiff, the full amount of whose claim had been admitted by the liquidator:

Held, that the court had jurisdiction to order the plaintiff to pay the costs of the application.

ACTION upon two bills of exchange and for money lent amounting to 63*l.* 16*s.*

Subsequently to the debt to the plaintiff, on the 24th Aug. the defendant company, at a meeting at which the plaintiff was present, passed a resolution to go into voluntary liquidation, and a liquidator was appointed. The writ was issued by the plaintiff on the 19th Sept., and on the same day the solicitors to the company wrote to the plaintiff that there would be no objection to his coming in and proving for the amount of his debt in the liquidation. On the 15th Dec. the liquidator took out a summons under sect. 138 of the Companies Act 1862 to have the proceedings in the plaintiff's action stayed, and the master, and on appeal the judge in chambers, ordered proceedings in the plaintiff's action to be stayed, and the plaintiff to pay the costs of the application.

The plaintiff appealed.

Cranstoun for the plaintiff.

T. W. Chitty for the company.

The Court dismissed the appeal.

On the question of costs, *Chitty* referred to:

Rose v. Gardden Lodge Coal Company, 38 L. T. Rep. N. S. 101; 3 Q. B. Div. 235.

CAVE, J.—The plaintiff has been ordered by the judge to pay the costs of the application, and it is said by the plaintiff that there was no jurisdiction to make that order. The answer to that is twofold. In the first place, I am not satisfied that there was formerly no jurisdiction, because in the case of *Rose v. Gardden Coal Company* the court apparently had no doubt that they possessed it, although they did not in that case exercise it. But, even if there was no jurisdiction, then I am clearly of opinion that it has been conferred since by sect. 5 of the Judicature Act 1890 (53 & 54 Vict. c. 44). If, therefore, there was jurisdiction in this matter, we have no power to alter the judge's order as to costs unless he gave leave to appeal.

COLLINS, J. concurred.

Solicitors for the plaintiff, *Keens and Co.*

Solicitors for the defendant, *Learoyd, James, and Mellor.*

Monday, May 28.

(Before CAVE and COLLINS, JJ.)

REG. v. MANSEL-JONES. (a)

Practice—Habeas corpus—Costs—Jurisdiction to award—Judicature Act 1890 (53 & 54 Vict. c. 44), ss. 4, 5.

The effect of sect. 5 of the Judicature Act 1890

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

(53 & 54 Vict. c. 44) is to extend the jurisdiction of the court over costs by placing within its discretion the costs of all proceedings except those exempted by virtue of sect. 4.

The costs of an application for a writ of habeas corpus awarded.

In this case, the court having granted a writ of habeas corpus against the defendant, ordering him to bring up the body of a certain lunatic detained by him in custody, the question arose whether the court had power to order the defendant to pay the costs of the application.

H. Terrell, in support of the motion, was stopped by the Court.

English Harrison, *contra*.—There was no statute empowering the court to order costs in the case of habeas corpus :

Dodd's case, 2 De G. & J. 510.

The only question, therefore, is whether sect. 5 of Finlay's Act (53 & 54 Vict. c. 44) confers such power. It is submitted it does not, for the effect of sect. 5 is only to enact in statutory form the substance of Order LXV., r. 1, and that rule has not the effect of conferring any fresh jurisdiction over costs, but only of regulating the mode in which already existing jurisdiction is to be exercised: (see per Cotton, L.J. in *Re Mills' Estate*, 55 L. T. Rep. N. S. 465; 34 Ch. Div. 24.) In the case of *Reg. v. Justices of London* (70 L. T. Rep. N. S. 148; (1894) 1 Q. B. 453), which was a case of prohibition, the court gave costs; but that was because the courts had exercised such power in cases of prohibition prior to the Act of 1890. It is admitted that no such power was exercised in habeas corpus. But, at any rate, this is a proceeding on the Crown side of the Queen's Bench Division, and therefore by virtue of sect. 4 the practice is unaffected by sect. 5 :

London County Council v. Churchwardens of West Ham, 67 L. T. Rep. N. S. 363; (1892) 2 Q. B. 173.

Terrell in reply.

CAVE, J.—No doubt the case of *Reg. v. The Justices of London* does not go the whole length that we are asked in the present case to go, because in that case, which was a case of prohibition, it was admitted that the jurisdiction might be exercised by any of the other courts, and that costs had been given in such cases. The point in that case, therefore, was merely whether sect. 4 of Mr. Finlay's Act took away the power which already existed to give costs in such a case, and the answer was that it did not. I do not see how any other answer was possible, as sect. 4 is plainly directed merely to preserving the jurisdiction in certain cases from being extended by sect. 5. But sect. 5 does profess to extend the jurisdiction of the court. It does say that the costs of and incident to proceedings in the Supreme Court shall be in the discretion of the court. Now, this is a proceeding in the Supreme Court, and therefore the costs of it are subject to the discretion of the court, unless they are saved by being on the Crown side of the Queen's Bench Division. It is only on these words that any argument can be founded. But, when we look at *Reg. v. The Justices of London*, it appears that the saving clause in sect. 4 is intended to be confined to proceedings which can be taken only on the Crown side of the Queen's Bench Division, and does not extend to such as might be taken in other courts. In my

opinion, therefore, sect. 5 does confer the power to give costs in cases of habeas corpus, and there is nothing in sect. 4 to take that power away. If sect. 5 had merely been a code of procedure showing how the court should exercise its power over costs in cases where it possessed that power, then it would have merely been a repetition of Order LXV., r. 1. But the substance and effect of sect. 5 is to confer fresh powers on the court, and one can well understand why such an enactment was passed. In the case of *Re Mills' Estate* it was held that Order LXV., r. 1, did not empower the court to award costs in any case where the power did not previously exist, and it was natural that the opportunity of a new Judicature Act should be taken to give the court power to deal with the costs in all proceedings before it. I think, therefore, that we have such power in the present case.

COLLINS, J.—I am of the same opinion. The question is whether sect. 5 of the Judicature Act 1890 confers power on the court to give costs in all proceedings save those mentioned in sect. 4. If so, this being a case of habeas corpus, we have such power here unless habeas corpus is within sect. 4, which provides that the Act shall not make any alteration in proceedings on the Crown side of the Queen's Bench Division. Now, if habeas corpus was a proceeding which could only be brought in the Queen's Bench Division, then it would fall under the exception. But habeas corpus could be dealt with by all the courts, and therefore it seems to me that the court has jurisdiction to award costs in this case, provided the power is given by sect. 5. Now, does sect. 5 apply to all proceedings except those mentioned in sect. 4? It is clear that it does when we look at the previous legislation on the subject. We are referred to Order LXV., r. 1, which was interpreted by Cotton, L.J. in *Re Mills' Estate*, and he held that the rule only meant to regulate the mode in which jurisdiction already existing should be exercised. But the Act of 1890 went upon the assumption that this was the true construction of the rule, and then proceeded, as Kay, L.J. held in *Reg. v. Justices of London*, to enlarge the jurisdiction. I think, therefore, that the effect of sect. 5 was to enlarge the jurisdiction over costs by extending it to all proceedings except those reserved by sect. 4.

Solicitor for the applicant, Elliott Hutchinson.
Solicitor for the respondent, W. A. Blazland.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 13, 30, and May 8.

(Before the PRESIDENT (Sir Francis Jeune.)

THE ENGLISHMAN AND AUSTRALIA. (a)

Collision—Steamship towing—Liability of tow—Admiralty jurisdiction—Maritime tort—Joint tort-feasors.

Where a steam tug towing comes into collision with another vessel the tow will be held jointly liable with the tug, unless it can be shown that the sole control is in the tug.

Such a collision is a maritime tort within the

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

ADM.]

THE ENGLISHMAN AND AUSTRALIA.

[ADM.]

jurisdiction of the Court of Admiralty, and the right to recover damages is governed by the rule prevailing in that court, and not by any common law doctrine of contributory negligence.

ACTION for damage by collision.

The plaintiffs were Messrs. Green, Holland, and Sons, owners of the steamship *Ada*, and the defendants were the owners of the steam tug *Englishman* and the owners of the barque *Australia*.

The collision occurred in the North Sea, between Hartlepool and Seaham.

The facts alleged on behalf of the plaintiffs were as follows:

On 22nd Feb. 1894, the *Ada*, a steamship of 555 tons register, belonging to the port of London, with engines of 99 h.p., and a crew of fourteen hands, was on a voyage from Sunderland to Devonport with a cargo of coal, in the North Sea off Seaham. About 6.45 a.m. she was on a S.E. by S. course, with the engines going slow, and making about three to four knots per hour. The weather was foggy, the wind light from the westward, and the tide first quarter ebb of the force of about one knot. The usual lights were exhibited, and the fog whistle was being sounded. In these circumstances the two mast-head (towing) lights of the *Englishman* were observed at about fifty yards distance, and bearing about three points on the starboard bow. The helm of the *Ada* was immediately put hard-a-starboard, two short blasts were blown on the whistle, and the *Englishman* was hailed to hard-a-starboard. The engines of the *Ada* were stopped and ordered to be reversed, but before they could be got astern, the *Englishman*, coming on at a high rate of speed, with the barque *Australia* in tow, struck the *Ada* with her stem a heavy blow on the starboard side, just before the bridge, doing her so much damage that she sank in a short time. Before the collision no whistle from the *Englishman* nor foghorn from the *Ada* was heard.

The *Englishman*, at the time, was under an engagement with the owners of the *Australia* to tow her to the Tyne, and those on board the *Englishman* were the servants of the owners of the *Australia*, and were subject to the control and orders of those on board the *Australia*.

It was alleged on behalf of the *Englishman*, which was a screw steam tug of 32 tons register and 169 tons gross, with a crew of nine hands, that at the time and place above mentioned she was towing the Norwegian barque *Australia* from Havre to South Shields. The wind was north-westerly and light, the weather a thick fog, and the tide about high water. The *Englishman* was on a N.W. by N. $\frac{1}{4}$ N. magnetic course, and was making from two and a half to three knots an hour. Her regulation towing and side lights were exhibited, and her whistle and the horn of the barque were being duly sounded for fog.

In these circumstances the whistle, and immediately after the masthead light, of a steamship which proved to be the *Ada* was heard and seen respectively about three points on the port bow of the *Englishman* at a distance of about one to two ship's lengths. The helm of the *Englishman* was at once hard-a-ported and her engines were stopped and reversed full speed, but the *Ada* coming on fast, and heading so as to

cause risk of collision, hailed the *Englishman* to starboard her helm, but before there was time to do so, the starboard bow of the *Ada* struck the stem of the *Englishman*.

It was also alleged (*inter alia*) that the *Ada* improperly starboarded her helm, and that she neglected to sound a fog whistle or show a proper or any green side light.

On behalf of the owners of the *Australia* it was alleged that she did not come into collision with the *Ada* or cause any damage to her, and if the collision was caused by the negligence of those on board the *Englishman*, any liability on the part of the *Australia* was denied.

Before and at the time of the collision the *Australia*, a Norwegian iron barque of 1232 tons net register, was being towed in ballast from Havre to the river Tyne by the steam-tug *Englishman*, of Hull, at the rate of between two and a half to three knots an hour, with all sails furled, on a course N.W. by N. $\frac{1}{4}$ N. magnetic. The regulation lights were exhibited on both vessels, and the foghorn and whistle were being sounded.

Shortly after the fog had become so thick that the tug was no longer visible to those on board the *Australia*, and they had hailed the tug to shorten in the tow-rope, the crash as of a collision was heard ahead of them, but neither the tug nor any other vessel, or their lights, were visible. The helm of the *Australia* was at once put hard-a-port, and, as the tug ceased towing the *Australia* rapidly lost her way, and presently made out the loom of the *Englishman* and of another steamer, which proved to be the *Ada*, lying with their heads to the eastward.

These defendants required the terms of the engagement to tow, alleged in the plaintiffs statement of claim, to be proved, and they denied that those on the *Englishman* were their servants, or were subject in any matter material to the collision complained of, to the control and order of those on board the *Australia*.

The action was tried before the President (Sir F. Jeune) and Trinity Masters, and on the 13th April 1894 he gave judgment to the effect that both the *Ada* and the *Englishman* were to blame for their excessive speed, and that the *Australia* had full knowledge of the speed of the *Englishman*, that she was able to hail, and that therefore she could have lessened the speed of the *Englishman* had she been so minded.

On the 30th April the question as to the liability of the *Australia* for the negligence of the *Englishman* came on for further argument.

Sir Walter Phillimore and Nelson for the plaintiffs.

Aspinall, Q.C. and Butler Aspinall for the tug *Englishman*.

Pyke, Q.C. and Scrutton for the *Australia*.

Judgment, in which the arguments sufficiently appear, was reserved, and delivered on the 8th May, as follows:—

THE PRESIDENT.—In this case the *Ada*, a steam vessel, brought an action against the tug *Englishman* and her tow, the *Australia*, a barque, in respect of a collision between herself and the *Englishman*, occurring in the North Sea off Seaham. I found that both the *Ada* and the *Englishman* were to blame for their excessive

ADM.]

THE ENGLISHMAN AND AUSTRALIA.

[ADM.]

speed, and that the *Australia* should and could have restrained, and did not restrain, the speed of the *Englishman*. Several points of law are now raised on behalf of the *Australia*. The first and main point is that the *Ada* was guilty of contributory negligence, and therefore cannot recover; in other words, that the rule of common law, and not the rule of Admiralty, applies. The argument, as I understand it, is that inasmuch as the collision was not between the *Ada* and the *Australia*, but between the *Ada* and the *Englishman*, and as therefore, in order to make the *Australia* liable to the *Ada*, the principle of the liability of a master for the negligence of his servant is introduced, this ousts the Admiralty doctrine that where in a collision two ships are to blame, the delinquent ship can recover part—fixed by Admiralty practice in this country at half—of the damage, and substitutes the common law doctrine that in an action of negligence neither of two wrongdoers can recover. It is apparently true that the precise set of facts in this case has hitherto not arisen for adjudication, because in the two cases nearest to it there is a difference. Neither in *The Niobe* (59 L. T. Rep. N. S. 257; 6 Asp. Mar. Law Cas. 300; 13 P. D. 55), where a vessel was held entitled to recover both against a tug, with whom she came into collision, and a tow, which was held responsible for the tug; nor in *The American and Syria* (31 L. T. Rep. N. S. 42; 2 Asp. Mar. Law Cas. 350; 6 P. C. 127), where, under similar circumstances of collision, a vessel was held entitled to recover against the tug alone, was the plaintiffs' vessel to blame. In the latter case, had the plaintiffs' vessel been to blame, the ordinary rule of Admiralty law would, no doubt, have been followed. But, although there is no authority in point, the case seems to me to be clear on principle, and, indeed, to be free from the difficulties which occur in several cases similar in some respects to the present. This is a case of a maritime tort, arising out of a collision between these ships, and in which both the plaintiffs and the defendants appear in the action as owners of ships, and in that capacity are to blame in respect of the collision. It is a case of a maritime tort, therefore it is a case within the Admiralty jurisdiction (see *The Sarah*, 1 Lush. 549), and a case to which decisions given in cases of contract, such as *The Energy* (3 A. & E. 48), are not applicable. It is a case arising out of a collision between ships. Therefore we need not concern ourselves with such exceptions to the Admiralty law as appear to have been made in America. I was referred in argument to the case of *The Max Morris* (30 Davies's Reps. 1), in which the Supreme Court of the United States held that a man who fell from the bridge to the deck, partly by his own fault and partly by that of the officers of the ship, was entitled to recover part of his damage. But it is sufficient for the present purpose to accept the limitation of the Admiralty jurisdiction to collisions between ships suggested by Lord Herschell and Lord Macnaghten in the case of *The Zeta* (33 L. T. Rep. N. S. 477; 3 Asp. Mar. Law Cas. 73; (1893) App. Cas. at p. 487). It is a case where both the plaintiffs and the defendants appear in the action as owners of the ship, and are not in that capacity to blame in respect of the collision. Therefore the question is not the same as in the case of *The Milan* (1 Lush. 388), where the owners

of the cargo in one ship in default brought an action against the owners of the other ship, and it was held that the defendants were liable to pay only half of the damage. It is not necessary to consider how far the authority of *The Milan*, recognised by the Court of Appeal in the case of *The Chartered Mercantile Bank of India v. Netherlands Steam Navigation Company* (48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65), was shaken by the observations made by the same court in the subsequent case of *The Bernina* (56 L. T. Rep. N. S. 450; 6 Asp. Mar. Law Cas. 112; 12 P. Div. 36), nor to point out the distinction between the case of *The Milan* and that of *The Bushire* (52 L. T. Rep. N. S. 740; 5 Asp. Mar. Law Cas. 416). Nor is it necessary to consider if the view taken by Butt, J. in *The Vera Cruz* (51 L. T. Rep. N. S. 24; 5 Asp. Mar. Law Cas. 254; 9 P. Div. 88), that the Admiralty rule applies not only in actions between ships, but in an action by the captain, is correct. I omit the consideration of the action in that case by the representatives of the captain of one ship against the owners of the other when both ships are to blame, and the captain himself. The one point which introduces a new element for consideration is that though one of the two ships in collision was the ship of the plaintiffs, the other ship in collision was not the ship of the defendants. But this appears to me to be immaterial when once it is established that the defendants are liable in respect of this collision, and that their liability rests on a principle forming part of the law maritime. This case is not like that of *The Vera Cruz* (51 L. T. Rep. N. S. 104; 5 Asp. Mar. Law Cas. 270; 10 App. Cas. 59) and *The Bernina*, in which the Court of Appeal held that as the actions were under Lord Campbell's Act they were not within the jurisdiction of the Admiralty Court, nor cases in which sect. 25, sub-sect. 9 of the Judicature Act of 1873 applies. It is clear from *The Siquani* (43 L. T. Rep. N. S. 768; 4 Asp. Mar. Law Cas. 383; 5 P. Div. 241) and the case of *The Niobe*, that when a vessel comes into collision with a tug by reason of the negligence of the tug, which the tow could have prevented, the tow is liable to such vessel, and that solely by the force of the law maritime. I am by no means sure that this case may not be said to fall within the principle of the tow and tug being in contemplation of law identified as one ship. That principle clearly applies for the purposes of the navigation rules. In *The Cleadon* (14 Moo. P. C. 93) and in the case of *The Niobe* (1891) App. Cas. 401, it was held in the House of Lords that the tow and tug were one ship in contemplation of law for all purposes of their joint navigation, and that that principle applied so as to make the underwriters, under a policy which in terms dealt with the insured ship coming into collision, liable in respect of a collision between her tug and another vessel. Nor does it appear to me that the decision in *The Mary* (41 L. T. Rep. N. S. 351; 4 Asp. Mar. Law Cas. 183; 5 P. Div. 14), or in the view taken by the Privy Council in *The American and Syria* (*ubi sup.*) conflict with either of these authorities. In *The Mary* the tow and the tug were *in pari delicto*, but the tow had a freedom from the consequences of her fault from the presence of a pilot, which the tug could not claim. It was indeed said in *The American and Syria* that the principle of the tug and tow being one ship did not in that case apply to make

ADM.]

BANK OF CHINA, JAPAN, AND THE STRAITS v. AMERICAN TRADING CO. [PRIV. CO.]

the tow liable, but that was because not only the sole power, but also the sole control was in the tug. But for the purposes of this case it is sufficient to adopt the language of the Privy Council in *The American and Syria*, viz., "The tug is in the service of the tow; the tow is answerable for the negligence of her servant, and is for some purposes identified with her." Inasmuch as such liability of the master for his servant is as much a part of the Admiralty as of the common law, and this case, therefore, falls entirely within the principles of Admiralty jurisdiction, I cannot see why the rule of Admiralty that a delinquent ship in collision can recover part of the damages is to be excluded. I will only add that in the case of *The Sisters* (34 L. T. Rep. N. S. 338; 2 Asp. Mar. Law Cas. 589; 1 P. Div. 117), which was referred to before me as an instance of an action in which the plaintiff and defendant ship were not in collision with each other, I think that the phrase of James, L.J. that "to disentitle the *Alfreda* to her right to recover there must have been contributory negligence," must be understood to mean that such contributory negligence would disentitle the *Alfreda* to her right of full recovery. There is nothing to show that the learned judge intended to suggest, much less to decide, that the *Alfreda*, if negligent, would have failed altogether in the action. The second point made was that the judgment should be drawn up so as to make the *Englishman* and the *Australia* primarily liable for a moiety of the sum recovered, with a remedy over against each in default of the other. This point seems to me to be concluded by the judgment in *The Avon and Thomas Joliffe* (1891 P. 7), and the form of the judgment in that case should be followed in this. Lastly, it was suggested, but not I think pressed, that the tonnage of the tug limited the total liability of the tug and tow. I can see no authority in the words of the 54th section of the Merchant Shipping Act of 1862 for this contention.

Solicitors: for the plaintiffs, *Lowless and Co.*; for the *Englishman*, *Pritchard and Sons*; for the *Australia*, *Thomas Cooper and Co.*

Judicial Committee of the Privy Council.

Jan. 31, Feb. 1, 2, March 7, 10, and April 28.

(Present: The Right Hons. Lords WATSON, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

BANK OF CHINA, JAPAN, AND THE STRAITS LIMITED v. AMERICAN TRADING COMPANY. (a)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Contract—Construction—Condition precedent—Collateral agreement—Exchange contracts—Agreement to finance goods.

The circumstance that one of the conditions of a contract affects only part of the consideration is not per se sufficient to make it collateral to the main contract, unless it appear that the condition was not intended by the parties to go to the root of the whole contract.

The respondent company had entered into "exchange contracts" with the appellant bank, by

which the bank undertook at the respective dates of settlement to pay to the company sterling money in exchange for silver at an agreed rate of exchange. Upon the face of each contract note were written the words "Goods financed through Bank of China." The company gave the bank the option of financing goods upon reasonable terms, but the bank declined to do so; and, the rate of exchange having fallen, refused to pay sterling money for silver in accordance with the exchange contracts as they became due, and the company incurred a loss.

Held, that, although the agreement to finance goods through the bank was a condition precedent to the fulfilment of the exchange contracts, the company had done all that was required of them in giving the bank a reasonable opportunity of financing the goods, and were entitled to recover on the contracts.

Judgment of the court below affirmed on different grounds.

THIS was an appeal from a judgment of the Chief Justice of Her Britannic Majesty's Supreme Court for China and Japan, at Shanghai (Hannen, C.J.), in an action brought by the respondents against the appellants to recover damages for breach of contract for the sale by the appellants to the respondents of telegraphic transfers on London at specified rates in Shanghai sycee silver, or the equivalent thereof, to be exchanged at Shanghai within certain specified limits of time. The Chief Justice delivered judgment in favour of the respondents, the American Trading Company, the plaintiffs in the action. From that judgment the Bank of China, Japan, and the Straits Limited preferred this appeal to the Judicial Committee of the Privy Council.

The facts are fully set out in the judgment of their Lordships.

Jan. 31, Feb. 1 and 2.—The *Solicitor-General* (Sir J. Rigby, Q.C.), *Latham, Q.C.*, and *McCarthy* appeared for the appellants, and argued that it was a condition precedent that the goods should be financed through the bank, which was not done. See

Graves v. Legg, 9 Ex. 709.

The contract as to the purchase of silver and the financing of the goods was one entire contract (*Atkinson v. Smith*, 14 M. & W. 695), and must be construed in its plain sense in accordance with the custom of the trade:

Boves v. Shand, 36 L. T. Rep. N. S. 857; 2 App. Cas. 455.

In any case the damages were assessed on an erroneous principle. See

Roper v. Johnson, 28 L. T. Rep. N. S. 296; L. Rep. 8 C. P. 167;

Brown v. Muller, 27 L. T. Rep. N. S. 272; L. Rep. 7 Ex. 319.

They also referred to

Frost v. Knight, 26 L. T. Rep. N. S. 77; L. Rep. 7 Ex. 111.

Greene, Q.C. and *Chapman* (Sir R. Webster, Q.C. with them), for the respondents, maintained that the financing the goods through the bank was not a condition precedent, but a collateral agreement, not going to the root of the contract:

Bettini v. Gye, 34 L. T. Rep. N. S. 246; 1 Q. B. Div. 183.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.] BANK OF CHINA, JAPAN, AND THE STRAITS v. AMERICAN TRADING CO. [PRIV. CO.]

The exchange contracts were absolute and unconditional, and were broken by the appellants. [Their Lordships required further evidence as to the negotiations between the parties as to financing the goods through the bank, and adjourned the case that it might be obtained.]

March 7 and 10.—The case came on for further hearing.

Greene, Q.C. for the respondents.—The evidence shows that the company did all that was incumbent upon them to fulfil their part of the contract.

The *Solicitor-General* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

April 28.—Their Lordships' judgment was delivered by

Lord WATSON.—The appellants carry on the business of bankers in London and Shanghai. The respondent company trade as merchants and commission agents in New York, Shanghai, and London; and part of their business consists in purchasing goods in Great Britain and America, which they export to and sell in China, receiving payment of the price in silver currency. It appears to be a common practice for merchants in Shanghai, upon their entering into contracts for future delivery, to guard against any speculative risk arising from the possible fluctuation of the rates of silver exchange between the date of sale and the time when the goods arrive and are delivered, by purchasing what are termed exchange contracts. These are simply contracts by which a bank, or other financier, undertakes to pay to the merchant, within certain limits of future time, sterling money, or its equivalent, in exchange for his silver, at a specified rate. It also appears to be an arrangement not uncommon, that the same bank which makes the exchange contract shall finance the goods, or, in other words, shall, in some shape or other, make advances to the merchants upon the security of the goods. In Aug. 1891 Mr. Talbot, the appellants' representative at Shanghai, and Mr. Fobes, the respondents' manager there, were introduced to each other, with a view to business, by Mr. Morris, an exchange broker. They discussed, apparently on three occasions, the subject of exchange contracts, and also of financing the goods, Mr. Talbot intimating that the first of these matters was one within his control, whilst the second must be settled by the London office of the bank. On the 11th Aug. the last of these occasions, Mr. Talbot agreed, pending negotiations, to give the respondents an exchange contract for 5000*l.* without any condition as to financing goods, which on the following day was embodied in a contract note by Mr. Morris as broker for the parties. As to that contract no question is raised in this case. Between the 13th and the 31st days of Aug. 1891, both inclusive, the bank at Shanghai entered into nine separate exchange contracts with the company. The result of these contracts was, that the bank became bound to give the company the sum of 57,500*l.* sterling in exchange for tael 255,938. 93*c.*, the rates of exchange ranging from 4*s.* 5½*d.* to 4*s.* 6½*d.* per tael, the dates of settlement being various periods from Dec. 1891 to May 1892. Upon the face of each of the contract notes there were written by the broker who made it "goods financed

through Bank of China," or similar words. In point of fact, none of the goods to which these contracts applied were financed by the bank, nor did the bank give sterling money against taels, in terms of the exchange notes. As the goods arrived at Shanghai and were paid for, the company purchased, with silver, the sums sterling specified in these notes, at the current rate of exchange, which had continued to decline from and after the month of Aug. 1891. The result was, that the company had to pay upwards of tael 38,000 beyond the amount which they would have had to pay to the bank under these nine contracts. The company brought two actions against the bank, before the Supreme Court of Her Britannic Majesty for China and Japan, one in March and another in June 1892. These actions have been treated as a single suit, both in the court below, and before this board. They cover the nine exchange contracts in question, which are alleged to have been broken by the bank, and the sums in silver actually paid by the company in excess of the rates of silver exchange fixed by the contracts are claimed as damages. The company admit that the conditions as to financing their goods through the bank were obligatory, but plead that they were duly complied with, so far as they were concerned, and also that the fulfilment of such conditions was not essential, inasmuch as they were collateral with, and not precedent to the agreement for exchange. In defence, the bank, whilst denying that the company had given them an opportunity of financing the goods, mainly relied upon the plea that the exchange contracts were inoperative, because it was matter of mutual stipulation that their existence was to depend upon the London office of the bank agreeing to finance the goods, which it never consented to do. The learned Chief Justice appointed the trial of these causes to take place before himself, for the purpose of hearing and determining all questions raised in the pleadings "except the questions whether the conditions precedent (if any) which the court may find, were to be performed by the plaintiffs in London, or elsewhere than Shanghai, were performed by the plaintiffs, and whether the performance thereof by the plaintiffs was excused by the defendants." At the trial, both parties led evidence, subject to that reservation, and thereafter it was adjudged that the company should recover from the bank the sum claimed in both actions, with costs of suit. It was held by the learned judge who tried the cause, that the brokers' contracts, upon which the actions were founded, were complete in themselves, and were not, as the bank maintained, determinable in the event, which occurred, of the company failing to make an arrangement with their London agency as to the terms upon which the goods were to be financed. In that finding their Lordships concur. There is no evidence, either internal or external, that these contracts were subject to any suspensive or resolute condition. It does appear that Mr. Talbot and Mr. Fobes did not entertain the same views of the import of the communications which passed between them at their meetings on the 11th Aug. and previous days. Mr. Fobes seems to have understood that arrangements for financing goods were to be independent of exchange, and were to be made with the London office of the bank, after contracts were completed in Shanghai. Mr. Talbot, on the other hand, was under the

PRIV. CO.] BANK OF CHINA, JAPAN, AND THE STRAITS v. AMERICAN TRADING CO. [PRIV. CO.]

impression that no exchange contracts were to be made by him until the company had arranged terms of finance with his London office. But his own testimony shows that he gave an unqualified assent to the contracts in question, as made by the brokers on behalf of the bank, he being at the time in the belief that such preliminary arrangements had already been made in London. His belief was no doubt erroneous; but their Lordships are satisfied that it was not induced by any misrepresentation of the company or their agents. The learned judge was also of opinion that, although the arrangement for financing goods through them formed part of the consideration in respect of which the bank agreed to give exchanges, it did not constitute a condition precedent to their so doing; and that the company's claim for loss of exchange was therefore maintainable, notwithstanding their having violated the arrangement. Upon that point their Lordships are unable to concur in his decision. The circumstance that one of the conditions of a contract only affects part of the consideration is not *per se* sufficient to make it collateral to the main contract. It is capable of being so construed, but cannot be so regarded, unless it also appear that the condition was not intended by the parties to go to the root of the whole contract. In this case, it appears to their Lordships that the condition as to financing of the goods, written upon the face of the contract notes, was meant to qualify the undertaking of the bank to purchase silver at a specified rate from the company. It was purposely omitted from the contract note of the 11th Aug., because, in that instance, the contract of exchange was to be independent of any arrangement to finance goods through the bank; and, in the opinion of their Lordships, the fair inference derivable from the manner in which the condition was introduced into all the subsequent notes is, that the parties meant, not to add an independent and collateral arrangement, but to add a condition to the contracts of exchange embodied in these notes. Having come to the conclusion that due compliance with their agreement to finance goods with the bank was a condition precedent to the company's right to demand fulfilment of the exchange contracts, their Lordships were not, owing to the state of the record, in a position to dispose of the case by a final judgment. The company had not been allowed to lead proof of their allegations that they had done all that was incumbent upon them, in order to comply with the condition precedent, and their averments on that point were disputed by the bank. Seeing that the evidence which the parties were prepared to offer was to be found in London, their Lordships thought it right, instead of remitting the case to Shanghai, to allow a proof to be taken by commission. That was accordingly done, and parties were heard upon the question whether the company had or had not done everything that they were bound to do in order to fulfil their obligation to finance their goods through the bank. In the view which their Lordships took, to the effect that the stipulation as to finance was a condition precedent, neither of the parties raised any controversy as to its true import. It may be convenient to indicate here the construction on which they were substantially in agreement, and their Lordships see no reason to dissent from it. The stipulation was meant to be one in favour of the

bank, and for their interest; and the bank was under no absolute obligation to accept the duty of financing, if they found the performance of that duty proved to be incompatible with their business engagements. If the bank did not desire to undertake the duty, they were bound to give reasonable notice, so as to enable the company to make financial arrangements elsewhere. If the bank wished to finance the goods, it was as much incumbent upon them, as upon the company, to suggest and to endeavour to settle reasonable terms. On the other hand, the company were bound to give the bank the option of either accepting or declining the duty of financing the goods; and also to do their best towards the adjustment of reasonable terms, in the event of the bank's acceptance. It is unnecessary, for the purposes of this case, to enter more minutely into the consideration of the obligations which were incumbent upon either party. The proof adduced under the commission granted by their Lordships adds very little, in their opinion, to the material facts previously disclosed in the history of the transaction, and in the correspondence of the parties. It is sufficiently obvious that throughout the negotiations with regard to finance, which began shortly after the date of the last of the contracts, and were conducted by their representatives in London, the parties were at cross purposes, owing to the different views which they entertained of their legal position. The bank acted upon the footing that the existence of the exchange contracts was wholly dependent upon their choosing to agree to terms for financing the goods, and that they were entitled to decline any terms which might be offered by the company, and by so doing to avoid liability for exchanges. Seeing that the rate of exchange gradually declined during the period of the negotiations, it was hardly to be expected that the bank, in the view which they took, should have accepted any terms of finance which were insufficient to recoup them for the loss which they would probably incur upon exchange, in the event of their acceptance. The company, on the other hand, appear to have acted on the true construction of the contract, and to have recognised the fact that they as well as the bank were placed by its terms under a mutual obligation to settle reasonable terms for the financing of their goods. The bank were by no means precipitate in breaking off the negotiations; and, had exchange rates risen, it does not appear to their Lordships to be improbable that they would have ultimately arranged terms of finance. But the bank never receded from the position which they originally took up, and they adhered to it in their defence to this action, that they had the option of determining whether the exchange contracts should come into existence or not, by their agreement or refusal to finance goods. Towards the end of Nov. 1891 the bank at length resolved to adopt the latter of these alternatives. On the 26th of that month Mr. Talbot, their agent in Shanghai, made this communication to Mr. Fobes, the representative of the company in that city: "A telegram from the head office of this bank states that, inasmuch as no arrangement had been made there up to the 20th inst., in connection with goods to be shipped to Shanghai on your account, the conditional settlements of exchange for forward delivery are void." To that intimation Mr. Fobes replied by

[CT. OF APP.]

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED.

[CT. OF APP.]

letter of the 27th Nov., in which he notified the fact that, owing to the refusal of the bank in London, his company had been compelled to pass their drafts for goods ready for shipment through other banks, and added, "I understand that your London office intend their refusal to apply to all contracts made with you, but I wish to say that, as a large part of the goods has still to come, we are prepared to send such goods through your bank in accordance with our contracts." The bank took no notice whatever of that communication. Their Lordships do not think it admits of doubt, that the intimation thus made by the bank, coupled with their failure to give any answer to the inquiry made by the company, amounted to a complete repudiation of all the contracts, whether for finance of goods or for exchange; and that the company were absolved from the necessity of making further offers to settle terms of finance, in order to preserve their claims to damages for breach of the contracts of exchange. In this appeal, the bank renewed the objection which was taken by them, and overruled in the court below, to the measure of damages as claimed. They maintained that, when the rate of exchange was steadily failing, it became the duty of the company to mitigate the loss which would fall upon the bank, in the event of their being held to have broken the contracts in question, by making forward contracts of exchange at current rates. In the opinion of their Lordships, it is sufficient for the purposes of the present case to say, that there is neither allegation nor proof, to the effect that the company failed to take any reasonable means for protecting the pecuniary interests of the bank. Their Lordships, for these reasons, have come to the conclusion, although upon different grounds from those assigned by the learned judge, that the respondent company are entitled to retain the judgment which they obtained in the court below. They will accordingly humbly advise Her Majesty to affirm that judgment. The appellant bank must bear the costs of this appeal.

Solicitors: for the appellants, *Harwood and Stephenson*; for the respondents, *Gibson, Weldon, and Bilbrough*.

Supreme Court of Judicature.

COURT OF APPEAL.

May 5 and 28.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Debenture—Covenant for payment on specified day—Company wound-up before such day—Principal becoming due.

Upon the occurrence of a winding-up of a company, the debenture-holders become entitled to realise their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital has not arrived.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Hodson v. Tea Company (14 Ch. Div. 850) approved.

Decision of Kekewich, J. (ante, p. 497) reversed.

THIS was an appeal from a decision of Kekewich, J. (reported ante, p. 497).

The facts, which are fully stated in the report in the court below, were shortly as follows:

The action was brought by the holder of debentures, charged on the undertaking and property of the company which was being wound up, for the realisation of the security, and the question raised by this appeal was, whether, for the purpose of realising such security, the principal moneys secured by the debentures, and thereby made payable at a future date, could be treated as if they had become due at the date of the commencement of the winding-up.

The company was formed and registered under the Companies Acts in Sept. 1887. Its object was to acquire and work certain patents. It had power to borrow money on debentures, and it raised 6000*l.* at 6 per cent. on sixty debentures for 100*l.* each charged on the undertaking and property of the company. The interest was to be paid half-yearly, and the principal was payable on the 31st Dec. 1894.

On the 19th July 1890 the company was ordered to be wound-up by the court.

On the 2nd July 1890 a writ was issued by the plaintiff, on behalf of himself and all the other holders of the debentures, for the usual accounts and for a receiver.

On the 5th Feb. 1894 a statement of claim was filed, and on the 14th March 1894 Kekewich, J., on a motion for judgment in default of defence, gave judgment for the plaintiff, directing an account of what was due to the plaintiff and the other holders of the outstanding debentures, and an inquiry of what the property comprised in and charged by the debentures consisted; but held that the principal moneys secured by the debentures ought not to be treated as if they had become due at the date of the winding-up.

The minutes of the order were as follows:

"Declare that the plaintiff and all other the holders of the debentures in the statement of claim mentioned are entitled to a charge on all the undertaking and property of the defendant company for securing the principal moneys and interest intended to be secured by the said debentures. And let the following accounts and inquiries be taken and made—that is to say: (1) An inquiry what debentures have been issued by the defendant company, and which of them are still outstanding, and what persons are the holders of the same respectively. (2) An account of what is due for interest to the plaintiff and the other holders of the said outstanding debentures. (3) An inquiry of what the property comprised in and charged by the said debentures consists, and in whom the same is vested. Adjourn further consideration into chambers. Liberty to apply."

Eve for the appellant.—The moment the winding-up commenced the money secured by the debentures became payable:

Re Panama, New Zealand, and Australian Royal Mail Company, 22 L. T. Rep. N. S. 424; L. Rep. 5 Ch. App. 318;

Hodson v. Tea Company, 14 Ch. Div. 859;

Brownlie v. Russell, 48 L. T. Rep. N. S. 881; 8 App. Cas. 235.

[CT. OF APP.]

WALLACE v. AUTOMATIC MACHINE COMPANY LIMITED.

[CT. OF APP.]

The other creditors benefit, as the company is relieved from paying future interest. The plaintiff could prove against the company in respect of all the moneys secured by the debentures, whether due or not :

Companies Act 1862, s. 158.

[KAY, L.J. referred to *Re Browne and Wingrove*, 65 L. T. Rep. N. S. 485; (1891) 2 Q. B. 574.]

Cur. adv. vult.

May 28.—LINDLEY, L.J. (after stating the facts set out above, continued :)—The plaintiff is not content with the order of Kekewich, J., as no account is directed of what is due in respect of the principal sums secured, and he has appealed in order to have the judgment corrected in this respect. The time for the payment of the principal not having yet arrived, it is clear that it is not a debt for which any action at law could now be brought. But it is equally clear that, as the company is being wound-up, the plaintiff and the other debenture-holders could, if they chose, prove against the company in respect of all the moneys secured by the debentures, whether due or not: (see Companies Act 1862, s. 158.) Moreover, by the Judicature Act 1875, s. 10, if the debenture-holders did so prove, they would have to give up their securities, and they could only prove for such amount as would be provable if the company had been a debtor and had been adjudicated bankrupt. The amount provable in bankruptcy in respect of a future debt bearing interest was determined in *Re Browne and Wingrove* (*ubi sup.*). The plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down. He wants to realise his security and to apply the proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up, and this circumstance entitles the debenture-holders to realise their security at once. This point was determined in *Hodson v. Tea Company* (*ubi sup.*), which was itself based on the earlier case of *Re Panama, New Zealand, and Australian Royal Mail Company* (*ubi sup.*). In *Hodson v. Tea Company* the debenture was not due, but it was treated as having become due on the commencement of the winding-up of the company, and accounts were directed of what was due for principal and interest on that footing. The principle on which this decision is founded is, in my opinion, correct, and the plaintiff is entitled to an order to give effect to it. The order appealed from must be varied accordingly, and the costs must be added to the amount due to the plaintiff on his security. Kay, L.J. has framed a declaration which should, I think, be embodied in the order, so that its principle may be made clear.

LOPES, L.J. concurred.

KAY, L.J.—This action is brought by the plaintiff on behalf of himself and all other holders of debentures in the defendant company for foreclosure or sale. By the form of the debentures the principal money secured by them was charged upon all the undertaking and property of the company, both present and future, as "a floating security," and was accordingly "not

to prevent or hinder the company from leasing, exchanging, selling, mortgaging, or otherwise dealing with the property as it may from time to time think fit." The principal money so charged was not to become payable till the 31st Dec. 1894, but the company was empowered to pay off the debenture-holders on the 1st July or 1st Dec. in any year, on giving at least three calendar months' previous notice in writing. The interest at 6 per cent. was payable on stated days fixed by coupons attached to the debentures. Default was made in payment of the interest on the 1st July 1890. The action was commenced on the 2nd July 1890. On the 4th July 1890 an order was made for a receiver. On the 19th July 1890 an order was made to wind-up the company. On the 14th March 1894 this action was heard as a short cause. The appeal is from this judgment. The question is, whether the debenture-holders can claim as against the security the interest and the full amount of their principal, although the day fixed for payment has not arrived, or whether they must be satisfied with interest only till the day of payment, or with the principal subject to a discount for payment before the day on which the principal becomes due. It is material to observe that it is not a question of proof in the winding-up, but of realisation of the security. By the winding-up order the position of the debenture-holders is very much altered. The subject of their security is, amongst other things, the undertaking—that is, the profit-producing concern. The winding-up practically put an end to any chance of producing further profits. The security is a floating charge—that is, the company might use all its assets included in the security for the purpose of its *bonâ fide* business, as though the charges did not exist. These powers are to some extent vested in the liquidator for the purposes of winding-up the company. If the debenture-holders were compelled to wait until the debentures became due, the security might, and probably would, be very much depreciated in the meantime. These considerations led to the conclusions expressed by Giffard, L.J. in the case of *Re Panama, New Zealand, and Australian Royal Mail Company* (*ubi sup.*) that, upon the occurrence of the winding-up, the debenture-holders had a right at once to realise their security. It follows that, if the time of realising is accelerated by this event, the realisation must be for the full amount, as though the debt was then due, and this seems to have been held in the same case. The same result was arrived at by Hall, V.C. in *Hodson v. Tea Company* (*ubi sup.*). I think there should be a declaration that, upon the occurrence of the winding-up, the debenture-holders became entitled to realise their security for the full amount secured by their respective debentures, notwithstanding that the day mentioned therein for payment of the capital had not arrived, and that an account should be directed of what is due for principal and interest to the time of actual payment on that footing, and for the costs of this action. The other inquiries directed seem to be in the right form. The costs of the appeal should be added to the security.

Solicitors: *Slaughter and May*.

CT. OF APP.] HANFSTAENGL v. EMPIRE PALACE LIMITED AND OTHERS (No. 2). [CT. OF APP.]

May 30, 31, and June 11.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

HANFSTAENGL v. THE EMPIRE PALACE LIMITED AND OTHERS (No. 2); HANFSTAENGL v. NEWNES. (a)

APPEAL FROM THE CHANCERY DIVISION.

Copyright—Foreign paintings—Illustrations in newspapers of tableaux vivants which were imitations of the paintings, but not infringements of the copyright therein—Application of foreign law to determine extent of copyright—Fine Arts Copyright Act 1862 (25 & 26 Vict. c. 68), ss. 1, 6—Berne Convention, art. 2—International Copyright Act 1886 (49 & 50 Vict. c. 33), s. 2, sub-sect. 3—Order in Council of the 28th Nov. 1887, clauses 1, 3.

The defendants, the proprietors of certain newspapers, sent artists to a theatre of varieties to make sketches of tableaux vivants, or "living pictures," from which sketches drawings were made, and reproductions of these drawings were published in the defendants' newspapers.

The idea of the tableaux vivants was taken from certain paintings painted in Germany by foreign artists, the copyright in which was the property of the plaintiff. The production of these tableaux vivants had been decided by the Court of Appeal (ante, p. 459; (1894) 2 Ch. 1) not to be an infringement of the plaintiff's copyright.

The drawings in the newspapers were rough and incomplete, and did not represent any of the artistic merits of the plaintiff's pictures. They merely conveyed a rough idea of the subjects of the pictures and of the grouping of their main features.

Held, that the drawings were not intended to be, and were not in fact, copies of the pictures, neither were they intended to be, nor were they in fact, reproductions of the designs of the pictures, and therefore they were not copies of the plaintiff's pictures, or reproductions of the designs thereof, within the Fine Arts Copyright Act 1862.

Decision of Stirling, J. reversed.

Held also, that, by virtue of sect. 2, sub-sect. 3, of the International Copyright Act 1886, if the German law of copyright conferred upon the plaintiff a less extensive right in his pictures than the right conferred on British authors by the Fine Arts Copyright Act 1862, the extent of the plaintiff's right was restricted to his right under the German law.

A copy of a picture may be an infringement of the copyright thereof although it may in no way compete with the commercial value of the picture.

THESE were motions in two actions. The first action was brought against the Empire Palace Limited for infringing the copyright in the plaintiff's pictures by giving representations by means of living figures of the subjects of those pictures, and against the proprietor and publisher of the *Daily Graphic* for publishing illustrations of such representations. As against the Empire Palace, the Court of Appeal had already decided (ante, p. 459; (1894) 2 Ch. 1) that the representation of "living pictures" at their theatre, imitating the plaintiff's pictures, was not, so far as the living figures were concerned, an infringement of his copyright, it being necessary that the reproduction, to come within the Copyright Act of 1862,

should be something in the nature and character of a picture.

The second action was by the same plaintiff against the proprietor and publisher of the *Westminster Budget*, who had published illustrations of the same representations. The plaintiff sued under the International Copyright Act 1886, and the Order in Council of the 28th Nov. 1887. He now moved in both actions to restrain the defendants, the proprietors and publishers of the *Daily Graphic* and the *Westminster Budget*, from infringing his copyright in "The Three Graces," "First Love," and certain other pictures. These were all painted in Germany by foreign artists, and had, with the plaintiff's sanction, been photographed and otherwise reproduced. Some of the photographs had been used by the proprietors of the Empire Theatre in producing the "living pictures" the subject of the first action.

The managers of the *Daily Graphic* and the *Westminster Budget* had instructed artists to visit that theatre and make sketches of the "living pictures." From these sketches drawings were subsequently made, reproductions of which appeared in the *Daily Graphic* of the 8th Feb. 1894, and the *Westminster Budget* of the 16th Feb. 1894, and in placards of the latter publication. These were the infringements complained of. A comparison of the illustrations appearing in the two newspapers, with the photographs and other copies of the original pictures, showed that, although there were certain differences between them, the former so closely resembled the latter as to be, in the opinion of Stirling, J., in fact "copies," "reproductions," or "colourable imitations" of the latter.

The case involved the question whether and to what extent the rights of the plaintiff were governed by German law. This question and the evidence as to the German law bearing on the case, are fully discussed in the judgment of Stirling, J.

Graham Hastings, Q.C. and T. E. Scrutton for the plaintiff in the first action.

Graham Hastings, Q.C. and A. H. Jessel for the plaintiff in the second action.—In *Ex parte Beal* (L. Rep. 3 Q. B. 387) sub nom. *Graves v. Beal* (18 L. T. Rep. N. S. 285) the copies were made by photographing an engraving of the original picture, and it was argued that they were copies of the picture. At L. Rep. 3 Q. B. 394, Blackburn, J. said: "When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps." [STIRLING, J.—I understand the expert in German law to say you may copy from anything which is not an infringement of the copyright.] But immediately after the reproduction of the same. The question is, whether this is to be determined by English law only. It should be determined by English law according to the principles upon which the copyright law is founded. There is the Irish case:

Turner v. Robinson, 10 Ir. Ch. Rep. 121, 510.

[STIRLING, J.—That case was not raised on the law of copyright.] No; there was no statutory

(a) Reported by JOHN SANDERSON and W. C. BISS, Esqrs., Barristers-at Law.

[CT. OF APP.] HANFSTAENGL v. EMPIRE PALACE LIMITED AND OTHERS (No. 2). [CT. OF APP.]

law of copyright at that time, but that case is exactly like this in that there is no evidence to prove publication. Since then there is the dictum of Fry, J. in

Lucas v. Cooke, 42 L. T. Rep. N. S. at p. 183; 13 Ch. Div. at pp. 879, 880; see also

Warne and Co. v. Seebohm, 58 L. T. Rep. N. S. 928; 39 Ch. Div. 73;

Tinsley v. Lacy, 1 Hem. & Mil. 747.

The case is analogous to that of the retranslation into German of an English translation of a German copyright work. This is bad, though taken entirely from something which cannot be interfered with:

Murray v. Bogue, 1 Drewry, 353, 358, 367-8.

If the German law is to govern, so far from the Berne Convention having produced unity your Lordship might have to consider the copyright laws of some twelve or thirteen countries:

Copyright Act 1844, 7 Vict. c. 12, ss. 2, 3, 4, 5.

Scrutton's Law of Copyright, 2nd edit., pp. 228, 229.

If German law is applicable, the evidence shows that this is an infringement according to German law. The defence that the representations are used merely to illustrate the text cannot be advanced in the case of the *Westminster Budget*, where no letterpress accompanies the illustrations. The pictures in the *Daily Graphic* do not illustrate the text. The text illustrates the pictures and follows them. The pictures are not subsidiary to the letterpress. The artist and the author had no communication with one another, but worked independently. The costumes in some of the representations are the same as in the photographs of the paintings.

Grosvenor Woods, Q.C. and *Bramwell Davis* for the defendants in the first action.

Grosvenor Woods, Q.C. and *H. A. Forman* for the defendants in the second action.—As to English law, we do not dispute any of the propositions that have been put forward. In cases like *Turner v. Robinson*, if machinery has been put up for the purpose of copying the work that is a distinct fraud. These are not copies at all. The newspapers have merely produced representations of scenes on a particular occasion, without reference to any picture. They are mere representations of certain persons in the costumes they wore and the attitudes they assumed at a certain time. The same principles apply in the case of the *Daily Graphic*. [STIRLING, J.—Can you go to a play and take down the words of it?] No. [STIRLING, J.—Can you take down substantial parts of it?] That is a question of the quantity or quality of what is taken down. We copied a work in which there was no copyright. It is difficult to draw a line where piracy of the works of artists begins or ends. It is impossible to say that we have trespassed on the design. The case is the same as if the artist had gone to a fancy dress ball and copied. Even supposing that we had taken the representations from the pictures themselves it would make no difference, for we have not published them as a work of art: (Scrutton's Law of Copyright, 2nd edit. 173.) This is a different case from *Tinsley v. Lacy*. Here there cannot possibly be any injurious effects. [STIRLING, J.—Your argument comes to this, that anyone may go to the next academy and copy pictures.] No; there they would be copied as works of art: (see

per Page Wood, V.C. in *Scott v. Stanford*, 16 L. T. Rep. N. S. at pp. 52, 53; L. Rep. 3 Eq. at pp. 722, 723). There is no case where publication of such rough sketches as these has been held capable of damaging a person's works:

Trade Auxiliary Company v. Middlesborough and District Tradesmen's Protection Association, 60 L. T. Rep. N. S. at p. 682; 40 Ch. Div. at p. 429; *Schauer v. J. C. and J. Field*, 68 L. T. Rep. N. S. 81; (1893) 1 Ch. 35; 9 Times L. Rep. 29.

How are damages to be ascertained? Are we to be responsible for all the profits of our paper on the days when these papers were published? As to the law by which we are governed, the Order in Council provides that the author of such work shall not have any greater right or longer term of copyright than that which he enjoys in the country in which the work is first produced. Why should we give to foreigners in our country higher rights than they have in their own? It is not shown that the plaintiff has such a right according to the law of Germany as is here claimed. In any case the illustrations are merely subsidiary to the text. [STIRLING, J.—Is an illustrated newspaper a literary or an artistic production?] A literary work. The illustrations in the *Westminster Budget* were subsidiary to the text in an earlier number. The text in the paper itself is the names of the performers. In *Dicks v. Brooks* (43 L. T. Rep. N. S. 71; 15 Ch. Div. 22) it is put on the ground that it must be a copy in the commercial sense, and similarly in *Hanfstaengl v. The Empire Palace Limited* (ante, p. 459; (1894) 2 Ch. 1). The court must be satisfied that there is an intention to compete with the plaintiff. If these are infringements they would fall within the words "or the design thereof," but the evidence of the German copyright lawyers shows that designs are not protected in Germany, and the International Copyright Acts having limited the plaintiff to the right which he has in his own country he has no copyright in the design.

Hastings in reply.—The effect of the International Copyright Act 1886, s. 2, sub-sect. 3, is that a man is not to have a greater right in England than he has in Germany. If, for instance, a foreigner has no copyright in a work of sculpture in Germany he is not to have it in England. [STIRLING, J.—Suppose in Germany a man had the right to copy except with pen and ink.] The moment the court finds a man has got the right the question of infringement has to be governed by English law only. They may show that it has fallen into the public domain: (Berne Convention, art. 6, Scrutton, 259.) If this is a true view the court is not concerned with the German law. The statute says nothing about competing. The defendants have mistaken a passage in Scrutton, 2nd edit. p. 165, on *Dicks v. Brooks*. How can there be no competition, and why should the subscribers of the paper have a right to purchase the back numbers of the *Daily Graphic*, the sale of which the defendants have for the present stopped?

Smith v. Chatto, 31 L. T. Rep. N. S. 775; 23 W. R. 290.

April 6.—STIRLING, J., after stating the nature of the motions, proceeded as follows:—On the hearing of the motions three questions were argued—(1) What would be the rights of the

plaintiff on the supposition that those were governed exclusively by English law; (2) whether German law is to any and what extent applicable; and (3) what are the rights of the plaintiff supposing that German law does to any extent apply? As to the first of these questions, the rights of the plaintiff are governed by the Copyright Act 1862 (25 & 26 Vict. c. 68). Sect. 1 of that Act confers "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, or the design thereof, or such photograph and the negative thereof, by any means and of any size." Sect. 2 provides that "nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object." Sect. 6 imposes certain penalties on any person who "shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution . . . any such work or the design thereof." The meaning of this Act has been considered by the Court of Queen's Bench in *Ex parte Beal* (*ubi sup.*), a case relating to a summary proceeding for the recovery of penalties under the Act. The general principle is thus stated by Lord Blackburn (then Blackburn, J.): "When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps." Does it make any difference that one of these intermediate steps is one which does not fall within the exclusive right conferred by the Legislature on the owner of the copyright? In answering this question, assistance may be derived from considering the case of literary copyright. Suppose that at a public meeting some portion of a copyright work was recited or read from an authorised copy of the book, that would be no infringement of the rights of the owner of the copyright. If a journalist happened to be present, could he take down in shorthand what was said and publish *verbatim* in his newspaper a substantial portion of his copyright work? I apprehend not. I speak of a substantial portion, because that is an element in dealing with questions of literary copyright. It is possible, for example, that in giving an account of the meeting the reporter might introduce a few lines of the work. So, in the present case, if the artist employed by the newspaper had seen fit to make a sketch of the theatre as a whole at the moment when one of these living pictures was being represented, it may be that the court would not interfere, even although the sketch included as part of it a delineation of the *tableau*. That, however, is not the state of facts with which I have to deal; in both these cases the illustrations represent the pictures only; in both papers they are described at the foot or the head as "Living Pictures at the Empire Theatre." It was said, however, that the defendants were unaware that the "living pictures" were imitations of actual pictures. In my judgment, however, it must be taken for the purposes of this motion that the defendants in both cases were aware that actual pictures were being reproduced. The article in the *Daily*

Graphic with reference to these very illustrations contains this passage: "There may be no high art about producing a living facsimile of a picture in itself purporting to represent an incident, thus getting a *tableau* doubly second-hand," and the writer says in his affidavit: "I did not know that the living pictures were copies of actual pictures, but I assumed that they were based on some pictures, and it was on this assumption that I wrote the paragraph." The artist of the *Westminster Budget* states that, after making his sketches, he asked the manager of the theatre whether he could give him any material which would assist him in completing his drawings, and that the manager subsequently lent him photographs of two of the representations. These photographs I understand to have been photographs of the pictures on which the representations were based. Under these circumstances, I think that the illustrations in question must be treated as copies of the plaintiff's pictures, and that they are not representations of scenes or objects within the meaning of sect. 2 of the Act 25 & 26 Vict. c. 68. It was much pressed upon me by the learned counsel for the defendants that these illustrations published by the defendants in no way compete with the copies of the pictures authorised by the plaintiff. If this contention be well founded, then the logical conclusion would seem to be that the owner of the copyright of a picture who had never permitted and did not intend to permit the picture to be copied could not restrain any one from making a copy of it. This cannot have been the intention of the Legislature. The answer to that argument appears to me to be that they constitute a violation of the exclusive right conferred by the statute of 1862; that, in the language of Kelly, L.C.B. (*Bradbury v. Hotten*, 27 L. T. Rep. N. S. at p. 455; L. Rep. 8 Ex. at p. 6), the defendants are thereby applying for their own use and for their own profit what otherwise the plaintiff might have turned, and possibly still may turn, to a profitable account. In my opinion, therefore, if these cases be governed exclusively by English law, the plaintiff is entitled to an injunction in each. It was said, however, in the second place, that the plaintiff's rights are to some extent dependent on the law of Germany. This turns on the provisions of the Berne Convention, the International Copyright Act of 1886, and the Order in Council of the 28th Nov. 1887. The Berne Convention is entitled "Convention for protecting effectually and in as uniform a manner as possible the rights of authors over their literary and artistic works." In art. 2 of the Convention there is this provision: "Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now, or may hereafter, grant to natives. The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin. The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the union, that one of them in which the shortest term of

protection is accorded by law. For unpublished works the country to which the author belongs is considered the country of origin of the work." Then the International Copyright Act of 1886 was passed. It states in the preamble: "Whereas by the International Copyright Acts Her Majesty is authorised by Order in Council to direct that, as regards literary and artistic works first published in a foreign country, the author shall have copyright therein during the period specified in the order not exceeding the period during which authors of the like works first published in the United Kingdom have copyright; and whereas at an international conference held at Berne in Sept. 1885 a draft of a convention was agreed to for giving to authors of literary and artistic works first published in one of the countries parties to the convention copyright in such works throughout the other countries parties to the convention; and whereas, without the authority of Parliament, such convention cannot be carried into effect in Her Majesty's dominions, and consequently Her Majesty cannot become a party thereto, and it is expedient to enable Her Majesty to accede to the convention." Sect. 2, sub-sect. 3, is as follows: "The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." An Order in Council was made on the 28th Nov. 1887, in pursuance of the Act, and by clause 1 it was ordered that "the convention as set out in the first schedule to this order shall, as from the commencement of this order, have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same." Clause 3 provides, "The author of a literary or artistic work which, on or after the commencement of this order, is first produced in one of the foreign countries of the Copyright Union shall, subject as in this order and in the International Copyright Acts 1845 to 1886 mentioned, have, as respects that work, throughout Her Majesty's dominions, the same right of copyright, including any right capable of being conferred by an Order in Council under sect. 2 or sect. 5 of the International Copyright Act 1844, or under any other enactment, as if the work had been first produced in the United Kingdom, and shall have such right during the same period, provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein than that which he enjoys in the country in which the work is first produced. The author of any literary or artistic work first produced before the commencement of this order shall have the rights and remedies to which he is entitled under sect. 6 of the International Copyright Act 1886." It is contended on behalf of the defendants that, although in the convention nothing is said as to the extent of right, but duration of the right is alone referred to, the Act and Order do mention both extent and duration of right, and that the plaintiff is not entitled to any greater right in this country than he enjoys in Germany. For the plaintiff it was urged that upon the construction of the Act and order the words "any greater right" must be read as simply equivalent to "any longer time;" or, if this were not so, that the controversy related, not to the right, but to the invasion of it;

and, consequently, that the plaintiff's rights were not governed by German law. It is sufficient to say on this occasion that I am not satisfied of the validity of either of these contentions on behalf of the plaintiff, and, consequently, I am bound to inquire what the German law is. On this, unfortunately, there is a considerable conflict of evidence. There are only the same two witnesses in each case, viz., Dr. Cruesemann for the defendants, and Dr. Samter for the plaintiff; but their evidence in the two cases differs somewhat. The parties would not agree that their various affidavits should be evidence in both actions, and each must, therefore, be considered separately. [His Lordship then referred to the evidence of the German lawyers, and continued:] I adopt for the present purpose the version of the law given by Dr. Cruesemann, and accordingly I have to inquire whether these reproductions in the *Daily Graphic* are "subsidiary to and serve only to illustrate the text" of the accompanying article. My answer is No. I think that, so far from being subsidiary to and serving only to illustrate the text, these illustrations constitute the main feature, and that the text is, in truth, subsidiary to and serves to illustrate them. [His Lordship then referred to further affidavits by the German lawyers filed in the second action, and, continuing, said:] In this case two points are raised—one the same as in the former action; the second that the illustrations are not directly from the original works but from reproductions, which do not fall within the scope of the prohibition contained in German law. As regards the first point, I think that the illustrations in the *Westminster Budget* are even less than in the case of the *Daily Graphic* reproductions in a literary work in which the literature is the principal matter and the illustrations only serve as explanations of the text. The only literary article in the *Westminster Budget* appears in the number of the 9th Feb., and it is illustrated by one picture, which is not complained of; it contains no reference to future illustrations of any kind, and these appear a week later, in the number of the 16th Feb. The case as to the placards of the *Westminster Budget* is stronger still. The second point is one as to which I feel more difficulty, and on it Dr. Cruesemann and Dr. Samter appear to be directly at issue. The question turns on the meaning of paragraph 5, sect. 2. of the statute referred to by both witnesses. Dr. Cruesemann translates it thus: "Every reproduction of a work of the forming arts which has been produced without the consent of the person entitled, with the intent of disseminating the same, is forbidden. A forbidden reproduction is to be considered such if the reproduction has not been created immediately from the original work, but mediately after a reproduction of the same." Dr. Cruesemann states in paragraph 6 of his affidavit of the 16th March that, according to German law, the "living pictures" are not illegal reproductions of the pictures, inasmuch as they could not be disseminated. This is in accordance with the decision of the Court of Appeal as to the English law, and I accept Dr. Cruesemann's evidence on this point. He then says, in paragraph 7, that if the "living pictures" are not reproductions in the sense of the Act, the pictures in the *Westminster Budget* cannot be considered as piracies. Dr. Samter, in paragraph 4 of his affidavit of the 14th March,

CT. OF APP.] HANFSTAENGL v. EMPIRE PALACE LIMITED AND OTHERS (No. 2). [CT. OF APP.]

expresses a contrary opinion. In this state of conflict I think that, as laid down in *Bremer v. Freeman* (10 Moo. P. C. 306, 307), I am at liberty to examine for myself the German statute, which I assume to be correctly translated by Dr. Cruesemann. The question appears to be whether a reproduction capable of being disseminated is forbidden if it is made "mediately after a reproduction" incapable of dissemination, and the better opinion seems to me that it is forbidden, for, on the other view, a reproduction of the picture, designedly made by an arrangement similar to that actually adopted in *Turner v. Robinson* (*ubi sup.*), would be permitted by the law. This seems to me to open a very wide door to infringement. I come, therefore, to the conclusion, on the materials before me, that even according to German law the defendants fail. There will be an injunction in each case to restrain the defendants and their agents from printing, publishing, selling, or offering for sale, or otherwise disposing of, any copies or colourable imitations of the copyright pictures of the plaintiff.

From this decision the proprietors of the *Daily Graphic* appealed, and it was agreed that the appeal should be treated as an appeal from a judgment on the hearing of the action.

Crackanthorpe, Q.C., Grosvenor Woods, Q.C., and H. A. Forman, for the appellants.—The International Copyright Act 1886, sect. 2, sub-sect. 3, provides that "the International Copyright Acts, and Order made thereunder, shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." Therefore, the plaintiff has no greater right than is given him by the law of Germany, which gives him a less extensive right than the law of England. But, even under English law, these defendants have not infringed the plaintiff's copyright. These drawings are sketches of the "living pictures" at the Empire Theatre, which it has been held are not infringements of the plaintiff's copyright. The object of the Act was to protect the commercial value of a painting, and not any sentimental value. The plaintiff must show some damage. These drawings are merely rough sketches which do not represent any of the artistic merits of the pictures, and cannot in any way interfere with the sale of photographs or other copies of them. They are a description of what is going on at the Empire Theatre in the form of pictures, and are merely accessory to the text of the newspaper. They are therefore not copies of the plaintiff's pictures, nor reproductions of the designs thereof, within the Fine Arts Copyright Act 1862, ss. 1 and 6:

- Dicks v. Brooks*, 43 L. T. Rep. N. S. 71, 73, 74; 15 Ch. Div. 22, 35, 36;
Bradbury v. Hotten, 27 L. T. Rep. N. S. 450, 455; L. Rep. 8 Ex. 1, 5, 6;
Chatterton v. Cave, 38 L. T. Rep. N. S. 397; 3 App. Cas. 483;
Gambart v. Ball, 8 L. T. Rep. N. S. 426, 427; 14 C. B. N. S. 306, 316, 317;
Ex parte Beal, 18 L. T. Rep. N. S. 285; L. Rep. 3 Q. B. 387;
Scott v. Stanford, 16 L. T. Rep. N. S. 51; L. Rep. 3 Eq. 718;
West v. Francis, 5 B. & Ald. 737, 743;
Smith v. Chatto, 31 L. T. Rep. N. S. 775.

The plaintiff is not registered in England as the proprietor of the copyright in these pictures, and he cannot maintain this action. The authorities, however, on the point are conflicting:

Fishburn v. Hollingshead, 64 L. T. Rep. N. S. 647; (1891) 2 Ch. 371;

The Hanfstaengl Art Publishing Company v. Holloway, 68 L. T. Rep. N. S. 676; (1893) 2 Q. B. 1.

[LINDLEY, L.J.—We will hear the argument on this point, if necessary, at a later stage of the case.]

Graham Hastings, Q.C. Scrutton, and A. H. Jessel for the plaintiff.—These drawings convey the same idea as the pictures themselves, and therefore they are infringements of the plaintiff's copyright:

Graves' case, 20 L. T. Rep. N. S. 877; L. Rep. 4 Q. B. 715;

Tinsley v. Lacy, 1 H. & M. 747;

Turner v. Robinson, 10 Ir. Ch. Rep. 510;

Ronorth v. Wilkes, 1 Camp. 94, 99.

It makes no difference that they were not copied from the pictures themselves:

Ex parte Beal, 18 L. T. Rep. N. S. 285, 287; L. Rep. 3 Q. B. 387, 394;

The London Stereoscopic and Photographic Company v. Kelly, 5 Times L. Rep. 169;

Cate v. Devon and Exeter Constitutional Newspaper Company, 60 L. T. Rep. N. S. 672; 40 Ch. Div. 500;

Murray v. Bogue, 1 Drew. 353.

It is immaterial that the copy has no commercial value; the plaintiff has a right to say, "You shall not copy my picture in any form."

The Hanfstaengl Art Publishing Company v. Holloway (*ubi sup.*).

It is not necessary to produce the original picture:

Lucas v. Williams, 66 L. T. Rep. N. S. 706; (1892) 2 Q. B. 113.

These drawings do not merely illustrate the letterpress, they are the principal thing. This case must be decided according to the law of this country, and not that of Germany. The International Copyright Act 1886 must be construed in connection with the Berne Convention, which it was intended to carry into effect. The words "greater right" in sect. 2, sub-sect. 3, of the International Copyright Act 1886, and sect. 3 of the Order in Council adopting the Berne Convention, are words of flexible meaning; and then article 2 of the Convention says that authors of any of the countries of the union shall enjoy "the rights which the respective laws do or may hereafter grant to natives," therefore those words are only an equivalent for the words "longer term of copyright," which immediately follow them. This is confirmed by the "Final Protocol." It will cause enormous inconvenience if a plaintiff is obliged, first of all, to prove what his rights are according to the law of his own country, and will cause great delay.

Crackanthorpe in reply.

Bramwell Davis watched the case for the defendant in the second action.

Cur. adv. vult.

June 11.—LINDLEY, L.J.—The plaintiff in this case is a foreign publisher. He claims to be entitled under the International Copyright Acts to the copyright of certain pictures, and he complains that his copyright has been infringed by

the reproduction of those pictures in the *Daily Graphic* newspaper without his consent. He accordingly applied for and obtained an injunction against the proprietors of the *Daily Graphic* restraining them from infringing his copyright. The proprietors have appealed from the order granting this injunction, and by consent this appeal is to be treated as if it were an appeal from a judgment on the trial of the action. The appellants contend (1) that, as the plaintiff is not registered as the proprietor of the copyright in the pictures in question, he cannot maintain this action; (2) that, assuming him to be entitled to the copyright in the pictures, the extent of that right must be determined by the German law and not by the English law; (3) that what the defendants have done is not an infringement of the plaintiff's copyright, even measured according to English law, and is still less an infringement of his copyright if measured according to German law, which, it is contended, confers upon him less extensive rights than the law of England. The first point—viz., the necessity for registration—has been reserved for further argument, for it is known to be difficult; there are conflicting decisions upon it. I shall assume for the present, that registration is unnecessary, and that the plaintiff is entitled to copyright in this country under the International Copyright Acts 1844 to 1886. The first question which then arises is, What is the right conferred by those Acts on the plaintiff? And the second question is, Have the defendants infringed that right? I will address myself to each of these questions in turn. The right conferred by the International Copyright Acts upon the plaintiff depends upon those Acts, and the Order in Council of the 23rd Nov. 1887, made under their provisions, and the Berne Convention of the 9th Sept. 1886 referred to in that Order in Council. These documents are to be found in a convenient form in Mr. Copinger's and Mr. Scrutton's works on Copyright. The short effect of these enactments, Order in Council, and Convention is, that, subject to the limitation imposed by sect. 2, sub-sect. 3, of the International Copyright Act 1886 (49 & 50 Vict. c. 33), the plaintiff is entitled to the rights conferred on British subjects by the Act 25 & 26 Vict. c. 68, which is the Act relating to copyright in paintings, drawings, and photographs. The right conferred by this Act is defined by sects. 1 and 2. [His Lordship read these sections.] The short effect of these two sections, so far as paintings are concerned, is to give to the author of every original painting the sole and exclusive right of copying or reproducing the same and the design thereof, by any means, and of any size, for the period mentioned in the Act. But anything in which there is no copyright may be copied, although somebody else may have copied it before, and may have a copyright in his own copy. See per Lord Blackburn in *Graves's* case (20 L. T. Rep. N. S. 881; L. Rep. 4 Q. B. 722). The limitation of this right, when claimed by foreigners under the International Copyright Acts, is expressed in sect. 2, sub-sect. 3, of the Act of 1886, which provides that, "The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." If, there-

fore, the German law of copyright confers upon the plaintiff a less extensive right in his pictures than the right conferred on British authors by the Act to which I have already alluded, the extent of the plaintiff's rights must be measured by the German standard, and not by the English standard, and must be restricted accordingly. Now, in one respect the German law of copyright is shown by the evidence before us to be less extensive than the English, for by German law copyright in a painting does not extend to reproductions in literary works, provided that such reproductions are explanatory only of some text. It cannot be said as a matter of law that English copyright does not extend to such a reproduction, although whether any particular illustration of a text would amount to an infringement of copyright in a particular painting would depend upon circumstances, as will appear presently. Again, there is evidence to show that the German law confers no copyright in the design of a picture, as distinguished from the picture; but, on the other hand, there is evidence to show that, even by German law, copyright in a picture extends to the idea conveyed by it. I confess that I do not feel sufficiently sure of the German law on this subject to be able to base my decision upon it; nor is it necessary for me to do so, as will appear presently. Having now ascertained the rights of the plaintiff, I proceed to consider whether they have been infringed by the proprietors of the *Daily Graphic*. In order to determine this question it is necessary to know exactly what they have done. They (and by "they" I include their artist) have not seen or copied the plaintiff's pictures, or any painting, engraving, drawing, or photograph of them. What the defendants have done is this: They have sent two persons to the Empire Theatre to describe and sketch what was being represented there. What was seen there was an arrangement of living persons, so dressed and placed as to represent what was represented in the plaintiff's pictures. The idea of the representation at the Empire Theatre was no doubt suggested by and taken from the plaintiff's pictures, and the representation was made as exact as could be with such materials as were procurable. But the representations at the Empire Theatre were not infringements of the plaintiff's copyright in his paintings. This has been already decided. The sketches published in the *Daily Graphic* are rough sketches of those representations, but the sketches are so rough and incomplete that they do not represent any of the artistic merits of the plaintiff's pictures. The sketches merely convey a rough idea of the subjects of the pictures, and of the grouping of their main features. To this extent, but not further or otherwise, it is possible to regard the sketches as copies of the plaintiff's pictures, or as reproductions of the designs thereof. Such being the facts, the question arises whether the publication of the sketches thus made is an infringement of the plaintiff's copyright. The learned judge has held it to be so, but I am unable to agree with him. I will pass over the difference between English and German law, to which I have alluded, with the remark that I am not satisfied that the sketches in the *Daily Graphic* are merely illustrations of the text. Their value to the reader does not depend on the text; and if they were, without the text, infringements of the plaintiff's copyright,

their connection with the text is not close enough to render the German law, as distinguished from the English, applicable to the case. The *Daily Graphic* is an illustrated paper, and the sketches complained of are intended to let people know what is to be seen at the Empire Theatre, and they have a value and importance wholly irrespective of the text which they are said to illustrate. They are principal objects, and not merely auxiliary or subordinate to the text by which it is sought to justify their insertion. Treating the matter as turning on the English law of copyright, conferred by the Act 25 & 26 Vict. c. 68, I am unable to hold these sketches infringements of the plaintiff's rights. The mere fact that the defendants did not know that they were copying the plaintiff's pictures would be immaterial if the sketches ought on other grounds to be regarded as infringements of the plaintiff's rights: (see *West v. Francis*, *ubi sup.*) Moreover, the defendants did, in my opinion, know that the scenes they sketched represented pictures in which someone might have a copyright. I do not decide the case, therefore, on the absence of any intention to copy the plaintiff's pictures, although the fact that the defendants never intended to copy them cannot be wholly disregarded in such a case as the present. Nor do I base my decision on sect. 2 of the statute 25 & 26 Vict. c. 68. The first portion of this section is not applicable, because the "work" there referred to is, I think, explained by the preamble to mean painting, drawing, or photograph, and, if the sketches complained of are copies of the plaintiff's paintings, they are copies of paintings in which he has a copyright. Neither is the second part of sect. 2 applicable to the case, because, although those sketches are sketches of a scene or object, the scene or object is not such as is referred to in the section. The scene or object referred to in the section is something which some one else has copied, and not a scene or object which is itself a copy from a painting in which there is a copyright. Although, therefore, these sketches are made from something in which there is no copyright, and although they represent something which is not itself an infringement of the plaintiff's copyright, yet I am not prepared to say, as a matter of law, that these sketches might not infringe the plaintiff's rights if they could be fairly regarded as reproductions of his pictures, or of the designs thereof. To hold otherwise would be to open the door to indirect piracy, which I am not at all disposed to do. A copy of a foreign copy of an English painting would not, I apprehend, be protected by sect. 2 (see *Murray v. Bogue* (*ubi sup.*), and the judgment of Lord Blackburn in *Ex parte Beal* (18 L.T. Rep. N. S. 287; L. Rep. 3. Q. B. 394) shows that, if a painting is in fact reproduced, it is immaterial what the intermediate steps may be by which the reproduction is arrived at. Again, the case of *Turner v. Robinson* (*ubi sup.*), where the painting of the death of Chatterton was pirated by copying an arrangement made up from the picture, shows what injustice might be done if it were to be held that sect. 2 protected the defendants, if they could otherwise be held to have infringed the plaintiff's rights. My decision is based on different and on wider grounds. Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself

right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion. It is on such considerations as these that fair reviews of literary works, although containing lengthy extracts from them, are not infringements of the copyrights in them; that a representation of part of a dramatic piece, if confined to some comparatively insignificant part of it, is not an infringement of the copyright in such piece. It was by considering the object of the statute, and not only its words, that in *Dicks v. Brooks* (*ubi sup.*) a worsted work copy of an engraving was held not to be an infringement of the copyright therein. Lastly, in this very action this Court, proceeding on the same principle, quite recently decided that the representation at the Empire Theatre, by human beings arranged as shown in a picture, was not an infringement of the copyright in such picture (*ante*, p. 459; (1894) 2 Ch. 1). Moreover, although the intention of an infringer is immaterial, if he copies more than is fair, so that his copy may be used as a substitute for the original, as in *Boworth v. Wilkes* (*ubi sup.*), yet in doubtful cases the extent to which the copying has been carried, and the object sought to be attained by the copies complained of, are matters which must be considered, as is shown by *Bradbury v. Hotten* (*ubi sup.*), and *Scott v. Stanford* (*ubi sup.*). The extent of copying and the degree of resemblance between the original and the copy are always most material, as was pointed out long ago in *West v. Francis* (*ubi sup.*). Guided by the foregoing considerations and by the principles acted upon in the decisions to which I have referred, I ask myself whether these sketches are such copies of the plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures. My answer to this question is, No. The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. They do not represent any of the beauties of the pictures. They are rough sketches, made for a very different purpose and answering a very different purpose, that purpose being, not to give an idea of the plaintiff's pictures, but to give a rough idea of what is to be seen at the Empire Theatre. In giving that idea it is true that they also give a very rough idea of the subject represented in the plaintiff's pictures. It is also true that in *West v. Francis* (5 B. & Ald. 743) Bayley, J. said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." But in applying this to any particular case the degree of resemblance is all important, and the possibility of injury to the plaintiff must be regarded, as was pointed out in *Dicks v. Brooks* (*ubi sup.*). It is only by a great stretch of language and by the exercise of much imagination that these sketches can be regarded as copies of the plaintiff's pictures or the designs thereof. The case is

very unlike *Gambart v. Ball* (*ubi sup.*), where engravings were copied by photography. I cannot bring myself to say that the sketches complained of are, in any fair sense of the words, copies of the plaintiff's pictures or reproductions of the designs thereof within the meaning of the statute to which I have referred. The question, if it came before a jury, would be one of fact for the decision of the jury, on a proper exposition by the judge of the meaning of the statute, and I do not believe that any jury, properly directed, would find these sketches to be copies of the plaintiff's pictures or reproductions of his designs. The defendants have not, in fact, directly or indirectly, intentionally or unintentionally, made any use, certainly not any unfair use, of the plaintiff's pictures or of the brains of their authors. This, in my opinion, settles the case. In order to avoid misunderstanding, I will observe that I do not think that the competition test is necessarily conclusive. I agree that if the defendants had copied the plaintiff's pictures they would have infringed his rights, even although the use made by the defendants of such copies could in no way compete with the sale of the plaintiff's pictures. This was the case in *The Hanfstaengl Art Publishing Company v. Holloway* (*ubi sup.*), where copies of the plaintiff's pictures were only used by being put on pill-boxes, but were, nevertheless, held to be infringements of his rights. Again, unauthorised sketches of pictures made on purpose to convey, and in fact conveying, tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction. But where copying a picture never enters the head of a person who is said to have copied it or to have reproduced its design, where the question is whether a sketch by such a person is or is not a copy or reproduction, then the impossibility of injury by competition may, I think, be fairly considered. The amusing sketches in *Punch* of the pictures in the Royal Academy are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves. The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended. In my opinion, therefore, the appeal must be allowed, and judgment must be entered for the defendants, with costs here and below.

LOPES, L.J.—The substantial question in this case is whether the drawings in the *Daily Graphic* are piratical copies or piratical reproductions of the author's (*i.e.*, the plaintiff's) pictures, or of the designs thereof within the meaning of the statute. This is a question of fact, and if decided in the negative determines this case. I deal with this case as governed by the English law. It is most material in the first place to consider the object of the Act of Parliament (25 & 26 Vict. c. 68), which first gave copyright in paintings, drawings, and photographs, and especially sects. 1 and 2 of that Act, upon the true interpretation of which this case depends. The object of the statute was to protect property, to protect the artistic faculty in painting, drawing, and photographing, and to prevent any interference by reproduction thereof with either the artist's

reputation or the commercial value of his work: (*Gambart v. Ball* (*ubi sup.*); *Dicks v. Brooks*, 43 L. T. Rep. N. S. 74; 15 Ch. Div. 36, per Baggallay, L.J.) There must be no such reproduction either mediately or immediately. The artist is to be protected in respect of that which is his own meritorious work. A reproduction of his design or part thereof, by any means, and in any size, is an infringement. But there must be such a reproduction as I have described. It is not every reproduction that amounts to an infringement. Thus in *Dicks v. Brooks* (*ubi sup.*) a Berlin woolwork pattern was held not to infringe the copyright in an engraving, and there are expressions in the judgment in that case with regard to what constitutes a copy which appear to be most appropriate to the case under consideration, and which I shall presently refer to. The short history of the drawings in the *Daily Graphic* is as follows: Artists instructed by the managers of the *Daily Graphic* visited the Empire Theatre and made sketches of the living representations of the plaintiff's pictures, which were there to be seen in the shape of *tableaux vivants*, and from these sketches were made drawings, of which reproductions by mechanical means appeared in the *Daily Graphic* of the 8th Feb. 1894. These are the infringements complained of. It has been held that the living representations of the plaintiff's pictures at the Empire Theatre are not infringements. That the drawings in question are not taken directly from the plaintiff's pictures, but from living representations of them, is immaterial, provided they are copies of the plaintiff's pictures within the meaning of the statute. Nor is it necessary that there should be knowledge on the part of those charged with infringement that they were copying the plaintiff's pictures. In this case admittedly they knew they were copying the pictures of some artist. But are these copies within the meaning of the Act of Parliament? Are they piratical imitations of the plaintiff's pictures, imitations of anything which was the artist's meritorious work? They may correctly be described as rough, rude drawings, devoid of any artistic merit, there is no attempt to reproduce the merits of the originals; no attempt at art, much less fine art; that which is attractive in the originals is absent, and they appear to me to have little more claim to be regarded as copies of the originals than the Berlin woolwork pattern had to be regarded as a copy of Millais' picture of "The Huguenots," in the case of *Dicks v. Brooks*. In that case James, L.J. said (43 L. T. Rep. N. S. 73; 15 Ch. Div. 35): "Nobody would ever take it to be the print, nobody would ever buy it instead of the print. Nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print, *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain. . . . Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the appellant's pattern is not a copy or a piracy of any part of that which constituted the

real merit and labour of the engraver of the defendant's print." Substituting the word picture for print, and drawings for pattern, every word of this judgment appears to me applicable to the present case. No doubt there is a resemblance between the drawings and the plaintiff's pictures, but not that kind of resemblance struck at by the statute. Bayley, J., in *West v. Francis* (*ubi sup.*), defined a copy to be "that which comes so near to the original as to give every person seeing it the idea created by the original." Can it be said that these drawings come so near to the originals as to give those seeing them the same idea as that which would be created by the originals? Sect. 2 of the Act has no application to the present case. Holding, as I do, that these drawings are not infringements according to English law, it is unnecessary to say anything with regard to the German law, though I agree with what has been said by Lindley, L.J. In my judgment these drawings in the *Daily Graphic* are not copies of the plaintiff's pictures or reproductions of their design within the meaning of the statute, and therefore the appeal must be allowed.

DAVEY, L.J.—The principal question in this case is whether, in the language of the Fine Art Copyright Act 1862 (25 & 26 Vict. c. 68), the defendants have infringed the plaintiff's exclusive right of copying, reproducing, and multiplying certain pictures and the design thereof. It is unnecessary for me to repeat the statement of the facts of this case, which has already been made. I will only observe that the fact that the sketches complained of were made from, and were intended to describe, the representations at the Empire Theatre, would not prevent their being infringements of the plaintiff's copyright if such sketches and reproductions are copies of the plaintiff's pictures or the design of them within the meaning of the Act. Now the first matter that one has to consider in these cases is, what was the object and intention of the statute. As was very well pointed out in the case of *Gambart v. Ball* (*ubi sup.*) and *Dicks v. Brooks* (*ubi sup.*), the object of these Acts is both to protect the reputation of the artist from being lessened in the eyes of the world, and also to secure him the commercial value of his property; to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. The pictures of which these sketches are said to be a piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. As objects of attraction they depend not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated. The sketches before us are mere outlines, descriptive, more or less accurate, of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art, and constitutes their claim to protection under the Act. What is a copy? I answer in the language of Bayley, J., in *West v. Francis* (*ubi sup.*): "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." Of course there may be a coarse or clumsy copy, but in my opinion it is im possible to

say that these woodcuts give the idea created by the originals, at any rate with such fulness or completeness as to make them copies or reproductions. The point is not that these things are bad copies, but that they are not intended and do not purport to reproduce the value and essential qualities of the pictures as works of art, and are, therefore, not copies or reproductions at all within the meaning of the Act. But it is said the Act protects not only the picture but the design. These words are probably inserted in order to bring within the protection of the Act a copy through a different medium—e.g., a black and white copy of a picture made by the engraver, the photographer, or the draftsman—but it must still be the design of the picture, and not a mere outline or descriptive sketch of it. The difference may at once be seen by comparing one of the photographs which have been shown to us with the woodcut or sketch complained of, and would no doubt be more striking if the sketch were compared with the picture itself which is the subject of copyright. I do not think that sect. 2 of the Fine Arts Copyright Act 1862 will assist the defendants. I agree that "work" in that section means work of art, and I think that the first part of the section is directed to save the imitation or copies of works of art in which there is no copyright; and the second part is directed to the representation of scenes and objects which may previously have been represented by others, so that a man shall not by first painting a particular landscape or figure acquire an exclusive right to the representation of that landscape or figure, although of course he may have copyright in his own representation of it. I also agree that the German law, as I understand it, does not in the circumstances of this case restrict or narrow the plaintiff's rights. I do not think that we could properly hold that these sketches were merely for illustration of the written text. I think it would be more true to say that the text is accessory to and explanatory of the pictorial description of the performance at the Empire Theatre. But for the reasons I have given I hold that these sketches are not copies within the meaning of the Act.

Solicitors: for the plaintiff, *H. Bentwitch*; for the proprietors of the *Daily Graphic*, *L. Basil Thomas*; for the proprietors of the *Westminster Gazette*, *Mellor, Smith, and May*.

April 30 and June 16.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

HOOD-BARES v. CATHCART (No. 1). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Married woman—Judgment against—Execution—Separate estate with restraint on anticipation—Income not due at date of the judgment—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1, sub-sects. 2, 4; sect. 19.

A judgment against a married woman cannot be enforced against any income of her separate estate, as to which she is restrained from anticipation, which is not due at the date of the judgment; and, therefore, an order for a receiver of

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

income of such separate estate, which becomes due after the date of the judgment, cannot be made by way of equitable execution, though the income is due and in arrear when the order is applied for.

THIS was an appeal by Mrs. Cathcart from an order of the Divisional Court (Charles and Bruce, JJ.), made on the 19th April, affirming an order of Wright, J., made on the 3rd April, appointing a receiver of rents of property belonging to Mrs. Cathcart.

On the 20th April 1893 the plaintiff recovered judgment for a large amount against Mrs. Cathcart, a married woman sued in respect of her separate estate. The action was to recover money due upon a contract.

The judgment was in the usual form of a judgment against a married woman, as settled in *Scott v. Morley* (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120).

Mrs. Cathcart was, at the date of the judgment, tenant for life of certain real estate, to the rents of which she was entitled for her separate use, subject to a restraint on anticipation.

On the 3rd April 1894, the judgment not being satisfied, and there being rents then due and in arrear from tenants of the estate, an order was made by Wright, J., at chambers, appointing a receiver of those rents by way of equitable execution.

Mrs. Cathcart appealed against the order, and the Divisional Court (Charles and Bruce, JJ.) dismissed the appeal.

Mrs. Cathcart appealed.

The appellant appeared in person.

Bartley Denniss for the respondent.

Cur. adv. vult.

DAVEY, L.J.—This is an appeal by Mrs. Cathcart, from an order of the Divisional Court, refusing to set aside an order of Wright, J., of the 3rd April 1894, appointing one Rodwell receiver of the rents, profits, and moneys then due, and in arrear, from the tenants of Mrs. Cathcart's estates, in respect of the judgment debt of the 20th April 1893, and interest thereon. The appeal was heard on the 30th April, before the Master of the Rolls, Smith, L.J., and myself. The facts which give rise to the appeal are as follows: On the 23rd April 1893 judgment was recovered against Mrs. Cathcart, a married woman, sued in respect of her separate estate for a large sum of money and costs. The action was founded on contract, and the judgment is in the form now usual in such cases, and settled by this court in *Scott v. Morley* (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120). Mrs. Cathcart was at the date of the judgment, and is, tenant for life of a real estate, to the rents of which she is entitled for her separate use without power of anticipation. On the 8th Feb. 1894, there being then rents in arrear, an order was made for a receiver of such rents, but the judgment was not thereby satisfied. On the 25th March 1894 another quarter's or half-year's rents became due. On the 3rd April 1894 the order complained of was made, appointing a new receiver for the purpose of getting at the rents which at the date of the order had become in arrear and due from the tenants, and the question is whether any

arrears of rent becoming due after the date of the judgment, as to which Mrs. Cathcart was at that date restrained from anticipating, can be taken by means of a receiver or sequestrator appointed after they became due, or by any other means, in satisfaction of this judgment. This point was not considered in the court below, probably because Mrs. Cathcart insists on conducting her own case, and the point was not, therefore, brought to their attention, and for the same reason we have not had the advantage of having it argued before us, and we have been obliged to investigate it for ourselves. So far as we can ascertain, the point has never been raised in this court. It is one of considerable importance in all cases not coming within sect. 2 of the statute 56 & 57 Vict. c. 63. By sect. 1, sub-sects. 2 and 4, of the Married Women's Property Act 1882, it is enacted as follows:—(2.) "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*. . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." (4.) "Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only her separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." By sect. 19 it is enacted that: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, or shall interfere with or render inoperative any restriction against anticipation at present attached to or to be thereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." As regards debts contracted after marriage, therefore, which is the present case, the restraint on anticipation is to be effectual. Before the Act it was held by this court, in *Pike v. Fitzgibbon* (44 L. T. Rep. N. S. 562; 17 Ch. Div. 454), that the general engagements of a married woman can be enforced only against so much of the separate estate to which she was entitled free from any restraint on anticipation at the time when the engagements were entered into, as remains at the time when the judgment is given, and not against separate estate to which she became entitled after the time of her engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation. It has been seen that the law as laid down in *Pike v. Fitzgibbon* (*ubi sup.*) has been altered by sect. 1 (4) of the Married Women's Property Act, so far as relates to after-acquired separate estate, but has not been altered as to the restraint on anticipation. Consistently with the ruling in *Pike v. Fitzgibbon*, it was held by this court, in *Re Glanville* (54 L. T. Rep. N. S. 411; 31 Ch. Div. 532), that the court would not order a prospective charge on future income of a

CT. OF APP.]

HOOD-BARES v. CATHCART (No. 1).

[CT. OF APP.]

married woman restrained from anticipation for costs recovered in an action by a married woman suing by a next friend before the Act, and the opinion was expressed that nothing could be taken in execution on a judgment for costs against a married woman, recovered in an action by her suing by a next friend, but what she was entitled to at the date of the commencement of the action. "If," said Cotton, L.J., "a married woman cannot even in a case of fraud give by contract a right against her separate estate she cannot give a right against it by institution of a suit." In *Cox v. Bennett* (64 L. T. Rep. N. S. 380; (1891) 1 Ch. 617) it was held by this court that under a judgment for costs, in an action by a married woman suing under the Married Women's Property Act without a next friend, payment of them can be enforced against any arrears of her separate income, although subject to a restraint against anticipation, if due at the time when the order to pay costs is made, and not only against her separate property to which she is entitled at the commencement of the proceedings. Some of the reasoning of one of the learned judges suggests the inference that a distinction may be drawn between an order for payment of costs and a judgment for debt or damages in an action on contract on the ground that in the former case the obligation on the married woman arises only upon the judgment. It has also been suggested on the same ground that a distinction may be drawn between debt and damages recovered in an action on contract, and damage recovered in an action founded on tort. The point has not been argued before us, and it is not necessary to express an opinion upon it for the purposes of this case. Whenever the point comes to be considered perhaps the answer to the suggestion may be found in the directions contained in the Act of 1882 for the court to order payment out of the married woman's separate estate, which *prima facie* means the separate estate at her disposal at the date of the order. It has been already held, in *Holby v. Hodgson* (62 L. T. Rep. N. S. 145; 24 Q. B. Div. 103), that a judgment debt due to a married woman might be attached by her judgment creditor although the judgment in favour of the married woman (which was for damages in an action for malicious prosecution) was not recovered until after the judgment against her. The question, therefore, may be put in this way: Are the arrears of separate income restrained from anticipation, becoming due after the date of the judgment, to be treated as separate property acquired after that date free from that restraint; or is the effect of the restraint to exclude income so circumstanced altogether from the operation of the judgment? There are authorities directly in point, though not binding on this court, which it will be convenient to consider before expressing an opinion. In *Claydon v. Finch* (28 L. T. Rep. N. S. 101; 15 Eq. 266), before the Act, Bacon, V.C. ordered a dividend on a fund in court, to which a married woman was entitled subject to restraint, to be paid to a sequestrator under a sequestration taken out after the dividend had become due to enforce orders for payment of costs made by the Divorce Court previously to that date. And in *Re Andrews* (53 L. T. Rep. N. S. 422; 30 Ch. Div. 159), after the passing of the Act, Pearson, J. made an order giving trustees leave to retain costs, ordered to be paid by a married woman,

out of her future income notwithstanding a restraint on anticipation. On the other hand, in *Stanley v. Stanley* (37 L. T. Rep. N. S. 777; 7 Ch. Div. 589), in 1878, Malins, V.C. refused to order costs recovered against a married woman under a judgment against her husband and herself by a mortgagee of his life estate, to be charged on her separate income notwithstanding that she had been a party to fraudulently concealing the restraint. It is not expressly stated whether the dividend sought to be charged in this case was due and in arrear, but apparently it was. In *Chapman v. Biggs* (48 L. T. Rep. N. S. 704; 11 Q. B. Div. 27), in 1883, the Divisional Court (Watkin Williams and Mathew, JJ.) discharged two orders to attach income of a married woman restrained from anticipation in the hands of her trustees. In one case the income had been received by the trustees, and was in arrear at the date of the order nisi; and in the other case the income came to the hands of the trustees two days later. The court did not think this made any difference. Watkin Williams, J., in giving judgment, said: "It seems to me that, if this form of execution could be obtained under the circumstances of this case, the restraint on anticipation could always be evaded. It is admitted that, at the time of giving the promissory note, the female defendant could not legally charge the income of the trust fund to accrue due thereafter, but to allow this sum of money to be attached would in substance be allowing her to anticipate." In *Draycott v. Harrison* (17 Q. B. Div. 147) the Divisional Court (Mathew and Smith, JJ.) allowed an appeal against an order made by a County Court judge against a married woman under sect. 5 of the Debtors Act. The woman had a separate income subject to a restraint, and had received income not due at the date of the judgment. The court held that the income so received was not applicable to the satisfaction of the judgment, and on that ground allowed the appeal. Mathew, J. said: "I think this case is not brought within the intent and meaning of the Act, for the reason that, if a married woman were liable to be committed for nonpayment of the judgment debt out of her separate property which she was restrained from anticipating, the equity doctrine that a judgment against a married woman can be enforced only against such of her separate property as is not subject to restraint upon anticipation would practically be got rid of. In every case the creditor need only wait until the debtor had received money from her trustees, and then apply for an order of committal. In that way the restraint upon anticipation would indirectly, but inevitably, become of no effect." These cases, therefore, are directly in point. The case of *Hyde v. Hyde* (59 L. T. Rep. N. S. 529; 13 P. Div. 166), when examined, has no direct bearing upon the point before us, as in that case the sequestration was not to enforce a previous judgment but a process of contempt, and was, in fact, the institution of the particular proceedings. It was, however, held that the sequestration could not, during coverture, be enforced against future income. In this state of the authorities we have to say what the rule shall be. The question must be determined by the construction of the Married Women's Property Act 1882, ss. 2 and 19, having regard to the previous state of the law, and to the

amendments of it made by the Act. It has been argued in some cases that the restraint on anticipation does not fetter the power of the court to make an order for payment out of a married woman's separate estate *in invitam*, but merely restrains her own power of alienation. On the other hand, it has been said that the jurisdiction of the court is measured by the married woman's own power. The former argument is, in our opinion, concluded by authority binding upon us, and also leaves out of sight the true nature and object of the restraint. The restraint on anticipation is an anomaly introduced by the Court of Chancery for the protection of the married woman against her own acts and her own weakness. She cannot override it by any engagement entered into by her, however solemn, or however much to her particular advantage in the circumstances of the case; and, on the other hand, it has been frequently held that the court cannot make her separate income, restrained from anticipation, liable to redress a fraud committed by her, however gross. It would therefore be contrary to principle, in our opinion, to hold that, either by suing as plaintiff or by doing any act or suffering any default which renders her liable to be sued, she can free her property from the fetter. So far from modifying the effect of the restraint as it existed before the Act, it appears to us that the Act carefully preserves it to the same extent as it existed previously. But, in truth, this point seems to us concluded by the form of judgment which was adopted and settled as the proper form by this court in *Scott v. Morley* (*ubi sup.*). The court thereby held itself bound by the restraint on anticipation to as full an extent as the married woman herself. On the construction of the judgment, therefore, we hold that property which was then subject to restraint is excluded from the execution on the judgment. If we were to allow successive receivership orders to be issued as the rents or income not due at the date of the judgment fell due, we should be giving an anticipatory operation to the judgment; we should be so far overriding the restraint on anticipation; and we should, in our opinion, be giving a wrong construction to the judgment. There is no magic in making a new order on each occasion. If the object can be effected in substance it might as well be done by one order empowering the receiver or sequestrator to receive the income or rents as they fall due. We are of opinion that full effect may be given to the provisions of the Married Women's Property Act by holding that the court has jurisdiction to order the debt, damages, or costs recovered against a married woman to be paid out of any separate estate which, at the date of the judgment, she had power to make liable for her engagements, including any after-acquired separate estate which is not subject to a restraint against anticipation; but that the court has no jurisdiction to order payment out of separate income which at the date of the judgment she is restrained from anticipating, although such income may be in arrear or in her hands when execution is sought to be levied against it. For the purposes of this judgment we have assumed that the restraint on anticipation was gone as to the rents in arrear, but we must not be taken to decide that point or express an opinion upon it. We have preferred to deal with the larger question. For these reasons we are of opinion that

the order appealed against should be discharged with costs.

Appeal allowed.

Solicitors for the respondent, Hood-Barrs and Co.

May 28 and June 16.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

HOOD-BARRS v. CATHCART (No. 2). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Married woman—Judgment—Separate property subject to restraint on anticipation—Execution—Receiver—Arrears of income accrued due after the date of the judgment—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1, sub-sects. 2, 4; s. 19.

Where judgment has been obtained against a married woman who has separate estate subject to a restraint on anticipation, the judgment creditor cannot obtain an appointment of a receiver of arrears of her income from such separate estate which accrued due after the date of the judgment.

THIS was an appeal from a judgment of the Queen's Bench Division (Charles and Bruce, JJ.) affirming an order of Lawrance, J. at chambers appointing a receiver of certain rents, at that time received by the defendant's agent, in execution of a judgment obtained by the plaintiff against the defendant a married woman who was possessed of separate estate subject to a restraint on anticipation.

The judgment was in the usual form in such a case, as settled in *Scott v. Morley* (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120).

The facts appear sufficiently in the judgment.

May 28.—The defendant in person.

Bartley Denniss for the plaintiff.

Cur. adv. vult.

June 16.—KAY, L.J. delivered the following written judgment of the Court (Lord Esher, M.R., Kay and Smith, L.JJ.).—On the 23rd April 1893 judgment was obtained in an action against Mrs. Cathcart for 1723l. 7s. 9d. and costs to be taxed, and the judgment proceeded thus: "Such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise, and execution herein is limited to the separate property of the said defendant not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Women's Property Act (1882), the property shall be liable to such execution notwithstanding such restraint." On the 11th April 1894 Lawrance, J., in chambers, appointed W. J. Rodwell receiver to receive the rents, profits, and moneys which became due to Mrs. Cathcart on the 25th March 1894 from the tenants of her Stourbridge and Wootton estates, and were received by Mr. F. W. Lewis as the defendant's agent, in respect of the judgment, and he was to pass his accounts and pay the balance into court, and it was ordered that the plaintiff was not to take the money out of court without the leave of a judge. On the 12th April 1894 Mrs. Cathcart gave notice of appeal from that order. On the 23rd that appeal was dis-

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

missed with costs, and execution upon that order was limited to her separate estate not subject to any restriction against anticipation, unless, by sect. 19 of the Married Women's Property Act 1882, the property should be liable to such execution notwithstanding such restriction. From that order Mrs. Cathcart now appeals to this court. The short question is, whether a receiver can be obtained of arrears of income of a married woman which accrued due after the date of the judgment where such income was settled to the separate use of the married woman with the usual restraint upon anticipation. The restraint of a married woman from anticipating her separate estate was an invention, it is said, of Lord Thurlow for the protection of a married woman. It has always been carefully guarded against invasion of any kind. In *Pike v. Fitzgibbon* in 1881 (42 L. T. Rep. N. S. 525; 44 L. T. Rep. N. S. 562; 14 Ch. Div. 837; 17 Ch. Div. 454) the question was, whether future separate property as to which there was no such restraint could be reached, and it was there held that, if at the date of the married woman's contract she had no separate property free from such restraint, an action against her on that contract must fail. She had no power to contract except as to the free separate property to which she was entitled at the time of making the contract. Consequently, if she had no such property at the time when she made that contract, any separate property which she might afterwards acquire could not be affected by the action. So also if she had free separate property at the time of the contract, only that property could be reached, and not any which she might afterwards acquire. The Married Women's Property Act 1882 was passed after this decision. Sect. 1, sub-sect. 1, enables a married woman to hold, acquire, and dispose of any real or personal property "as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee." Sect. 1, sub-sect. 2, provides that "in respect of and to the extent of her separate property" she may contract and she may sue or be sued in contract, tort, or otherwise "in all respects as if she were a *feme sole*;" and by sub-sect. 3 every contract entered into by her is to be deemed to be a contract with respect to and to bind her separate estate, unless the contrary be shown. Sub-sect. 4 is in these words: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Sect. 19 provides that nothing in the Act "shall interfere with or render inoperative any restriction against anticipation." The effect of sect. 4 is to enable a creditor of a married woman to obtain satisfaction of his claim, not only out of any free separate property which she had at the time of contracting the debt, but also out of any she may afterwards acquire. So if judgment be obtained in an action not for breach of contract but in tort or otherwise (sect. 1), execution may be had not only against the free separate property which she had at the date of the judgment, but also against any she may acquire after that date. Does this apply to separate property as to which at the time of the contract and judgment she was restrained from anticipation? Of course it does not until the

restraint is removed. But when that restraint is removed, if it is removed, by the income becoming payable, can it be intercepted under this statute before the actual receipt of it by the married woman? The so-called restraint upon anticipation is a restraint upon alienation. The ordinary form of this restriction in a settlement directs payment of income to the wife for her separate use "and so as that the said (wife) shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation, and that her receipts only shall be effectual discharges for the same." Any alienation before the fund reaches the wife's hands would seem to be forbidden, although the income might be due to her when the alienation was attempted. The alienation of a capital sum to which the wife is absolutely entitled may be prevented in like manner: (*Baggett v. Meux*, 1 Coll. 138; affirmed, 1 Ph. 627; *Re Boven*, 50 L. T. Rep. N. S. 796; 27 Ch. Div. 411). There are cases in which the restraint has been treated as being at an end as to income which has become due, but is in the hands of a tenant or trustee and has not been paid over to the married woman: (*Pemberton v. M'Gill*, 1 Dr. & Sm. 266.) But in these the restriction must have been peculiarly worded. If the restriction in this case is in the ordinary form, a short answer to the claim to appoint a receiver would be that, notwithstanding that the rents are in arrear, they are still subject to the restraint upon alienation, and therefore the creditor could not attach them by any means. But suppose that this is not so, and that in this case income after it becomes due loses the restraint and is free separate property, is it not the intention of sect. 19 to prevent this income being affected? Before the Act after-acquired separate property could not be affected at all. The Act enables this to be done, but provides that nothing in the Act shall interfere with or render inoperative any restraint on anticipation. If arrears of income which accrue due after the judgment can be reached in this way, the Act will have interfered with the restraint on anticipation as hitherto understood (see note on p. 112 of *Meryon White & Blackburne's treatise upon the Act*). The Act of 1882, which for the first time rendered future separate property liable to be affected, contains this proviso in sect. 19. If the words of the proviso had been that nothing in the Act should affect separate property as to which there was a restraint upon anticipation, the same argument might still have been raised, because at the time when the receiver was appointed in this case it might be contended that the restraint had ceased to be operative. But this mode of intercepting the income before it reaches the hands of the married woman would enable a vigilant judgment creditor to defeat the object of the restraint in such cases. This is an interference with such restraint which, if it had been intended, should have been expressed in the Act in explicit terms. In the absence of an express enactment to that effect the true conclusion is, that this is not the intention or effect of the statute. But it is necessary to examine the decisions which relate to the question before and since the passing of the Act of 1882. One of the first cases on the subject seems to be *Claydon v. Finch* in 1873 (28 L. T. Rep. N. S. 101; L. Rep. 15 Eq. 266), where on the 11th Jan. 1872, a married woman was ordered to

pay the costs of a suit instituted by her husband for restitution of conjugal rights, and a year afterwards, on the 5th Jan. 1873, a dividend became due upon a fund in court which was settled to her separate use without power of anticipation. On the 9th Jan., before the dividend was paid, a writ of sequestration was issued, and Bacon, V.C. ordered the costs to be paid out of such dividend on the petition of the sequestrators. This was before the Act of 1882. In *Re Andrews*, in 1885 (53 L. T. Rep. N. S. 422; 30 Ch. Div. 159) Pearson, J. ordered that trustees of income settled for the separate use of a married woman without power of anticipation by a will which came into operation in 1884 should be allowed to retain out of such income their costs of an action against them by her. In *Re Shakespear*, in 1886 (53 L. T. Rep. N. S. 145; 30 Ch. Div. 169), it was held that in the case of a contract by a married woman since the Act of 1882 she must have separate property at the time of the contract, otherwise she cannot contract so as to bind future separate property. If she had such property at the time of the contract, and afterwards committed a breach of the contract, and proceedings are taken against her for such breach, any separate property which she may have at the date of the judgment will be liable for the breach of contract. In *Palliser v. Gurney*, in 1887 (19 Q. B. Div. 519), the decision in *Re Shakespear* was approved by the Divisional Court, and it was decided that when anyone sues a married woman for breach of contract he must prove that she had separate property at the time of the contract. This was approved and followed by the Court of Appeal in *Stogdon v. Lee* (64 L. T. Rep. N. S. 494; (1891) 1 Q. B. 661). Such separate property must, of course, be free from any restraint upon anticipation at the time of the contract: (*Harrison v. Harrison*, in 1888, 60 L. T. Rep. N. S. 39; 13 P. Div. 180; *Leak v. Driffield*, in 1889, 61 L. T. Rep. N. S. 771; 24 Q. B. Div. 98.) In *Re Glanvill*, in 1885 (54 L. T. Rep. N. S. 411; 31 Ch. Div. 532), on further consideration, an action brought by a married woman was held to be useless and improper, and the next friend of the plaintiff was ordered to pay the costs of the defendants. He could not be found, and the Court ordered that such costs should be retained out of income of the married woman which was due to her, and was in the hands of the defendants, who were her trustees, but which she was restrained from anticipating. The suit had been commenced before the Married Women's Property Act 1882, and Cotton, L.J., noticing (on page 539) that the only income then due had accrued since the order, on further consideration, allowed the appeal. The other Lords Justices concurred, all of them reserving their opinion as to the effect of the Act of 1882, if the action had been commenced after that statute. This decision seems to overrule *Claydon v. Finch* (*ubi sup.*). In *Hyde v. Hyde*, in 1888 (59 L. T. Rep. N. S. 529; 13 P. Div., 166), sequestrators under like circumstances were held entitled to arrears due at the time when an order for sequestration was made in 1888; but it was decided that the sequestrators had "no right to demand any separate income not already actually due at the time of the order, as regards which there was an effectual restraint upon anticipation." The sequestration in that case was not to enforce payment of money previously owing, but because the

married woman had committed a contempt by contumaciously refusing to obey an order of the Divorce Court to deliver up her children. The sequestration, therefore, only created a pecuniary obligation from the date of the order. In *Cox v. Bennett* (64 L. T. Rep. N. S. 330; (1891) 1 Ch. 617) the married woman in 1890, under the power conferred by the Act of 1882, commenced an action without a next friend in the Queen's Bench Division against the trustees of her father's will to recover 840*l.* This action was stayed, and she then took out a summons for the same purpose in a suit for the administration of her father's property. The summons and action were both dismissed, with costs, in July and Aug. 1890, execution being limited to her separate property not subject to any restraint on anticipation "unless by virtue of sect. 19, of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restraint." At the time of such dismissal of the summons the trustees had 304*l.* income in hand, and at the dismissal of the action an additional sum of 55*l.* 3*s.* 7*d.* The trustees applied to be allowed to retain their costs of the summons out of the former sum, and of the action out of both sums. It was held that they might do so, chiefly on the ground that the proceedings had been taken by the married woman after the passing of the Married Women's Property Act, 1882, which distinguished the case from *Re Glanvill* (*ubi sup.*), Lindley L.J. intimating that, in his opinion, if a married woman institutes proceedings since the Act, and is ordered to pay costs, having no separate estate when the proceedings commenced, if at any time afterwards you can find arrears that can be attached, you may attach those arrears, although of course you cannot attach the future income which she is restrained from anticipating, the Act being intended to alter, in that respect, the law as laid down in *Pike v. Fitzgibbon* (*ubi sup.*). It was pointed out, however, in the same case that this consideration was hardly necessary to the decision, because the obligation to pay costs to the opposite party could not exist at the time of bringing the action, when none of the costs were incurred. It could only arise when the order for payment of such costs was made, and the question was as to part of the separate income which was in arrear at the date of that order. In *Whitaker v. Kershaw*, in 1890 (63 L. T. Rep. N. S. 203; 45 Ch. Div. 320), a married woman took by assignment from her husband, the residuary estate of his deceased father. Part of it consisted of shares in a limited company. The residue was handed over to her, and subsequently a call was made upon the shares which the executors of the father were compelled to pay. After realising the shares they brought the action in 1888 for the balance due to them and the costs incurred. At the time of bringing the action the married woman had no free separate estate, but had some as to which she was restrained from anticipation. The Court of Appeal, recognising the fact that the action was not for any breach of contract, held that, under the words, "or otherwise," in sect. 1, sub-sect. 2, of the Act of 1882, she could be sued, and also decided that her possession of separate estate as to which she was restrained from anticipation was sufficient; Cotton L.J. saying: "It was urged that Mrs. Kershaw had no separate estate. That is not so. She has

CT. OF APP.]

Re HARRISON; HARRISON v. HIGSON.

[CHAN. DIV.]

separate estate, and although the remedy against it may be defeated by the restraint on anticipation, still she has separate estate." Fry L.J. said: "There is nothing that deserves consideration in that point." It seems difficult to reconcile this decision with *Palliser v. Gurney* (*ubi sup.*), and *Stogdon v. Lee* (*ubi sup.*), and *Leak v. Driffield* (*ubi sup.*). In *Pelton Brothers v. Harrison* (65 L. T. Rep. N.S. 514; (1891) 2 Q. B. 422,) the married woman was sued after the death of her husband, and the judgment was in the same form as in the present case. She had free separate property during the coverture. The Court of Appeal discharged an order for a receiver on the ground that the judgment was limited to her separate property, and being discoverable at the time of the action and the judgment, she had no separate property, and the property which she then had was not within the terms of the judgment. In *Stanley v. Stanley*, in 1878 (37 L. T. Rep. N. S. 777; 7 Ch. Div. 589), the married woman joined with her husband in 1873 in obtaining a mortgage of her separate estate, fraudulently suppressing the fact that she was restrained from anticipating it. Judgment was entered against both in 1873, and a charging order was obtained "to charge the next accruing dividend" upon her separate property. The dividend was not due at the date of the charging order. This order was discharged. *Claydon v. Finch* (*ubi sup.*) was cited, but Malins, V.C., although he found that the wife was a party to the fraud, said: "Notwithstanding this I am bound to hold that in no case and by no device whatever can the restraint upon anticipation be evaded. In *Chapman v. Biggs*, in 1883 (48 L. T. Rep. N. S. 704; 11 Q. B. Div. 27), the action was upon a promissory note signed by husband and wife. An order was made in chambers to attach in execution income accrued after judgment belonging to the married woman for her separate use which she was restrained from anticipating. The order was rescinded by the judge, and his decision was supported by the Divisional Court on the ground that, if the attachment was allowed, the restraint upon anticipation could always be evaded. The dates are not given, so that it does not appear whether the promissory note and judgment were before or after the Act of 1882. In *Draycott v. Harrison*, in 1886 (17 Q. B. Div. 147), judgment on a bill of exchange dated in 1884 was recovered against a married woman for 33l. She had a small income for her separate use without power of anticipation, and the County Court judge made an order for her committal under the Debtors Act 1869, sect. 5, to compel her to pay out of income which she had received. This was reversed by the Divisional Court on the ground that there was no jurisdiction to make such an order, because it would indirectly make the restraint of no effect. In *Re Lumley* (W. N., 1894, p. 77, corrected at p. 80; since affirmed W. N., 1894, p. 114), North, J. held that where an order was made against a married woman for payment of costs the material date was the date of that order, and a sequestration ought not to be issued to obtain income, subject to restraint, which accrued due after that date. Since the Act of 1882 a judgment in the form used in this case, which was settled in *Scott v. Morley*, in 1887 (57 L. T. Rep. N. S. 919; 20 Q. B. Div. 120), is a judgment against the married woman which can be made the foundation

of a garnishee order, and this was allowed against a sum recovered by the married woman after the date of the judgment in an action by her against a third person for malicious prosecution, which was her separate property without any restraint on anticipation: (*Hollby v. Hodgson*, in 1889 (62 L. T. Rep. N. S. 145; 24 Q. B. Div. 103.) But such a judgment cannot be enforced against a married woman by a bankruptcy notice: (*Re Hannah Lynes* (68 L. T. Rep. N. S. 739; (1893) 2 Q. B. Div. 113). In the case of Government stock or shares in public companies a charging order against a married woman may likewise be obtained (*Harrison v. Harrison* (*ubi sup.*); but whether it would be granted against arrears of income when such stock or shares are subject to a restraint on anticipation must depend upon the answer to the question now to be considered. On the whole it does not appear that this question has been deliberately decided in any case so as to be binding upon the Court of Appeal. In our opinion it was not intended by the Act of 1882 to enable a judgment against a married woman to be enforced against arrears of her separate estate accruing due afterwards, as to which she was restrained from anticipation, either by a receiver, sequestration, charging order, or any kind of process. We are therefore of opinion that this order for a receiver should be discharged with costs here and below, and any money in the receiver's hands or which has been paid into court by the receiver should be paid out to Mrs. Cathcart. With respect to contracts entered into by a married woman after the 5th Dec. 1893, it is enacted by the Married Women's Property Act 1893 that they may have effect against her free separate property subsequently acquired, though she has none at the date of the contract, and may be enforced by process of law against all property she may thereafter have while discoverable. But property which she is restrained from anticipating is excepted. When she herself institutes any action or proceeding the court may order the costs of the opposite party to be paid out of property which is subject to such restraint and enforce such payment by receiver and sale. This statute, although it alters the law as laid down in the cases which have been cited in some respects, does not seem to affect as to future contracts and judgments the question decided in this case.

Appeal allowed.

Solicitors for the plaintiff, Hood-Barrs and Co.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Dec. 16, 1893.

(Before KEKEWICH, J.)

Re HARRISON; HARRISON v. HIGSON. (a)

Will—Construction—Gift to "children"—Illegitimate children.

A testator bequeathed his residuary estate in trust for his four children A., B., C., and "Ann Jane H. the wife of James H.," and declared that his trustees should stand possessed of the share of Ann Jane H., and invest the same and pay the

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

Re HARRISON; HARRISON v. HIGSON.

[CHAN. DIV.]

income to the said Ann Jane H. during her life, "and so that during any coverture she should not have power to anticipate the same," and after her death, "in trust for the children or child of the said Ann Jane H. who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and if more than one in equal shares as tenants in common." James H. had gone through the ceremony of marriage with Ann Jane H., but his deceased wife was the sister of the testator, so that his marriage with Ann Jane H. was invalid. At the date of the will Ann Jane H. had had one child by James H., and after the death of the testator two other children were born. The testator was aware of the facts. Upon the death of Ann Jane H., a summons was taken out in the Liverpool District Registry to determine who was entitled to her share of the residuary estate.

Held, that the illegitimate child born at the date of the will was entitled, and that the illegitimate children born afterwards were not entitled.

THIS was an originating summons taken out in the Liverpool District Registry to determine certain questions arising under the will of James Harrison. By his will dated the 22nd Dec. 1887 James Harrison gave his residuary real and personal estate upon trust for conversion and payment of an annuity, and subject thereto, in trust for his four children, John Harrison, Margaret Thomson, "Ann Jane Higson the wife of James Higson," and F. W. R. Harrison, in equal shares, and he declared that his trustees should stand possessed of the share of Ann Jane Higson, and should invest the same upon the investments therein authorised, and should pay the income of the said share and the investments representing the same to the said Ann Jane Higson during her life, "and so that during any coverture she should not have power to anticipate the same," and after her death should stand possessed of the said share and the investments thereof "in trust for the children or child of the said Ann Jane Higson, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and if more than one in equal shares as tenants in common." James Harrison died in 1888. James Higson had in 1881 gone through the ceremony of marriage with the said Ann Jane Higson, but his deceased wife was the sister of the testator, so that the marriage with Ann Jane Higson was invalid. Before the date of the will Ann Jane Higson had one child by James Higson, and after the death of the testator two more children were born. The testator was aware of the facts. Ann Jane Higson died in Jan. 1892, and the main question was who was entitled to her share of the residuary estate.

P. O. Lawrence for the trustees of the will.

Benshaw, Q.C. and *Rotch* for the children of Mr. and Mrs. Higson.—The child born before the date of the will is clearly entitled to take:

Re Horner; Eagleton v. Horner, 58 L. T. Rep. N. S. 103; 37 Ch. Div. 695;

Hill v. Crook, L. Rep. 6 H. of L. 265.

The testator described his daughter as the wife of James Higson, thereby showing that he intended her children to take.

Warmington, Q.C. and *T. R. Hughes* for the defendant, F. W. R. Harrison.—The word "children" means legitimate children:

Dorin v. Dorin, 33 L. T. Rep. N. S. 281; L. Rep. 7 H. of L. 568.

If Ann Jane Higson had contracted a legal marriage the children of that marriage only would have taken:

Re Ayles's Trusts, 1 Ch. Div. 282.

Henry Cunningham for the defendant, Margaret Thomson.

KEKEWICH, J.—These cases invariably present great difficulty, because the rule which will be found laid down in any one of the judgments of learned judges in the cases which have been cited, is a strong one. *Bowen, L.J.*, in *Re Haseldine; Grange v. Sturdy* (54 L. T. Rep. N. S. 322; 31 Ch. Div. 511), says at p. 517 of 31 Ch. Div. that the word "children" "*prima facie* applies to legitimate children only, and illegitimate children are excluded unless the language of the testator shows that he meant to include them." Having that case, to which I must refer again directly, before me, I may as well notice that the Court of Appeal gave force to evidence of surrounding circumstances by an adoption of the rule in *Wigram on Extrinsic Evidence* set out in the note on p. 513 of 31 Ch. Div. Where the words require explanation in this case or any other, you may bring in those facts which enable you to stand in the testator's shoes, or as it is sometimes phrased, to sit in his chair, and see the objects which the will affects. I must on the evidence before me take it that this testator knew that his daughter, Ann Jane Higson, was not the wife of James Higson. That I think is clear beyond dispute. She had gone through the ceremony of marriage with James Higson, and that I think the testator also knew. In the absence of evidence to the contrary, I must assume that the testator knowing the parties well—whether he was on good terms with them or not is perfectly immaterial—must have known that the marriage of James Higson with this lady was not good in law. Therefore, if he chose to designate her as the wife of James Higson, he was applying an expression of courtesy which would not hold good in its strict meaning. One must get at that before one goes further, as is pointed out by *Stirling, J.* in *Re Horner*. Referring to *Re Ayles's Trusts* he says at p. 707 of 37 Ch. Div.: "In the next place, it is not said positively one way or the other in the report whether the testator was aware of the fact that James Hicks and his daughter Ann had not been married at the date of the will. That of course is a most important point, because unless the court is satisfied that the testator knew that the person whom he designates as wife was not in fact the wife, you cannot arrive at the conclusion that he was using the word 'wife' otherwise than in the legal meaning." I am perfectly satisfied here that the testator knew that Ann Jane Higson was not the wife, in a legal sense, of James Higson, and that therefore when he describes her as the wife of James Higson he must be taken to mean the reputed wife, the lady who is living with James Higson as his wife, notwithstanding that she does not strictly fill the character. Then of course there is nothing to prevent him making a bequest to her children by James Higson as *persons designate*. There is nothing to prevent him

[CHAN. DIV.]

Re THE WALLASEY BRICK AND LAND COMPANY LIMITED.

[CHAN. DIV.]

doing that in any language which would satisfy the court that he intended the issue of this connection to take. The question of construction is whether having regard to the surrounding circumstances he has done so. The case is by no means free from difficulty. The testator makes a gift of this share to "Ann Jane Higson, the wife of James Higson," and then, as he does with another daughter's share, he settles the share, and gives his daughter a life interest, and after her death directs the trustees to stand possessed of the share in trust for her children or child. Am I to understand that as meaning the children or child of Ann Jane Higson by her present or reputed husband, the gentleman with whom she is living as his wife, or am I to restrict it to its strict legal sense as meaning the legitimate children of Ann Jane Higson? It is an extremely strong thing to say that the testator contemplated, I must not say a divorce, but a severance of this connection, and then a marriage between Ann Jane Higson and a stranger, and that his language is directed only to that. I have already pointed out that he knew that they were living together, and the way in which he referred to that fact. But he knew more than that. He knew that there was a child of the connection. That fact is conclusively proved by the evidence, and to my mind there is an absolute repugnancy between the words and the facts such as Stirling, J. found in *Re Horner* (at p. 705 of 37 Ch. Div.) where he says: "I find Charlotte described as the wife of Thomas Horner. She was not his wife, and therefore if I were to hold that wife meant legal 'wife,' and 'child' meant legitimate child, I should be introducing as it appears to me a repugnancy and inconsistency between the language of the testator and the facts of the case." If I were to hold that this testator did not include in the words "children or child of the said Ann Jane Higson," the child then living of Ann Jane Higson by James Higson, I should find that repugnancy; and that being so I am entitled to say that the testator did mean to include that child. I have intentionally passed over an expression which has been referred to in the limitation of the life interest of Ann Jane Higson, it is that the income is to be paid to her during her life, and so that "during any coverture, she shall not have power to anticipate the same. The testator does not say "during her present or any future coverture," which is, unless my memory is at fault, the more common form of conveyancers. The expression which I find here may not improbably have been used by a draftsman who bore in mind the fact that there could not in law be a limitation of that kind during the existing coverture or connection; and it may have been used in that way for what it was worth. But I am asked to conclude that the testator not only contemplated the possibility of a real future coverture, but intended it to be understood that the reputed coverture was not one in fact, and therefore that he thought only of a future marriage, and intended the expression "children or child" to refer only to the children or child of a future marriage. I think that would be forcing the words too far, having regard to the circumstances which he must be taken to have known. It seems to me that though the case of *Re Horner* was entirely different in its facts, the principle of that decision properly applied to the facts of this

case justifies me in saying that the one child born at the date of the will is entitled to take. And that conclusion seems to me to be consistent also with *Re Haseldine* in the Court of Appeal, and with *Hill v. Crook*, which of course is binding on both courts. There is a difficulty which has been pressed upon me by Mr. Warmington, that if there had been a severance of the connection with James Higson, and then a marriage of Ann Jane Higson with some other person, and issue of that marriage born, there would have been a difficulty in saying who were to take under this clause, because it would be impossible to exclude legitimate children, and the general rule of law is that legitimate and illegitimate children cannot take as one class. The answer is to be found in the observations made by Bowen, L.J. in *Re Haseldine*, the short effect of which is that if once you arrive at the conclusion upon the language of the will, construed with reference to circumstances fairly under consideration, that illegitimate children or some illegitimate are intended to take, you are not to be deterred by the possibility of legitimate children also coming in, because it would be possible in such a case as that to treat the class as consisting of legitimate and illegitimate children. I have not that case to deal with here, because that state of facts has not arisen; but the possibility has to be taken into consideration, and I think that the observations of Bowen, L.J. meet it. The claim of the after-born children seems to me to be entirely excluded. The authority on that point, standing out beyond all others, is *Dorin v. Dorin*. Cotton, L.J., who was engaged as counsel in that case, spoke of it as a hard case; and the House of Lords were disposed to assist the claimants if they could. There the circumstances pointed very strongly towards including the illegitimate children. A man made a will providing for the children of the lady with whom he had been living for some time; but the court said that the word "children" must mean the children of a legal marriage where that was possible. I have not forgotten that a legal marriage between these two persons was not possible, but a marriage between this lady and a stranger at some future time was possible; and I cannot admit illegitimate children who are not strictly within the description given by the testator.

Solicitors: *Donnison and Edwards*, Liverpool;
Peter Graham, Liverpool, for *Dutton and Son*,
Newcastle, Staffordshire.

Saturday, Jan. 27.

(Before KEKEWICH, J.)

Re THE WALLASEY BRICK AND LAND COMPANY LIMITED. (a)

Company — Reduction of capital — Petition — Trading — Cessation of — Assets — Distribution among shareholders — Companies Act 1867 (30 & 31 Vict. c. 131), s. 11 — Companies Act 1877 (40 & 41 Vict. c. 26), s. 3.

This was a petition presented by the company for the confirmation of resolutions for the reduction of the capital. The petition stated that the company had carried on business until May 1888,

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

Re SMITH; SMITH v. LANCASTER.

[CHAN. DIV.]

when it ceased to trade, and had not since traded. The company had no creditors.

Held, that the company if not defunct was in a comatose condition, and the whole object of the petition was to enable the available assets to be distributed among the shareholders in proportion to the amount paid on their shares; the power given by the Companies Acts being discretionary, the court would make no order.

THIS was a petition presented by the company for the confirmation of resolutions for the reduction of the capital. The objects for which the company was established were, among other things, (1) the acquisition of land, (2) the working of clay, (3) the manufacture of bricks, tiles, &c., (4) the demising or letting to builders or others, either for building or improving, or occupation purposes or otherwise, and the selling of all or any lands acquired as aforesaid. The capital of the company was 30,000*l.* divided into 6000 shares of 5*l.* each, of which 3843 shares had been issued, on 539 of which 5*l.*, and on 2854 4*l.* 15*s.* had been paid. The remaining 450 shares had been issued as fully paid up. The resolutions proposed to reduce the capital from 30,000*l.* to 6000*l.*, divided into 6000 shares of 1*l.* each, by returning 18*s.* per share to the fully paid-up shareholders, and 13*s.* to the other shareholders, and cancelling capital to the extent of 3*l.* 2*s.* per share, and reducing the nominal amount of all the shares to 1*l.* The petition stated that the company had carried on business until May 1888, when it ceased to trade, and had not since traded. It had sold all its lands, machinery, and plant, except a specified piece of land. It was also stated that capital to the amount of 10,657*l.* 10*s.* had been lost, or was then unrepresented by available assets, and that capital to the amount of 2481*l.* 19*s.* was in excess of the wants of the company. The company had no creditors.

W. D. MacConkey for the petition.—[KEKEWICH, J.—Should not this have been a petition to wind-up the company?] The company would not be able to sell the land so advantageously, if a winding-up order was made. The company is authorised by sect. 9 of the Companies Act 1867 to present this petition. The company is still a going concern, and to sell this piece of land is within the objects of the company as set out in the memorandum of association. The order asked for is just and equitable:

Re The Barrow Hematite Steel Company, 59 L. T. Rep. N. S. 500; 39 Ch. Div. 582.

KEKEWICH, J.—I am not disposed to make this order. For the moment I do not ask the petitioner's counsel to go into the details, or to consider other possible objections. Treating it as otherwise a good petition, there may be other points on which I should require to be satisfied. But I do not get so far as that. There is no doubt that, by the words of the 9th section of the Companies Act 1867, any company limited by shares may reduce its capital in the way specified, and the court, by sect. 11, may make an order confirming the reduction. But the objects for which the court and the company are armed with these powers are well known, and the jurisdiction under sect. 11 is a discretionary one. I will consider that discretion as purely judicial; that is, I ought to make the order in a proper case. The company in this case is not in any fair sense a

going concern. According to the petition it has ceased to trade since May 1888, and has not since traded. Why is it not wound-up? Because it has a piece of land which cannot at present be sold. All the company now intends to do is to sell it, and the sole object of this petition is to use the machinery of the Act to enable the other assets to be distributed among the shareholders in proportion to the amount paid up on their shares. The company is not dead, but it is certainly in a comatose state; it can never be alive again, and to my mind the Act of Parliament was not passed in order to enable what is here proposed to be done. There is no precedent for an order in such a case, and I decline to make one, and refuse the petition.

Solicitors: *Wright, Becket, and Co., Liverpool.*

May 22 and June 5.

(Before KEKEWICH, J.)

Re SMITH; SMITH v. LANCASTER. (a)

Settled land—Tenant for life—Sale by several tenants for life—Solicitors—Costs—Settled Land Act 1882 (45 & 46 Vict. c. 38), s. 2, sub-sect. 6; s. 21, sub-sect. (10); s. 53.

An order for the appointment of trustees for the purposes of the Settled Land Act was made on the application of all the parties (twenty-five in number) who constituted the persons entitled to exercise the power of a tenant for life under the Settled Land Act 1882. The property was sold, and on such sale F. acted as solicitor of the vendors, being instructed for that purpose by about four-fifths of the several parties. The others instructed independent solicitors. This was a motion on behalf of two sets of independent solicitors, to vary an order made in chambers disallowing their costs out of the proceeds of sale.

Held, that the independent solicitors were not entitled to their costs out of the proceeds of sale: Motion refused with costs.

AN order for the appointment of trustees of the will of Hannah Smith for the purposes of the Settled Land Act 1882 was made on the application of all the parties (about twenty-five in number) who constituted the persons entitled to exercise the power of tenant for life under the Act. The property was sold, and the conveyances were executed by all the parties. A Mr. Fowle a solicitor signed the contracts as agent for all the tenants for life. The sales were six in number to six purchasers, the property realising 2470*l.* Before the completion of the various purchases some of the persons, who had directed the sale, employed other solicitors, who perused and approved and obtained the execution of the conveyances to the respective purchasers. A summons was taken out by the trustees for the purposes of the Settled Land Act 1882, to determine (1) what costs and expenses ought to be allowed to the applicants and to the tenants for life or to any other persons of or incidental to the sales and conveyances of the real estate out of the entire proceeds of sale, and to whom such costs and expenses ought to be allowed and paid. (2) Whether any and what costs and expenses of or incidental to the said sales and conveyances

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CHAN. DIV.]

Re SMITH; SMITH v. LANCASTER.

[CHAN. DIV.]

which ought not to be allowed out of the entire proceeds of the sale ought to be allowed out of any and which of the respective shares of such proceeds, into which the same were divisible under the will of the testatrix. On the 26th April 1894, the judge in chambers ordered that only one set of costs of or incidental to the sales and conveyances of the real estate should be allowed as vendors' costs out of the entire proceeds of sale, such costs to be taxed as between solicitor and client, and that such taxed costs be paid by the applicants the trustees of the settlement to Fowle, the solicitor who conducted the sales.

This was a motion by some of the tenants for life, and their incumbrancers, who had employed separate solicitors, to vary the order by declaring that the costs of the applicants of or incidental to the sales and conveyances were payable out of the entire proceeds of the said sales, and that such of the applicants as were represented by separate solicitors in and about the sales and conveyances were entitled to separate sets of costs.

Henry Terrell for the motion.—By her will made the 5th Aug. 1862 Hannah Smith gave the income of her real and personal estate to her five children, and the children of a fifth child. Twenty-one of the parties employed the same solicitor, but the remaining four of the parties appeared by two separate sets of solicitors. I ask that their costs should be allowed out of the proceeds of sale. Sect. 21 of the Settled Land Act 1882 enacts, that capital money may be applied (sub-sect. 10) in payment of costs, charges, and expenses, of or incidental to the exercise of any of the powers, or the execution of any of the provisions of the Act. A sale by several persons as tenant for life, is analogous to a sale by several persons under the Partition Act: where each party is entitled to appear by a separate solicitor:

Humphreys v. Jones, 53 L. T. Rep. N. S. 482; 31 Ch. Div. 30;

Snow's Annual Practice (1894), vol. 2, p. 339;

Rule 2 of the General Order 1882 to the Solicitors' Remuneration Act 1881 (c), Approval and Perusal of Documents.

Then some of the shares are mortgaged, and a mortgagee selling under the Act is entitled to a separate set of costs:

Re Beck, 49 L. T. Rep. N. S. 95; 24 Ch. Div. 608;
Cardigan v. Curzon-Howe, 60 L. T. Rep. N. S. 723;
41 Ch. Div. 375.

I say that these persons, whom I represent, are entitled to the costs of perusing and approving the conveyances, and completing.

George Williamson for twenty-one tenants for life.—On the particulars of sale the vendors were described as Thomas Smith and the other persons who were declared to have the powers of tenants for life. One solicitor, Mr. Fowle, represented them all, and signed the contracts for sale. I say all the tenants for life adopted the contracts, and cannot now say that Mr. Fowle did not represent them. Sect. 2, sub-sect. 6, of the Settled Land Act defines a tenant for life. Under sect. 53 of the Act the tenant for life represents the interest of all parties. I say that the twenty-five tenants for life constitute one tenant for life, and are in the position of a trustee. The price of the property was only 2470*l*.

Fawcus for the trustees of the settlement.

Henry Terrell in reply.—In future several tenants for life will refuse to concur in a sale.

KEKEWICH, J.—There is a statement of facts in this case which was supplemented by some detailed information given by Mr. Terrell in the course of his argument. There is no occasion to recapitulate the whole story. The short point is this: An order for the appointment of trustees of the will for the purposes of the Settled Land Act was made on the application of all the parties (twenty-five in number) who constituted the tenant for life, or more strictly speaking the person entitled to exercise the power of tenant for life under the Act. The property was sold, and on such sale Mr. Fowle acted as solicitor of the vendors, being instructed for that purpose by roughly speaking four-fifths of the several parties aforesaid. The others instructed independent solicitors, some instructing one, and some another, and the question is whether these independent solicitors are entitled to receive any and what costs out of the capital of the proceeds of sale. On the case coming before the chief clerk, he was of opinion that there should be only one bill of costs allowed for the vendors, to be according to the scale, but that it was reasonable for Mr. Fowle to send the conveyances for execution by such of the vendors as did not instruct him to the other solicitors, and that each of them should be paid three guineas for obtaining the execution by his clients, but he did not allow these solicitors anything for perusing the conveyances or other charges. With this the independent solicitors were dissatisfied and the matter came before me in chambers on the 26th Feb. 1894. I held that the independent solicitors were entitled to no costs at all out of the proceeds of sale, and this is a motion to discharge the order then made. The first step in the argument of the applicant is a reference to the Settled Land Act 1882, sect. 21, sub-sect. 10, which directs payment out of the proceeds of sale of costs, charges, and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act. But this does not advance the matter. It is common ground that the costs properly incurred in and about the sale and the conveyances of the property to the purchasers ought to be paid out of the purchase money, but the question is whether these costs were from that point of view properly incurred. The next step was a reference to the rules under the Solicitors' Remuneration Act, which were relied on as showing that these solicitors were entitled to charge for their services on the lines there prescribed. I am not considering whether, as between them and their clients, they are not entitled to be paid these costs, but whether they ought to be paid out of the proceeds of sale, and the Solicitors' Remuneration Act and the rules thereunder do not seem to me to touch the question. An argument deserving more attention was rested on the analogy of the Partition Act and the practice thereunder. According to that practice the owner of every share is entitled to appear by a separate solicitor at the cost of the entire estate, so that, in an extreme case, there may be paid out of the proceeds of sale as many bills of costs as there are shares. The answer to that argument is that here the parties interested have not separate shares. They together constitute one tenant for life (see Settled Land Act 1882, sect. 2, sub-sect.

Q.B. Div.]

MASSEY (app.) v. MORRISS (resp.).

[Q.B. Div.]

6), and a sale under the powers of the Act is necessarily the operation of all acting conjointly and not concurrently. If any statutory provision or the practice of the court gave these independent solicitors separate bills of costs as against the proceeds of sale, I should of course be bound to allow them, and therefore I have carefully considered the question whether they are entitled wholly or partially to what they claim. But it certainly is not a case in which I should be disposed to exercise any discretion vested in me favourably towards the applicants. The purchase money is something over 2000*l.*, the interest of each person in the estate is necessarily small, and the costs are necessarily large. I do not think that I ought to encourage any increase of them. This remark might not be directly applicable to a case of a different character, but, as at present advised, I do not think that even if the proceeds of sale were greater, and the interests of the parties were more extensive, I should be disposed to come to a different conclusion. I see no reason why some few of a large body of tenants in common for life should indulge in the luxury of separate solicitors at the cost of the corpus. The settlement of conveyances to purchasers might reasonably and safely be left to the solicitor acting for the main body. The motion must be refused with costs.

Solicitors: *Andrew, Wood, and Co.*, for *Waistell, Northallerton*; *Hickin, Smith, and Capel Cure*; *Williamson, Hill, and Co.*, for *Fowle and Horsfall, Northallerton*.

QUEEN'S BENCH DIVISION.

Wednesday, June 6.

(Before CAVE and COLLINS, JJ.)

MASSEY (app.) v. MORRISS (resp.). (a)

Ship—Overloading—Vessel in foreign port—Owner resident in this country—Liability of owner—Merchant Shipping Act 1876 (39 & 40 Vict. c. 80), s. 28.

The Merchant Shipping Act 1876 provides by sect. 28 that any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc, shall for each offence incur a penalty not exceeding one hundred pounds.

The appellant, the owner of a British ship, was resident and carried on business in this country. His ship, while in a foreign port, was so loaded by the master as to submerge the centre of the disc. The master was appointed by the appellant, who was not informed and was not aware of the overloading of the ship. The appellant was convicted for having allowed his ship to be so overloaded.

Held, that the conviction was wrong, as there was no evidence to show that the appellant had allowed the ship to be overloaded.

CASE stated by the stipendiary magistrate for the city of Liverpool.

The appellant was the owner of the *Opah* residing and carrying on business at Hull. The *Opah* was in Dec. 1893 at Kymassi, in the island of Negropont, Greece, and there took on board a cargo chiefly consisting of magnesia stone, and on the 5th Dec. 1893 left Kymassi with

the said cargo for Garston. The *Opah*, at the time of leaving Kymassi aforesaid, was so loaded as to submerge in salt water the centre of the disc to the knowledge of the master. The *Opah* was at the time aforesaid in command of a master appointed by the appellant. The appellant was not informed, and was not aware of the overloading of the *Opah*, and the mate stated that he had been ordered by the master not to put the ship at any time below her marks.

The Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) enacts as follows:

Sect. 28. Any owner or master of a British ship who neglects to cause his ship to be marked as by this Act required, or to keep her so marked, or who allows the ship to be so loaded as to submerge in salt water the centre of the disc, and any person who conceals, removes, alters, defaces, or obliterates, or suffers any person under his control to conceal, remove, alter, deface, or obliterate any of the said marks, except in the event of the particulars thereby denoted being lawfully altered, or except for the purpose of escaping capture by an enemy, shall for each offence incur a penalty not exceeding one hundred pounds.

If any of the marks required by this Act is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding one hundred pounds.

It was contended, on behalf of the appellant, that, upon these facts and in the absence of any evidence that the appellant had any knowledge of, or in any way connived at, the overloading, the appellant could not be convicted.

The stipendiary magistrate, however, being of opinion that the appellant was responsible for the act of the master of the said vessel in overloading her, and that it was immaterial whether the appellant was personally aware of the overloading, convicted the appellant.

The questions for the opinion of this court are, whether, upon the facts stated, the appellant did allow, within the meaning of sect. 28 of 39 & 40 Vict. c. 80, the *Opah* to be so loaded as to submerge the centre of the disc of the said vessel, and whether the conviction was right.

If the court shall be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion to the contrary, then the said conviction is to be quashed.

Pickford, Q.C. and Maurice Hill for the appellant.—Before an owner can be convicted for allowing his ship to be overloaded, it must be shown that he had some knowledge of the fact that the overloading had taken place. There is an absolute liability on the part of the owner, under the section, if the marks are wrongly placed, but not if there is overloading. The magistrate was guided in his decision by the judgments given in cases under the Licensing Acts, where the licensed persons had been convicted for allowing drunkenness or gaming on their premises, although such drunkenness or gaming took place without their actual knowledge. But the scheme of the Licensing Acts is entirely different from that of the Merchant Shipping Acts, and there is no analogy between them. This section contemplates the case of something being allowed by the master which is not allowed by the owner. [CAVE, J.—There must be something in the

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. HIS HONOUR JUDGE SNAGGE.

[Q.B. Div.]

nature of "allowing" by the owner.] There is nothing of that description, unless it could be said that the owner having appointed the master was responsible for his acts. There is no *mens rea* on the part of the owner.

H. Sutton for the respondent.—The knowledge of the owner of the overloading is to be implied, and he is to be treated as if he was an actual party to the act. In sect. 22 of the same statute the words used are "knowingly allows," which point to a distinction between cases in which facts come to the knowledge of the owner, and those in which they do not. It has been held under the Licensing Acts, that the knowledge of the person in charge of licensed premises is to be considered knowledge on the part of the licensed person, although such licensed person may not be on the premises at the time when the act complained of is committed :

Bond v. Evans, 59 L. T. Rep. N. S. 411; 21 Q. B. Div. 249;

Mullins v. Collins, 29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 292.

[CAVE, J.—I do not think that any inference can be drawn from those cases that will assist in that now before us.] The owner appointed the master, and is therefore responsible for his acts. [CAVE, J.—If the master had committed the same offence before, and the owner continued him in his position as master, it might be some evidence against the owner.]

CAVE, J.—This seems to me to be a very clear case. The words of the section are, "any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc shall for each offence incur a penalty not exceeding one hundred pounds." The question is whether the appellant did allow his ship to be so loaded as to submerge in salt water the centre of the disc. There is nothing to show that he in any way allowed it, except that he appointed the master who was in command of the ship when the loading was performed, and I cannot think that it was the intention of the Legislature that the owner should be liable upon that account. If such had been the intention, it would have been easy to say that, if the master overloaded the ship, the owner should be liable. In order to make the owner liable there must be some act done by him, and in the present case there is no such act. By appointing the master, the owner does not render himself liable for everything done by that master on the other side of the world. If it could be shown that a particular master had been appointed with the object of having the ship overloaded, that would be a very different case, but there is no such suggestion in the present case. The alehouse cases which seem to have influenced the magistrate when hearing this case are distinguishable from this case. There the licensed person is made responsible for what goes on upon his premises, and he obtains his licence upon the ground of his personal character. If he were not responsible he might delegate some person, who was not fit, to carry on his business, and then when a complaint was made he could say that he was not responsible. The Licensing Acts are drawn with the object of preventing this being done. Those cases are in no degree analogous to the present case.

I am therefore of opinion that this conviction must be quashed.

COLLINS, J.—I am of the same opinion.

Conviction quashed.

Solicitors for the appellant, *Botterell and Roche, v. Hill, Dickinson, Dickinson, and Hill*, Liverpool.

Solicitor for the respondent, *The Solicitor to the Board of Trade*.

June 6 and 20.

(Before CAVE and COLLINS, JJ.)

REG. v. HIS HONOUR JUDGE SNAGGE. (a)

Solicitor—Managing clerk—County Court—Right to address the court—“A solicitor acting generally in the action”—County Courts Act 1888 (51 & 52 Vict. c. 43), s. 72.

The County Courts Act 1888 provides, by sect. 72, that it shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister, or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor.

Upon the hearing of an action in a County Court a solicitor, who was managing clerk to a firm of solicitors retained by the defendant in the action, appeared for the defendant. Judgment was given in favour of the defendant, and upon a motion for a new trial the same solicitor appeared to oppose the motion on behalf of the defendant, and claimed the right to address the court. The County Court judge refused to allow the solicitor to address the court as of right.

Held, that the County Court judge was right, as the solicitor was not a solicitor acting generally in the action or matter for the defendant.

THIS was an order nisi calling upon His Honour Judge Snagge, the judge of the County Court of Oxfordshire holden at Oxford, and Samuel Simmonds, to show cause why the said judge should not hear one Arthur Addison, a solicitor of the Supreme Court claiming to appear and address the court on an application for a new trial on behalf of one Silas Turner, the defendant in an action between the said S. Simmonds, plaintiff, and the said S. Turner, defendant, now pending in the said County Court.

In the action of *Simmonds v. Turner* the plaintiff claimed a quarter's rent of certain premises and a sum in respect of the repairs to the premises. The action was tried before the County Court judge, who gave judgment of nonsuit against the plaintiff. An application was made on behalf of the plaintiff for a new trial. The solicitors acting on behalf of the defendant were Thomas Mallam and Co., and the present applicant Arthur Addison, himself a solicitor of the Supreme Court, was in their permanent and exclusive

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Q.B. Div.]

REG. v. HIS HONOUR JUDGE SNAGGE.

[Q.B. Div.]

employment. The applicant Addison appeared on behalf of the defendant to oppose the application for a new trial, and claimed the right to be heard on behalf of the defendant. The County Court judge declined to allow the applicant to address the court as of right, but offered to grant him leave to do so. The applicant refused to apply for leave to address the court, and the application for a new trial was adjourned until the opinion of this court had been obtained upon the question whether the applicant had a right to appear and address the County Court.

The County Courts Act 1888 (51 & 52 Vict. c. 43) enacts:

Sect. 72. It shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained by or on behalf of any party on either side, but without any right of exclusive audience, or, by leave of the judge, for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor.

H. Sutton, on behalf of the County Court judge, showed cause.—It is submitted that the decision of the County Court judge was correct. The judge found as a fact that Mallam and Co. were the solicitors acting generally in the action or matter for the defendant, and the members of that firm were therefore the only solicitors who could claim the right to be heard on behalf of the defendant. Under 15 & 16 Vict. c. 54, s. 10, it has been held that a managing clerk to the solicitors of one of the parties to an action has no right to be heard:

Reg. v. Spooner, 18 L. T. Rep. N. S. 325;

Ex parte Rogers; *Bookham v. Potter*, 18 L. T. Rep. N. S. 479; L. Rep. 3 C. P. 490.

The 51 & 52 Vict. c. 43, s. 72, re-enacted that section, and added the words, "the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor." [CAVE, J.—Do not those words give a managing clerk, who is a solicitor, a right of audience?] If a managing clerk has a client of his own he can appear for such client, but not for a client of the solicitor by whom he is employed. It was held under the Bankruptcy Act 1861 that a commissioner in bankruptcy was not bound to hear a managing clerk to the solicitors of a bankrupt:

Ex parte Broadhouse; *Re Broadhouse*, 17 L. T. Rep. N. S. 126; L. Rep. 2 Ch. 655.

Sir R. Webster, Q.C. and Hollams in support of the order.—The decision in *Ex parte Rogers*; *Bookham v. Potter* (18 L. T. Rep. N. S. 479; L. Rep. 3 C. P. 490), turned upon the question whether the solicitor had been duly retained, and is no authority upon the present point. And in *Ex parte Broadhouse*; *Re Broadhouse* (17 L. T. Rep. N. S. 126; L. Rep. 2 Ch. 655) the court held that the solicitor who wished to address the commissioner in bankruptcy was not the solicitor of the party whom he claimed to represent. The County Courts Act 1888, s. 72, enlarges the number of persons who may address the court.

Addison had the sole conduct of all the proceedings before the court, and was not retained as an advocate by Mallam and Co., although he was in their permanent and exclusive employment. It is therefore submitted that he was entitled to be heard as of right.

June 20.—COLLINS, J.—Cave, J. has asked me in this case to deliver my judgment first. This is an order calling upon the judge of the County Court of Oxfordshire to show cause why he should not hear one Arthur Addison, a solicitor of the Supreme Court, claiming to appear and address the court on behalf of one Silas Turner, the defendant in an action in the said County Court. Mr. Addison is a fully-qualified solicitor, and is the managing clerk to Messrs. Mallam and Co., who were the solicitors retained by the defendant in the action. At the hearing on the 25th Jan. he, as he states in paragraph 1 of the affidavit on which the order was obtained, "on the instructions of his principals, the above-named Messrs. Mallam and Co., appeared for the defendant," in whose favour the action was decided: and again on the 22nd Feb., he appeared to oppose a motion for a new trial, "by the direction of his employers, the said Messrs. Mallam and Co., and with the assent of the said defendant." He further avers that he has had the entire management on behalf of the defendant of the proceedings in the action from the commencement. It was on this last occasion—viz., Feb. 22, on the motion for the new trial—that the question for our decision arose. Mr. Addison then claimed to be heard as of right to show cause on behalf of the defendant, and the learned County Court judge, while offering to hear him by leave, declined to admit his claim to be heard as of right. The learned County Court judge finds as a fact—and this was a matter of fact for his decision—that Mr. Addison was not the solicitor acting generally in the action for the defendant, and that the firm of Mallam and Co. were the solicitors so acting. The question turns upon the 72nd section of the County Courts Act 1888, which runs as follows: "It shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained as an advocate by or on behalf of any party on either side, but without any right of exclusive audience, or, by leave of the judge, for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor." The question is whether, under the provision of the above section and on the facts as found by the learned judge, Mr. Addison was entitled as of right to be heard. The learned judge has held that he was not. With the exception of the concluding words in italics, the section is identical with that of the earlier Act (15 & 16 Vict. c. 108, s. 43). Sir R. Webster, who argued for Mr. Addison, did not indeed admit that under the former Act his client would have had no right of audience, but his main contention was that the new words, at all events, made it

Q.B. Div.]

REG. v. HIS HONOUR JUDGE SNAGGE.

[Q.B. Div.]

clear that the right now existed. It is to be observed that the new words do not in terms confer any right on any person not theretofore entitled. They merely provide for the removal of a possible bar to a right otherwise complete. This throws us back on the first part of the section to see whether it conferred a *prima facie* right on Mr. Addison to address the court. If so, he was not disabled from exercising such right by the fact that he was in the permanent and exclusive employment of Messrs. Mallam and Co. What, then, is the standard laid down by the section by which to determine whether a solicitor is entitled to address the court? It is that he must be "a solicitor acting generally in the action or matter for a party in the action or matter." Does this embrace a solicitor who is not retained by the party, but who appears only as the servant or agent of the solicitor or firm so retained under orders received from him or them? There is weighty authority under the former statute that it did not. "There can," says Blackburn, J., dealing with the same words in *Reg. v. Spooner* (18 L. T. Rep. N. S. 325, "only be one attorney for a party at a time"; and in *Ex parte Rogers; Bookham v. Potter* (18 L. T. Rep. N. S. 479; L. Rep. 3 C. P. 490) Montague Smith, J. says: "Under sect. 10 of 15 & 16 Vict. c. 54 the only attorney who is entitled to be heard in the County Court is the attorney acting generally in the action for the party. If he was acting as attorney generally in the action the fact of his being clerk to another attorney would not preclude his right to be heard. But the matter of fact was for the consideration and determination of the judge. If he found that he was not acting as the attorney generally in the action, his refusal to hear him was quite right." Bovill, C.J., with whom Willes, J. concurred, clearly explains the circumstances which would under that statute have entitled a managing clerk to audience. He says: "Although it turns out that that point is not raised by the affidavit upon which the rule is founded, I think it right to say that, in my opinion, there is nothing in the fact of a gentleman being a clerk to another to prevent his being heard as the attorney in the cause. He must, however, satisfy the requirement of the statute 15 & 16 Vict. c. 54, s. 10, by showing that he is the attorney acting generally in the cause. . . . Who is to determine whether or not the attorney is acting generally in the action? The judge before whom the party appears has the best means of determining that question . . . he seems to have held that Mr. Rogers was acting merely as clerk to Mr. Stenning, and was not engaged generally as attorney in the cause." It is obvious, therefore, that the judges in that case thought that, though a managing clerk might be retained by and act for the party generally in the action, it would be a question of fact whether he was acting as such or merely as clerk for somebody else, and that both the principal and the clerk could not at the same time be the attorney acting generally in the action. But it is suggested that all these learned judges did not realise or remember that the words of the statute are "an attorney" and not "the attorney" acting generally in the action. Bovill, C.J., however, begins by quoting the exact words of the statute, and it seems clear to me that they must have been present to the minds of all the judges. I

think the indefinite article is used in the statute because it is dealing with any action and any party to an action and with any one of certain classes—viz., solicitors and barristers—and the indefinite article is therefore more appropriate; but when in a given case a solicitor or firm of solicitors is retained, he or it becomes the solicitor or firm of solicitors acting generally in the action or matter. I think a solicitor cannot be said to be a solicitor acting generally in the action or matter for a party unless the relation of solicitor and client exist between him and such party. It may well be that when a firm is retained each member of the firm may be described as a solicitor acting generally in the action for the party who retains him, but I think the same could not be said of a managing clerk who was not retained. The position of managing clerk, when held by a solicitor, though it does not exclude him, does not qualify him to claim audience. That must depend, I think, on whether he is found as a fact to be a solicitor retained by a party and acting generally for him in the action or matter. I think that the observations of Lord Cairns, L.J. in *Ex parte Broadhouse* (17 L. T. Rep. N. S. 126; L. Rep. 2 Ch. at p. 658) are applicable to this case. In speaking of sect. 212 of the Bankruptcy Act 1861, which authorised solicitors to appear and plead without employing counsel, he says: "That section did not, in any way, alter the ordinary character in which alone a solicitor is entitled to appear in any court, viz., as the solicitor of a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is, that the court should have before it a person who on the one hand is under an obligation to the court because he is one of its officers, and on the other hand is under an obligation to the suitor because he is in privity with him, and is the actual person who represents him. Unless that chain of connection is maintained and kept complete, the object of allowing solicitors to appear on behalf of other parties is entirely defeated." Acting upon this view, the court (Lord Cairns and Rolt, L.J.J.) upheld the refusal of the commissioners to hear a gentleman whose position was very similar to that of Mr. Addison in this case, viz., a qualified solicitor acting as managing clerk for the firm actually retained. I think the standard by which the court try the right of audience in that case is virtually the same as that laid down by the statute in the case before us. The test put by Lord Cairns was, "is the person who claims audience the solicitor of a particular client?" The condition required by the statute is that he shall be "a solicitor acting generally for a party in the action or matter," and it seems to me that the same reasons which prevented him having audience in that case as solicitor for the bankrupt would prevent him from having audience in this case as a solicitor acting generally for the defendant in the action. In both cases the objection of want of privity between him and the client equally applies. The only difference between the two cases lies in the use of the indefinite article in the statute which I have already considered. I think the Legislature cannot have intended, merely by using the indefinite instead of the definite article, to create a class of advocates open to the objec-

Q.B. Div.]

REG. v. DYSON.

[CR. CAS. RES.]

tions pointed out by Lord Cairns. If this is the proper view of the words—"a solicitor acting generally in the action or matter for such party"—have the added words of the new section altered the law? I think not. I think they only remove a possible doubt, and expressly enact the proposition covered by the *semble* in *Ex parte Rogers*; *Bookham v. Potter* (*ubi sup.*)—viz., that the fact that a qualified solicitor is managing clerk to someone else shall not of itself debar him from having audience as solicitor for a party, provided he can show that he is such solicitor, which in this case he cannot. This is the view taken by Judge Heywood in his able work "Annual County Court Practice, 1894," p. 236, and by the learned judge in this case, with the conclusion and reasoning of whose judgment I agree. I am, therefore, of opinion that this order must be discharged.

CAVE, J.—If this had been *res nova*, I should have found great difficulty in coming to the conclusion that the words in the 15 & 16 Vict. c. 54, s. 10—"It shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record, being an attorney acting generally in the action for such party"—mean "It shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record, being the attorney acting generally in the action;" and I should have been at a loss to suggest any reason why the Act should use this roundabout expression instead of saying simply, "It shall be lawful for the party to the suit or other proceeding, or for his attorney, being an attorney of one of Her Majesty's Superior Courts of Record." But, upon consideration of the language used by the judges in *Ex parte Rogers* (18 L. T. Rep. N. S. 479; L. Rep. 3 C. P. 490), and in the face of the opinion of my brother Collins, I feel that it is not open to me to consider that question, and that I must deal with the construction of that section as if the words used had been, "An attorney, &c., being the attorney acting generally in the action." When I come to interpret those words I respectfully concur in the opinion of Lord Blackburn that there can only be one attorney for a party at a time, and that the words "the attorney for the party" do not include the managing clerk of the attorney in whose name the proceedings in the action are conducted. If, as under these circumstances I am bound to hold, that is the true construction of the 15 & 16 Vict. c. 54, s. 10, I do not see how I can put a different construction on what are practically, if not identically, the same words in the statute of 1888. It has been contended, however, that the words of the statute of 1888—"The right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor"—enable us to decide this case in favour of the applicant. If I could read the words as they stand—"A solicitor being a solicitor acting generally in the action or matter for such party"—I should think that there was great force in this contention. The words naturally apply to a managing clerk for a solicitor who is himself a solicitor, and who, as managing clerk, has had the management and control of the action, and I do not understand what the expression "exclusive employment" means, unless it means that he is excluded from carrying on

business on his own account. But, as I have said, I think I am precluded from reading the words as they stand. The clause says that "the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor." But the right of a solicitor who is a managing clerk of the solicitor in the action, and who has had the management and control of the proceedings in the action, is not excluded on the ground specified in the clause, but on the ground that he is not the solicitor acting generally in the action. I am therefore compelled to come to the somewhat absurd conclusion that this clause has no meaning at all, and does not in any way affect the construction of the Act. It is said that it refers to a managing clerk to a solicitor who is allowed to carry on business in the County Court without limit in his own name and for his own benefit. But I confess I do not see how such a man can be said to be in the exclusive employment of the solicitor whose managing clerk he is, and I very much doubt whether such arrangements exist to any considerable extent in the profession. I have a strong suspicion that the clause in question was intended to put an end, in favour of managing clerks who are also solicitors, to the question whether they could address the court in matters in which they had been acting generally for the party. But, even if this is so, I am afraid the words used are not sufficient, so long as I am obliged to construe the words "being a solicitor acting generally in the action" as meaning the same thing as the words "being the solicitor acting generally in the action." I agree, therefore, that this order must be discharged.

Order discharged.

Solicitor for the applicant, *E. Williamson*.

Solicitor for the County Court judge, the *Solicitor to the Treasury*.

CROWN CASES RESERVED.

Saturday, April 21.

(Before Lord COLERIDGE, C.J., HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ.)

REG. v. DYSON. (a)

Undischarged bankrupt—Obtaining credit without disclosing bankruptcy—Practice—Evidence—Intent to defraud—32 & 33 Vict. c. 62, s. 18; 46 & 47 Vict. c. 52, s. 31.

An intent to defraud is not an ingredient of the offence created by sect. 31 of the Bankruptcy Act 1883, which renders it unlawful for an undischarged bankrupt to obtain credit to the extent of twenty pounds or upwards from any person without informing such person of the fact of his being an undischarged bankrupt.

CASE reserved for the consideration of this court by the Court of Quarter Sessions for the West Riding of Yorkshire, pursuant to 11 & 12 Vict. c. 78. The case was as follows:—

Alfred Dyson was indicted at the Christmas General Quarter Sessions of the peace for the West Riding of Yorkshire, held at Leeds, on the 1st and 2nd Jan. 1894, for offences alleged to have

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

CR. CAS. RES.]

REG. v. DYSON.

[CR. CAS. RES.]

been committed by him under sect. 37 of the Bankruptcy Act 1883.

The first count of the indictment (omitting formal parts) was as follows:

That at the time of the committing of the offence next hereinafter mentioned, Alfred Dyson was an undischarged bankrupt, who had on the 30th April 1885 been adjudged bankrupt under the Bankruptcy Act 1883, and that the said Alfred Dyson on the 16th May 1892, being such undischarged bankrupt as aforesaid, unlawfully did obtain credit to the extent of 20*l.* and upwards, that is to say, to the extent of 103*l.* 13*s.* 11*d.* from one Isaac Naylor, without informing the said Isaac Naylor that he the said Alfred Dyson was then an undischarged bankrupt.

The second count was in the same form as the first count except that the amount of credit therein alleged to have been obtained from the said Isaac Naylor was 163*l.* 2*s.* 6*d.*, and the date upon which such credit was alleged to have been obtained was the 3rd June 1892.

The indictment contained two further counts which are not material to the question raised in this case. It was proved at the trial that the defendant had been duly adjudged bankrupt under the Bankruptcy Act 1883 on the 30th April 1885, in the County Court of Yorkshire, holden at Huddersfield, and that he had never obtained his discharge from such bankruptcy. It was also proved that the defendant had since his bankruptcy carried on business in Huddersfield, and that on the 16th May 1892, and the 3rd June 1892 respectively, goods to the value of 103*l.* 13*s.* 11*d.* and 163*l.* 2*s.* 6*d.* respectively were purchased upon credit by the defendant from the said Isaac Naylor, at Bradford, and that such goods were on the said dates respectively delivered to the defendant upon credit, and kept by him without any payment being made therefor. It was also proved that the defendant did not on either of the said dates, or at any other time, inform the said Isaac Naylor that he the defendant was an undischarged bankrupt, and that the said Isaac Naylor was not at the time the said credits or either of them were obtained aware of such fact.

It was proposed by counsel for the defendant to put questions to the witnesses called on behalf of the prosecution with a view to show that, although the above-mentioned credits had been obtained by the defendant without any information having been given that he was an undischarged bankrupt, and without the said Isaac Naylor having been aware of the fact, such credits had been so obtained by the defendant without intent to defraud, and it was submitted on behalf of the defendant that, if he could show that although the said credits were obtained as aforesaid they were so obtained without intent to defraud, he was entitled to an acquittal.

It was objected by counsel on behalf of the prosecution that an intent to defraud was not an ingredient of the offence charged under sect. 31 of the Bankruptcy Act 1883, and that an offence under the said section was proved upon proof that the defendant had obtained credit to the extent of 20*l.* or upwards without giving the information specified in the section.

The Court was of opinion that for the purpose of determining whether or not an offence under the section had been committed it was immaterial to consider whether the credit had been obtained

with or without an intent to defraud, and ruled that questions proposed to be put only with a view to show an absence of an intent to defraud could not be put, and directed the jury upon the question of fraudulent intent in accordance with the above opinion.

The Court at the request of the counsel for the defendant consented to reserve this case for the consideration of Her Majesty's judges in the event of the jury convicting the defendant.

The jury convicted the defendant upon the first two counts of the indictment, and he was sentenced by the court to six weeks imprisonment without hard labour.

The defendant has pending the consideration of this case been discharged on recognisance of bail to render himself in execution in the event of the conviction being affirmed.

The question for the consideration of the judges of Her Majesty's High Court of Justice is, whether the above-mentioned ruling and direction was right or wrong.

If the court is of opinion that the defendant should have been allowed to cross-examine with a view to show that, in obtaining the above-mentioned credits under the circumstances and in manner above mentioned, he had no intent to defraud, and that the jury should have been directed to acquit the defendant if satisfied that in obtaining the said credits he had no such intent, the conviction in this case is to be quashed; otherwise it is to be affirmed.

By sect. 31 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), it is enacted that:

Where an undischarged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act 1869, and the provisions of that Act shall apply to proceedings under this section.

By sect. 18 of the Debtors Act 1869 (32 & 33 Vict. c. 62) it is enacted that:

Every misdemeanour under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours;" and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

Harper, on behalf of the prisoner, contended that the effect of the enactment in sect. 31 of the Bankruptcy Act 1883, that the provisions of the Debtors Act 1869 shall apply to proceedings under the section, was to incorporate into that section the provision of sect. 18 of the earlier Act, and that therefore it was incumbent on the prosecution to prove an intent to defraud on the part of the prisoner, or that at any rate it was open to the prisoner to disprove any such intent. [HAWKINS, J.—The object of the statute is not to prevent fraud, but to prevent a person who is an undischarged bankrupt obtaining goods from people without those people being informed that he is an undischarged bankrupt.] In *Reg. v. Peters* (54 L. T. Rep. N. S. 545; 16 Q. B. Div. 636; 16 Cox C. C. 36; 55 L. J. 173, M. C.), Lord Coleridge,

C.J. said: "In such a case as the present where a man obtains goods and does not pay for them for a substantial period of time, I am not prepared to say that we ought to limit the plain meaning of the words in the Act of Parliament." It would appear therefore that the jury were entitled to take into consideration any evidence the prisoner might be able to give as to intent; that here, such evidence having been withheld from the jury, the conviction was wrong.

Lowenthal, on behalf of the prosecution, was not called upon.

Lord COLERIDGE, C.J.—This is an indictment under sect. 31 of the 46 & 47 Vict. c. 52, a statute which says that where an undischarged bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act 1869. Now this man did, the jury have found, obtain credit to the extent of 103*l.* 13*s.* 11*d.* and 163*l.* 2*s.* 6*d.* from a person with whom he dealt without informing such person that he was an undischarged bankrupt. It appears to me, therefore, that the whole purpose of the statute was fulfilled, and that everything that was necessary was proved before the quarter sessions. The only distinction between this and the case of *Reg. v. Peters (ubi sup.)* is, that there it was a cash transaction, whereas here it was not a cash transaction. That case clearly lays down the rule that it is immaterial whether it was a cash transaction or not. The words of the statute are "obtaining credit," and it is found that here the prisoner obtained goods on credit. The prisoner having obtained credit without giving the required information, I cannot entertain a doubt but that whether or not he had any intent to defraud he had done all that was necessary to bring him within the section, and that the conviction was perfectly right. It follows that the conviction must be sustained.

HAWKINS, J.—I am of the same opinion, and cannot entertain any doubt on the subject when I read the words of the section, namely, that "where an undischarged bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour." The reference at the end of the section to the Debtors Act 1869, to which our attention has been drawn by the learned counsel for the prisoner, is relied upon as showing that an intent to defraud is an essential element in the offence created by the section. I have looked at that Act, however, and am very much struck by the fact that all the offences there are offences in the creation of which the words "with intent to defraud" are used, or the words "unless the jury is satisfied that he had no intent to defraud." It can hardly therefore have been intended by the Legislature in the present Act to have made this an offence only where there is an intent to defraud. I am quite satisfied that, if it had been so intended, we should have found those words in the statute. I am therefore of opinion that this conviction must be affirmed.

MATHEW, J.—An ingenious attempt is made in this case to incorporate sect. 18 of the Debtors

Act 1869 into sect. 31 of the Bankruptcy Act 1883, and to read the latter section as if there were found at the end of the section these words: "And when any person is charged with any such offence, any evidence attending to show that the act charged was not committed with a guilty intent shall be taken into consideration." Now is that the usual way to interpret statutes? It seems to me clear that it is not, because when you look at sect. 18 of the earlier Act it is clear that it applies to proceedings before justices, and that its object is to enlarge the discretion of the justices under the general discretion conferred upon them by the Vexatious Indictments Act. In my opinion this conviction should be affirmed.

CAVE, J.—I am of the same opinion. The question of intent does not arise in this case.

GRANTHAM, J.—I am of the same opinion.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitors for the prisoner, *Van Sandau and Co., for Milnes and Marshall, of Huddersfield.*

Saturday, April 21.

(Before Lord COLERIDGE, C.J., HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ.)

REG. v. BLABY. (a)

Practice—Criminal law—Evidence—Previous conviction—Meaning of "convicted"—Finding of jury—Prisoner released on recognisances—Offences against Coinage Act 1861—24 & 25 Vict. c. 99. ss. 9 and 12.

The prisoner having been found guilty by the verdict of a jury of any of the misdemeanours, crimes, or offences mentioned in sects. 9, 10, and 11 of 24 & 25 Vict. c. 99 (the offences relating to Coinage Act 1861), is sufficient to satisfy the word "convicted" in sect. 12 of that Act, which enables the conviction of a person for felony who has committed any of the misdemeanours, crimes, or offences mentioned in sects. 9, 10, and 11, after having been convicted previously of any of such misdemeanours, crimes, or offences. Evidence therefore of such finding is sufficient to support an indictment under sect. 12, and it is not necessary to prove that final judgment was given upon such finding.

CASE stated by the Common Serjeant of London for the consideration of this court as follows:

This prisoner was tried before me at the February Sessions of the Central Criminal Court, for feloniously uttering counterfeit coin under sect. 12 of 24 & 25 Vict. c. 99.

A copy of the indictment is sent herewith for reference.

The prisoner was given in charge to the jury in accordance with the usual practice on the first part of the indictment only, viz., that which charged her with uttering a counterfeit florin on the 11th Jan. 1894, to Emily Hutchinson, well knowing it to be false and counterfeit.

Mr. Partridge appeared as counsel for the Mint, and the prisoner was defended by Mr. Burnie.

The prisoner in the hearing of the jury said, "I desire to plead guilty to the uttering of the

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

CR. CAS. RES.]

REG. v. BLABY.

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florin on the 11th Jan. 1894." The jury thereupon found a verdict of "guilty" accordingly. The prisoner was then given in charge to the jury on the second part of the indictment, which charged her with having been previously convicted on the 23rd April 1888, in the name of Ellen Edwards, of unlawfully uttering a counterfeit half-crown to Ellen Dann, knowing the same to be false and counterfeit.

To this charge the prisoner pleaded "not guilty."

John Smith was then called and said:

I am a sergeant of the S Division of police. I know the prisoner at the bar. I was present in this court in April 1888. On the 23rd of that month the prisoner was found guilty by the jury of uttering a counterfeit half-crown to Ellen Dann, well knowing the same to be false and counterfeit. She was convicted in the name of Ellen Edwards. The prisoner is the same woman. I produce this certificate of her conviction. [Certificate put in and read.] She was released on recognisance to come up for judgment if called upon.

A copy of the certificate of conviction is sent herewith. (a)

Mr. Burnie, on the part of the prisoner, submitted there was no case to go to the jury. In order to constitute a conviction there must be both verdict and judgment. Here there was no judgment, only an order empowering the prisoner to be released on entering into a recognisance to come up for judgment. By 28 & 29 Vict. c. 18, s. 6 (b), the mode of proving a previous conviction is set out, and provides that the certificate shall contain the substance and effect only (omitting the formal part) of the indictment and conviction. It is the universal practice for the clerks of arraigns and justices of the peace to set out in such certificates both verdicts and judgments. Why, if the verdict of the jury amounts to a conviction? The universal practice of such experienced Crown lawyers is entitled, like the practice of conveyancers, to the highest consideration. An interlocutory judgment is quite unknown to the criminal law; final judgment is the only judgment known to the law, that is a judgment followed by sentence. *Reg. v. Miles* (24 Q. B. Div. p. 423), although at first sight it may seem to be an authority to the contrary, when examined, strongly supports this view, because in this case judgment was entered *ipsissima verba* of the Summary Jurisdiction Act. If this case had been dealt with in 1888 under the

protection of the First Offenders Act, and had followed the words of that statute, there would have been a judgment. This case was not so dealt with, but the prisoner was released on recognisance under the common law powers from time immemorial vested in a judge of oyer and terminer and general gaol delivery. It is plainly laid down in *Hawkins' Pleas of the Crown*, p. 33, and *Hale's Pleas of the Crown*, p. 684, that there can be no conviction without judgment, and this would seem to follow from the passage in *Chitty on Criminal Law* (1816), vol. 1, p. 725 and p. 736. The point was fully considered in 1844 by the full Court of Common Pleas in *Burgess v. Boetefeur and Brown* (13 L. J. 122, M. C.), and the court were unanimous that there can be no conviction without judgment.

Mr. Partridge, for the Crown. — *Burgess v. Boetefeur and Brown* had been distinguished in a recent case tried before Sir James Stephen, viz., *Jephson v. Barker* (3 Times L. Rep. 40), in 1890, and referred to in Stroud's Judicial Dictionary. All through the Coinage Act the word "conviction" is plainly used in the sense of verdict.

I entertained very great doubt on the point, but thought it safer to follow Sir James Stephen and rule that there was a case for the consideration of the jury, and leave this court to determine authoritatively as to what constitutes a "conviction." It is evident Sir James Stephen was not himself free from doubt, for he stayed execution to enable the point to be reconsidered in the Court of Appeal, but the case was not proceeded with. The point is from a practical point of view one of great importance, as the practice of releasing convicted persons on simple recognisance is a very general and growing one, and the protection of the First Offenders Act is of very limited scope. The jury found the prisoner was the same person named in the certificate, and I respited judgment, and released the prisoner on bail. The question for the court is whether upon the facts before set out, the prisoner could be properly convicted of felony.

By sect. 9 of 24 & 25 Vict. c. 99, it is enacted that:

Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall . . . be guilty of a misdemeanour.

By sect. 12 of the same Act, it is enacted that:

Whosoever, having been convicted, either before or after the passing of this Act, of any such misdemeanour, or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanours or crimes and offences in any of the said sections mentioned, shall . . . be guilty of felony.

And by sect. 37, it is provided that:

Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and con-

(a) The certificate was as follows: "Central Criminal Court to wit. These are to certify that at the general session of the delivery of the Queen's Gaol of Newgate, and other prisons holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, on Monday, the 23rd day of April, in the year of our Lord 1888, before certain justices of our said Lady the Queen, assigned to deliver the said gaols of the prisoners therein being, Ellen Edwards was in due form of law convicted on a certain indictment against her for that she did unlawfully utter a counterfeit half-crown to Ellen Dann, knowing the same to be false and counterfeit, against the statute, &c., and against the peace, &c., and the said Ellen Edwards was thereupon ordered to find one surety in the sum of twenty pounds for her appearance to hear judgment when called upon.—Dated the 30th day of Jan. 1894.—H. K. AVOXY, Clerk of the said court."

(b) This should no doubt have been 24 & 25 Vict. c. 99, s. 37.

viction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first committed, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court.

Burnie, on behalf of the prisoner, submitted first, that the word "conviction" strictly means the judgment of the court, and not the verdict of the jury, though it might in ordinary language be so considered, and that this being a penal statute the word was to be construed in its strict legal sense. Secondly, that even assuming the word to mean the verdict of the jury, it was necessary for the prosecution to prove what the final judgment of the court was, for *non constat* that it was in accordance with the verdict, or that such verdict was not set aside. All that the prosecution had done was to prove an order, not a judgment of the court, and there was a great difference between an order and the judgment of the court. In *Burgess v. Boetefeur and Brown* (8 Scott's New Rep. 194; 7 M. & G. 481; 13 L. J. 122, M. C.), in an action under 25 Geo. 2, c. 36, s. 5, by an inhabitant who had given information as to the keeping of a disorderly house, in consequence of which the keeper of the house was indicted and pleaded guilty, but was not brought up for judgment until some time afterwards, it was held that there had been no conviction until sentence was pronounced. In the course of his judgment Tindal, C.J. said, "Undoubtedly 'conviction' is *verbum equivolum*; it is used sometimes to denote the verdict of the jury, and at other times in its strict legal sense to denote the judgment of the court." This being so, it was incumbent upon the court to place the construction upon the word which was most favourable to the prisoner. In *Reg. v. Ackroyd* (1 C. & R. 158) Cresswell, J. held that a certificate of a previous conviction under 7 & 8 Geo. 4, c. 28, s. 11, must state that judgment was given. Here there was no judgment shown by the certificate, merely an order that the prisoner should come up for judgment when called upon. It therefore showed, so far as it showed anything, that no judgment had ever been given. Again, in *Reg. v. Stonnell* (1 Cox C. C. 142), Patteson, J. held that a certificate of a previous conviction for felony was not admissible unless it set forth not only the fact of the prisoner's conviction, but also the judgment of the court thereon. So, too, in *Hale's Pleas of the Crown*, vol. 1, p. 685, is the following: "By conviction, I conceive, is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment." The form of conviction runs, "It was thereupon considered by the court," and where the entry upon a record was merely "it was ordered" the court held that there had been no judgment:

Res v. Kenworthy, 1 B. & C. 711.

In *Jephson v. Barker and another* (3 Times L. Rep. 40) the court held that where the keeper of a disorderly house had merely been bound over to come up for judgment if called upon, there had been sufficient conviction to satisfy 25 Geo. 2, c. 36, s. 5; but there, as pointed out by Stephen, J., the judgment was final except in certain events,

Vol. LXX., N. S., 1815.

whereas here the certificate showed that there had been no final judgment, the order being to come up for judgment when called upon. He also cited *Reg. v. Miles* (24 Q. B. Div. 423), as showing what a final judgment was.

Sutton and Partridge, for the prosecution, were not called upon.

HAWKINS, J. delivered the judgment of the court as follows:—The Lord Chief Justice and my learned brothers have asked me to deliver judgment in this case on their behalf as well as my own, and I have no difficulty in expressing my opinion that this conviction should be affirmed; and affirmed on the very simple ground that the two sects. 9 and 12 of the Coinage Offences Act 1861 show clearly what construction should be placed on the word "conviction" in sect. 18. It is unnecessary therefore to decide any of the questions which have been so ably argued by Mr. Burnie. Now sect. 9 of the Act enacts that whosoever shall put off any false or counterfeit coin shall be guilty of a misdemeanour, and being convicted thereof, that is to say, being found guilty of the misdemeanour, shall be liable to be imprisoned. The sentence was to follow the conviction. It is clear, therefore, that the intention of the Legislature in enacting this was that, if a person was found guilty of an offence within the section, the Legislature meant that to be treated as a conviction, and used the word "convicted" as meaning having been found guilty. In this case the prisoner was clearly found guilty, for, on looking at the certificate, it shows that. It is true that there is no mention in it of an actual judgment or sentence, but that she had been found guilty the certificate established beyond all question. Now the prisoner is indicted under sect. 12 of the Coinage Offences Act 1861, which creates this new offence, and enacts that whosoever having been convicted of any such misdemeanour, or crime and offence, as in any of the last three preceding sections mentioned, that is to say, sects. 9, 10, and 11, shall afterwards commit any of the misdemeanours, or crimes and offences, in any of the said sections mentioned, shall be guilty of felony. The statute therefore makes that a felony which, had it been the first occasion upon which the prisoner had been convicted, would have been a misdemeanour. The prisoner having pleaded guilty to the charge, in order to prove the previous conviction the certificate was put in, and was admitted without objection. Now that certificate shows undoubtedly that the prisoner had been previously convicted. Such conviction was under sect. 9, and she pleaded guilty to having committed a similar offence to that of which she had been convicted under sect. 9. It therefore seems to us that she comes directly within the language of the 12th section, and is guilty of the felony of which it is stated in the case she has been convicted. It seems to me and to my learned brothers that the case is beyond all argument when you come to read sects. 9 and 12. The conviction must therefore be affirmed.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury*.

Solicitor for the prisoner, *T. O. Evans*.

House of Lords.

March 15, 19, and April 16.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MACNAGHTEN, and MORRIS.)

BRITISH AND AMERICAN TRUSTEE AND FINANCE CORPORATION v. COUPER. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Company — Reduction of capital — Dissentient shareholder—Companies Act 1867 (30 & 31 Vict. c. 131), ss. 9 and 11, and 1877 (40 & 41 Vict. c. 26), ss. 3 and 4.**It is not beyond the statutory jurisdiction of the court, under the Companies Acts 1867, 1877, to sanction a scheme for the reduction of the capital of a limited company which does not deal in the same way with all shares of the same class.**A company carried on business in the United Kingdom and in America, and a portion of its investments and some of its shareholders were in that country. Differences having arisen between the directors in England and the American committee, it was agreed that the American shareholders should take over the American investments upon terms, that the company should cease to carry on business in America, and that the capital of the company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was duly passed and confirmed. All the creditors of the company had either been paid or had assented to the arrangement.**Held (reversing the judgment of the court below), that the arrangement was not ultra vires of the company, and should be sanctioned by the court.**Re Denver Hotel Company (68 L. T. Rep. N. S. 8; (1893) 1 Ch. 495) distinguished.**Trevor v. Whitworth (57 L. T. Rep. N. S. 457; 12 App. Cas. 409) explained.**THIS was an appeal from a judgment of the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.), who had affirmed a judgment of North, J. The facts of the case are fully set out in the judgment of the Lord Chancellor. In the courts below it was held that the case was governed by the rule laid down in *Re Denver Hotel Company* (68 L. T. Rep. N. S. 8; (1893) 1 Ch. 495).**Cozens-Hardy, Q.C. and Kirby appeared for the appellants, the company.**Romer for the respondent, a dissentient shareholder.**At the conclusion of the arguments their Lordships took time to consider their judgment.**April 16.—Their Lordships gave judgment as follows:—**THE LORD CHANCELLOR (Herschell).—My Lords: The appellant company on May 18, 1892, presented a petition praying that a special resolution passed and confirmed at extraordinary general meetings of the corporation might be confirmed by the court. The resolution provided for a modification of the conditions of the memorandum of association by a reduction of the capital of the company from 2,000,000*l.*, divided into 188,600 ordinary shares of 10*l.* each, and 114,000 general**founders' shares of 1*l.* each (of which there had been issued 63,109 ordinary and 72,298 general founders' shares), to 1,691,737*l.*, divided into 160,767 ordinary shares of 10*l.* each and 84,067 general founders' shares of 1*l.* each, and that the remainder of the capital—namely, the 27,833 ordinary shares, numbered as therein mentioned—be paid off (the capital represented thereby being in excess of the wants of the company), and that such last-mentioned ordinary and general founders' shares respectively and all liability thereon be wholly extinguished. The company had carried on business in the United States, and a portion of its investments were in that country. These investments had been made by the directors on the advice of a committee of the board resident in America. Differences arose between the board of directors in England and the American committee as to the management of the business of the corporation, which rendered it impossible to carry on such business both in England and the United States with advantage. It was accordingly determined that the best course to be adopted was that the company should cease to carry on business in the United States, and it was arranged that the American investments should be made over to the American shareholders subject to the payment of 11,000*l.* to the corporation, and that the shares held by the American shareholders should be cancelled, thus reducing *pro tanto* the capital of the company. This arrangement was, as I have stated, approved by the shareholders at two extraordinary general meetings. All the creditors of the company have either been paid or have assented to the arrangement. The interests of the shareholders alone have therefore to be considered. On the hearing of the petition confirmation by the court was opposed by one of their number. North, J. dismissed the petition with costs, and his decision was affirmed by the Court of Appeal. The case was, in both courts, supposed to be governed by the views expressed by the Court of Appeal in the case of *The Denver Hotel Company* (68 L. T. Rep. N. S. 8; (1893) 1 Ch. 495) that a company could not reduce its capital by paying off some of its shareholders unless all shareholders of the same class were dealt with alike. The merits of the arrangement embodied in the resolution now in question were not entered into. The position assumed was that the court had no power to confirm it as being *ultra vires*. This renders it necessary to consider carefully what are the powers conferred by the Companies Act, 1867, and the amending Act of 1877. By the earlier of these statutes companies were for the first time empowered to reduce their capital. Sect. 9 provides that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum as to reduce its capital; and by sect. 11 a company which has passed a special resolution for reducing its capital may apply to the court by petition for an order confirming the reduction, and on the hearing of the petition the court, if satisfied that every creditor entitled to object to the reduction has either been paid or been secured or consents, may make an order confirming the reduction. In consequence of views indicated by Jessel, M.R., that the Act of 1867 did not sanction the return of unpaid capital the Act of 1877 was passed. It was enacted by sect. 3 that "capital," as used in the Act of 1867, shall include paid-up capital, and*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

the power to reduce capital conferred by that Act "shall include a power to pay off any capital which may be in excess of the wants of the company." To the terms of sect. 4 I shall have occasion to refer presently. It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured. Now, it can scarcely be denied that such a scheme as that under consideration, by which certain of the shareholders receive a part of the assets of the company equivalent to their shares therein, such shares being then cancelled, is a mode of effecting a reduction in the capital of the company. When the case of *Trevor v. Whitworth* (57 L. T. Rep. N.S. 457; 12 App. Cas. 409) was before this House Lord Macnaghten said: "I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now the Act of 1882 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power to 'pay off any capital which may be in excess of the wants of the company,' and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or 'the payment to any shareholder of any paid-up capital.' It follows that, if the operation be affected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital, within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company." I did not express myself so definitely on the point, but I said, "Experience appears to have shown that at circumstances might occur in which a reduction of the capital would be expedient, Accordingly, by the Act of 1867, provision was made enabling a company, under strictly defined conditions, to reduce its capital. Nothing can be stronger than these carefully worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be." And further on I said: "And the stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result." There can be no doubt that the *ratio decidendi* in that case was in part, at least, this—that a company which paid away its assets for the purchase of its own shares did

thereby reduce its capital, and that not in a manner authorised by the Legislature. If, then, the scheme which the court is asked to confirm be in fact one for reduction of capital, I am, with all deference, at a loss to understand how the court in confirming it could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. Indeed, the provisions of sect. 4 of the Act of 1877 recognise that a scheme may involve the payment to a shareholder of a part of the paid-up capital, for it enacts that where the reduction of capital by the company does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the creditors of the company, unless otherwise directed by the court, shall not be entitled to object or required to consent to the reduction. In the case of *The Denver Hotel Company*, Lindley, L.J., in delivering the judgment of the court, said: "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost, nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of sect. 3 of the Companies' Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor v. Whitworth* as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts 1867 and 1877, it is *ultra vires* of a limited company to buy its own shares, even if its memorandum and articles expressly authorise it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself." If all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the court to refuse to confirm such a resolution, or which shows that it would be *ultra vires* to do so. I do not see any danger in the conclusion that the court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to intrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly protected by this: that the decision of the majority can only prevail if it be confirmed by the court. This is a complete answer to the argument ably urged by Mr. Romer at the bar, that if all the shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the

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BRITISH AND AMERICAN TRUSTEE, &C., CORPORATION v. COUPER.

[H. OF L.]

majority. There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the court, and that no such scheme ought to be confirmed unless the court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the court has no power to sanction it. It was further argued that the scheme was not within the statutory powers of the company, inasmuch as these were confined to paying off "any capital which may be in excess of the wants of the company." I may observe that sect. 3 of the Act of 1877, which contains these words, only enacts that the power to reduce capital conferred by the Act of 1867, "shall include" that power. But even if this is to be regarded (which I am far from saying that it is) as a limitation of the power to reduce capital by paying off paid-up capital, I am of opinion that, in view of the alterations intended in the method of carrying on the business of this corporation the case is one in which the reduction has been effected because the capital is in excess of the requirements of the company. Assuming that it is within the power of the court to confirm such a scheme as the present, it was scarcely contended by the learned counsel who represented the respondent that there was any ground for refusing to do so, or that it involved any result either unjust or inequitable; and, indeed, in view of the evidence before the court, it would not have been possible successfully to maintain such a contention. For these reasons I am of opinion that the judgment appealed from should be reversed, and that the special resolution should be confirmed, and I move your Lordships accordingly. Having regard to the fact that the term "reduced" has been used in describing the company for a very considerable time, I think that they may be allowed hereafter to discontinue that addition.

LORD WATSON.—My Lords: The appellants, who are a company limited by shares, ask the court to confirm a special resolution for the reduction of their capital, which has been passed by a statutory majority of the members. The scheme submitted for confirmation involves the cancellation of all their unissued shares, and also the application of part of the available assets of the company to the purchase and extinction of a certain proportion both of general founders' shares and ordinary shares, those being the two classes into which their nominal capital is divided. If the scheme were carried out their reduced capital would consist of the shares now held by those members whose interests are not to be purchased and extinguished. The company have practically no outside creditors; but their petition is opposed by the respondent, who owns shares of both classes. At the bar of the House he did not maintain that, under the scheme sought to be confirmed, the shareholders of either class, whether they were bought out or continued to be members, would not each of them receive a fair and reasonable equivalent for his present interest in the company, and nothing more. He relied solely upon the plea that it is beyond the statutory jurisdiction of the courts to sanction any scheme for the reduction of capital which does not deal in precisely the same way with each and every share belonging to the same class. If that be the law it is manifest that in some cases the result might be unfortu-

nate. Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter, and it may be greatly for the advantage of the company that the latter alternative should be adopted. Although every member of the company were agreed as to the desirability of taking that course, if the plea of the respondent be well-founded, the court would have no power to assist them. North J. dismissed the petition, and his decision was affirmed by the Appeal Court. There is no record before us of what was said by the learned judges; but it appears that the case was admitted by counsel to be within the rule expressed by Lindley, L.J., in *Re Denver Hotel Company* (*ubi sup.*), and that the rule was followed as a precedent binding upon them, and without discussion by the Appeal Court. In that case the scheme before the court for its approval embraced a transaction for the sale of one of the company's assets to a shareholder. The sale was to be in consideration of a sum of 3000*l.*, and, as Lindley, L.J., states, "in further consideration of his surrendering his shares to the company." North J., who had refused confirmation, held that the transaction amounted in substance to the repayment of capital to part of a class of shareholders, against the wish of one-seventh of the whole; and, in those circumstances, his Lordship was of opinion that he had no power to give effect to the arrangement, although he considered it to be a beneficial one, and would have been prepared to sanction it if he had the power to do so. The Appeal Court reversed his judgment, and confirmed the resolution. They held that the transaction was not a purchase, but a surrender of shares, which could have been effected by the company without the sanction of the court. Lindley, L.J., said: "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of sect. 3 of the Companies Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself, by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor v. Whitworth* (*ubi sup.*) as intimating that any such transaction is within the statute." I agree with the Lords Justices in thinking that the observations made in *Trevor v. Whitworth* by Lord Macnaghten were not intended to have, and have not, any direct bearing upon the construction of the powers committed to the court, with respect to reduction of capital, by the Act of 1867 and subsequent statutes. They were directed to the point that the purchase of its own shares by a company, although made on terms advantageous, is, in effect, a reduction of its paid-up capital, and is, therefore, *ultra vires* of the company. For the purpose of this appeal the decision of the House

H. OF L.] BRITISH AND AMERICAN TRUSTEE, &C., CORPORATION v. COUPER. [H. OF L.]

in *Trevor v. Whitworth* does not appear to me to go further than to affirm that the purchase of its shares by a company is one of the methods by which a reduction of its capital can be effected. It does not establish that reduction by that method is more deeply tainted with illegality than any other means by which the same result is attainable. To my mind the only substantial question arising in this appeal is whether these empowering statutes give jurisdiction to entertain proposals for reduction of capital in any manner whatever of which the courts may approve, or whether their jurisdiction is excluded, in the case of proposals to reduce it by the purchase of shares. Sect. 9 of the Act of 1867 contains the leading enactments upon this subject. It enables a company limited by shares so far to modify the conditions in its memorandum of association as to reduce its capital, if authorised to do so by its regulations as originally framed, or as altered by special resolution. Sect. 11 provides that a company which has passed a special resolution to that effect may apply to the court for its confirmation. Specific directions are given for the guidance of the court, with the view of protecting the interests of creditors of the petitioning company; but, in so far as concerns the interests of its members, I do not find a single expression in the Act tending to indicate that the discretion of the court to grant or refuse such an application does not extend to every possible mode of reducing capital. The decision of the Appeal Court in *Re Denver Hotel Company* proceeds upon the view that reduction by purchase of shares is not covered by the words of sect. 3 of the Act of 1877. Assuming that view to be correct, the clause does not, in my opinion, derogate from the rights already given to companies, subject to the approval of the court, by the Act of 1867. It does not profess to give a complete definition of these rights; it simply explains, and possibly extends, in some particulars, the provisions of the previous statute. The next clause (sect. 4) contains a proviso which appears to me to support the inference that capital may be legitimately reduced by buying out some of the members of the company. It dispenses with certain conditions required by the Act of 1867, except in cases where the reduction of capital involves "either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital." These last words appear to contemplate that repayment of paid-up capital may be made either to all or to one or more of the body of shareholders. For these considerations I cannot, notwithstanding the able argument of Mr. Romer, for the respondent, resist the conviction that the courts below were bound to entertain the present case and to dispose of it upon its merits. I see no reason to doubt that the Court of Appeal arrived at a just conclusion in *Re Denver Hotel Company*, although I am by no means satisfied that the surrender made in that case was one which the company could lawfully accept without the sanction of the court. In *Trevor v. Whitworth*, Lord Macnaghten said: "I conceive that there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction."

I concur in that opinion; and I do not think the transaction ceases to be a sale in substance when the surrender of his share forms, not the whole, but part only, of the consideration given by a shareholder in exchange for an asset of the company. Seeing that the respondent has not argued that any injustice would follow to himself or any other member of the company, I am of opinion that your Lordships ought not only to reverse the judgments appealed from, but to confirm the special resolution.

Lord MACNAGHTEN.—My Lords: I agree. Under the Companies Act 1862 it was not competent for a company limited by shares to reduce its capital. Such an operation would have been in contravention of one or more of the statutory conditions of the memorandum, which the Act as it then stood made unalterable. The difficulty, however, was removed shortly afterwards by legislation. The Companies Act 1867 declares that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum, if authorised to do so by its regulations as originally framed, or as altered by special resolution, as to reduce its capital. The power is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured, or their claims must be satisfied. The public, the shareholders, and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings, and by the discretion which is intrusted to the court. Until confirmed by the court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure. With these safeguards, which are certainly not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reductions may set free. The Companies Act 1877 was passed mainly in order to remove certain doubts created by the decision of Jessel, M.R. in *Re Ebbw Vale Steel, Iron, and Coal Company* (36 L. T. Rep. N. S. 308; 4 Ch. Div. 827), which was a surprise to the profession at the time, and is, I believe, generally thought to have been incorrect. At any rate, the Act of 1877 gives no support or countenance to the construction which Jessel, M.R. adopted; in fact, it destroys the foundation of his argument. While it dispenses with the intervention of the court in the case of reduction of capital by cancellation of shares not taken or agreed to be taken by any person, it yet reserves to the court the power of requiring the consent of creditors in the case of reduction by cancellation of lost capital, the very case in which Jessel, M.R. thought such a requirement so unreasonable that he felt constrained to hold that the case itself was not within the Act. The Companies Act 1877 declares that certain cases to which, in the opinion of Jessel, M.R., the Act of 1867 did not apply, shall be included in the power conferred by that Act. It introduces some valuable amendments, and it is useful in throwing light upon the scope of the earlier Act. It is

H. OF L.]

BRITISH AND AMERICAN TRUSTEE, &C., CORPORATION v. COUPER.

[H. OF L.]

clear, for instance, from sect. 4, that the court must look at the arrangements as a whole, and have regard to all the circumstances of the case, and the consequences which, to use the language of the Act, the reduction "involves." Then it is clear from the following part of the section that, in the opinion of the Legislature, reduction of capital is a matter which concerns, or may concern, the public. The court must take everything into account before confirming the reduction. But there is not a word in the Act of 1877 from beginning to end tending to narrow the scope of the Act of 1867. The generality of the powers conferred by that Act is left wholly untouched. Turning to the facts of the case under appeal, your Lordships have before you an English company limited by shares and formed for the purpose of engaging in financial undertakings of every sort and description in every part of the globe. Its main purpose, however, was to make investments in English and American securities, and the operations so far have been confined to that field. The English business is under the control of the board of directors in London. The American business has been managed by some of the directors who are resident in America, acting as a committee under the supervision of the London Board. For some time past there has been friction between the London board and the American committee. The board were cautious and old-fashioned. The committee advocated a bolder policy, and demanded a freer hand. Matters were approaching a dead-lock. At last, after much negotiation, both sides arrived at the conclusion that a separation of interests was desirable. It was seen that, in the state of the market, winding-up would be disastrous to all concerned. So it was proposed that the American shareholders who were content to follow the American committee should take over the American assets and sever their connection with the company, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment. The proposed arrangement has been approved by special resolutions at general meetings, in which the American shareholders, apparently, took no part. The application to the court was for an order confirming a reduction of capital to meet the arrangement. It is for the company, and for the company alone, to judge of the prudence of the course proposed. The objects of the company are wide enough to swallow up the wealth of Lombard-street, or of the city of London. But again it is for the company to determine, subject of course to the statutory provisions for the protection of creditors, whether its capital, under the circumstances, and in view of the policy approved by the shareholders, is or is not in excess of its present wants. It is not suggested by the one shareholder, who stands alone in opposing the application, that the majority are acting oppressively, or that the arrangement is unfair or inequitable in the ordinary sense of those words. His real objection rather seems to be that he prefers the American system of doing business, and that he has more confidence in the American committee than in the London board. Why should the proposed arrangement not be carried into effect? The House has not the advantage of any judgment on the question, either in the court of first instance or in the Court of Appeal.

It seems to have been conceded in both courts that the case was governed by the judgment of the Court of Appeal in *Re The Denver Hotel Company* (68 L. T. Rep. N.S. 8; (1893) 1 Ch. 495). The actual decision in that case does not touch the question, although there are some observations of Lindley, L.J., who delivered the judgment of the court, which, if accepted, would conclude the matter. Speaking for myself, I cannot see any substantial distinction between *Re Denver Hotel Company*, where the reduction was confirmed, and the present case, where it is admitted that, if the view of the Court of Appeal in *Re Denver Hotel Company* be correct, confirmation must be refused. In both cases, as it seems to me, you have a purchase by a limited company of its own shares; for I cannot agree that a transaction which involves a surrender of shares as part of the consideration, is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor v. Whitworth* (57 L. T. Rep. N.S. 457; 12 App. Cas. 409). Undoubtedly, as Lindley, L.J. observes, "the cases upon reduction of capital are not in a satisfactory state. There are authorities in which it seems to be laid down that a proposed reduction of capital cannot be confirmed if it involves a purchase by the company of its own shares for that reason alone. That of itself, however, cannot be a sufficient objection. The shares are not to be purchased out of the company's registered capital, but out of moneys withdrawn from the capital and set free by the reduction. A company cannot employ any part of the capital with which it is registered, so long as it forms part of its registered capital, in the purchase of its own shares. But, if it proposes to reduce its capital in accordance with the statutory provisions which empower it to do so, there is no reason why it should not employ the fund set free by the reduction in the purchase of shares which it is intended to extinguish. Nothing can be more contrary to the principle of the Companies Acts than the return of capital by a company limited by shares. But, if capital money is set free by reduction of capital, no one ever suggested that it could not be returned to the shareholders; and, indeed, the Act of 1877 declares that such an operation is included in the power conferred by the Act of 1867. The fact that a thing is prohibited if it is done in the wrong way, and at a time when the circumstances of the case do not justify it, is no reason for holding the thing prohibited if it is to be done in the right way, and when it is justified by the circumstances. Mr. Romer did not press this point as constituting in itself a sufficient answer to the application. The reduction, he said, was not objectionable simply because it involved a purchase by the company of its own shares, but because a purchase by a company limited by shares of some of its own shares must involve dealing with shareholders, members of one and the same class, in different ways. You cannot, he said, reduce or extinguish some of a class of shares without equally reducing or extinguishing all the others of the same class. That was the objection which, in the opinion of the Court of Appeal, would have been fatal to the application of the *Denver Hotel Company* if the court had regarded the transactions as really a purchase of shares. The words of sect. 3 of the Act of 1877 "cannot in our opinion," says Lindley L.J., "be construed so as to enable a company to prefer

one shareholder to another of the same class as himself by buying up his shares." With all deference I venture to think that that mode of stating the proposition is really begging the question. It assumes that the person whose shares are to be purchased is getting a preference, an undue advantage for himself, at the expense of his fellow shareholders. But why should that assumption be made? The person whose shares are bought gets money or money's worth. The persons on whose behalf the company buys have their own shares improved by the value of the shares extinguished. If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the court say that there is a preference on the one side or on the other? If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no real inequality in the treatment of a class of shareholders, although they are not all paid in the same coin, or in coin of the same denomination. It is not easy to ascertain the origin of the objection urged on behalf of the respondent, though it has been put forward not infrequently. It seems to have grown out of the decision in the case of *Hutton v. Scarborough Cliff Hotel Company* (12 L. T. Rep. N. S. 228, 289; 2 Dr. & Sm. 514; 4 De G. J. & Sm. 672), on which Mr. Romer relied. In that case the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorising the directors to issue a certain number of preference shares. The proposed issue was restrained at the suit of an ordinary shareholder, on the ground mainly that, although the company had passed a special resolution authorising the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Kindersley, V.C., on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing in respect of dividends, and that what it was proposed to do was "contrary to the very nature of a joint stock company," and was "an alteration in the constitution of the company." It is difficult to understand what the learned Vice-Chancellor meant by the expression "constitution of the company," and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view that equality among shareholders in respect of dividends was an "implied stipulation in the memorandum." There is nothing in the Act of 1862, or in any other Act, requiring the memorandum to contain anything in reference to the rights of shareholders *inter se*. The division of the capital into shares of a certain fixed amount, which must appear in the memorandum, would not be altered or affected by issuing

some of these shares as preference shares. The practical result of the decision has been that, except in cases coming within the rule laid down in *Harrison v. Mexican Railway Company* (32 L. T. Rep. N. S. 82; L. Rep. 19 Eq. 358), a decision which has not met with universal acceptance, no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton v. Scarborough Cliff Hotel Company* (*ubi sup.*) was not founded upon a sound view of the Companies Act 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view, because I find that Cotton, L.J. has disapproved of the chief ground on which the decision was based. "In reality," he says, in *Guinness v. Land Corporation of Ireland* (47 L. T. Rep. N. S. 517; 22 Ch. Div. 349), "it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary." Lindley, L.J., in a later case, took the same view (*Re South Durham Brewery Company*, 53 L. T. Rep. N. S. 928; 31 Ch. Div. 261). I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that, if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount, distinguished by numbers for the purpose of identification, but with no other distinction between them express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal. In the result, therefore, I am of opinion that the objection on the part of the respondent is not well founded. I think that the proposed reduction is within the power conferred by the Act of 1867. "There is nothing in the Act," as North, J. has observed in *Re Barrow Haematite Steel Company* (59 L. T. Rep. N. S. 500; 39 Ch. Div. 582), "which requires that the reduction should be spread either equally or rateably over all the shares of the company." There is nothing in my opinion either unfair or inequitable in the arrangement involved in the proposed reduction, and I see no reason why it should not be confirmed.

Lord MORRIS concurred.

Judgment appealed from reversed, with costs here and below. Special resolution of the company confirmed.

Solicitors for the appellants, *Ashurst, Morris, Crisp, and Co.*

Solicitors for the respondent, *Linklater and Co.*

PRIV. CO.]

HOGGAN v. ESQUIMALT RAILWAY COMPANY.

[PRIV. CO.]

Judicial Committee of the Privy Council.

Thursday, May 3.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords HOBHOUSE, MACNAGHTEN, and SHAND, and Sir R. COUCH.)

HOGGAN v. ESQUIMALT RAILWAY COMPANY. (a)
ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of British Columbia — Unoccupied Crown lands — "Settler" — Land Act 1875 (38 Vict. No. 5) — Island Railway Act 1883 (47 Vict. c. 14).

A right of settlement under the Land Act 1875 of British Columbia, and the consolidating Acts, can only be obtained in respect of unoccupied, unsurveyed, and unreserved Crown lands, and not in respect of any land reserved as a town site; and there is nothing in the Island Railway Act 1883 giving any further right of settlement, or any new or extended sense to the word "settler."

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Supreme Court of Canada (Ritchie, C.J., Strong, Fournier, Gwynne, and Patterson, JJ.), who had affirmed a judgment of the Supreme Court of British Columbia (Begbie, C.J., McCreight and Drake, JJ.), who had affirmed a judgment of Walkem, J. in favour of the respondents, the defendants below, in an action brought against them by the appellant claiming a right to certain land as an "actual settler for agricultural purposes," under the statutes in force in the colony.

Shaw, Q.C. (Solicitor-General for Scotland), Haldane, Q.C., and Ram appeared for the appellant.—The argument turned upon the effect of the sections of the Colonial statutes, which are set out in the judgment.

Cozens-Hardy, Q.C., Pooley, Q.C. (of the Colonial Bar), and Clay, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell).—This is an appeal from a judgment of the Supreme Court of Canada, affirming a judgment of the full court of British Columbia, which had affirmed a judgment of Walkem, J. The appellant commenced an action against the respondents in the Supreme Court of British Columbia, whereby he claimed a declaration that he was entitled under the British Columbia Act (47 Vict. c. 14) entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," to acquire and purchase from the respondents a certain parcel or track of land of 160 acres, at the price of 160 dollars. The claim was founded upon sect. 23 of the Act, which provides that "The company shall be governed by sub-sect. (f) of the herein-before recited agreement." The agreement referred to was one which had been entered into in 1883 between the Government of Canada and the Government of British Columbia respecting the railway of the respondents, and provided amongst other things for the grant of

certain lands by the Provincial to the Dominion Government for the purposes of that railway. Sub-sect. (f) is in the following terms: "The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years after the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler." The lands on Vancouver Island referred to in the sub-section include the land which is the subject of this action. The case on behalf of the appellant was, that he was an actual settler for agricultural purposes; that he claimed the land within four years from the passing of the Act—the Act being passed on the 19th Dec. 1883, and his claim being made before the 19th Dec. 1887—and that he was therefore entitled to a conveyance of the land to him by the respondents. He founded his claim to be a settler for agricultural purposes upon the fact that he had occupied the land in question, or a portion of it, by erecting buildings thereon, by sowing with vegetables four or five acres of it, and by clearing and preparing for agricultural use some five acres more. Prior to the Act under which the appellant claims, the Government had reserved a certain tract of land, including the 160 acres in question, as a town site. That is found as a fact, and is not now contested. They had sold off some plots of it to purchasers who were desirous of acquiring land of that description, but it had not been thrown open by them for purchase. The contention on the part of the appellant is, that whatever might have been the case at the time when this land was Crown property, as soon as the Act to which reference has been made was passed, and at all events as soon as the land had been conveyed to the respondents, it became open to any settler for agricultural purposes to acquire 160 acres of it, on payment of one dollar an acre. The appellant had, on two occasions before this action was brought, applied to have his right of pre-emption to the land in question recorded by the commissioners appointed by statute for that purpose. The application had been twice rejected, and there had been no appeal by him from that rejection. He bases his claim entirely upon the right which he alleges is given by the 23rd section of the Act, incorporating as it does sub-sect. (f) of the agreement; and there can be no doubt that, unless he can show that he is an actual settler for agricultural purposes, entitled to the rights conferred by that sub-section, he has no case at all against the respondents. Sub-sect. (f) uses the term "actual settlers for agricultural purposes," and in considering what is the meaning of the language used, it is necessary to look at the whole of the sub-sect. (f). The lands were to be open for four years from the passing of the Act to actual settlers for agricultural purposes, and in the meantime and until the railway was completed—that is to say, the railway which was in contemplation at the time, and for the purpose of the construction of which lands were conveyed by the Provincial Government to the Dominion Government—the Government of British Columbia were to be the agents of the Government of Canada for administering, for the purposes of settlement, the lands conveyed, and for such purposes the Government of British Columbia were to make and issue

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.]

HOGGAN v. ESQUIMALT RAILWAY COMPANY.

[PRIV. CO.]

pre-emption records to actual settlers. Neither the agreement, nor the Act itself, contains any definition of the expression "Actual settlers for agricultural purposes." But it is important to notice that by the same 23rd section, which by incorporation gives rights to actual settlers for agricultural purposes, rights are given to *bonâ fide* squatters who have continuously occupied and improved lands within the area acquired by the company, but, in order to give a squatter a right, that land must have been continuously occupied and improved by him for one year prior to the 1st Jan. 1883. The term "squatter" is of course well known, and commonly used. It refers to a person who has taken possession of a piece of land and occupied it by buildings or by cultivation, and has by so taking possession of it asserted a right to it; and in the present case, where the possession has been exercised continuously for the period named in the section, the Act converts the possession into a right. The question now arises, what is a "settler" as distinguished from a "squatter"? It is obvious that the term "settler" found in the agreement means something different from the term "squatter" in the 23rd section of the Act, because the rights which are given to the "squatter" are confined to the case of continuous occupation and improvement of the land for one year prior to the first January 1883, whilst as regards "settlers" rights may be acquired for four years from the passing of the Act. The Government of British Columbia are by the terms of sub-sect. (f) to issue pre-emption records to actual settlers: "and in order to understand what is meant by that expression recourse must be had to certain prior legislation in the colony. When the Land Act of 1875 (38 Vict. No. 5) is examined, which was in force in British Columbia until a consolidating Act was passed on the 18th Feb. 1884, the meaning of the word "settler" becomes sufficiently obvious. By sect. 3 of this Act any person therein specified "may record any tract of unoccupied, unsurveyed, and unreserved Crown lands . . . not exceeding three hundred and twenty acres in extent in that portion of the province situate to the northward and eastward of the Cascade or Coast Range of mountains, and one hundred and sixty acres in extent in the rest of the province." By sect. 5 a person desirous of recording such land must stake it out. Sect. 9 provides that upon the applicant for such land complying with certain provisions specified in the Act, and on paying the sum of two dollars to the commissioner, the commissioner shall record such land in his favour as a pre-emption claim, "and shall give to such applicant, hereinafter called a 'settler,' a certificate of such record, according to the form No. 3 in the schedule hereto." Sect. 10 enacts as follows: "The settler shall within thirty days thereafter enter into occupation of the land so recorded; and if he shall cease to occupy such land save as hereinafter provided, the commissioner may, in a summary way, upon being satisfied of such cessation of occupation, cancel the record of the settler so ceasing to occupy the same, and also improvements and buildings made and erected on such land shall be absolutely forfeited to the Crown, and such settler shall have no further right therein or thereto." Sect. 11 provides that "the occupation required shall mean a continuous *bonâ fide* personal residence of the settler, agent, or family on the land recorded by

such settler." A settler, therefore, is obviously defined by this Act by implication as a person who has complied with its requirements, and so obtained a right to record land under its provisions. Unless he occupies land recorded in the manner provided by the Act it appears clear that he is not a settler within its meaning and obtains no right under it. Now it is only in respect of unoccupied, unsurveyed, and unreserved Crown lands under that Act that there can be any right of settlement obtained, because the Act only applies to such lands. Inasmuch, therefore, as the land in question in the appeal had been reserved as a town site, it could not be affected by any claim of any person as a settler under the Land Act. Is there anything in the Island Railway Act of 1883 which enables a person to become a settler, or gives him any right of pre-emption as a settler in respect of any lands which, being reserved lands, were not capable of being settled in that sense under the Land Act? Their Lordships are unable to find anything in the Island Railway Act to indicate that there was any such intention; that any lands which down to that time were not capable of being occupied by a settler within the meaning of the Land Act, and in the manner prescribed by the Land Act, became by reason of the Island Railway Act capable of such occupation. When the language of the latter Act is examined, it obviously contemplates that in the case of settlers there shall be a pre-emption record, and that a settler is only a person who has obtained the record by pursuing the means prescribed by the statute. The object of sub-sect. (f) in the Island Railway Act appears to have been this—that it was not desirable that while the railway was in course of construction the lands should be incapable of any settlement, and inasmuch as being destined ultimately to be the property of the railway, there would be no one who could during the period of construction provide the requisite machinery for transferring the lands, or putting the lands into the possession of persons who were desirous of occupying and cultivating them, the Provincial Government was, during that period, to deal with these lands (though ultimately they were to become the lands of the railway company), just as it had dealt with them prior to the passing of the Island Railway Act, the commissioner receiving the necessary documents, and giving the necessary records then as before. It is quite true that, in the present instance, as events have turned out, and it is said as contemplated by the Island Railway Act, a short period elapsed between the completion of the railway by the respondents, and the expiration of the four years; but there is certainly no machinery contained in that Act which provides for the respondents during any such interval occupying the position of the Provincial Government, and doing that which certain officials of the Provincial Government were to do in a certain prescribed manner. Whatever may have been the cause which led to that interval being possible, their Lordships are of opinion that it was not the intention of the Legislature that any new right of pre-emption should be given; that the word "settler" should be used in any new sense; or that anyone should be capable of being a settler who had not been capable of being a settler in respect of those lands under the pre-existing law. The contention, therefore, on behalf of the appel-

PRIV. CO.]

KOPS v. THE QUEEN.

[PRIV. CO.]

lant appears to their Lordships to fail. The truth is that, unless it be by reason of a compliance with the provisions of the Land Act, there seems to be no distinction between a "squatter" and a "settler." Their Lordships inquired of the learned counsel for the appellant how they distinguished between the two terms. It was suggested that a settler under the Act must be a settler for agricultural purposes: but a person settling or occupying for agricultural purposes may be as much a squatter as a person occupying for other purposes. Indeed the learned counsel for the appellant entirely failed to suggest any distinction between the case of the squatter and the case of the settler, unless by the word "settler" were meant a person capable of and entitled under and in pursuance of the provisions of the Land Act. It being clear that the appellant was not in that position, their Lordships are of opinion that the judgment appealed from must be affirmed, and the appeal dismissed with costs; and they will humbly advise Her Majesty accordingly.

Solicitors for the appellant, *Harrison and Powell*.

Solicitors for the respondents, *Hepburn, Son, and Cutcliffe*.

Saturday, June 9.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords HOBHOUSE, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

KOPS v. THE QUEEN. (a)

PETITION FOR LEAVE TO APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Criminal law—Criminal Law and Evidence Amendment Act of New South Wales (55 Vict. No. 5)—Prisoner competent to give evidence in his own behalf—Comments of judge.

It is no ground for interfering with the verdict of a jury in a criminal case that the judge in his summing up commented upon the fact that the prisoner might have given evidence in his own behalf, but had not done so.

Petition for leave to appeal refused.

THIS was a petition for special leave to appeal from a judgment of a majority of the Supreme Court of New South Wales, refusing to quash a conviction of the petitioner for arson.

The Act 55 Vict., No. 5, of New South Wales provides that a prisoner charged with an indictable offence shall be competent, but not compellable, to give evidence on the charge. The question which it was desired to raise in the appeal, to prefer which special leave was asked, was whether the judge was entitled to comment to the jury on the fact that the prisoner had not been called to give evidence. The charge was one of attempting to set fire to a building. The prisoner was defended by counsel, and was not called to give evidence. The judge before whom the trial took place, in summing up, commented upon the fact that the prisoner had not been called to give evidence. The judge, at the request of counsel for the prisoner, stated a case for the Supreme Court of New South Wales as to whether the comment was right. The case was heard before the full court, consisting of seven judges, five of whom were of

opinion that the conviction should be confirmed, the other two being of the contrary opinion. The petitioner now applied for special leave to appeal to the Judicial Committee of the Privy Council.

Shearman for the petitioner.—The Act does not put a prisoner on the same footing as an ordinary witness. He is "competent but not compellable." It is for the prosecution to prove their case. This is a criminal statute, and must therefore be construed most strongly in favour of the prisoner. The fact that he did not give evidence is not to be presumed against him, and the judge had no right to comment on it.

At the conclusion of the argument for the petitioner their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell).—This is a petition for leave to appeal in a criminal matter. In the case of *Ex parte Deeming* (1892) A. C. 422, which was a petition for a similar indulgence, Lord Halsbury, L.C., in delivering the opinion of the board, quoted from the judgment in *Dillet's case* the following passage, of which their Lordships entirely approve: "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." The point which it is sought to raise by the appeal, for which special leave is asked, is whether upon the trial of a prisoner since the passing of the Criminal Law and Evidence Amendment Act (55 Vict., No. 5) New South Wales, it is legitimate for the judge, in commenting upon the facts proved, to refer to the capacity of the prisoner to give evidence on his own behalf and so explain matters which would naturally be within his own knowledge, an explanation of which would be important in view of the evidence already given. The argument will have to go to this length, and their Lordships understand it is put as high as this—that either in no case is a judge entitled to comment upon the prisoner having refrained from giving evidence, or that in this particular case there were circumstances rendering such comment illegitimate in point of law. The majority of the learned judges in the court below held that the comments made by the learned judge in this case were made according to law, and that there was no reason to interfere with the verdict. Their Lordships see no reason to doubt the correctness of the conclusion at which the majority of the learned judges arrived. They do not lay down—it is not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient or calculated to further the ends of justice—which undoubtedly does regard the interests of the prisoner as much as the interests of the Crown, who are prosecuting—to call attention to the fact that the prisoner had not tendered himself as a witness, it being open to him either to tender himself or not as he pleased. But, on the other hand, there are cases in which it appears to their Lordships that such comments might be both legitimate and necessary. The only language to be found in the clause on which the argument was

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

CT. OF APP.] *Re HALLETT AND Co.; Ex parte COCKS, BIDDULPH, AND Co.* [CT. OF APP.]

based is that the words "not compellable" are used. It appeared to the minority of the learned judges in the court below that this indicated an intention that no such comments as those made by the learned judge who tried this case should be made to the jury. In their Lordships' opinion, having in view the fact that in the English Act to amend the Law of Evidence (14 & 15 Vict. c. 90), which enabled parties to tender themselves as witnesses and be called as witnesses in civil actions, the provision was that they should be both competent and compellable to give evidence when the subsequent legislation introduced in part the same capacity as regarded criminal cases enabling persons charged with crimes to tender themselves, the word "compellable," which in the earlier statute obviously meant compellable by process of law as other witnesses, must have in that subsequent legislation the same meaning and not any more extended meaning such as has been contended for here; and consequently the argument founded on the use of the words "not compellable" can not prevail. Their Lordships will therefore humbly advise Her Majesty that the petition for special leave to appeal should be dismissed.

Solicitors for the petitioner, *Shearman and Rayner*.

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, April 7.

(Before Lord ESHER, M.R., SMITH and DAVEY, L.JJ.)

Re HALLETT AND Co.; Ex parte COCKS, BIDDULPH, AND Co. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Proof—Secured creditor—Promissory note—Guarantee by third party—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 168.

H. and Co., upon lending a sum of 16,000l., received from the borrower a promissory note for that amount, and also a guarantee from an insurance company to pay H. and Co. "or the holders for value for the time being" of the promissory note if it was not paid by the borrowers when it fell due. Afterwards H. and Co. borrowed 16,000l. from their bankers, and indorsed the note to them, and also handed over to them the guarantee. The note was dishonoured. The insurance company went into liquidation. H. and Co. became bankrupt, and their bankers presented a proof for 12,000l., the balance due to them. The trustee in bankruptcy rejected the proof on the ground that the bankers were "secured creditors" within sect. 168 of the Bankruptcy Act 1883, which defines "secured creditor" as "a person holding a mortgage, charge, or lien on the property of the debtor as a security for a debt due to him from the debtor;" and that consequently the bankers were bound to deduct from their proof the value of the security held by them.

Held (reversing the decision of Williams, J.), that the note having been indorsed over in the ordi-

nary way to the bankers, and the beneficial ownership of the guarantee having been transferred to them, they were not "secured creditors" within sect. 168 of the Bankruptcy Act 1883.

THIS was an appeal by Cocks, Biddulph, and Co. from a decision of Williams, J. affirming the rejection of their proof by the trustee in bankruptcy of Hallett and Co.

In Nov. 1892 Hallett and Co. lent the sum of 16,000l. to the Agence Dalziel, and received from them a promissory note for the same amount payable six months after date, and also a written guarantee by the National Insurance and Guarantee Corporation to pay to "Hallett and Co. or the holders for value of the promissory note for the time being the said sum of 16,000l. and interest thereon" if that sum was not paid by the Agence Dalziel when the note fell due.

Afterwards Hallett and Co. borrowed 16,000l. from their bankers, Cocks, Biddulph, and Co., and indorsed the note to them, and handed over to them the guarantee.

The note was dishonoured when it fell due.

The National Insurance and Guarantee Corporation went into liquidation.

Hallett and Co. became bankrupt.

Cocks, Biddulph, and Co. presented a proof in the bankruptcy for 12,581l., the balance of money due to them from the bankrupts.

The trustee rejected the proof on the ground that Cocks, Biddulph, and Co. were "secured creditors" within sect. 168 of the Bankruptcy Act 1883, and were therefore bound to deduct from their proof the value of the security held by them. This was upheld by Williams, J.

By sect. 168 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) it is provided:

Secured creditor means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor.

Farwell, Q.C. and Vernon R. Smith for the appellants.—Cocks, Biddulph, and Co. are not "secured creditors" within sect. 168. They are absolute holders of the note, and the guarantee is merely an accessory to it. The guarantee, if given up or cancelled, would in no way benefit the bankrupts' estate. It is not a contract of indemnity to Hallett and Co., but only to the holder of the note. The note having been indorsed to the appellants, the guarantee was no part of Hallett and Co.'s property at the time of their bankruptcy:

Ex parte Schofield; Re Firth, 40 L. T. Rep. N. S. 832; 12 Ch. Div. 337.

Herbert Reed, Q.C. (Whately with him) for the respondent.—The note and the guarantee were handed to Cocks, Biddulph, and Co. as security for their loan to Hallett and Co. Both documents were in fact only pledged to Cocks, Biddulph, and Co. It was an equitable mortgage to secure the loan. The handing over of the guarantee could not amount to an assignment of it either at law or in equity.

Lord ESHER, M.R.—The transaction in this case seems to me to be perfectly clear. Hallett and Co. had lent money to the Agence Dalziel, but we have merely to consider what occurred between Hallett and Co. and Cocks, Biddulph, and Co. Hallett and Co. being the owners of a

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.]

COLE v. ELEY.

[CT. OF APP.]

promissory note for 16,000*l.*, go to their bankers, Cocks, Biddulph, and Co., and ask for credit as against the note; in other words, they ask Cocks, Biddulph, and Co. to discount it. That was done, and upon having the note indorsed to them, Messrs. Cocks, Biddulph, and Co. lent money to Hallett and Co. When that was done, Cocks, Biddulph, and Co. became the owners of the note, and could indorse it over to anyone else or deal with it as they wished. But something further occurred. Hallett and Co. handed over to Cocks, Biddulph, and Co. a guarantee which they had received from the National Insurance and Guarantee Corporation Limited. It is true that the property in that guarantee would not pass by an indorsement, but it was passed in this sense, that at common law Hallett and Co. would be bound to lend their name to Cocks, Biddulph, and Co. to enable them to sue on it, and if Hallett and Co. sued on it in their own behalf they would have been stopped by the court because they would be only bare trustees. But, however that may be, Cocks, Biddulph, and Co. would be considered in equity to be the owners of the guarantee and entitled to sue on it. Now, a bankruptcy court is a court of equity, so that in this case we must take it that Hallett and Co. have indorsed the note so as to pass the property in it, and have transferred the guarantee in such a way that in equity they have no more right in it. It is true that Cocks, Biddulph, and Co. have got something which secures them against recovering nothing on the promissory note, but they are not on that account "secured creditors" under the Bankruptcy Act. The expression is defined in sect. 168 of the Bankruptcy Act 1883, which says that "secured creditor means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." The expression means nothing else than that, because the word "means" is used in the section, not "includes," or any other similar word. Now this contract with the Guarantee Corporation, which was handed over by Hallett and Co. to Cocks, Biddulph, and Co., with the intention that it should become their property, cannot be said to have been handed over as a "mortgage, charge, or lien" on Hallett and Co.'s property. I am, therefore, of opinion that Cocks, Biddulph, and Co. are not "secured creditors" within the Act, and consequently are not under the disabilities of secured creditors.

SMITH, L.J.—In this case Cocks, Biddulph, and Co. put in a proof for a debt of 12,581*l.* against the estate of the bankrupts Hallett and Co. That proof was rejected on the ground that they were secured creditors and had not valued their security. The whole question now is, whether they are persons "holding a mortgage, charge, or lien on the property of" Hallett and Co. "as a security for a debt due" to them from the debtors, within sect. 168 of the Bankruptcy Act 1883. It seems to me that they are not within those words. The guarantee that has been referred to was not handed over to them as a security by way of mortgage, charge, or lien on the debtors' property. The words of the section must refer to a mortgage, charge, or lien existing on property of the debtor at the date of the bankruptcy. Obviously this guarantee and promissory note had ceased to be the property of

Hallett and Co. before they became bankrupt, and Cocks, Biddulph, and Co. are therefore not "secured creditors."

DAVEY, L.J.—I am of the same opinion. The question is, whether Cocks, Biddulph, and Co. are "secured creditors" of Hallett and Co. They are indorsees of a promissory note of 16,000*l.*, made by the Agence Dalziel, for which they paid 16,000*l.*, and also holders of a guarantee of the note by the National Insurance and Guarantee Corporation. The point which was really pressed upon us was, that Cocks, Biddulph, and Co. are merely mortgagees or pledgees of the note, and if that were made out, they might perhaps be "secured creditors" within the Act; but to my mind there is not a scintilla of any such evidence. They are indorsees of the note, and they hold the guarantee as an additional security, but that was not a security on the property of Hallett and Co., who, as James, L.J. said in *Ex parte Schofield* (*ubi sup.*), merely gave the security of some one else. That gave no mortgage, charge, or lien on the debtors' property. Cocks, Biddulph, and Co. were out-and-out holders of the promissory note and the guarantee, and the trustee must be directed to admit their proof.

Appeal allowed.

Solicitors for Cocks, Biddulph, and Co., Walker, Martineau, and Co.

Solicitors for the trustee, Rooper and Whately.

Tuesday, June 5.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

COLE v. ELEY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Solicitor—Charging order—Costs—Assignment of judgment debt—“Purchaser for value without notice”—Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28.

By sect. 28 of the Solicitors Act 1860, in every case where a solicitor is employed to prosecute or defend any suit or proceeding, the court may declare such solicitor entitled to a charge upon the property recovered or preserved, “and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right.”

The plaintiff in an action, having recovered judgment for a sum of money against the defendant, assigned the judgment debt to a purchaser for valuable consideration. The purchaser gave notice of the assignment to the solicitor who acted for the plaintiff in the action, and the solicitor thereupon obtained a charging order for his costs upon the sum recovered.

Held, that, as the purchaser had notice that the money had been recovered in an action, he had notice of the solicitor's right to a lien; that he was therefore not a purchaser for value “without notice” within the meaning of sect. 28 of the Solicitors Act 1860, and that the solicitor's charge had priority over his assignment.

APPEAL from an order of the Queen's Bench

(a) Reported by T. R. BRIDGWATER and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

Division (Charles and Collins, JJ.) affirming an order of Lawrance, J. at chambers, making absolute an order *nisi* for a charging order under sect. 28 of the Solicitors Act 1860, in favour of Mr. Baker, the solicitor for the plaintiff, in the action of *Cole v. Eley*, for his costs and expenses in that action.

The plaintiff recovered judgment by consent against the defendant for a sum of money payable by instalments, and assigned this judgment debt for valuable consideration to one Read, who had been a witness in the action. Read gave notice of the assignment to Baker, the plaintiff's solicitor, and Baker thereupon applied for and obtained a charging order as above upon the money recovered in the action.

By sect. 28 of 23 & 24 Vict. c. 127 :

In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of, the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding . . . and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right.

Read appealed from the order of Lawrance, J. to the Queen's Bench Division.

May 4.—*Horace Kent* for the appellant.—This charging order which is appealed against is not valid against the assignee of the judgment debt. This assignment was "made to a *bonâ fide* purchaser for value without notice" within the meaning of sect. 28 of 23 & 24 Vict. c. 127. Those words here mean without notice of the charging order, and as this charging order was not made until after the assignment was made, the appellant could not be said to have had notice, and the appellant is therefore protected. The following cases are quite distinguishable from the present one. In *Burchell v. Pugin*; *Molloy, garnishee* (32 L. T. Rep. N. S. 495; 44 L. J. 278, C. P.; L. Rep. 10 C. P. 397), the solicitor had taken the first step, and it was held that he was therefore entitled to priority. In *Faithfull v. Ewen* (37 L. T. Rep. N. S. 805; 7 Ch. Div. 495) the solicitor's claim for his lien was against mortgagees who were parties to the suit, and were supposed as such to have had notice of the rights of the solicitor. [COLLINS, J.—*Faithfull v. Ewen* was acted upon in the case of *Shippey and another v. Grey* (42 L. T. Rep. N. S. 673; 49 L. J. 524, Q. B.), which was a case decided in the Court of Appeal, and was not the case of an administration suit.]

Crispe and *Hawtin* for Mr. Baker.—The appellant to whom the assignment has been made had been a witness in the action *Cole v. Eley*, and must be taken to have known that Mr. Baker was the solicitor for the plaintiff, and therefore the appellant had notice of the solicitor's lien. The case of *Faithfull v.*

Ewen (*ubi sup.*) decided that such a notice is sufficient. The case of *Hough v. Edwards* (1 H. & N. 171) seems to be quite inconsistent with the decisions in *Faithfull v. Ewen*; *Haymes v. Cooper* (33 Beav. 431); and *Shippey and another v. Grey* (*ubi sup.*); the last case and the case of *Faithfull v. Ewen* were cases decided by the Court of Appeal. It is quite clear, therefore, that the appellant is not "a *bonâ fide* purchaser without notice" within the meaning of the 28th section of the Solicitors Act 1860, and his claim ought not to prevail. [CHARLES, J.—It seems that the decisions in *Shippey v. Grey* (*ubi sup.*) and *Hough v. Edwards* (*ubi sup.*) cannot be reconciled. The learned Judge also referred to the following case: *Filcher v. Arden*; *Ex parte Brook* (38 L. T. Rep. N. S. 111; 47 L. J. 479, Ch.; 7 Ch. Div. 318); and COLLINS, J. referred to *Brunsdon v. Allard*, 2 E. & E. 19.]

The following cases were also referred to :

Symson v. Prothero, 26 L. J. 671, Ch.;
Emden v. Carte, 44 L. T. Rep. N. S. 344, 636, 840;
 17 Ch. Div. 169; 50 L. J. 492, Ch.;
Greer v. Young, 49 L. T. Rep. N. S. 224; 52 L. J. 915, Ch.; 24 Ch. Div. 545;
Dallow v. Garrod; *Ex parte Adams*, 52 L. T. Rep. N. S. 240; 14 Q. B. Div. 543;
Re Suffield and Watts; *Ex parte Brown*, 58 L. T. Rep. N. S. 911; 20 Q. B. Div. 693;
Ross v. Buxton, 60 L. T. Rep. N. S. 630; 58 L. J. 442, Ch.; 42 Ch. Div. 190;
Price v. Crouch, 60 L. J. 767, Q. B.

CHARLES, J.—This is a contest between a solicitor who got a charging order upon money recovered by his exertions in an action and a person who had bought for valuable consideration the judgment debt. [His Lordship recited the facts and continued:] We have to deal with this state of things—a judgment recovered and a *bonâ fide* purchaser of the judgment debt before the making of the charging order. Ought this order to have been made? We have come to the conclusion that it ought, and that the learned judge's order *nisi* was rightly made absolute. The rights of the parties are clearly not dependent altogether upon the statute of 1860, although whether or not the solicitor is to have the charging order does depend entirely upon statute. The solicitor undoubtedly had a lien for his costs from the date of the judgment independent of the express charge which he has now obtained. The question is, what is his position with regard to another person whose rights accrued and were perfected before he applied for and obtained the charging order? The statute has left a purchaser protected as regards the charge if he is a *bonâ fide* purchaser for value without notice. The 28th section of the Act provides that "all conveyances and acts done to defeat, or which shall operate to defeat," the charging order "shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against" the charging order. The first question then is, a *bonâ fide* purchaser of what? If we read the section briefly it would mean without notice of the charging order; but it seems plain, on further consideration of the statute and of the rights of the parties, that it is not the true construction; it must be without notice of the solicitor's right to a lien on the proceeds of the judgment. It follows, therefore, that the fact of the date of the assignment being

CT. OF APP.]

COLE v. ELEY.

[CT. OF APP.]

before the date of the charging order was applied for is not decisive in the assignee's favour. Then comes the next question—had he notice of the lien? It may be he had no express notice of the lien, and to that extent he is a *bonâ fide* purchaser for value without notice; but the question is, although he had no express notice, is he in the position of one who had actual notice that the right to the lien existed? The authorities are decisive that he had notice, for he knew that he was buying a judgment debt. Suppose this had been a fund in court. It is plain that in such a case the assignee would be treated as having notice, according to the decision in *Haymes v. Cooper* (33 Beav. 431), in which Sir John Romilly, M.R. said on p. 434: "If the statute had not passed I should not have had any doubt on the subject, but this Act declares the court shall have power to declare that the solicitor is entitled to a charge for his costs, and that all conveyances to defeat it, unless to a *bonâ fide* purchaser for value without notice, shall be void. My opinion is that, where a man knows that there is a fund in court, he knows also that it is subject to the solicitor's lien for costs in recovering it, and that he is entitled to be paid in the first instance. The Act, however, clearly points out that there may be a *bonâ fide* purchaser who may have priority. As to that I express no further opinion than this, that the present is not the case, for Mr. Cooper had notice of the lien of the solicitor." In that case the Master of the Rolls (Sir J. Romilly) treats the fact of there being a fund in court as amounting to notice of the existence of the solicitor's lien. The next question is, do the same considerations apply to the case of a judgment debt? For a long time it was my impression that they did not apply, for, if they did, the case of *Hough v. Edwards* (*ubi sup.*) and *Sympson v. Prothero* (*ubi sup.*) would have been decided otherwise than they were if those considerations did apply. I was much impressed with the argument that, if notice of the charging order is notice within the meaning of the statute, the words of the statute, "*bonâ fide* purchaser for value without notice," would have no serious meaning. My attention has been called to the case of *Faithfull v. Ewen* (*ubi sup.*), decided in the Court of Appeal, and I find I have no alternative open to me in the present case except to decide in favour of the solicitor's right to a charging order. In that case, which was a considered judgment of the Court of Appeal, the plaintiffs in a suit mortgaged their interests in the estate, the subject-matter of the suit, to two defendants. The mortgage was sent to the plaintiffs' solicitor for his perusal and approval, and he sanctioned their executing it, nothing being said about the solicitor's claim for costs. The solicitor afterwards obtained a charging order on the plaintiffs' interests. The Court of Appeal, consisting of James, Baggallay, and Thesiger, L.J.J., held in that case that, as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that the charge ought not to be postponed to the mortgage. In delivering the judgment in that case Baggallay, L.J. said (on p. 807, 37 L. T. Rep. N. S.): "It is insisted on their behalf" (the respondents) "that, inasmuch as Mr. Brook" (the solicitor) "was cognisant of the arrangement under which the defendants Ewen and Clark were about to advance their money,

and did not in any way assert his rights under the statute, although he had every opportunity of doing so, he must be treated as having waived them in favour of the defendants. We are unable to adopt this view. The defendants Ewen and Clark, and their advisers, were of course aware of the pending suit, and they must have known, or must be presumed to have known, the rights which the solicitor of the plaintiffs was entitled to under the statute." The judgment in that case therefore treats knowledge of the existence of the suit as knowledge of the solicitor's lien. It has been urged on behalf of the appellant in this case, that the facts in the present case are different to those in *Faithfull v. Ewen* (*ubi sup.*), which was the case of an administration suit; but *Faithfull v. Ewen* was relied upon in the case of *Shippey v. Grey* (*ubi sup.*), and in that case the contest was similar in character to the present one. The plaintiffs there were solicitors for a person named Washington in an action in which he recovered a sum of money; the defendant was a judgment creditor of Washington, and obtained *ex parte* a garnishee order attaching all debts due to Washington. The plaintiffs learning this gave notice to the defendants in the action in which Washington was the plaintiff of their claim to a lien, and afterwards applied for a charging order. The Court of Appeal, affirming the Divisional Court, held that the plaintiffs in the issue had a lien for their costs, and were entitled to a charging order, and the garnishee order had not priority. In the case of *Hough v. Edwards* (*ubi sup.*), which was cited in favour of the appellant, the court did decide that the claim of the garnishee must prevail as against the general lien of the solicitor; but the case of *Faithfull v. Ewen* was relied on by the counsel for the solicitors (now Collins, J.), and the court acceded to my learned brother's contention. Bramwell, L.J. said, in his judgment, in *Shippey v. Grey* (42 L. T. Rep. N. S. on pp. 674, 675): "I am of opinion that this appeal must fail on this ground, that the decision of the Court of Appeal in *Faithfull v. Ewen* (*ubi sup.*) is in point." Brett, L.J., who had himself decided *Burchell v. Pugin*, relied on *Faithfull v. Ewen*, and said (42 L. T. Rep. N. S. p. 675): "I am of the same opinion, and even if *Faithfull v. Ewen* had not been decided, I should have been of the same opinion." Therefore the conclusion to which I have come is, that we have no alternative, on the authority of the cases *Haymes v. Cooper*, *Faithfull v. Ewen*, and *Shippey v. Grey*, but to decide that in the present case the solicitor is entitled to a charging order, and that the appeal must be dismissed. We think it right, in order to prevent any misunderstanding, to add a direction that any portion of the judgment debt which may be received by the solicitor must be applied solely to the costs in the action of *Cole v. Eley*, and not in respect to any antecedent debts.

COLLINS, J.—I am of the same opinion. The solicitor apart from the charging order being granted had an equitable right to a lien against the fund recovered in the action of *Cole v. Eley*; that being so, the question to be decided is, whether that right can be defeated by the sale of the judgment debt. It is clear that that right cannot be defeated by the sale of the judgment debt unless it was "made to a *bonâ fide* purchaser for value, without notice." The point, therefore, is

—apart from the charge—did the purchaser, in buying the debt, have notice of the equitable right of the solicitor? If he did, his right cannot override the solicitor's right. I am of opinion that the point is decided by the Court of Appeal in the case already referred to—*Faithfull v. Ewen* (*ubi sup.*). In effect that case decides that notice that the subject-matter of the assignment is the subject-matter of a suit amounts to notice to the assignee of the solicitor's right to a lien. The cases referred to as to garnishees seemed to raise a difficulty; the cases which create that difficulty are *Hough v. Edwards* (*ubi sup.*), and *Burchell v. Pugin* (*ubi sup.*); in the latter case the fact that the solicitor took the first step seems to have been relied upon in the judgment. My opinion is, that the cases as to garnishee orders may be explained by a doctrine that lies at the root of the rights of a judgment creditor who has obtained a garnishee order, namely, that he takes no more than the rights of the debtor. This doctrine is illustrated by the judgment in the case of *Hirsch v. Coates* (18 C. B. 757, at p. 764), where Willes, J. said as follows: "I think this statute" (the garnishee clause of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125, sect. 61) "must be construed like any other statute, giving its words their plain ordinary and proper sense. So construing it, I think it can only operate to give the judgment creditor the same degree of charge upon the debts which are the subject of the order as an assignment in bankruptcy would give—such as the judgment debtor was entitled to at law and in equity. In the case of *Pickering v. The Iffracombe Railway Company* (17 L. T. Rep. N. S. 650; L. Rep. 3 C. P. at pp. 250, 251) the same learned judge said as follows: "The last point is that notice to Lord Poltimore was necessary and none was given. That turns upon this, whether the 61st section of the Common Law Procedure Act 1854 intended to give the garnishee something more than the debtor himself was entitled to. But, as was pointed out by Mr. Mellish, there is no such language in the Act." Then, after referring to an exception to the general rule that the creditor can have no more than the debtor was entitled to, which was said to exist with regard to another statute, the learned judge continued: "But, upon the construction of the 61st section of the Common Law Procedure Act 1854, I think the defendants have failed to show that any such exception was intended to apply to this case." The Court of Appeal followed this view in *Baddeley v. The Consolidated Bank* (59 L. T. Rep. N. S. 419; 38 Ch. Div. 238), and there Cotton, L.J. said (L. T. Rep. N. S. on p. 423): "But it was said the plaintiff had allowed Smith to deal with that which was comprised in the security in such a way as to enable greater benefit to be obtained by his garnishee orders than otherwise would have been obtained. He had not given notice to the railway company, he had left his bonds and other property in the hands of Smith. Well, we have not heard Mr. Rigby upon that point, but assuming that we had, then in my opinion that will not enable Wallis by means of a garnishee order to get a greater right as against this property than he would otherwise be entitled to. In my opinion his rights under the garnishee order were only to attach that which could properly, and without violation of the rights of other persons, be dealt

with by Smith. Smith had already assigned all his claim against the railway company to the plaintiff. That was a security otherwise unimpeachable, and in my opinion Mr. Wallis under his garnishee order cannot establish any claim in derogation of the rights which the plaintiff had under his security." It was there held that an equitable charge obtained before the garnishee order took priority of the order, though no notice of the charge had been given. It is possible that under certain circumstances a purchaser, if he can show that he is a *bonâ fide* purchaser for value without notice, may stand in a better position than a judgment creditor who has obtained a garnishee order. I am of opinion that the case of *Faithfull v. Ewen* (*ubi sup.*) concludes the present case. There is in this present case *primâ facie* evidence of a notice to the assignee of the solicitor's right to a lien. The affidavit of the assignee does not disclaim notice, but practically admits it, and therefore under those circumstances he cannot be properly said to be a *bonâ fide* purchaser for value without notice. The charging order, in my opinion, was rightly made, and this appeal must be dismissed.

Read appealed.

June 5.—*H. Kent* for the appellant.—The only question is, whether Read is a purchaser "without notice." Sect. 28 of the Solicitors Act 1860 only gives the solicitor a right to come to the court and ask for a declaration of a charge. The section does not impose a charge, but gives the solicitor the right to obtain one. The "notice" therefore referred to in the section means notice of the charging order. Inasmuch as the charging order was subsequent to the assignment, the purchaser could not have had notice of the charge. He referred to the cases cited in the court below, and to

Archbold's Practice, 14th edit., p. 164.

Smyly, Q.C. and *Crispe*, for the respondent, were not called upon.

Lord ESHER, M.R.—It is unnecessary to go through all the cases which have been referred to. It seems to me clear that Collins, J. was right when he said in his judgment in the present case that *Faithfull v. Ewen* decided that notice that the subject-matter of the assignment is the subject-matter of a suit amounts to notice to the assignee of the existence of the solicitor's right to a lien. Such knowledge as that prevents the purchaser from being a purchaser for value "without notice." That is exactly the case here. *Faithfull v. Ewen* was a decision of this court, and it was followed in other cases also in this court, and those cases conclude the present point. The appeal therefore fails.

KAY, L.J.—I am of the same opinion. When the purchaser bought this judgment the charging order was not made. *Faithfull v. Ewen*, however, decided that it is not necessary that the purchaser should have notice of the charging order, but that it is sufficient if he is aware of facts which entitle the solicitor to obtain a charging order. In this case the purchaser knew that, because he purchased the judgment debt from the plaintiff.

SMITH, L.J.—I am of the same opinion. There are four cases in the Court of Appeal, begin-

CT. OF APP.]

CLEMENTS v. LONDON AND NORTH-WESTERN RAILWAY CO.

[CT. OF APP.]

ning with *Faithfull v. Ewen*, all of which are against the contention of the appellant.

Appeal dismissed.

Solicitor for the appellant, *F. Norton*.

Solicitors for the respondent, *Montagu Scott and Baker*.

Friday, June 15.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

CLEMENTS v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Infant—Contract of service—Contracting out of Employers' Liability Act—Insurance society—Benefit of infant.

The plaintiff, when an infant, entered into the service of the defendant company as a railway porter at weekly wages. One of the terms of his contract of service was, that he should become a member of the L. & N.W.R. Insurance Society, the object of which was "to provide pecuniary relief in cases of temporary or permanent disablement arising from accident occurring while in the discharge of duty and also in cases of death." Under this term of his contract of service he became bound to subscribe a small sum to the society, and the defendant company also became bound to contribute to it, and the plaintiff agreed "to accept such contribution, and any advantages to which he may be entitled under the rules of the society, in satisfaction and in lieu of any claims which he (or his representative in case of death) might or otherwise would have under the Employers' Liability Act 1880 or any Acts amending it." The society was managed under a number of rules. An injury having been accidentally caused to the plaintiff in the course of his employment, he, while still an infant, brought an action to recover damages under the Employers' Liability Act after he had received compensation in accordance with the rules of the society. The defendant company relied on the plaintiff's contract with them.

Held (affirming the decision of the Queen's Bench Division, ante, p. 531), that, in the opinion of the court, the plaintiff's contract of service with the defendant company, when considered as a whole, was for his benefit, and that he was therefore bound by it, and judgment must therefore be for the defendants.

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Collins, JJ.), reported ante, p. 531, affirming the decision of the judge of the Bloomsbury County Court in an action for damages for personal injury brought under the Employers' Liability Act 1880 that the plaintiff was precluded by his agreement with the defendants from recovering against them under the Act.

The plaintiff, while an infant, entered the service of the defendant company as a railway porter at weekly wages, and upon entering their service signed a form of agreement by which he became a member of the London and North-Western Railway Insurance Society, and agreed to accept the advantages which he thereby

obtained in lieu of any right of action against the defendants under the Employers' Liability Act 1880.

The form of agreement and the rules of the society, so far as they are material to the present case, are set out in the report of this case ante, p. 531.

Minton Senhouse for the appellant.—An infant can bind himself only by contracts of service or contracts for necessities. He cannot bind himself by a contract of insurance such as the defendants rely upon in this case. In Bacon's Abridgment, tit. Infancy, I. 1, the rule is stated to be that an infant may bind himself to pay for necessities "and likewise for his good teaching and instruction whereby he may benefit himself afterwards;" and in Comyn's Digest, tit. Infant, c. 2, it is laid down thus: "So, regularly, a contract by an infant, if it be not for necessities, shall be void." In the old authorities no other kinds of contracts are mentioned as being binding on infants. In *De Francesco v. Barnum* (63 L. T. Rep. N. S. 438; 45 Ch. Div. 430) Fry, L.J. points out that the two recognised exceptions of contracts which bind an infant are contracts of apprenticeship and of labour. All the cases in which infants have been held to be bound by their contracts are cases of contracts for necessities, or for apprenticeship or service. This contract does not come within those exceptions. [Lord ESHER, M.R. referred to *Kirton v. Elliott* (2 Bulstr. 69; and KAY, L.J. referred to *Maddon v. White*, 2 T. B. 159.)] The last-mentioned case was considered by Jessel, M.R. in *Martin v. Gale* (36 L. T. Rep. N. S. 357; 4 Ch. Div. 428), where he says: "There must be some mistake in the report of what Buller, J. is stated to have said. No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle." Unless the two well-recognised exceptions are adhered to, it will become necessary to say that an infant can bind himself by any contract which a court will hold to be for his benefit. Such a rule would be far too loose. [KAY, L.J. referred to *Smith v. Lucas* (45 L. T. Rep. N. S. 460; 18 Ch. Div. 531.) In *Corn v. Matthews* (68 L. T. Rep. N. S. 480; (1893) 1 Q. B. 310) the case of *Meakin v. Morris* (12 Q. B. Div. 352) was approved, and in the latter case Lord Coleridge, C.J. held that, if one stipulation in a contract must necessarily be to the disadvantage of an infant, it will invalidate the contract. In this contract the stipulation by which the infant gives up his right of action against the employer, and also the stipulation by which weekly deductions are to be made from his wages, are clearly to the disadvantage of the infant. The contract as a whole is not for the benefit of the infant; by action he might recover a much larger sum from his employer; it would be more beneficial for him to insure in some insurance company, and to preserve his right of action against his employer.

Shearman for the respondents.—A contract made between an infant and his employer which regulates the terms of the employment is binding upon the infant unless it is manifestly to his prejudice; unless it be shown clearly that the contract is not for the benefit of the infant it is binding upon him:

Cooper v. Simmons, 5 L. T. Rep. N. S. 712; 7 H. & N. 707;

(a, Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

CT. OF APP.] CLEMENTS v. LONDON AND NORTH-WESTERN RAILWAY CO. [CT. OF APP.]

Re Francesco v. Barnum, 63 L. T. Rep. N. S. 38 ;
45 Ch. Div. 430 ;

Corn v. Matthews, 68 L. T. Rep. N. S. 480 ; (1893)
1 Q. B. 310.

The contract in this case upon which the defendants rely was part of the contract of service, and the whole contract is clearly not prejudicial to the infant.

Minton Senhouse replied.

Cur. adv. vult.

June 15.—Lord ESHER, M.R.—In this case the plaintiff, when he was under age, entered the service of the defendant company and became a porter on their railway at a certain rate of wages. Afterwards, while so employed in their service, an injury was caused to him through the working of the railway, and in respect of that injury he has brought an action against the company claiming damages and full compensation. The answer of the company is, that at the time the plaintiff entered into their service as porter, and as a part of that contract of service, he accepted on certain terms an agreement by the company to the effect that in case of any accident happening to him in the course of his employment, whether caused by the negligence of their servants or not, and without any further inquiry as to the cause of the accident, they the company would compensate him either by making him an allowance during the time in which he should be sick or disabled, or else in case of permanent disablement by paying him a lump sum; and that if he should be killed, then they would pay to his representatives who might be entitled to sue under Lord Campbell's Act certain fixed sums of money. The plaintiff accepted those advantages, and undertook in return that if in the course of his employment an accident should happen to him through the negligence of other servants of the company, he would not sue the company either at common law or under the Employers' Liability Act, but would accept instead the compensation or allowance which would be payable under the company's agreement. Now, at the time when the plaintiff brought this action for damages for the injuries he has suffered he was still an infant. Under his contract with the defendants he received for several weeks—until he had recovered, I think—the sums of money which became payable to him by reason of his accident; and he received this money without having the burden thrown on him, as it would otherwise have been, of showing how the accident happened, and of proving negligence on behalf of the company or their servants. But, after having taken these moneys, he was persuaded into bringing this action, claiming full compensation for his injuries from the beginning, without taking into account the money he had already received. His claim is, in fact, that he is entitled to full compensation in addition to the allowance which he received under his contract with the company. He claims to be entitled to repudiate his contract with the company, and to treat it as if it had never existed, and as if he had never received any money under it. That raises the question whether this contract is such a one as he, being an infant at the time when he entered into it, and at the time when he brought this action, is entitled to set aside as void. I think it is unnecessary for me to go into the cases which have been cited. The answer to the question

depends upon whether, upon the true construction of the contract, taking the contract as a whole, it was a contract which was clearly for his advantage. It is for the court to decide what is the true construction of the contract taken as a whole, and, having done that, to say whether the contract is one which is clearly and manifestly for the benefit of the infant. Now, upon the first question, as to the construction of the contract, there cannot in this case be any doubt. The question therefore now is, whether this court agrees with the decision of the County Court judge and of the Divisional Court in saying that this contract was clearly to the advantage of the infant. This is a contract of service, and the court knows perhaps better than any jury what advantages were given under it to the infant. Supposing that there had been no such terms in the contract as there are here, then in the event of an accident happening to the plaintiff he would have been obliged, unless he could have arranged some terms with the company, to have brought an action against them before he could have got any compensation. That action must have been brought either in the superior courts or in the County Court. In that action he would run the risk of being unable to prove that the accident was the result of the negligence of some one on the part of the defendants. It might be that the accident was the result of some concealed defect in an instrument that was being used, as, for instance, in a chain, that was not and could not be known to the company or their servants. It might be that the accident was not the result of negligence, but was a pure accident. It would lie upon him to prove negligence in the defendants or their servants, and no one who understands the law can fail to see that the burden of proof is heavy and often cannot be supported. But even if he were successful in his action, and obtained judgment against the company for damages and costs, he would be certain to incur some costs beyond those which he could recover from the company, and which his legal advisers would claim from him. Those costs would have to be paid out of the damages recovered from the company, and every one with experience knows that in most cases such as this, where the plaintiff does not get judgment for any large sum, the amount of damages obtained is seriously encroached upon by the costs, so that the plaintiff, though he may succeed in winning a verdict, gets very little by it eventually. Now, those risks of losing an action and of obtaining but a slight advantage if the action is won, are all obviated by this agreement. Moreover in cases of accidents in which it would be clear that neither at common law, nor under the Employers' Liability Act would the infant have any legal claim enforceable against the company, they have agreed by their contract with him to give him considerable compensation. That is a great advantage to him. Some disadvantages have been suggested, but to my mind it does not prevent an agreement like this from being an agreement for the benefit of the infant that there may be some disadvantages in it. The agreement must be construed as a whole, and the court must consider whether, as a whole, it is beneficial to the infant. The court must see whether that which is a benefit to him exceeds, and greatly exceeds, that which is, or may fairly be said to be, a disadvantage; and if, on the whole,

CT. OF APP.] CLEMENTS v. LONDON AND NORTH-WESTERN RAILWAY CO. [CT. OF APP.]

the contract is to his manifest advantage and benefit, then it is one which he has no power to avoid. In such a case a contract of service is binding on the infant as much as if he were of full age, and he cannot avoid it. Under the circumstances of this case, therefore, I am of opinion that this agreement was clearly for the plaintiff's advantage, and the existence of it is an answer to his action against the company. The appeal must be dismissed.

KAY, L.J.—I have come to the same conclusion. There are in this case some questions of such general interest that I wish to add somewhat to what the Master of the Rolls has said. The law relating to the contracts of infants has been a great deal discussed, perhaps more than necessary to the actual decision of the case before us; but there can be no doubt whatever, that all contracts by an infant are not void. It was long ago settled in words which I will read from Coke upon Littleton, at p. 172a: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities and likewise for his good teaching or instruction whereby he may profit himself afterwards." Then it has been since held in the case of *Peters v. Fleming* (6 M. & W. 42) that the term "necessaries" includes such articles as are necessary and suitable to the station, degree, and condition of the infant, and that a contract by an infant for such things must be treated as being absolutely binding upon him just as though he were a man of full age. Then, besides that, it has undoubtedly been held that the contracts of infants respecting their apprenticeship or their labour are not contracts which are absolutely void, that is to say, are not contracts to an action upon which a plea of infancy is a complete defence; and in all those cases, if an action is raised while the infant remains an infant, the question both at law and in equity has always been whether a contract of that kind, when carefully examined in all its terms, is or is not for the benefit of the infant, and if it be for the benefit of the infant, the court will not allow him to repudiate it. Now, I will take only one or two of the cases which illustrate that. The first I refer to is a case which came before Lord Kenyon when Chief Justice: *Rex v. The Inhabitants of Hindringham* (6 T. R. 557). That was a contract of apprenticeship by an infant, and Lord Kenyon said this: "There is no ground for saying that the apprentice did any act to put an end to the indentures when he entered into the King's service"—he had bound himself apprentice to the King's service in the Navy. "But I desire it may not be taken for granted that an infant who binds himself apprentice, a contract so notoriously for his own benefit, may put an end to that contract at any time during his minority." He does not absolutely decide the question there, but his opinion certainly was, that the infant was not able to put an end to the contract if the contract, upon looking into it carefully, proved to be to his benefit. Then to take only one other of these cases. In the case of *Leslie v. Fitzpatrick* (37 L. T. Rep. N. S. 461; 3 Q. B. Div. 229) under the Employers and Workmen Act 1875, which enables a dispute between a workman and his employer to be heard and determined by a court of summary jurisdiction, it was held that an agreement by which an infant undertook to serve an iron ship-

builder as plater and rivetter for five years for weekly wages, with a proviso that should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident or in consequence of strikes or combination of workmen, or from any cause over which they should not have any control, they should have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the Act; the question whether the proviso is or is not inequitable as regards the infant depending upon whether it was at the time of the agreement common to labour contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, and also upon whether the wages were a fair compensation for the services of the infant. I read that from the marginal note, but I refer to the case for the language of the late Lush, J., afterwards Lush, L.J. He says: "Whether the provisions are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment and the means of maintaining himself. If, on the other hand advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound." The matter being treated, as I have said, entirely upon the examination of that contract for labour and service and on a consideration of the whole of the contract, the court had to determine whether it was for the benefit of the infant or not. If it were for the benefit of the infant, then the court would not allow him, during his infancy, to repudiate the contract. Now, in this particular case, the sort of contract entered into was this: The employees of the London and North-Western Railway Company formed what they called an insurance society, the object of which is to compensate any one of those servants of the company who may sustain injury, whether temporary or permanent, in the course of their employment, or their relatives in case of death. This insurance society gives more to its members than they would obtain under the ordinary law of the land, because compensation is given in cases where they would not be entitled to bring any action for damages. So that, although in some cases the compensation a member can get from the society may not be quite as large as the nominal amount of damages he might get by the verdict of a jury in a case in which an action would lie against the company, nevertheless he gets this very great advantage that he will get compensation for an injury from the society in many cases where he would have no legal remedy against the company, or possibly against any one else. In the present case the plaintiff entered into the company's service on weekly wages, and about a week afterwards he

signed the forms, which I need not read, by which he became a member of the insurance society, and entitled to all the benefits provided for its members. We are told that the company require all people who enter their service to join this insurance society, and their joining the society is a condition of the agreement of service with the company. I cannot doubt, therefore, that the learned judges in the courts below were quite right in treating this agreement as part of the terms of the plaintiff's contract of service, and I myself treat it as being a part of his contract of service. Now I take it that the law applicable to such a case as this is, that *prima facie* a contract by an infant respecting the terms upon which he is to enter into somebody's employment is for his benefit, and unless there are in it terms which show, when the whole contract is considered, that it is not for his benefit, the court will not allow him to repudiate it while he remains an infant. If while he is still in that employment he comes to the court and seeks to say that he is not bound by his contract, the question for the court is whether that contract, being a contract of service, is of such a nature, when carefully regarded as a whole, as to be for his benefit or not. Now I will not repeat what has been already said by Mathew, J., in his judgment in this case. He has gone through all the clauses of this agreement with great care, and examined all the numerous objections that have been made to the various clauses, and to my mind he has given a perfectly sufficient and satisfactory answer to the arguments by which it was endeavoured to be shown that particular clauses were not for the benefit of the infant. I agree entirely that the whole contract is to be looked at together, and if the whole contract, being part of a contract of service, is really for the benefit of the infant, the court will not allow him to repudiate it, but will treat it as binding upon him. On that ground therefore this action must fail. Now it was a part of that contract that he should not, while bound by it, bring such an action as this. Obviously the railway company, who give nearly one half the funds which that insurance society has to dispose of among the members of the society who may meet with accidents, were bound to make that kind of term with their *employés* in their own favour, and it was part of the contract which the plaintiff entered into with the railway company that, as a condition of his obtaining the benefits of this insurance society, he would not seek to recover against the company what he is seeking to recover in this action. I quite agree that, looking to the whole contract, that clause could not be treated as a clause which was not, on the whole, a benefit for the infant, and looking to the very great advantages which he otherwise obtains under the insurance contract, that seems to me to be a reasonable and proper term, and I think he was bound by it. But supposing this not to be a labour contract, does the law which I have been stating apply, or does it not apply, to contracts which are not contracts of labour? I will not attempt to give a definition, because I do not find in the cases that I have examined any exhaustive definition of how far this law does extend; but that it does extend to contracts which are not contracts of labour is quite clear from very many decided cases. One of the earliest cases on the subject was a case of *Drury v. Drury*

(2 Eden. 39), which came, in the first place, before Henley, L.C., and that was not at all a case of a labour contract. It was the case of a contract by a young lady, who was about to marry, in respect of the settlement to be made on her marriage. She was entitled to certain property, and had the expectation of more property coming to her from her father, and a settlement was made which she executed, by which there was secured to her by her intended husband a jointure of 600*l.*, and the settlement provided that the same should be taken and accepted by her in full satisfaction and bar of all dower—I am reading it quite shortly—and also in lieu of and full satisfaction of any share of any personal estate which her husband should be possessed of or entitled to. The argument was, that that is a thing about which an infant could not possibly bind herself or contract, and that therefore the contract was simply void, and Lord Henley seems to have been of that opinion. The case went to the House of Lords, and is reported under the name of *The Earl of Buckinghamshire v. Drury* (2 Eden. 60). It was heard before Lord Hardwicke and Lord Mansfield, I do not know who the other noble lords present were. I wish to read a few words from the judgment of Lord Mansfield; at page 72. Speaking of infants' agreements, he says: "By our law some agreements bind absolutely; some are void; some are voidable. Contracts for necessities, such as diet, education, &c., are good, and the infant's body liable to be taken in execution for them. So of a sum advanced for taking an infant out of gaol. Infancy never authorises fraud, as, if goods were delivered to an infant, and he embezzles them, trover would lie against him; or, if he took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent by pretence of infancy. If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again. If he receives rents he cannot demand them again when of age. In *Watts v. Haiswell*, where the issue in tail, being eighteen years old, himself engrossed the mortgage deed made by his father, and did not discover his right to the mortgage"—that means did not disclose his right to the mortgage—"Lord Cowper held him bound thereby, because being of years of discretion he had acted dishonestly in not discovering his title, and expressed his assent to the rule that had been laid down of infants' deriving their protection from those they contracted with, i.e., from the nature of the contract, if fair or otherwise. Were infants not bound by such agreements as this no lady could marry under age without her father or some near friends becoming security that she would, when of full age, join in a fine to bar herself of dower, which, if she should afterwards refuse to do, the husband must have his remedy for a collateral satisfaction against the heir of the father." Then, after considering the agreement, and seeing that upon the whole it was for the benefit of the infant, the House of Lords supported it, and held her bound by it. That was not a contract in any way for necessities or for labour. Buller, J., in the case of *Maddon v. White* (2 T. R. 159), referring to that case said this: "Lord Mansfield, in the case of *Drury v. Drury*, laid it down as a general principle that if an agreement be for the benefit of an infant at the time it shall bind him; Lord Hardwicke after-

CT. OF APP.]

CLEMENTS v. LONDON AND NORTH-WESTERN RAILWAY CO.

[CT. OF APP.]

wards adopted this rule." That dictum was commented upon by the late Master of the Rolls, Sir George Jessel, in the case of *Martin v. Gale* (36 L. T. Rep. N. S. 357; 4 Ch. Div. 428). During the argument he says this: "There must be some mistake in the report of what Buller, J. is stated to have said. No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle." In that particular case of *Martin v. Gale* (*ubi sup.*), where an infant had assumed to assign the reversionary interest in personal property as security for money advanced to him, the Master of the Rolls held that the deed was not binding upon the infant. Obviously it was not a mere contract, it was an attempted assignment of a reversionary interest in personal estate. I will refer to another well-known case also decided by the late Master of the Rolls—I mean *Smith v. Lucas* (45 L. T. Rep. N. S. 460; 18 Ch. Div. 531). In that case the question arose upon a marriage settlement, and the question was, how far the wife was bound, being an infant at the time of the settlement, which she had executed, by a contract in the settlement. Sir George Jessel, M.R. says: "Then is the covenant void or voidable? I think it is voidable. I cannot help seeing that there may be cases in which such a covenant as this would be for the benefit of the wife so as to protect her from her husband. It settles the property on her for life restrained from anticipation, with a remainder for the children. It is part of the whole arrangement made on the marriage, by which provision is made for her and her children. It is a voidable covenant, in my opinion, and not a void covenant." That was a covenant to settle the after-acquired property of the married woman. I will only refer by name to a case in which this doctrine has lately come before the House of Lords—the case of *Edwards v. Carter* (69 L. T. Rep. N. S. 153; (1893) A. C. 360). There the question was, whether an infant, having by a marriage settlement entered into a contract of this kind, and not having repudiated it for some four years after he had attained twenty-one, should be allowed to repudiate it on the ground that he had not looked into the settlement, and did not know until recently that it contained a provision binding upon him in respect of his property. The House of Lords held that the contract was one which possibly he might have repudiated if he had done so within a reasonable time after he had attained twenty-one, but that his saying that he did not know what was in the settlement which he himself had executed could not possibly be listened to, and that, whether he knew or not, it was too late to repudiate it at the time when he attempted to do so. That decision shows that the contract is not *ipso facto* void, and those cases to which I have been referring most certainly establish this, that this doctrine as to whether infants' contracts are void or voidable does not apply merely to contracts for necessities or contracts for labour, but it has been extended (though I do not for a moment attempt to fix what the limit of it may be) to other contracts, such as contracts in marriage settlements. The question in such a case is the same as in the case of a contract for labour, when it comes before the court, the infant being still an infant, viz., is the contract, looking to the whole provision of the settlement, one for the benefit of the infant, and if it is for the

benefit of the infant, then the court takes upon itself to do that which the infant himself could not do while he was an infant, namely, to elect whether or not he shall be treated as bound by it, the contract being not altogether void, but only voidable. Even if this contract were not, as I think it is, a contract concerning the terms of employment of the infant, I think it would be a contract which would come within the rule which I have now been discussing. Now, I have not said a word about what the consequences might be if the infant had chosen to leave the service of the railway company. He is not bound to serve them for any definite term. A very important question indeed might arise whether, if an infant affected, contrary to the usual practice, to bind himself to be a servant of the railway company for a term of years, such a contract would be for his benefit. Probably it would be held not to be for his benefit, and one which he might therefore repudiate, we are not dealing now with a question of what would be the effect if the contract of service had come to an end, and at the same time this contract of insurance, which was, I suppose, only to last while he was a servant, had come to an end too. He remains, or at least he did when this action was brought, in the service of the company. According to the terms of the contract, if it is to be treated as binding, it was binding on him at the commencement of the action. He seems to have obtained all the benefits and compensation which he could get under this contract, and after having received that compensation he brings this action. I think the case completely fails, and that the judgment of the learned judges below should be affirmed.

SMITH, L.J.—This is an action by a porter in the service of the London and North-Western Railway Company, which he has brought by his next friend, he being a few months under age, against the company under the Employers' Liability Act for damages sustained as he alleges by the negligence of the company. The company set up an agreement which he entered into when he entered their service whereby he bound himself not to take action against them either at common law or under the Employers' Liability Act. In answer to this defence of the company the plaintiff says that he is not bound by that agreement because at the time when he entered into it he was an infant. The question therefore arises whether or not that contract is binding on the plaintiff. Now, the judges below have found, and in that I think they are entirely correct, that when this young man, being then about nineteen and a half years of age, entered into the service of the London and North-Western Railway Company, he became a subscriber to a society which was then in existence. The objects of the society are stated in rule 3 to be, "To provide pecuniary relief in cases of temporary or permanent disablement arising from accident occurring while in the discharge of duty, and also in all cases of death." The plaintiff had a deduction made from his wages of 2d. a week, which was paid to that society, to which also the London and North-Western Railway Company largely subscribed. The benefits which he was to receive in case of accident, no matter how happening, except from his own wilful default, were in case of death, 80l.; in case of permanent injury, 80l.; and during temporary disablement 14s. a week. After having

CT. OF APP.]

Re PINHORNE; MORETON v. HUGHES.

[CHAN. DIV.]

entered into that contract of service he met with an accident, and he thereupon for some twenty-two weeks received the 14s. a week from the society according to these terms. Now, having as we are now told (I do not know that this was proved) become well he brings this action against the London and North-Western Railway Company to recover damages as if he had never received a farthing or been party to being a member of this society. Now, we have to consider whether or not this suggestion that this contract did not bind the infant is or is not good in law. There can be no doubt that *primâ facie* an infant is incapable of contracting; but there are exceptions to that, and I will read a few words from the judgment of Fry, L.J. in *De Francesco v. Barnum* (63 L. T. Rep. N. S. 438; 45 Ch. Div. 430). The learned judge having stated the general rule as to the incapacity of an infant to bind himself by contract, and having mentioned one exception which is not applicable to the present case, continued: "There is another exception which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour and you have a remuneration of wages, that contract, I think, must be taken to be *primâ facie* binding upon an infant." I take that to be absolutely good law. *Primâ facie*, therefore, this contract which this infant entered into, as I have already mentioned, is binding upon him. It is for the court and not for the jury to determine, as we have already held in a case in this court—I think it was *Flower v. London and North-Western Railway Company* 70 L. T. Rep. N. S. 829; (1894) 2 Q. B. 65—whether it is for his benefit; and if the court should be of opinion that the agreement as a whole is not for the benefit of the infant, but that it is unfair that he should be bound by it, then the court says that the contract is not binding on the infant. It was said in the case of *Corn v. Matthews* (68 L. T. Rep. N. S. 480; (1893) 1 Q. B. 310) by the Master of the Rolls, Lord Esher: "The mere fact of some conditions in the deed being against the apprentice does not enable the court on that ground only to say that the agreement is void. It is impossible to frame a deed, as between a master and an apprentice"—I read that as an "infant," because this was an apprenticeship deed, and on this point it is the same as the case in hand—"in which some of the stipulations are not in favour of the one and some in favour of the other. But, if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void." Now, in this deed are there any stipulations which make the whole contract unfair to the infant? In my judgment it is a most fair contract for the infant. First of all, no matter how the accident may happen to him, even if it be one for which he has no remedy in a court of law at all, still, he is to have these remunerations paid to him according to the scale which is set out in the rules of the society. He avoids going into litigation, and having, as my Lord pointed out, the costs as between solicitor and client set off against any damages he may recover; he avoids also the uncertainty of getting a verdict, even if he may have some evidence of a cause of action against the company; and, in my judgment, instead of this agreement being to the detriment of the infant, it is manifestly on the

whole to his advantage. Therefore, in my opinion, the reply which is made to this agreement, namely, that the plaintiff is not bound by it because he is an infant, fails, and the defendants, the railway company, can set up this agreement in answer to this action under the Employers' Liability Act as the learned County Court judge has held, and as has been affirmed by my brothers Mathew and Collins. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for the plaintiff, *Edward Clarke*.
Solicitor for the defendants, *C. H. Mason*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, April 17.

(Before CHITTY, J.)

Re PINHORNE; MORETON v. HUGHES. (a)

Will—Construction—Gift of share to person dying before testator—Settlement of share—Lapse.

A testator gave his residuary real and personal estate to trustees upon trusts for sale and conversion, and directed them to stand possessed of the moneys arising therefrom, which should remain after certain payments thereout, and the investments representing the same (thereinafter called the residuary trust funds), "in trust for my four sisters" (naming them) "in equal shares, provided always, and I declare, that my trustees shall retain the shares of each of my sisters of and in the residuary trust fund upon the trusts following; that is to say, upon trust to pay the income thereof to my same sister during her life without power of anticipation, but with power, nevertheless, for my same sister to appoint by deed or will that, after her decease, the whole or any part of such income shall be paid to any husband of her who may survive her during his life or any less period, and from and after the decease of my same sister, and subject to any appointment . . . to her husband . . . in trust for the children of my same sister, who, being male, shall attain the age of twenty-one years, or, being female, shall attain that age or marry, in equal shares. And I direct that in case my same sister shall die without leaving a child who shall attain a vested interest in the said residuary trust funds, then, after the death of my same sister, and such failure of her issue, her share in the residuary trust funds shall (subject to any interest appointed to her husband) be held in trust for the persons who, under the statutes of distribution of the effects of intestates, would be entitled thereto in case my same sister had died possessed thereof intestate, and without having been married." One of the testator's sisters died in his lifetime, leaving a husband and three children, who were now living, and the question was raised whether the one-fourth share given to such sister had lapsed, so that there was an intestacy as to such share. Held, that the share of the deceased sister had not lapsed, and that there was no intestacy as to it. *Re Roberts; Tarleton v. Bruton* (53 L. T. Rep. N. S. 432; 30 Ch. Div. 234), distinguished.

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

CHAN. DIV.]

Re PINHORNE; MORETON v. HUGHES.

[CHAN. DIV.]

HENRY STANLEY PINHORNE died in Oct. 1892, having made his will, dated in April 1885, whereby he gave, devised, and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and he directed the trustees to stand possessed of the moneys arising therefrom, which should remain after payment thereof of his debts, funeral and testamentary expenses and legacies, and the investments representing the same (thereinafter called the residuary trust funds),

In trust for my four sisters, Eveline Hughes, Florence Pinhorne, Cecile Kerr, and Adele Pinhorne, in equal shares. Provided always and I declare that my trustees shall retain the share of each of my sisters of and in the residuary trust funds upon the trusts following, that is to say, upon trust to pay the income thereof to my same sister during her life without power of anticipation, but with power, nevertheless, for my same sister to appoint by deed or will, that after her decease the whole or any part of such income shall be paid to any husband of her who may survive her during his life or any less period, and from and after the decease of my same sister, and subject to any appointment . . . to her husband . . .

In trust for the children of my same sister, who, being male, shall attain the age of twenty-one years, or, being female, shall attain that age or marry in equal shares. And I direct that in case my same sister shall die without leaving a child, who shall attain a vested interest in the said residuary trust funds, then, after the death of my same sister and such failure of her issue, her share in the residuary trust funds shall (subject to any interest appointed to her husband), be held in trust for the person or persons, who under the statutes of distribution of the effects of intestates would be entitled thereto, in case my sister had died possessed thereof, intestate, and without having been married.

Eveline Hughes, one of the testator's four sisters, died in the testator's lifetime, on the 4th Aug. 1885, leaving a husband and three infant children, who were now living. The trustees of the will applied to the court, by originating summons, to have the question determined whether the one-fourth share given to Eveline Hughes, and directed to be retained by them upon the trusts aforesaid in favour of her, her husband and children, had lapsed, or whether the infant children were entitled to it contingently on their attaining twenty-one years.

Underhill for the trustees.

Badcock for the infant children of Eveline Hughes.—The effect of the will as a whole, is to settle one-fourth share of the residuary trust funds on Eveline Hughes for life, with remainder to her children, and there is no lapse by reason of the death of Eveline Hughes in the lifetime of the testator, she having left children who are now living. In *Stewart v. Jones* (3 De G. & J. 532) the gift was to a class. *Re Roberts; Tarleton v. Bruton* (53 L. T. Rep. N. S. 432; 30 Ch. Div. 234), is distinguishable, because in that case the testator had given the share to the niece, and had settled the share which she would have taken if she had survived him. He also referred to

Re Speakman; Unsworth v. Speakman, 4 Ch. Div. 620.

C. E. Macnaghten for the next of kin.—There is an absolute gift of a fourth share to each sister, to which is added a direction for the settlement of the share of each sister, and as Eveline Hughes did not live to take a share, there was nothing upon which the settlement could operate. The

case of *Re Roberts; Tarleton v. Bruton*, is an authority in my favour.

CHITTY, J.—The argument for the intestacy stands thus: It is said—here is an absolute gift of a fourth share to each of the testator's sisters; that is followed by a settlement affecting only that which each sister takes, and nothing is settled except what the sister does take. But one of the four sisters named having died in the lifetime, the law of lapses applies; she takes nothing, consequently nothing is settled. Now, it is a pertinent question on this will to ask what interest the sister Eveline would have taken if she had survived. It seems to me that one answer, and one answer only, can be given to that, namely, a life interest, and a life interest only. The meaning of a testator is to be ascertained by the words which he has used. The various parts of the will must be taken into consideration, the whole must then be put together, and on a just consideration of all the parts as a whole, the court arrives at the testator's intention. Now, this will begins with the trusts for the four sisters named, in equal shares, and the observation commonly made is at once admitted that if that clause stood alone Eveline would have taken an absolute interest. But it does not stand alone. The testator goes on immediately with a proviso and a declaration. The trusts which are declared exhaust the whole beneficial interest; under those trusts she takes a life interest, with power to appoint to her husband after her death; then a trust for her children, and in default of children, a trust for the persons who under the Statutes of Distribution would be entitled to her estate. It is not necessary to read the whole of that trust. The effect, therefore, is to my mind plain. The sister takes only a life interest in a fourth share. What is the meaning of the term "the share of each of my sisters" in the proviso and declaration? The answer seems to me to be, the fourth share in which on, a just construction of the whole will, she takes a life interest only. Following the most technical method of construction, I say that the proviso and the declaration cut down the apparent absolute interest, as given in the first instance. To be definite, the proviso cuts it down, and the declaration shows what the testator's intention really is. Paraphrasing the testator's words without reading them, he, in effect, says: "I do not mean her to have it; I mean it to go according to the declaration." The result, then, is, that the first trust on this will is introduced merely for the purpose of the division of the fourth share. I see no difficulty in interpreting, in strict accordance with the will of the testator, the words "the share of each of my sisters." The fourth share means that which I have just now apparently given her, but which I show by my will I do not intend for her except in the way hereinafter mentioned, that is to say, it is a fourth share, to be settled on her in such a manner that she takes a life interest only in it. The result, then, is, in my opinion, that the death of Eveline in the testator's lifetime has not displaced the settlement. Of course the testator anticipated, as testators always do, that the object of his bounty would survive. But in effect he has given her a life interest; that has come to an end by her death, and by her death no doubt in his lifetime. I think the settlement is well effected and stands. Although some observations may be made in regard to the

ultimate trust for the next of kin, and possibly it may be open to the observation made by Cotton, L.J. in *Re Roberts; Tarleton v. Brunton* (*ubi sup.*), that it is somewhat "whimsical," yet I am not impressed with the force of any such observation. I see no difficulty in giving effect to this trust, if it should hereafter arise. Now, the authorities cited in support of the argument for an intestacy do not, in my view, apply. In *Stewart v. Jones* (*ubi sup.*) the gift was to a class, viz., to the daughter's own children. The 33rd section of the Wills Act does not apply to such a gift, and only such persons who survived the testator could under the form of the gift, and I may add, the substance of the gift, take a share. But, passing that by, the settlement was in terms a settlement of the share which each of the testator's daughters on her attaining the age of twenty-one years, or marrying under that age "shall" (I am reading the words) "become entitled to under the trusts aforesaid." The difficulty in the case was to say that the daughter, who had died in the testator's lifetime, had "become entitled under the trusts aforesaid" to a share. Now, the words I have to deal with in this case are not similar words. The declaration is a settlement of the share as I have read it. It is not a settlement of the share which the daughter shall become entitled to. The other case of *Re Roberts; Tarleton v. Brunton*, was a case of a gift to nephews and nieces named, and so far is like the present case, but that was followed by a provision that in case any of them should die under the age of twenty-one, his or her share, whether original or accruing, should go to the others of them. As was observed by the learned judges who dealt with it, if a niece had died under twenty-one leaving children, the children could not have taken. The key of the judgment I think, which I do not consider it necessary to read at length, is to be found in what Lindley, L.J. said, "You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes." Now, in that case it was impossible for the court to arrive at the conclusion, that it was not proper to read the gift to the nephews and nieces named, with that divesting clause to which I have referred as amounting to a direction to divide the estate in shares. That appears to me to be a cardinal distinction between that case and the one that I have to deal with. I think, for the reasons that I have given in the earlier part of this judgment, that it is a proper and just thing, having regard to the language of the testator, to say that that clause, which would apparently give an absolute interest, stands merely for the purpose of notional division in fourths. The result, therefore, is that I hold that there is no intestacy, to this extent, that the children are entitled to contingent interests according to the form of the declaration. I will say nothing at the present moment with regard to the ultimate limitation. No question may arise hereafter, but I can conceive that a possible question might have to be discussed upon that clause, if ever it should be necessary to submit it for consideration.

Solicitors: Ullithorne, Currey, and Villiers, for Neve, Cresswell, and Sparrow, Wolverhampton; Crowders and Vizard, for Shore and King, Birmingham; Bower, Cotton, and Bower, for Radford, Gill, and Radford, Manchester.

QUEEN'S BENCH DIVISION.

Feb. 2 and 3.

(Before MATHEW and COLLINS, JJ.)

BEXLEY HEATH RAILWAY COMPANY (apps.) v. NORTH (resp.). (a)

Lands Clauses Acts—Compensation for land actually taken—Injury to surrounding property—Tenancy less than a year—Magistrate's jurisdiction—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), ss. 68, 85, and 121.

The respondent rented land from the Crown on lease of thirty years, the Crown reserving the right to determine the lease as to any portion of the land on giving three months' notice.

The appellant railway company gave the respondent notice to treat as to a small portion of the land. The Crown gave the respondent three months' notice to terminate the lease as to that small portion required by the railway company. The learned police magistrate (G. G. Kennedy, Esq.) awarded the respondent compensation for the loss of the land actually taken, viz., for the remainder of the three months' tenancy, and, in addition, he allowed compensation for injury and damage by the severance to and injuriously affecting of the remainder of the lands held on the lease of thirty years.

Held, that, as the case of Reg. v. Kennedy (68 L. T. Rep. N. S. 454; (1893) 1 Q. B. 533), in which the same parties appeared, decided that the magistrate had jurisdiction to assess compensation under sect. 121 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), the land taken being in the possession of a person having no greater interest therein than as a tenant from year to year, compensation in the present case could only be for the loss of right to occupy land for the remainder of the three months' tenancy, and not for damage done by severance to and injuriously affecting of the remainder of the lands held on a thirty years' lease.

THIS was a case stated by Gilbert George Kennedy, Esq., one of the magistrates of the police courts of the metropolis, in accordance with 20 & 21 Vict. c. 43 and the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 43, on the application in writing of the appellants, who were dissatisfied with his determination upon the question of law which arose before him, as hereinafter stated:

2. On the 21st Oct. 1892 a summons was issued on behalf of the appellants, requiring the respondents to appear before a police magistrate at the Woolwich Police-court to hear and determine a question of disputed compensation, between the respondent and the appellants in manner provided by the Lands Clauses Consolidation Act 1845.

3. On the 28th Oct. 1892 the summons came on for hearing, when the respondent contended that the magistrate had no jurisdiction, on the ground that he, the respondent, held lands in question under a lease dated the 5th Feb. 1889 for a term of more than a year, and the magistrate then came to the conclusion that he had no jurisdiction, and he so decided.

4. On the 17th Nov. 1892 the appellants applied to the Divisional Court for a rule nisi for a mandamus to show cause why the magistrate

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

BEXLEY HEATH RAILWAY COMPANY (apps.) v. NORTH (resp.).

[Q.B. Div.]

should not hear and determine the amount of compensation to be paid by the appellants to the respondent under sect. 121 of the Lands Clauses Consolidation Act 1845. On the 18th Jan. 1893 the case was argued before the Lord Chief Justice (Lord Coleridge) and Cave, J., and on the 8th Feb. 1893 the Divisional Court gave judgment, deciding that the magistrate had jurisdiction, and that he should proceed to determine the amount of compensation. (That case is reported as *Reg. v. Kennedy*, 68 L. T. Rep. N. S. 454; (1893) 1 Q. B. 533.)

5. On the 21st March 1893, and on the 1st May 1893, the said summons again came on for hearing before the magistrate, when the following facts were proved or admitted:

6. By a lease dated the 5th Feb. 1889, the Crown demised to the respondent certain lands and premises in the parish of Eltham, in the county of Kent, together with certain sporting rights thereover, upon certain conditions and subject to certain rents therein mentioned, to hold the same unto the respondent as to the premises therein first described from the 10th Oct. 1886 for the term of thirty years, as to the premises therein secondly described from the 5th April 1887 for the term of twenty-nine and a half years, and as to the premises therein thirdly described (being) the residue of the said demised premises, and including a keeper's cottage, and rights of sporting from the 1st March 1886 for the term of thirty years, subject, nevertheless, to the right, reserved to the Crown in certain events therein mentioned, to determine the said terms as to the whole of the said premises or any part thereof after giving three months' notice in writing to the respondent.

7. The appellants, who were constructing a new railway, required for the purposes of the said railway certain portions of the said lands demised to the respondent as aforesaid, such portions consisting of a strip running through and bounded on each side by portions of the said demised lands; and on the 11th May 1891 and the 24th June 1891 they served on the respondent certain notices to treat with respect to the said portions required by them as aforesaid.

8. On the 27th June 1892 the Crown served on the respondent a three months' notice to determine the respondent's tenancy of those portions of the said lands for which the appellants had given the respondent notices to treat as aforesaid. No notice has been served by the Crown on the respondent to determine the respondent's tenancy of any other portion or portions of the said demised lands.

9. No further material step was taken by either the appellants or the respondent until on or about the 20th July 1892, when the appellants gave notice that they required possession, and took possession of the said portions mentioned in the said notices to treat under and by virtue of sect. 85 of the Lands Clauses Consolidation Act 1845, and of sect. 36 of the Railway Companies Act 1867.

10. On the part of the appellants it was contended that in point of law the magistrate ought not to allow the respondent any compensation except in respect of the value of the lands taken and the damage by severance or otherwise injuriously affecting the adjoining lands during the continuance of the unexpired term for which the lands

mentioned in the said notices to treat were held. It was agreed by the counsel who appeared before the magistrate that the amount of compensation payable by the appellants to the respondent should be taken at the sum of 31l. 10s.

11. On the part of the respondent it was contended that, in addition to the sum of 31l. 10s., the magistrate ought in point of law to allow the respondent compensation for any loss or injury he might sustain for damage done to him during his tenancy of the remainder of the lands still held by him under the lease of the 5th Feb. 1889, by reason of the severance or otherwise injuriously affecting the same.

12. The magistrate decided against the appellants' contention, being of opinion that the respondent's contention was correct, and determined the amount of compensation payable by the appellants to the respondent at the total sum of 386l. 10s. and 21l. costs, and made a formal order to that effect, dated the 15th May 1893.

13. The question for the decision of the court is, whether as a matter of law the magistrate ought to have allowed the respondent compensation only for the value of the lands taken and for damage by severance to the remainder of the lands (held under the said lease of the 5th Feb. 1889) during his unexpired term or interest in those portions of the demised lands mentioned in the notices to treat. It was further agreed by the counsel who appeared before the magistrate on behalf of the appellants and the respondent that, if this contention should be held correct, in order to save the expense of further appearing before the magistrate, the formal order dated the 15th May 1893 should be amended by reducing the amount of compensation payable to the respondent from 386l. 10s. to 31l. 10s., and that in the event of the appellants' contention being held correct, the magistrate should state in this special case how the costs of the inquiry should be borne. He accordingly determined, and stated, that in any event the costs of the inquiry should be dealt with as set forth in the said order, that is to say, that, in addition to the sum payable in compensation (whether 386l. 10s. or 31l. 10s.), the sum of 21l. should be paid as costs of the said inquiry to the respondent by the appellants.

Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18).

Sect. 68 provides for compensation being settled by arbitration or by a jury, at the option of the party claiming compensation.

Sect. 85 provides for the promoters of an undertaking being allowed to enter on lands before purchase, on making deposit by way of security, and giving a bond.

Sect. 121 enacts:

If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such land, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ

Q.B. Div.]

BEXLEY HEATH RAILWAY COMPANY (apps.) v. NORTH (resp.).

[Q.B. Div.]

about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the persons appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act.

Farwell, Q.C. and *Boyle* for the appellants, the railway company.—The respondent is only entitled to compensation for the loss of the land which has been actually taken in severance for the three months remaining to him. We submit that this case is *res judicata*, as this has already been heard and determined in the case of *Reg. v. Kennedy* (68 L. T. Rep. N. S. 454; (1893) 1 Q. B. 533), which was a decision in this case, and the court, consisting of Lord Coleridge, C.J. and Cave, J., held that the magistrate had, under sect. 121 of the Lands Clauses Consolidation Act 1845, to determine the amount of compensation. Apart from this case being *res judicata*, we say that sect. 121 clearly says that compensation shall be given "for the damage done to him in his tenancy," that is the whole question. The judgment of Lush, J. in *Reg.* (on the prosecution of James Baxter and Henry John) v. *Great Northern Railway Company* (35 L. T. Rep. N. S. 551; 49 L. J. 4, Q. B.; 2 Q. B. Div. 151) says, on page 552 L. T. Rep.: "The intention of the 121st section was to give compensation for every species of interest being less than the interest of a tenant from year to year."

Winch, Q.C., Forman, and F. O. Robinson for the respondent.—The respondent was entitled to compensation for his severance of, and for damage and injury done to, the lands still held by him, on his remainder of the tenancy of the thirty years' lease held from the Crown, in addition to compensation for the lands actually severed. In the case of *Essex v. The Acton District Local Board* (61 L. T. Rep. N. S. 1 (H. of L.); 14 App. Cas. 153) Lord Halsbury (Lord Chancellor) on page 2 L. T. Rep. says, "that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken." They also cited

The Duke of Buccleuch v. The Metropolitan Board of Works, 27 L. T. Rep. N. S. 1; L. Rep. 5 H. of L. E. & I. App. 418;

Metropolitan Board of Works v. McCarthy, 31 L. T. Rep. N. S. 182; 43 L. J. 385, C. P.; 7 H. of L. E. & I. App. 243.

MATHEW, J.—This is a case stated by one of the police magistrates for the metropolis (Mr. Kennedy) with reference to the compensation which the respondent is to have for land taken by a railway company, which land was part of his property in Kent. We have had considerable doubt and considerable difficulty as to how the case should be dealt with, because the argument has been that the decision pronounced in this same case (*Reg. v. Kennedy*) by Lord Coleridge and my brother Cave practically concluded the matter. Now the circumstances of the case were these: The property was held from the Crown on very peculiar terms. There was a lease for about thirty years subject to this, that the whole of the lease of the land or the lease of any part of the

land might be terminated upon three months' notice. No doubt that lease was so framed in anticipation of the coming of the railway, and, further, as it would appear from the lease, in anticipation that some of the land might be made available for building purposes. The land was used for sporting purposes by Colonel North. It appeared that in the month of May 1891 a notice to treat was given by the company for a strip of land upon which it was intended to construct the railway. Nothing was done under that notice to treat for some time, and there is no doubt that, if proceedings had been taken upon that notice to treat in the ordinary time, compensation must have been assessed for all the damage consequential upon the construction of the railway in that place. Part of the land would have been taken, and then the damage done to the rest of the land would have been recoverable by the owner. In assessing the compensation, of course it would be necessary to bear in mind the precarious character of the tenure and the severance of the land held for thirty years, but capable of a lease being determined on three months' notice, the severance of a strip of that land from the other land held in that same way and upon the same conditions. From a commercial point of view there is no great interest in either holding. Of course there is the right to assess the compensation as if all were freehold, and as if all were held on long leasehold in the ordinary way. For that compensation would be assessed. The position was this: The lessors, before any step was taken by the railway company, gave a notice terminating the lease in respect of this strip of land intended to be taken by the railway company, and upon that, before the expiration of the three months, the railway company entered into possession. Thereupon proceedings were taken by the railway company to have compensation assessed before a magistrate, the term in the property taken being under twelve months. It came before the magistrate, and objection was made by Colonel North to his jurisdiction on the ground that he intended to claim compensation in respect of the damage done to the rest of his property by reason of the taking of this portion. The learned magistrate yielded to the objection, and thereupon a *mandamus* was applied for to this court and was granted, compelling him to assess the compensation, but the effect of the judgment appears to me to be that the magistrate would have had no jurisdiction under sect. 85 of the Lands Clauses Consolidation Act if any compensation were claimed in respect of the damage done to the rest of the severed property. On examination of my brother Cave's judgment that appears to be the *ratio decidendi*. When the matter came before the court it was argued on the one hand, "This is a simple case of compensation for a term of two months in a particular piece of land, and therefore it is a matter to be dealt with by the magistrate." It was argued on the other hand, "True, it is a claim for compensation in respect of a term which will end at the end of two months, but it is a claim for land, part of a larger holding, which has been severed from that holding whereby the remainder of the holding has been damaged." The judges appear to have thought that the jurisdiction depended upon whether it was a claim for severance merely of the part taken, or whether it was a claim for a severance and the damage

Q.B. Div.]

ROSE AND ANOTHER (apps.) v. WATSON (resp.).

[Q.B. Div.]

done to the rest of the property, and it would appear from my brother Cave's judgment that, considering it was a claim for a severance of the part taken, it was a matter on which the magistrate had jurisdiction. [The argument of Colonel North's counsel having been that there was a claim in respect of severance of the rest of the property.] Cave, J. goes on to say: "I endeavoured to elicit from the learned counsel for Colonel North what his claim was, but he was very reticent upon the subject. The claim had either not been made out or was not ready for production, and the result was, that I could not ascertain what the claim precisely was. I have, therefore, arrived at the conclusion, perhaps not unnaturally under the circumstances, that Colonel North has no claim except for the loss of the right to occupy the particular piece of land in question from the 20th July 1892, when possession was taken, down to the expiration of his interest, which would be less than three months, and also for the severance occasioned by taking a part of his property during the same period. Now, if that is so, then it is clear that his actual interest is less than a year's interest, and that it comes within the principle of the statute that the compensation in that case should be assessed by a police magistrate and not by a jury." Therefore it was held that the jurisdiction of the magistrate depended upon the conclusion which the court arrived at, that there was no claim in respect of the damage done to the rest of the property by the severance, and the conclusion which my brothers appear to have arrived at is this, that if any such claim was intended to be put forward it ought to have been made under sect. 68 and not under this section, which gave the magistrate no jurisdiction to deal with it. That being so, it appears to me we are bound by that judgment. It is unnecessary I should say more for the present than that we acquiesce in it, and therefore find that the lesser sum for which the compensation has been assessed is the amount that is recoverable.

COLLINS, J.—I am of the same opinion. I have very little to add. I base my judgment solely on the ground that it seems to me that it was part of the *ratio decidendi* in the case in the Divisional Court, *Reg. v. Kennedy (ubi sup.)*, that there was no real claim for the injuriously affecting of the land other than the land taken. It was argued by Mr. Lawson Walton, who was contending against the jurisdiction of the magistrate in that case, that there was a claim not merely for the taking of the land and the severance of that land, but also for injuriously affecting the residue. Those were his words, "injuriously affecting the residue by reason of the execution of the company's works;" that was his argument. He argued that that claim existed, and, existing, ousted the jurisdiction of the magistrate under that section. Now, the judgment of the court deals with two points. It deals first of all with the question whether the rights of the parties are to be dealt with as though they were ascertained at the date of the notice to treat, because it was conceded that at the date of the notice to treat there was a possible interest, larger than a year's interest in Colonel North. Therefore they had to deal first of all with that question, and they arrived at the conclusion that the date of the notice to treat is not conclusive, and that the rights of

the parties are to be measured by what took place when the company took possession under sect. 85. That was one step towards the decision of the question whether the magistrate had or had not jurisdiction. But Cave, J. also sets himself another question, namely, was there any other claim outside and beyond the mere compensation to be paid for the thing taken and the damage by severance which could not survive the fact of a severance itself, was there anything else outside that? Then he deals in detail in terms with the argument of Mr. Lawson Walton that there was a claim for injuriously affecting, and he arrives at the conclusion which seems to be one of fact, that no such claim in fact existed. He bases that on two grounds: That Colonel North had not formulated it when he had the chance after the notice to treat, and that counsel was unable to formulate it when Cave, J. put the question to him. Then having said that, he said this: "I have therefore arrived at the conclusion, perhaps not unnaturally under the circumstances, that Colonel North has no claim except for the loss of the right to occupy the particular piece of land in question from the 20th July 1892, when possession was taken, down to the expiration of his interest, which would be less than three months, and also for the severance occasioned by taking a part of his property during the same period. Now, if that is so, then it is clear that his actual interest is less than a year's interest." So he arrives at the conclusion that the interest is less than a year's interest, and comes within the principle of the statute giving the exclusive jurisdiction to the magistrate. He arrives at that conclusion after considering that there is no claim for injuriously affecting the residue of the land, or any claim outside the price to be paid for the land taken, and the damage for the severance of that land from the rest. Therefore it seems to me that that was a necessary step to the decision of the case, and was taken by the court, and that their judgment is based upon it. Therefore I yield to it, and I also give judgment in accordance with the opinion of Mathew, J.

Judgment for the appellants, with leave to respondent to appeal.

Solicitors for the appellant company, *Dollman and Pritchard*.

Solicitor for the respondent, *George Whale*.

Monday, April 9.

(Before CHARLES and COLLINS, JJ.)

ROSE AND ANOTHER (apps.) v. WATSON (resp.). (a)
Church rate—Assessment—"Full annual rent or value."

The words "full annual rent or value" of premises rateable to the relief of the poor in a private Act of Parliament authorising the raising of a church rate,

Held, to mean full net annual value, and not the gross estimated rental of the premises.

CASE stated by justices of the borough of Harwich, raising the question what meaning was to be given to the words "full annual rent or

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

[Q.B. Div.]

ROSE AND ANOTHER (apps.) v. WATSON (resp.).

[Q.B. Div.]

value" in sect. 8 of the private Act (1 & 2 Geo. 4, c. cxiv.), which provides that

It shall be lawful for the said churchwardens, and they are hereby directed and required in each and every year until all the moneys necessary to be borrowed under or by virtue of this Act and the interest thereof shall be paid off and discharged, and the several other purposes of this Act shall be carried into complete execution, at any meeting or meetings to be holden in vestry for that purpose (of which meetings and the purpose thereof notice in writing signed by the said churchwardens shall be given and published in the said church or chapel two Sundays at the least immediately preceding the same respectively), to make a rate or rates, assessment or assessments, not exceeding six shillings in the pound in any one year on the full annual rent or value of all houses, buildings, rated or rateable for the benefit of the poor of the said parish of Saint Nicholas, on, &c., &c., and shall be paid to and raised, levied and collected by the churchwardens for the time being, &c., &c.

Crump, Q.C. and *Reginald Smith* for the appellants.—Full annual rent or value means the full rent of the premises, or in other words the gross estimated rental. *Bramwell, B.*, in his judgment in the case of the *Sheffield Waterworks Company v. Bennett* (27 L. T. Rep. N. S. 199; 41 L. J. 233, Ex.; L. Rep. 7 Ex. 409), as to the meaning of "rent," says as follows (on p. 205 L. T. Rep.): "It means value. It must mean value, &c." and he gives a definition of the meaning of "value" in his judgment in the case of *Dobbs v. Grand Junction Waterworks Company* (49 L. T. Rep. N. S. 541; 53 L. J. 50, Q. B.; L. Rep. 9 App. Cas. 49); he says (on p. 542 L. T. Rep.): "Value means net value, net value means value," and he goes on to say, "Gross value is different from value." Here the word "full" is used, and it must mean "gross;" these two expressions are synonymous. "Full annual rent or value" means the same as "gross annual rent or value;" it cannot mean "net annual rent or value," and the expressions "full net" or "gross net" would be contradictions.

Macmorran for the respondent.—The terms "full annual rent" and "full annual value" are synonymous. Rent has been held to be equivalent to annual value, and annual value is equivalent to net annual value. This was so decided in *Sheffield Waterworks Company v. Bennett*. Lord Selborne, in his judgment in *Dobbs' case* (*ubi sup.*), said he entirely agreed with Lord Bramwell in that case as regards his meaning of the word value, that it must be taken in its natural sense unless there is something in the Act which points to an artificial or arbitrary sense.

Crump, Q.C. in reply.

CHARLES, J.—In this case the justices dismissed an information charging the respondent, being a person duly rated and assessed under a private Act of 1 & 2 Geo. 4, c. cxiv. s. 8, and who had failed and refused to pay the rate made by the churchwardens by virtue of that statute, and this appeal has been brought to test the correctness of the justices' decisions. The churchwardens having assessed the respondent on the gross estimated rental of his premises, the question is, whether the churchwardens were right in so doing, or whether they should have made it upon the rateable value. The words of sect. 8 are "full annual rent or value." What construction are we to put on these words? What is the meaning of the word "rent?" As to

that, recourse should properly be had to the opinion of the Court of Exchequer in the case of *The Sheffield Waterworks v. Bennett* (*ubi sup.*). That was a case of water rate, and contains an elaborate judgment of *Bramwell, B.* as to the meaning of "rent," which he there says he considers to be equivalent to "annual value," and I should be disposed to hold therefore that the words here "full annual rent" are equivalent to "full annual value." But it is not necessary to refer to that case to discover the meaning of full "annual rent," because in the present case the word "value" is included with the word "rent." In considering the meaning of the word "value" I do not think we can disregard the cases which have been referred to, and in which, although they refer to different subject matters, the general terms may be applicable. If we look at the judgment of the House of Lords in *Dobbs v. The Grand Junction Waterworks Company* (*ubi sup.*) we there find that Lord Bramwell discusses the meaning of "value" in the Acts imposing a liability to pay rates (two private Acts were there in question); and it is, in my opinion, well worthy of notice that he says the judgment would be the same whichever of the two Acts in question was taken. In the earlier of those two Acts the words are "actual amount or annual value," and in the second "annual value" only, and Lord Bramwell says that value means net value, and that net value is equivalent to value. He therefore gets these two things. First, that "annual rent" and "annual value" mean the same thing, and that "value" means "net value." Therefore we have a definition of the meaning of "rent" and "value," and that definition, if the words had stopped there, on the decision in that case and others *in pari materia*, we should have been bound to hold that it meant the "rent or net annual value," which is the definition in the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96, s. 1), and which might be adopted. Now, does the insertion of the word "full" make any difference? Does the word "full" mean "gross"? If it does Mr. Crump's contention is a good one. Now, what does Lord Bramwell, in his judgment in *Dobbs v. The Grand Junction Waterworks Company* (*ubi sup.*), say as to the meaning of the words "gross value?" He says (on p. 542 L. T. Rep.), "Now gross value is different from value. It is, though a convenient, an inaccurate expression like 'gross profits.' The difference between what a thing costs and the larger sum it sells for is not profit, if the buying and selling are attended with expense to the trader. Value is net value, and involves those reductions from rent which the appellant claims." Can we consider "full" equal to "gross"? I think, after reflection, that we cannot. I think that "full annual rent" is equal to full annual net rent, and I have come to the conclusion, therefore, that we cannot accept Mr. Crump's contention, looking at the definition of Lord Bramwell that "full annual net value" means full in the sense that it is to have no deduction taken from it except by statute. In sect. 4 of the Public Health Act 1875 "rack rent" is defined as "rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises," &c. "Gross annual net value" would be a contradiction in terms. The Legislature saw no contradiction in using the words "full net annual value," meaning the rateable value. Full net annual value is that

Q.B. Div.] PATTEN v. THE WEST OF ENGLAND IRON, &C., COMPANY LIMITED. [Q.B. Div.]

which reaches the landlord's pocket. I am, therefore, of opinion that the churchwardens were wrong in having levied this rate upon the gross estimated rental, and that the justices were right in having dismissed the information, and the appeal therefore must be dismissed.

COLLINS, J. — The levy was made by the churchwardens upon the gross estimated rental of the premises, and not upon the rateable value of the premises. The cases cited have laid it down in cases *in pari materia* that "annual rent or value" means "net annual rent or value." The chief question therefore seems to be, is the meaning of the word "full" equivalent to the word "gross"? I do not think that the meaning of the word "full" is equivalent to the meaning of the word "gross." The Legislature has given express meaning to the words "full net annual value." Under these circumstances, therefore, I think the churchwardens were wrong and the magistrates were right, and that this appeal therefore must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford, Landon, and Rodgers.*

Solicitors for the respondent, *Morris and Bristow.*

Friday, May 4.

(Before CHARLES and COLLINS, JJ.)

PATTEN v. THE WEST OF ENGLAND IRON, TIMBER, AND CHARCOAL COMPANY LIM. (a)

Arbitration—Costs of action, reference and award—Costs of reference not given by special referee—Order XXXVI., r. 50.

A cause of action having been referred to a special referee for trial under Order XXXVI., the referee made his award in favour of the defendants, and awarded them the costs of the action and of the award. Nothing was said as to the costs of the reference.

Held, that, as the costs of the action and of the award had been given by the referee, it must be considered that the costs of the reference were included in the costs of the action.

THIS was an appeal by the defendants from the order of the judge in chambers reversing the order of the master, and disallowing the costs of the reference. The following order had been made by the master: "That the whole cause be tried before Mr. George Bryant Sully, J.P., of Bridgewater, shipping agent, who shall have all the powers of certifying and amending of a judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order XXXVI."

The following award was made by the special referee: "I do hereby award, certify, and report that there is nothing due from the defendants to the plaintiff in this action. And I hereby direct and award that the defendants recover against the plaintiff the costs of the action and of this my award."

The learned master's reply to the plaintiff's objections to the taxation was as follows: "The order of reference in this case referred the whole cause to a special referee under Order XXXVI. I find that the practice of the official referees in

cases so referred to them is to make no distinction between costs of the action and costs of the reference, treating themselves as officers of the court, and as such trying an action and not a reference. The same principle seems to apply to a special referee: (see Arbitration Act, s. 15, sub-sects. 1 and 2.) In my view, therefore, the costs of the reference are included in the costs of the action which have been awarded to the successful party by the special referee."

The master accordingly having allowed the costs of the reference to the defendants, the learned judge reversed this order of the master.

Order XXXVI., r. 50, provides as follows:

Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party as a judge of the High Court.

Sect. 15, sub-sect. (1) of the Arbitration Act 1889 (52 & 53 Vict. c. 49) provides as follows:

In all cases of reference to an official or special referee or arbitrator under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by rules of court, and subject thereto as the court or a judge may direct.

Sub-sect. (2) provides that:

The report or award of any official or special referee or arbitrator on any reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury.

J. D. Crawford, on behalf of the defendants, in support of the appeal.—The learned master's order was rightly made, and ought to be restored. The learned judge seems to have been under the impression that the costs of the reference were not to be included in the costs of the action, but by Order XXXVI., r. 50, the special referee is placed in the position of a judge, who has full discretion over the costs of the proceedings. The costs of a reference have always been included in an award giving the costs of the action. He cited

Re An Arbitration between Walker and Son and Brown, 9 Q. B. Div. 434; 51 L. J. 424, Q. B.; 30 W. R. 703.

[He was stopped by the Court.]

Hextall, on behalf of the plaintiff, in support of the order of the judge in chambers.—The order of the learned judge is right. The referee has a discretion as to costs; in this case he has exercised this discretion by directing the plaintiff to pay the costs of the action and of the award; but he has omitted to direct him to pay the costs of the reference, it must therefore be assumed that he has purposely omitted to do so. There is no case which decides that the costs of the reference are to be included in the costs of the award or costs of the action. He cited

Forshaw v. De Witte, 24 L. T. Rep. N. S. 397; L. Rep. 6 Ex. 200; 40 L. J. 153, Ex.;

Fearon v. Flinn, 5 C. P. 34;

Galatti v. Wakefield, 40 L. T. Rep. N. S. 30; 46 L. J. 70, Ex.; 4 Ex. Div. 249;

Re Autothropic Steam Boiler Company, 59 L. T. Rep. N. S. 632; 57 L. J. 448, Q. B.; 21 Q. B. Div. 182.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

SMITH (app.) v. MASON AND Co. (resps.).

[Q.B. Div.]

CHARLES, J.—The whole cause of action was referred under an order of reference to a special referee for trial, by Order XXXVI., r. 50, and therefore the special referee was in the same position as a judge at the trial. The special referee gave his award, by which he certified and reported that there was nothing due from the defendants to the plaintiff in the action, and then directed in his award that the defendants were to recover against the plaintiff the costs of the action and of the award. The defendants claimed before the master in chambers to tax the costs of the reference as part of the costs of the action, and the master held that the defendants were entitled so to tax those costs. The learned judge in chambers was of the contrary opinion, and he reversed the order of the master. I agree with the view taken by the master: a special referee is in a position analogous to that formerly occupied by an arbitrator under the old practice, where the reference was compulsory, though it was otherwise where the reference was by consent. It therefore follows that the special referee was in the position of a judge, and had full discretion as to the costs of the proceedings before him. In the present case the special referee has given the costs of the action to the defendants, and in my opinion this includes the costs of the reference. I observe that the master's statement as to the practice of the official referees is in accordance with the opinion which I have expressed in the present case. The order therefore of the judge in chambers must be set aside, and the order of the master restored.

COLLINS, J.—I am of the same opinion. Order XXXVI., r. 50, distinguishes between a "reference" and a "trial." In the present case there was a trial before the special referee, and therefore in my opinion the costs of the trial include the costs of the reference. The order of the master must therefore be restored.

Appeal allowed.

Solicitor for the plaintiff, *Edgar Bogue*, for G. T. Tweed, Honiton, Devon.

Solicitors for the defendants, *Church, Rendell, Todd, and Co.*, for *Densham and Row*, Bampton, Devon.

Wednesday, May 30.

(Before CAVE and COLLINS, JJ.)

SMITH (app.) v. MASON AND Co. (resps.). (a)

Revenue—Stamps—Medicine "held out or recommended to the public"—*Public notice or advertisement*—Stamp Act 1804 (44 Geo. 3, c. 98), schedule B.—*Medicines Stamp Act* 1812 (52 Geo. 3, c. 150), ss. 1, 2, and the schedule.

Sect. 2 of the *Medicines Stamp Act* 1812 imposes a penalty upon any person who "shall utter, vend, or expose to sale . . . or buy or receive, or keep for the purpose of selling by retail . . . any packet, &c., containing any of the drugs, &c. mentioned and set forth in the schedule annexed to this Act" without a paper cover provided by the Commissioners of Inland Revenue, duly stamped for denoting the duty charged on such packet, &c. The schedule of the Act—after setting out all the different kinds of medicines for the prevention, cure, or relief of disorders affecting

the human body which shall, "by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, &c. upon any packet, box, &c. held out or recommended to the public by the makers, vendors, &c., as nostrums or proprietary medicines, &c., or as beneficial to the prevention, cure, or relief of any distemper, malady, &c. incident to or affecting the human body"—specified under the head of "Special Exemptions" "all medicinal drugs whatsoever which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient whatsoever, by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship . . . or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty."

The respondents, a limited company, sold a powder and a tincture without stamps. They had issued a price list describing the articles sold as beneficial for certain ailments, and one of the articles, the tincture, was wrapped in a handbill similarly describing the article. Informations were preferred against the respondents.

The justices dismissed the informations.

Held, that, as the respondents had held out or recommended the medicines by public notice or advertisement as beneficial to the cure of disorders by issuing a price-list, &c., and that as the respondents did not come within the "special exemptions" of the schedule, the informations ought not to have been dismissed.

THIS was a case stated by justices.

The appellant, an officer of the Inland Revenue, laid against the respondent company two informations by order of the Commissioners of Inland Revenue. The first information stated as follows:

That the respondents did utter, vend, and expose to sale a packet containing a certain preparation and composition to be used and applied as a medicine and medicament for the prevention, cure, and relief of disorders and complaints incident to and affecting the human body and liable to stamp duty chargeable in respect of medicines under the statutes, to wit, Dr. Gregory's Stomachic Powder, without a paper cover, wrapper, and label provided by the Commissioners of Inland Revenue, pursuant to the statute, and duly stamped, for denoting the duty charged on such packet, being properly and sufficiently pasted, stuck, fastened, and affixed thereto, contrary to the form of the statute, whereby, and by force of the statute, the respondents have for such offence forfeited the sum of 10l.

The second information was stated in similar terms, but it related to the sale of a medicine called Tincture of Nux Vomica.

The following facts were stated in the case:

The respondent company was a registered company under the Companies Act 1862 and 1890, and carried on the business of a chemist and druggist and vendor of medicines at Durham and other places.

The company sold to Thomas Jameson, at their shop in Durham, at the price of 6d. each, one bottle of Dr. Gregory's Stomachic Powder, and in a cylindrical cardboard box, one bottle of tincture of nux vomica, and there was not any stamp affixed to either the bottles or box.

Previously to purchasing the medicines, Jameson had received from the respondent company at their shop a book, being the respondents' Cash Price List 1893, which was distributed gratis by them,

(a) Reported by T. B. BRIDGWATER, Esq., Barrister-at-Law.

Q.B. Div.]

SMITH (app.) v. MASON AND CO. (resps.).

[Q.B. Div.]

and was descriptive of medicines and other commodities sold by the respondent company and which they offered for sale and were prepared to sell. The book contained on the cover an index of contents, and the words following:

Mason and Co.'s (Limited) Cash Price List, 1893. Prescriptions dispensed by qualified chemists.

This was followed by a statement of the respondents' various addresses.

Page 10 of the book contained a notice of Dr. Gregory's Stomachic Powder in the following terms:

Dr. Gregory's Stomachic Powder, composed of the finest Turkey rhubarb, calcined magnesia, and Jamaica ginger, for acidity, flatulence, loss of appetite, and the symptoms attending on impaired digestion. Its properties are anti-acid and gently aperient. It is well adapted for gouty and dyspeptic invalids, and may be taken under any circumstances. Price 3½d. and 6d. per bottle.

The label affixed to and delivered with the bottle of Dr. Gregory's Stomachic Powder sold to Jameson was in the following terms:

Dr. Gregory's Stomachic Powder. Prepared from the original receipt of the late Dr. Gregory of Edinburgh, composed of the finest Turkey rhubarb, calcined magnesia, and Jamaica ginger. The dose for an adult is one or two teaspoonfuls taken either at bedtime or early in the morning, in a glassful of common or peppermint water.

And there was added to this a statement of the addresses of the respondent company.

Page 33 was headed "Mason and Co's (Limited) Patent Medicine List." In the first column the list of homœopathic medicines commenced, from which the following was an extract:

Homœopathic medicines.—The following tinctures and pills are kept in stock. They are prepared by duly qualified homœopathic chemists, and the utmost and most scrupulous care is taken in their manufacture.

The first sizes are sold at 6d. or six for 2s. 9d. The medicines can be sent by post for 1d. per bottle extra. Uses of the principal medicines . . . Nux vomica—Derangements of the stomach, spasms, heartburn, constipation, piles.

The bottle of tincture of nux vomica was inclosed in a cardboard case, in which was a handbill, wrapped round the bottle containing the tincture, in the following terms:

Barker and Barker, manufacturers of homœopathic medicines, wholesale and retail, 26, High Holborn, London. In the selection and preparation of all remedies great care is taken to use only that particular form of drug which has been the subject of original provings. Uses (as in the patent medicine list).

And affixed to the bottle, and on the outside of the cardboard box were labels stating the amounts of doses, and that the tincture was prepared by Barker and Barker, and on the top of the box was pasted a small circular label with the names of the tincture, and of the makers Barker and Barker.

The contents of the bottle of Dr. Gregory's powder was the medicinal powder or preparation well known and regularly sold by the name of Dr. Gregory's Stomachic Powder, and answered to the description given in the notice on page 10 of the book, and was the article so noticed. The contents of the bottle of nux vomica was homœopathic tincture of nux vomica, and was the nux vomica referred to in the book, and in the handbill wrapped round the bottle. Both the powder

and the tincture of nux vomica were used and intended to be used for the purposes described in the respondents' book and in the handbills wrapped round the bottle. The homœopathic tincture of nux vomica was the same as the tincture of nux vomica in the British Pharmacopœia, except that the homœopathic tincture was weaker.

The respondents had not paid any duties in respect of either of the articles, and both were sold without the paper cover, wrapper, or label, provided and supplied by the Commissioners of Inland Revenue, and duly stamped, as described in sect. 2 of the Medicines Stamp Act 1812.

The justices held that the facts and circumstances as stated did not disclose any evidence of any offence against sect. 2 of the Medicines Stamp Act 1812, and dismissed both the informations.

Sect. 2 of the Act of 1812 (52 Geo. 3, c. 150) enacts as follows:

That if any person or persons, whether licensed or not, shall utter, vend, or expose for sale, or offer or keep ready for sale . . . or buy or receive or keep for the purpose of selling by retail . . . any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, herbs, oils, waters, essences, tinctures, pills, powders, preparations, or compositions mentioned and set forth in the schedule annexed to this Act, without a paper cover, wrapper, or label, provided and supplied by the Commissioners of Stamps . . . duly stamped for denoting the duty charged on such packet, box, bottle, pot, phial, or other inclosure, being properly and sufficiently pasted, stuck, fastened, or affixed thereto . . . so and in such manner as that such packet, box, bottle, pot, phial, or other inclosure cannot be opened . . . without tearing such stamped cover, wrapper, or label so as to prevent its being used again . . . the person or persons so offending shall for every such offence forfeit the sum of ten pounds. . . .

The schedule to the above Act, after setting out a long list of medicines of different sorts, goes on to say:

And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plasters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and official preparations whatsoever to be used or applied externally or internally, as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in any wise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons whatsoever . . . which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisement, or by any written or printed papers or handbills, or by any labels or words written or printed, affixed to or delivered with any packet, box, phial, or other inclosure containing the same, held out or recommended to the public by the makers or vendors or proprietors thereof as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body.

The same schedule goes on under the head of "Special Exemptions" as follows:

All medicinal drugs whatsoever which shall be uttered or vended entire without any mixture or composition with any other drug or ingredient whatsoever by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship, or by any person who hath served as a surgeon in the Navy or Army . . . or by any other person whatsoever licensed to sell any medicines chargeable with a stamp duty.

Q.B. Div.]

SMITH (app.) v. MASON AND Co. (resps.).

[Q.B. Div.]

Danckwerts on behalf of the appellant.—The justices were wrong in dismissing these informations. The effect of the respondents' price list is to hold out or recommend to the public the medicines in question as specifics, or as beneficial to the prevention, cure, or relief of ailments, &c., incident to or affecting the human body, within the meaning of the schedule to the Medicines Stamp Act 1812, and both cases come within the Acts imposing the stamp duties, and within the 2nd section of the Act of 1812, which imposes the penalty. The wrapper round the bottle of the tincture of nux vomica brings the case also within the statute. The special exemption does not apply in either case. No evidence was given of a sale by any qualified chemist, nor was there evidence of any licence which justified the respondents in selling.

Wilkes Chitty on behalf of the respondents.—The label does not hold out or recommend the medicine as a specific; it merely describes the nature of the preparation. The price list is not a "public notice or advertisement," nor can it be said to be "affixed to or delivered with any packet," &c. The respondents were clearly not the makers or the original or first vendors of the medicine called "Dr. Gregory's Stomachic Powder," or of the tincture of nux vomica in the second information; therefore it cannot be said that the medicine was "held out or recommended to the public by the makers, vendors, or proprietors thereof." If there is any doubt whether the prescriptions, as the price list states, were dispensed by duly licensed and qualified chemists, the case ought to be remitted to the justices; as there is no evidence to the contrary, the special exemptions would apply. The justices, as the case was presented to them, were right in dismissing the informations.

CAVE, J.—I am of opinion that this appeal must be allowed, and that this case must be remitted to the justices with an intimation of our opinion that they ought not to have dismissed the informations on the ground which they appear to have taken. It has been contended, on behalf of the respondent company, that they were within the special exemption of the schedule to the Act of 1812, and that even if they were not, they had not contravened sect. 2 of the Act by selling these articles without a proper stamp, &c., and the justices so held that the respondents, upon the facts disclosed, had not committed an offence within the statute, and they dismissed both the informations. I think that the justices were wrong in so doing. First take the case of the sale of Dr. Gregory's Stomachic Powder. By the schedule of the Act of 1812 all powders, &c., to be used or applied externally or internally as medicines for the relief of any complaint recommended to the public by the vendors thereof by public notice or advertisement, is brought within the scope of that Act. Dr. Gregory's Stomachic Powder is a powder to be used internally as a medicine, and it was, by a public notice or advertisement, held out or recommended to the public, by the vendors, as beneficial for the relief of several complaints. The respondent company say, firstly, that there was no public notice or advertisement, and secondly, that they bring the case within the Act, the notice or advertisement ought to have been affixed to or delivered with the medicine. But on page 10 of the price list in question, I

find the following statement: "Dr. Gregory's Stomachic Powder, composed of the finest Turkey rhubarb, calcined magnesia, Jamaica ginger, for acidity, flatulence, loss of appetite, and the symptoms attending an impaired digestion." If this statement were inserted in a newspaper, it would clearly be considered an advertisement or notice, and it would not matter whether the statement is inserted in a newspaper, which can be purchased for a penny, or in a price list which is distributed gratis to the public. It is as much a public notice or advertisement in the one case as in the other. I am of opinion that the words in the schedule to the Medicines Stamp Act 1812, "affixed to or delivered with any packet," &c., do not apply to the words "public notice or advertisement." I am inclined to think that they apply to the words "label or words written or printed;" but in any case they do not apply to "public notice or advertisement," and when once the powder is recommended to the public as beneficial by a public notice or advertisement, the case is brought within the Act. Then as to the second point which was taken on behalf of the respondents. It is said that the respondents come within the "special exemption" in the schedule to the Act of 1812; but when we look at it, we find it to be in the following terms: "All medicinal drugs whatsoever which shall be uttered or vended entire, without any mixture or composition whatsoever, by any surgeon, apothecary, chemist, or druggist, who hath served a regular apprenticeship . . . or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty." The exemption, therefore, is confined to persons who have served a regular apprenticeship, or are duly licensed to sell medicines chargeable with a stamp duty, and it does not apply to persons who do not come within that description. Therefore, I am of the opinion that the special proviso does not apply, and that there is a good *prima facie* case against the respondents as far as relates to the sale of Gregory's Stomachic Powder. With regard to the tincture of nux vomica, the same opinion holds good there. It comes within the words "also all other pills, powders, lozenges, tinctures," &c., in the schedule to the Medicines Stamp Act 1812. There is a printed paper attached to the case, the effect of which is to hold out or recommend to the public, tincture of nux vomica as beneficial to the prevention, cure, or relief of disorders or complaints affecting the human body. There is not any necessity to discuss the question whether the paper should be delivered with the bottle or not, because in point of fact the paper was delivered with this bottle of tincture of nux vomica, and therefore there is a public notice or advertisement holding out or recommending this tincture of nux vomica to the public, within the meaning of the schedule of the Act. But it was also contended that the respondents also came within the meaning of the special exemption as regards this part of the case. But, in the first place, the exemption is "all medicinal drugs whatsoever which shall be uttered or vended entire without any mixture or composition with any other drug or ingredient." No doubt nux vomica is a medicinal drug, but it is not vended entire without some mixture or composition with some other drug or ingredient, because it is mixed with or dissolved in spirits of wine, and is sold as a tincture, and

Q.B. Div.]

SMITH (app.) v. MASON AND

[Q.B. Div.]

the word "tinctures" is mentioned in the schedule of the Act. Moreover, there is no proof of licence which would justify the respondents in selling these medicines chargeable with the stamp duty. For these reasons I am of the opinion that this case must go back to the justices with the intimation of our opinion to the effect which I have stated.

Col. I am of the same opinion, and on the same basis.

Case remitted to the justices.

Solicitor the appellant: The Solicitor to the Board of Revenue.

Solicitor the respondents, Crossman and Pritchard, Durham.

END OF VOL. LXX.
